CONSTITUTIONAL LAW

2026–27

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II. THE DIVISION OF LEGISLATIVE POWER BETWEEN CONGRESS AND THE STATES

Watch Video: Recap and Transition

A. Enumerated Powers, Implied Powers, and the Necessary and Proper Clause (22 PAGES)

A fundamental idea in U.S. constitutional law is that because the Federal Government owes its legal existence to the U.S. Constitution, it has only the powers that are somehow conferred by that document. This arrangement contrasts with the state governments, which are constrained by various *rights* provisions in the U.S. Constitution but do not need to find any affirmative authorization there for legislating or regulating in the first place. Under this scheme, matters not entrusted to Congress (or the President) by the U.S. Constitution are, in effect, being left to state legislatures to address as they see fit.* (This residual power to regulate in the public interest, held by states but not by the Federal Government, often goes by the awkward name of the "police power.") And debates over the *extent* of Congress's powers are thus often, in substance, debates about the allocation of power *between* Congress and the states.

The textual focal point of these debates is Article I, § 8, which lists (or, as it's most often put, "enumerates") various powers of Congress. Take a moment to read through that list (beginning on p. vi above). We will focus on four powers that have proved especially important (and controversial): (1) the power to regulate "Commerce . . . among the several states"; (2) the power to "lay and collect Taxes"; (3) the associated power to "provide for the . . . general welfare" through spending; and (4) the last-listed, open-ended power to "make all laws which shall be necessary and proper for carrying into execution" any of the others.

In fact, we will start with that final provision—known as the Necessary and Proper Clause—because it was central to the first major debate over the extent of Congress's powers, and indeed over how to interpret the new Constitution in general. As you'll see, arguments about the scope of this express grant of authority overlap with broader arguments about "implied powers"—i.e., powers that might have been conferred by implication simply by

* State legislatures derive their authority from state constitutions. But unlike the U.S. Constitution, state constitutions ordinarily grant the state legislatures sweeping authority to legislate on all matters. See, e.g., Mass. Const., pt. II, c. 1, §1, art. 4 (granting "[f]ull power and authority . . . to [make] all manner of wholesome and reasonable . . . laws . . . as they shall judge to be for the good and welfare of this commonwealth").

dint of their relationships to one or more enumerated powers, even without the Necessary and Proper Clause as a textual foothold.

In the balance of this section, you'll first read a bit about the political controversy and constitutional debate that set the stage for the Court's landmark decision in *McCulloch v. Maryland* (1819). You'll then read the *McCulloch* opinion itself and one modern case, *United States v. Comstock* (2010), that poses some of the same issues in a very different setting. (There is one other recent case in which the Necessary and Proper Clause played a central role: *NFIB v. Sebelius* (2012), where the Court considered the constitutionality of the Affordable Care Act's "individual mandate" provision. But because the Court's analyses of the Necessary and Proper Clause and the Commerce Clause in that case are hard to tease apart, we will defer *NFIB* until we can consider both of those constitutional provisions in tandem.)

INTRODUCTION TO THE BANK CONTROVERSY

In 1790, just months after the Constitution went into effect, Treasury Secretary Alexander Hamilton proposed that Congress should charter a national bank. The bank, a kind of public-private partnership, would hold deposits, aid in tax collection, make loans to the U.S. government, and issue "notes" that could function like paper money. It would also use its capital for private lending that could fuel economic growth.

Hamilton's proposal gave rise to the country's first major debate about the interpretation of the new Constitution—one that, notably, unfolded almost entirely outside the courts. Several Members of Congress, led by James Madison, opposed the bank law on constitutional grounds. Madison's main argument was that none of Congress's enumerated powers could reasonably be read to encompass the power to charter a bank. Chartering the bank would not impose a tax, for instance, nor did it amount to borrowing money on the credit of the United States. As for the Necessary and Proper Clause, Madison argued:

> Whatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress. Its meaning must, according to the natural and obvious force of the terms and the context, be limited to means necessary to the end, and incident to the nature of the specified powers. The clause is in fact merely declaratory of what would have resulted by unavoidable implication, as the appropriate, and, as it were, technical means of executing those powers. In this sense it has been explained by the friends of the Constitution, and ratified by the State Conventions.
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> The essential characteristic of the Government, as composed of limited and enumerated powers, would be destroyed, if instead of direct and incidental means, any means could be used which, in the language of the preamble to the [bank] bill, "might be conceived to be conducive to the successful conducting of the finances,

> or might be conceived to tend to give facility to the obtaining of loans.…" If [Congress], by virtue of the power to borrow, can create the means of lending, and, in pursuance of these means, can incorporate a Bank, they may do any thing whatever creative of like means. [Indeed, Congress could], by virtue of the power to levy [a tax], create the ability to pay it. The ability to pay taxes depends on the general wealth of the society, and this, on the general prosperity of agriculture, manufactures, and commerce. Congress then may give bounties and make regulations on all these objects.
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> Mark the reasoning on which the validity of the bill depends. [If] implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.
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> [In any event, the] proposed Bank could not be called necessary to the Government; at most [it] could be but convenient. Its uses to the Government could be supplied by keeping the taxes a little in advance; by loans from individuals; [or] by other Banks[.]

After Congress passed the Bank Law over these objections, President Washington's Attorney General, Edmund Randolph, and his Secretary of State, Thomas Jefferson, both urged him to veto it. Their arguments substantially overlapped with Madison's. Even if "a bank will give great facility or convenience in the collection of taxes," for example, Jefferson observed that "the Constitution allows only the means which are '*necessary*,' not those which are merely 'convenient' for effecting the enumerated powers."

While Madison, Randolph, and Jefferson all worried that the constitutional theory undergirding the bank law would leave little beyond Congress's reach, Hamilton countered that "principles of construction like those espoused by the Secretary of State and the Attorney General would be fatal to the just & indispensable authority of the United States." He explained:

> [E]very power vested in a Government is in its nature *sovereign*, and includes by *force* of the *term*, a right to employ all the *means* requisite, and fairly *applicable* to the attainment of the *ends* of such power; and which are not precluded by restrictions & exceptions specified in the constitution; or not immoral, or not contrary to the essential ends of political society.
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> [Accordingly,] the only question must be, in this as in every other case, whether the mean[s] to be employed, or in this instance the corporation to be erected, has a natural relation to any of the acknowledged objects or lawful ends of the government. Thus a corporation may not be erected by congress, for superintending the police of the city of Philadelphia because they are not authorized to

> *regulate* the *police* of that city; but one may be erected in relation to [Congress's enumerated powers]. [It] is incident to a general *sovereign* or *legislative* power to *regulate* a thing, to employ all the means which relate to its regulation to the *best & greatest advantage*.
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> [It] is essential to the being of the National government, that so erroneous a conception of the meaning of the word *necessary* [as Jefferson had posited] should be exploded. It is certain, that neither the grammatical, nor popular sense of the term requires that construction. [It] is a common mode of expression to say, that it is *necessary* for a government or a person to do this or that thing, when nothing more is intended or understood, than that the interests of the government or person require, or will be promoted, by the doing of this or that thing. The imagination can be at no loss for exemplifications of the use of the word in this sense.
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> [A narrower] construction would beget endless uncertainty & embarrassment. The cases must be palpable & extreme in which it could be pronounced with certainty, that a measure was absolutely necessary, or one without which the exercise of a given power would be nugatory. There are few measures of any government, which would stand so severe a test.

Under an appropriately liberal standard, Hamilton argued, the proposed bank was supported by several different powers. First, it related to the collection of taxes, in that it would "increas[e] the quantity of circulating medium" and create a convenient currency in which taxes could be paid. Second, the bank also related to Congress's power to borrow money, in that it would provide an effective means through which people could lend to the government. Third, it related to the regulation of commerce among the states, "in so far as it is conducive to the creation of a convenient medium of *exchange* between them." And fourth, the bank was related to "the execution of the powers that concern the common defense" (such as the power to "raise and support armies"), since the performance of these responsibilities plainly required that the government's finances be in order, as the bank would help to ensure.[*]

Washington found Hamilton's arguments more persuasive and signed the bank law. Although the bank's twenty-year charter expired in 1811, Congress passed a second bank law in 1816—moved in part by the toll and aftermath of the War of 1812—and Madison, who had now become President, signed it into law. Despite his fervent opposition to the first bank, Madison explained that he viewed constitutional objections as now being "precluded . . . by repeated recognitions under varied circumstances of the

[*] Hamilton also invoked Congress's power to "make all needful Rules and Regulations respecting the . . . Property belonging to the United States." Because the United States would be a joint proprietor of the bank's stock, he suggested, the bank either was or was closely entangled with government property.

validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation." This was an early statement of what, as we'll see, would become a recurring idea throughout constitutional law—that, at least under certain conditions, the fact of a settled practice may carry constitutional weight independent of the practice's original justification.

Still, the Second Bank was politically unpopular in some quarters, and it became even more so when the economy took a downturn and the bank called in a raft of speculative loans that its debtors could not pay. Several states, including Maryland, responded with laws aimed at crippling the bank. *McCulloch*—easily the second-most famous decision of the early Republic—arose from Maryland's effort to enforce such a law.

McCulloch v. Maryland

4 Wheat. (17 U.S.) 316 (1819)

[In 1818, Maryland imposed a $15,000 annual tax on any bank that operated in the state pursuant to a charter not granted by Maryland. The only such bank was the Second Bank of the United States, which lacked a state charter because it was chartered by Congress. When the Bank refused to pay, Maryland sued the Bank's local representative, J.W. McCulloch, in state court. Maryland prevailed, and McCulloch, on behalf of the Bank, appealed to the U.S. Supreme Court.]

■ CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

In the case now to be determined, the [appellee], a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the [appellant], on his part, contests the validity of an act which has been passed by the legislature of that state. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty.

The first question made in the cause is, has Congress power to incorporate a bank? It has been truly said that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.*

It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived, 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. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first Congress elected under the present constitution. The bill for incorporating the bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance. These observations belong to the cause; but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the constitution.

[The] counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be

* [The "cases of peculiar delicacy" that the Court refers to here were criminal cases involving frauds upon the bank; those convictions would arguably have been invalid if the bank was not a valid legal entity in the first place. —BE]

exercised in subordination to the states, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The Convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal[.] [By] the convention, by Congress, and by the state legislatures, the instrument was submitted to the people. [It] is true, [the people] assembled in their several states [for ratifying conventions]—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments. [The] government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, [is] now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist. In discussing these questions, the conflicting powers of the general and State governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. [The] government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding." [Art. VI, cl. 2.]

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;"* thus leaving the question, whether the particular power

*[Article II of the Articles of Confederation, in contrast, provided: "Each state retains . . . every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States . . . ." — BE]

which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is *a constitution* we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. [A] government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, *that* raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction, (unless the words imperiously require it,) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers.

[Maryland does not dispute] that the powers given to the government imply the ordinary means of execution. [But] it [denies] that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation. [The] government which has a right to do an act, and has imposed on it, the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that [one] particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

[The] power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. [The] power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof." The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

[The] argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "*necessary and proper*" for carrying them into execution. The word "*necessary*" is considered [by Maryland] as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison. [A] thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. This comment on the word is well illustrated by [the] 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying "imposts, or duties on imports or exports, except what may be *absolutely* necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it.

[Take], for example, the power "to establish post offices and post roads." This power is executed by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the post road, from one post office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post office and post road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a Court of the United States, or of perjury in such Court. To punish these offences is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment. [Punishment] is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. In ascertaining the sense in which the word "necessary" is used in this clause of the constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and *proper* to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the State of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straitened and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland, is founded on the intention of the Convention, as manifested in the whole clause. To waste time and argument in proving that, without it, Congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, Congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the State of Maryland, would abridge, and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think [too] apparent for controversy. We think so for the following reasons: 1st. The clause is placed among the powers of Congress, not among the limitations on those powers. 2nd. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been, or can be assigned for thus concealing an intention to narrow the discretion of the national legislature under words which purport to enlarge it. [Had] the intention been to make this clause restrictive, it would unquestionably have been so in form as well as effect.

[The] result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. 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.

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. [We] find no reason to suppose, that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. [Being] considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.

[If] a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. [That] it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation.

[But] were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity [is] to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

[It] being the opinion of the Court, that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire:

2. Whether the State of Maryland may, without violating the constitution, tax that branch? That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If [this prohibition] may restrain a State from the exercise of its taxing power on imports and exports[, the] same paramount character would seem to restrain [a] state from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeals were used.

On this ground the counsel for the bank place its claim to be exempted from the power of a State to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds. This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

[That] the power of taxing [the bank] by the States may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit, that the sovereignty of the State, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle, not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view, while construing the constitution.

The argument on the part of the State of Maryland is, not that the States may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the constitution leaves them this right in the confidence that they will not abuse it. [It] is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.

The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against abuse. But the means employed by the government of the Union have no such security, nor is the right of a state to tax them sustained by the same theory. Those means are not given by the people of a particular state, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the states. They are given by all, for the benefit of all—and upon theory, should be subjected to that government only which belongs to all. [Consequently], the people of a single state cannot confer a sovereignty which will extend over [the people of the United States].

If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. [We] have a principle which is safe for the states, and safe for the Union. [We] are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give.

[Still, Maryland insists that] all inconsistencies are to be reconciled by the magic of the word CONFIDENCE. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is. [The American people] did not design to make their government dependent on the states.

[After] most deliberate consideration, [the Court has] a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared. We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

SOME METHODOLOGICAL LESSONS OF *MCCULLOCH*

Recall Professor Fallon's suggestion, in chapter 1, that "the ultimate criteria for determining what the Constitution means . . . are necessarily rooted in social facts involving the behaviors, expectations, and attitudes of participants" in the actual practice of constitutional argument. *Supra*, p. I-27. *McCulloch* exemplifies the sheer diversity of arguments that evidently count as valid moves within the terms of that practice. The Court's analysis ranges widely across claims about past practice, linguistic meaning, original purposes or intentions, political theory, and the good or bad effects of different holdings, among other things.

Of the various kinds of arguments that figure in *McCulloch*, three are particularly worth flagging—not because they are necessarily the most important in the Court's reasoning, but because they are especially associated with this case in the legal imagination and will recur in different forms in later cases.

1. Arguments from Settled Practice. Note how Chief Justice Marshall's treatment of the first question in the case—concerning the constitutionality of the bank—begins with "the former proceedings of the nation respecting" that same issue. What weight does past practice, especially the past practice of the political branches, carry in his analysis here? Why should it have any weight at all? We will see similar appeals recur in other areas, especially when we turn to the division of authority between the President and Congress in Section III.

2. "Structural" Argument. Chief Justice Marshall's analysis of the second question in the case—concerning the validity of Maryland's law—features the best-known example of a "structural" argument in constitutional law (a term coined in an influential book by Charles Black).[*] Here is Black's explanation of what he means:

> [When turning to the second question in *McCulloch*,] I find my students, each year, become rather puzzled. As laymen they have absorbed the layman's notions about constitutional law, and they think it consists, indeed that it must consist, in the interpretation of the commands embodied in particular texts. Yet Marshall's reasoning, on this branch of the case is, as I read it, essentially structural. It has to do in great part with what he conceives to be the *warranted relational properties between the national government and the government of the states*, with the structural corollaries of national supremacy[.] You can root the result, if you want to (and Marshall sometimes may seem to be doing this) in the supremacy clause of Article VI, but that seems not a very satisfying rationale, for Article VI declares the supremacy of whatever the national law may turn out to be, and does not purport to give content to that law. In this, perhaps the greatest of our constitutional cases, judgment is

[*] See CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

> reached *not fundamentally on the basis of that kind of textual exegesis which we tend to regard as normal, but on the basis of reasoning from the total structure which the text has created*.[*]

Black's definition of "structural" argument isn't very precise, and the term has come to be used differently by different people. But the idea is roughly that the Constitution sets up or presupposes certain entities that logically stand in certain relationships to one another, and that the very structure of this "organizational chart," as it were, has certain binding implications—even if these implications might not be stated (or perhaps even implied) by any particular bit of the constitutional text.

In Black's hands (and Chief Justice Marshall's) this style of thinking seems to pull in favor of the National Government; something like "national supremacy" is central to the organizational chart as they see it. As we proceed, keep an eye out for other arguments that might be "structural" in nature, bearing in mind that they might cut in favor of state rather than federal authority and that, like the structural argument in *McCulloch*, they might come bundled with appeals to particular textual provisions.

3. Political Process Arguments. Finally, *McCulloch* is also a valuable reference point for another distinctive brand of constitutional argument—often termed a "political process" argument, and developed most fully in a hugely influential book by John Hart Ely that advocated a "political process theory" of judicial review.[†] We will focus more on this idea later, since it mainly applies to individual rights. But the idea, in a nutshell, is that there is a special warrant for judicial intervention when the Court concludes not just that the majoritarian political processes are reaching some "wrong" result (whatever that might be), but that those processes are somehow unable or ill-suited to resolve the question at hand in a fair or appropriate way—a matter of process, rather than substance. Chief Justice Marshall makes an argument of that sort when he explains why the ordinary checks against excessive taxation cannot be relied upon in the special situation where a state is taxing an instrumentality of the national government rather than its own constituents.[‡]

United States v. Comstock

560 U.S. 126 (2010)

■ JUSTICE BREYER delivered the opinion of the Court.

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[*] *Id.* at 14-15 (emphasis added).

[†] See JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

[‡] Ely suggested (pp. 85-86) that the same sort of thinking explains the caveat, at the end of *McCulloch*, to the effect that that a state might be free to impose a "tax [on] the real property of the bank, in common with the other real property within the state." How is that different from the perspective of political process concerns?

A federal civil-commitment statute authorizes the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released. 18 U.S.C. § 4248. [The] question presented is whether the Necessary and Proper Clause, Art. I, §8, cl. 18, grants Congress authority sufficient to enact [this statute]. In resolving that question, we assume, but we do not decide, that other provisions of the Constitution—such as the Due Process Clause—do not prohibit civil commitment in these circumstances. In other words, we assume for argument's sake that the Federal Constitution would permit a State to enact this statute, and we ask solely whether the Federal Government, exercising its enumerated powers, may enact such a statute as well. On that assumption, we conclude that the Constitution grants Congress legislative power sufficient to enact § 4248. We base this conclusion on five considerations, taken together.

First, the Necessary and Proper Clause grants Congress broad authority to enact federal legislation. [Every] law enacted by Congress must be based on one or more of [its enumerated] powers. But, at the same time, "a government entrusted with such" powers "must also be entrusted with ample means for their execution." *McCulloch*. Accordingly, the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are "convenient, or useful" or "conducive" to the authority's "beneficial exercise." [*McCulloch*.] In language that has come to define the scope of the Necessary and Proper Clause, [Chief Justice Marshall] wrote:

> "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* [*supra*, p. II-12].

We have since made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power. [Neither] Congress' power to criminalize conduct, nor its power to imprison individuals who engage in that conduct, nor its power to enact laws governing prisons and prisoners, is explicitly mentioned in the Constitution. But Congress nonetheless possesses broad authority to do each of those things in the course of "carrying into Execution" [its] enumerated powers.

Second, the civil-commitment statute before us constitutes a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades. [History can be helpful in reviewing] the reasonableness of the relation between the new statute and pre-existing federal interests. Here, Congress has long been involved in the delivery of mental-health care to federal prisoners and has long provided for their civil commitment. [Section 4228] is a modest addition to a longstanding federal statutory framework that has been in place since 1855[.]

Third, Congress reasonably extended its longstanding civil-commitment system to cover mentally ill and sexually dangerous persons who are already in federal custody, even if doing so detains them beyond the termination of their criminal sentence. For one thing, the Federal Government is the custodian of its prisoners. As federal custodian, it has the constitutional power to act in order to protect nearby (and other) communities from the danger federal prisoners may pose. [If] a federal prisoner is infected with a communicable disease that threatens others, surely it would be "necessary and proper" for the Federal Government to take action, pursuant to its role as federal custodian, to refuse (at least until the threat diminishes) to release that individual among the general public, where he might infect others (even if not threatening an interstate epidemic, cf. Art. I, §8, cl. 3). And if confinement of such an individual is a "necessary and proper" thing to do, then how could it not be similarly "necessary and proper" to confine an individual whose mental illness threatens others to the same degree?

Moreover, § 4248 is "reasonably adapted" to Congress' power to act as a responsible federal custodian (a power that rests, in turn, upon federal criminal statutes that legitimately seek to implement constitutionally enumerated authority). Congress could have reasonably concluded that federal inmates who suffer from a mental illness that causes them to "have serious difficulty in refraining from sexually violent conduct" would pose an especially high danger to the public if released. And Congress could also have reasonably concluded [that] a reasonable number of such individuals would likely *not* be detained by the States if released from federal custody.

Fourth, the statute properly accounts for state interests. Respondents and the dissent contend that § 4248 violates the Tenth Amendment because it "invades the province of state sovereignty" in an area typically left to state control. But the Tenth Amendment's text is clear: "The powers *not delegated to the United States* by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The powers "delegated to the United States by the Constitution" include those specifically enumerated powers listed in Article I along with the implementation authority granted by the Necessary and Proper Clause. Virtually by definition, these powers are not powers that the Constitution "reserved to the States."

[Nor] does this statute [improperly] limit the scope of [state authority]. [To] the contrary, it requires *accommodation* of state interests: [it] requires the Attorney General to encourage the relevant States to take custody of the individual without inquiring into the "suitability" of their intended care or treatment, and to relinquish federal authority whenever a State asserts its own.

Fifth, the links between § 4248 and an enumerated Article I power are not too attenuated. [Even] the dissent acknowledges that Congress has the implied power to criminalize any conduct that might interfere with the exercise of an enumerated power, and also the additional power to imprison people who violate those (inferentially authorized) laws, and the additional power to provide for the safe and reasonable management of those prisons, and the additional power to regulate the prisoners' behavior after their release. Of course, each of those powers [is] ultimately "derived from" an enumerated power[.] And, as the dissent agrees, that enumerated power is "the enumerated power that justifies the defendant's statute of conviction[.]" Neither we nor the dissent can point to a single specific power that justifies a criminal defendant's conviction in *all* cases because Congress relies on different enumerated powers (often, but not exclusively, the Commerce Clause power) to enact its various federal criminal statutes. But every such statute must itself be predicated on an enumerated power. And the same enumerated power that justifies the creation of a federal criminal statute, and that justifies the additional implied federal powers that the dissent considers legitimate, justifies civil commitment under § 4248 as well. [W]e must reject [the] argument that the Necessary and Proper Clause permits no more than a single step between an enumerated power and an Act of Congress.

Nor need we fear that our holding today confers on Congress a general "police power[.]"[*] [Section] 4248 is narrow in scope. It has been applied to only a small fraction of federal prisoners. And its reach is limited to individuals already "in the custody of the" Federal Government. [Far] from a "general police power," § 4248 is a reasonably adapted and narrowly tailored means of pursuing the Government's legitimate interest as a federal custodian in the responsible administration of its prison system.

[W]e take these five consideration together. They include: (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodations of state interests, and (5) the statute's narrow scope. Taken together, these considerations lead us to conclude that the statute is a "necessary and proper" means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others.

■ JUSTICE KENNEDY, joined by JUSTICE ALITO, concurring in the judgment.

This separate writing serves [to] withhold assent from certain statements and propositions of the Court's opinion[, including] the Court's explanation of the Tenth Amendment. The Constitution delegates limited powers to the National Government and then reserves the remainder for the

[*] [As noted above (*supra, p.* II-1), the "police power" is a term of art for the catch-all power of state governments to regulate in the public interest. —BE]

States (or the people), not the other way around, as the Court's analysis suggests. And the powers reserved to the States are so broad that they remain undefined. Residual power, sometimes referred to (perhaps imperfectly) as the police power, belongs to the States and the States alone.

[It] is correct in one sense to say that if the National Government has the power to act under the Necessary and Proper Clause then that power is not one reserved to the States. But the precepts of federalism embodied in the Constitution inform which powers are properly exercised by the National Government in the first place. See *Lopez* (Kennedy, J., concurring) [*infra*, p. II-58]; see also *McCulloch* [*supra*, p. II-5]. It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that the power is not one properly within the reach of federal power.

■ JUSTICE ALITO, concurring in the judgment.

[I] am persuaded, on narrow grounds, that it was "necessary and proper" for Congress to enact [§ 4248.] [The] statute recognizes that, in many cases, no State will assume the heavy financial burden of civilly committing a dangerous federal prisoner who, as a result of a lengthy federal incarceration, no longer has any substantial ties to any State.

[In] order to [execute] the enumerated power[s] on which federal criminal laws rest, it is also necessary and proper for Congress to protect the public from dangers created by the federal criminal justice and prison systems. [Just] as it is necessary and proper for Congress to provide for the apprehension of escaped federal prisoners, it is necessary and proper for Congress to provide for the civil commitment of dangerous federal prisoners who would otherwise escape civil commitment as a result of federal imprisonment.

[In] a disturbing number of cases, no State [is] willing to assume the financial burden of providing for the civil commitment of federal prisoner who, if left at large after the completion of their sentences, would present a danger to any communities in which they chose to live or visit. [T]his is not a case in which is merely possible for a court to think of a rational basis on which Congress might have perceived an attenuated link between the powers underlying the federal criminal statutes and the challenged civil commitment provision. Here, there is a substantial link to Congress's constitutional powers.

■ JUSTICE THOMAS, joined in part by JUSTICE SCALIA, dissenting.

[Section] 4248 can be a valid exercise of congressional authority only if it is "necessary and proper for carrying into Execution" one or more of those federal powers actually enumerated in the Constitution. [T]he Government identifies no specific enumerated power or powers as a constitutional predicate for § 4248, and none are readily discernable. Indeed, not even the

Commerce Clause [can] justify federal civil detention of sex offenders. Congress may not regulate noneconomic activity (such as sexual violence) based solely on the effect such activity may have [on] interstate commerce. *Lopez* [*infra*, p. II-55].

[The] Court perfunctorily genuflects to *McCulloch*'s framework for assessing Congress' Necessary and Proper Clause authority, [then] promptly abandons [it] in favor of a novel five-factor test supporting its conclusion that § 1428 is a "necessary and proper" adjunct to a number of *unenumerated* "authorit[ies]. The Court's newly minted test cannot be reconciled with the Clause's plain test or with two centuries of our precedents interpreting it. It also raises more questions than it answers. [This] shift from the two-step *McCulloch* framework to this five-consideration approach warrants an explanation as to why *McCulloch* is no longer good enough and which of the five considerations will bear the most weight in future cases[.] The Court provides no answers for these questions.

[T]he power to care for the mentally ill and, where necessary, the power "to protect the community from the dangerous tendencies of some" mentally ill persons, are among the numerous powers that remain with the States. [Protecting] society from violent sexual offenders is certainly an important end. [But] the Constitution does not vest in Congress the authority to protect society from every bad act that might befall it. [Although many states participating as *amici* tell] us that they do not object to Congress retaining custody of "sexually dangerous persons" after their criminal sentences expire[,] Congress' power [is] fixed by the Constitution[.] [It] does not expand merely to suit the States' policy preferences, or to allow State officials to avoid difficult choices regarding the allocation of state funds. [Absent] congressional power that is in accordance with, or necessary and proper to, an enumerated power, the duty to protect citizens from violent crime, including acts of sexual violence, belongs solely to the States. [Today's] opinion [comes] perilously close to transforming the Necessary and Proper Clause into a basis for [a] federal police power

A. The Commerce Power: From the Founding to the New Deal Settlement (32 PAGES)

In this section, we'll trace the trajectory of the Court's decisions regarding the scope of the commerce power over about the first 200 years of American history. As Chief Justice Roberts would later summarize this progression, "[t]he path of our Commerce Clause decisions has not always run smooth." *NFIB v. Sebelius* (2012) [*infra*, p. II-78]. As you'll see, that is probably an understatement. The story begins with the Court's first sustained analysis of the Commerce Clause in *Gibbons v. Ogden* (1824). We'll then turn to the Court's efforts to balance federal and state authority in the context of the developing national economy; to the series of decisions invalidating elements of the "New Deal" in the wake of the Great Depression; and to the emergence of a "New Deal Settlement" that recognized very broad power on the part of Congress to legislate in the national interest, culminating in the Court's decisions upholding the Civil Rights Act of 1964.

Gibbons v. Ogden

9 Wheat. (22 U.S.) 1 (1824)

[Aaron Ogden had an exclusive license under New York state law to operate a steamboat, in New York waters, carrying passengers between New York City and New Jersey. Thomas Gibbons, once Ogden's business partner, opened a competing ferry business on the same route. Ogden sought an injunction in state court to block Gibbons from operating in New York waters. Gibbons responded that, although his steamboat might not be authorized under New York law, it was licensed under a federal statute, the Coasting Act of 1793. The state court ruled for Ogden, enforcing his state-law monopoly right despite Gibbons's federal license.]

■ CHIEF JUSTICE MARSHALL delivered the opinion of the Court[:]

[The Constitution] contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? [We cannot perceive the propriety of a rule that] would deny to the government those powers which the words of the grant, as usually understood, import, and which [would] cripple the government, and render it unequal to the object for which it is declared to be instituted. [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[.] If, from the imperfection of human language, there should be serious doubts respecting the extent of any given sovereign power, it is a well settled rule, that the objects for which it was given, [should] have great influence in the construction.

[The] words are, "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The subject to be regulated is commerce[.] [T]o ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for [Ogden] would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations [that would] be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

[If] commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. [The] power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. [Commerce] then, comprehends and has always understood to comprehend, navigation within its [meaning].

The subject to which the power [is] applied [is] commerce "among the several states." The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

[The commerce power is] the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. [If], as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over [commerce among the several States] is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New-York, and act upon the very waters to which the prohibition now under consideration applies.

[In] the exercise of this power, Congress has passed "an act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." [This statute] implies, unequivocally, an authority to licensed vessels to carry on the coasting trade. [The] act of a State inhibiting the use of [waters and ports] to any vessel having a license under the act of Congress, comes, we think, in direct collision with that act.

We will discuss Chief Justice Marshall's interpretation of each of the key components of the Commerce Clause in class. Alongside those particular arguments, though, *Gibbons* is often cited for the broader idea that "[t]he enumeration presupposes something not enumerated." See, *e.g.*, *NFIB v. Sebelius* [*infra*, p. II-76]. As commonly deployed today, the argument is that there must be some significant laws that Congress lacks power to enact—even apart from any individual rights guarantees—because otherwise the choice to enumerate particular powers in Article I, § 8, would be inexplicable. Before moving on, think about what kind of argument that is and how persuasive you find it, especially in light of the distinction between original meaning and original intentions or expectations (*supra*, p. I-31). Is a candidate reading of Article I, § 8, undercut if, in light of current facts about

American society, Congress's powers would prove to be sweeping under that interpretation?*

THE COMMERCE POWER AT THE TURN OF THE 20TH CENTURY

Although *Gibbons* offered an account of the commerce power and its limits, Congress did not actually undertake to exercise that power in a meaningful way until several decades later. In fact, until the late 1800s, the Commerce Clause was mainly invoked as the basis of an implied limit on a *state*'s authority to regulate interstate commerce, since those matters were (the argument went) exclusively entrusted to Congress.† Then, in the late nineteenth and early twentieth centuries (sometimes known as the "Progressive Era"), two significant lines of cases emerged. Simplifying a bit, the first set of cases dealt mainly with whether some activity being regulated by Congress was (or was sufficiently related to) interstate commerce; the second concerned whether an improper congressional *purpose* could vitiate an otherwise-valid exercise of the commerce power.

1. The Bounds of the Commerce Power: The Sugar and Railroad Cases

As technological developments in manufacturing, transportation, and communication enabled the growth of interstate markets, Congress began exercising more authority over the national economy. In 1890, it passed the Sherman Anti-Trust Act, prohibiting certain trusts (monopoly arrangements that stifled competition), and the Interstate Commerce Commission, regulating railroads. These new exercises of authority confronted the Court with new questions about the extent of the commerce power.

In **United States v. E.C. Knight Co. [The Sugar Trust Case]**, 156 U.S. 1 (1895), the Court rejected the federal government's use of the Sherman Act to block a sugar refining company from acquiring nearly complete control over the nation's market for refined sugar. The company argued that the Sherman Act did not apply to it because sugar refining was a kind of manufacturing, and thus an inherently intrastate concern, rather than commerce. The Court agreed. Justice Fuller wrote: "Commerce succeeds to manufacture, and is not a part of it. [The] regulation of commerce applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several States, the

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* *Cf.* Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 574, 631 (2014) ("One can reasonably assume that people do not write rules that they *know* will never have applications. But it does not follow that every rule people write *has*, or in the future *will have*, applications. [This inference would be especially weak] for rules that remain in place for long periods of time, because the circumstances for which a rule was written might be characteristic of the world the authors knew but not of the world at all later times.").

† This idea is often termed the "Dormant Commerce Clause": the thought is that Congress's power to regulate interstate commerce—even if it that power is "dormant" rather than exercised—precludes state regulation of that same commerce. We are not covering the Dormant Commerce Clause in this course.

transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce[.]"

Only Justice Harlan dissented: "[I]n my judgment, the general government is not placed by the Constitution in such a condition of helplessness that it must fold up its arms and remain inactive while capital combines, under the name of a corporation, to destroy competition, not in one State only, but throughout the entire country, in the buying and selling of articles—especially the necessaries of life—that go into commerce among the states."

In the **The Shreveport Rate Cases**, 234 U.S. 342 (1914), however, the Court upheld the Interstate Commerce Commission's (ICC) authority to regulate even intrastate railroad rates. The ICC had found that two railroad carriers were charging lower rates for routes within Texas than for comparable routes from Texas to Shreveport, Louisiana. It ordered the companies to fix equal rates for the routes rather than "discriminating" against interstate traffic. The railroad carriers challenged the ICC's order, arguing that Congress lacked the power to dictate intrastate railroad rates.

The Court disagreed. Justice Hughes, writing for the majority, explained that Congress's power "to regulate" amounted to a power "to provide the law for the government of interstate commerce; to enact all appropriate legislation for its protection and advancement; [to] foster, protect, control, and restrain." Congress's authority over "interstate carriers as instruments of interstate commerce" thus "necessarily embrace[d] the right to control [the railroads'] operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate [to] the maintenance of conditions under which interstate commerce may be conducted upon fair terms." "[This] is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled." (Two Justices dissented without writing an opinion.)

2. The Relevance of Congressional Purpose

Meanwhile, Congress also enacted several bans on the interstate transport of particular products. Although these laws expressly targeted interstate activities, they were rooted in the sorts of concerns about public health or morality that had typically been addressed by states pursuant to their broad "police power." The new federal laws thus posed the question of whether Congress could impose its own nationwide regulations directed at these traditional state concerns.

In **Champion v. Ames [The Lottery Case]**, 188 U.S. 321 (1903), the Court considered whether Congress could prohibit the interstate transportation of lottery tickets. In a 5-4 ruling, it upheld the law. Writing for the majority, Justice Harlan (who had dissented in the *Sugar Trust Case*) presented the matter as straightforward: "[L]ottery tickets are subjects of traffic and therefore are subjects of commerce," and regulating their movement between states was thus "a regulation of commerce among the several States." He rejected the argument that lottery tickets were an improper target of federal regulation. "As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the 'widespread pestilence of lotteries' and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another."

Chief Justice Fuller, writing for the four dissenters, took the opposite view. Although the law operated on interstate commerce, its purpose was simply to suppress lotteries in general. And "[t]he power of the State to impose restraints and burdens on persons and property in conservation and promotion of the public health, good order and prosperity is a power originally and always belonging to the States, not surrendered by them to the General Government." Upholding the law would amount to holding "that Congress has general police power," thereby permitting it to "accomplish objects not entrusted to the General Government" and "defeat[ing]" the Tenth Amendment. In support of this purpose-oriented conception of congressional power, the dissenters invoked the "pretext" passage in *McCulloch v. Maryland* [*supra*, p. II-13]: "[S]hould Congress [under] the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the Government; it would become the painful duty of this tribunal [to] say that such an act was not the law of the land."

Over the next several years, the logic of the *Lottery Case* was extended in various respects. For example, in **Hipolite Egg Co. v. United States**, 220 U.S. 45 (1911), the Court sustained the Federal Government's authority, under the Pure Food and Drug Act of 1906, to confiscate preserved eggs that contained a "deleterious ingredient." The petitioner conceded that *transporting* the eggs in interstate commerce violated the Act, but argued that Congress could not authorize the *seizure* of the products from store shelves once they had passed out of interstate commerce. The Court rejected that distinction. "[I]t certainly will not be contended that [prohibited articles] are outside the jurisdiction of the National Government when they are within the borders of a State," wrote Justice McKenna for the unanimous Court. "The power to [confiscate] is certainly appropriate to the right to bar them from interstate commerce and completes [the law's] purpose [to] prevent [the] use of [adulterated articles]." [Citing *McCulloch*, *supra*, p. II-5; *The Lottery Case*, *supra*, p. II-28].

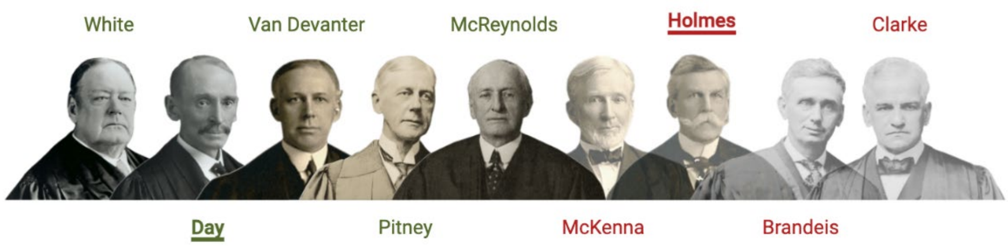
Likewise, in **Hoke v. United States**, 227 U.S. 308 (1913), the Court upheld a federal law prohibiting the transportation of women in interstate commerce "for immoral purposes" (i.e., prostitution). In light of *Hipolite Egg*, *The Lottery Case*, and similar cases, Justice McKenna reasoned, Congress's authority to ban items from interstate commerce was settled. "The principle established by these cases is the simple one [that] Congress has power over transportation 'among the several States'; that, the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations."

THE RESTRICTIVE TURN IN COMMERCE CLAUSE JURISPRUDENCE—AND THE EMERGENCE OF THE NEW DEAL SETTLEMENT

In the years that followed, however, the Court struck down several important statutes as exceeding Congress's power under the Commerce Clause. The first major step in this retrenchment was *Hammer v. Dagenhart* (1918). As you read *Dagenhart*, consider how the Court sought to square its holding with the preceding cases and whether you find its argument convincing.

Hammer v. Dagenhart

247 U.S. 251 (1918)



[In 1916, Congress enacted the Keating-Owen Child Labor Act, prohibiting the interstate sale of goods manufactured in factories that employed children under age fourteen, or where children between ages fourteen to sixteen worked for more than eight hours per day or six days per week. Roland Dagenhart, who worked in a cotton mill in Charlotte, North Carolina with his two teenage sons, argued that the law was unconstitutional. By a vote of 5-4, the Supreme Court agreed.]

■ JUSTICE DAY delivered the opinion of the Court:

[Is] it within the authority of Congress in regulating commerce among the States to prohibit the transportation in interstate commerce of [goods manufactured in a factory employing children]? [In] *Gibbons* v. *Ogden,* Chief Justice Marshall, [defining] the extent and nature of the commerce power, said, "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed." In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroying it as to particular commodities.

But it is insisted that [*The Lottery Case*, *Hipolite Egg*, and *Hoke*] establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities. [These] cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate. [The Court then reviewed its holdings in *The Lottery Case*, *Hipolite Egg Co.*, and *Hoke*.] In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within its prohibited ages. The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in [manufacturing]. The goods shipped are of themselves harmless. [When] offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control.

[Over] interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation. [If] it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States[.]

[It] is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other States where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the State of production. In other words, that the unfair competition, thus engendered, may be controlled by closing the channels of interstate commerce to manufacturers in those States where the local laws do not meet what Congress deems to be the more just standard of other States.

There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition. Many causes may co-operate to give one State, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions. [Upholding this statute] would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress.

[We] have neither authority nor disposition to question the motives of Congress in enacting this legislation. [The] necessary effect of this act [is] to regulate the hours of labor of children in factories and mines within the States, a purely state authority. Thus the act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend. The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed.

■ JUSTICE HOLMES, joined by JUSTICES MCKENNA, BRANDEIS, and CLARKE, dissenting.

The single question in this case is whether Congress has the power to prohibit the shipment in interstate or foreign commerce of any product of a cotton mill [that employed children in the manner specified in the statute.] [The] objection urged against the power is that the States have exclusive control over their methods of production[.] [But] if an act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects[.]

[The] statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. Congress is given power to regulate such commerce in unqualified terms. It would not be argued today that the power to regulate does not include the power to prohibit. [The] question then is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitutional because of its possible reaction upon the conduct of the States in a matter upon which I have admitted that they are free from direct control. [I] should have thought that the most conspicuous decisions of this Court had made it clear that the power to regulate commerce [could] not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State.

[If] there is any matter upon which civilized countries have agreed [it] is the evil of premature and excessive child labor. I should have thought that if we were to introduce our own moral conceptions where in my opinion they do not belong, this was preeminently a case for upholding the exercise of all its powers by the United States.

But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone and that this Court always had disavowed the right to intrude its judgment upon questions of policy or morals. It is not for this Court to pronounce when prohibition is necessary to regulation if it ever may be necessary—to say that it is permissible as against strong drink but not as against the product of ruined lives. The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. [Congress] may carry out its views of public policy whatever indirect effect they may have upon the activities of the States.

The conservative turn in Commerce Clause jurisprudence that began with *Dagenhart* grew sharper as the Great Depression (1929-1939) put new pressures on the Federal Government to meet the needs of destitute Americans. Embracing President Franklin D. Roosevelt's "New Deal" legislative agenda, Congress enacted sweeping legislation addressing pensions, working conditions, wage-and-hour standards, and labor rights. In a series of decisions in the early 1930s, the Court then invalidated several of these broad recovery laws as exceeding the Commerce Clause power.

In **Railroad Retirement Board v. Alton Railroad Co.**, 295 U.S. 330 (1935), for example, the Court struck down the Railroad Retirement Act's compulsory pension system for railroad employees. The claim of Commerce Clause authority, Justice Roberts wrote, rested on "[t]he theory [that] one who has an assurance against future dependency will do his work more cheerfully, and therefore more efficiently." But "the fostering of a contented mind on the part of an employee by legislation of this type," he concluded, was not "in any just sense a regulation of interstate transportation." After all, "[p]rovision for free medical attendance and nursing, for clothing, for food, for housing, for the education of children, and a hundred other matters, might with equal propriety be proposed as tending to relieve the employee of mental strain and worry," but "[these] matters obviously lie outside the orbit of Congressional power." Likewise, in **Schechter Poultry Corp. v. United States**, 295 U.S. 495 (1935), the Court struck down wage-and-hour standards for slaughterhouses that had been imposed under the National Industrial Recovery Act. The government's claim that wages paid for intrastate activity affect prices (and thereby the interstate economy) "prove[d] too much," Chief Justice Hughes explained; crediting such an "indirect effect upon interstate commerce" would "destroy the distinction [between] commerce 'among the several States' and the internal concerns of a State."

After winning a landslide re-election in 1936, President Roosevelt mounted a public campaign against the Court and called for Congress to expand its membership so that he could appoint several new Justices. He made his case in a radio address (branded a "Fireside Chat"):

> [I]n the last three national elections an overwhelming majority of [Americans] voted a mandate that the Congress and the President

begin the task of providing protection [against the ongoing economic crisis]. The Courts, however, have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic condition.

[Since] the rise of the modern movement for social and economic progress through legislation, the Court has more and more often and more and more boldly asserted a power to veto laws passed by the Congress and State Legislatures in complete disregard of [the Court's traditional deference to the other branches].

[When] the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways, to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these Acts of the Congress—and to approve or disapprove the public policy written into these laws.

The Court in addition to the proper use of its judicial functions has improperly set itself up as a third House of the Congress—a super-legislature, as one of the justices has called it—reading into the Constitution words and implications which are not there, and which were never intended to be there.

We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it. In our Courts we want a government of laws and not of men.

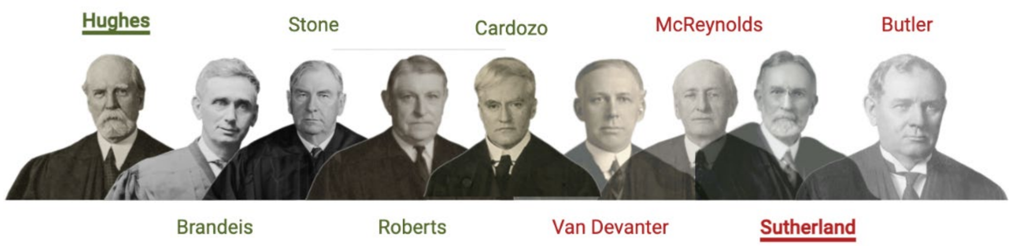
I want—as all Americans want—an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written—that will refuse to amend the Constitution by the arbitrary exercise of judicial power—amendment by judicial say-so. It does not mean a judiciary so independent that it can deny the existence of facts universally recognized.

[I have come to] the conclusion that, short of amendments, the only method which [is] clearly constitutional, and would at the same time carry out other much needed reforms, [is] to infuse new blood into all our Courts. We must have men worthy and equipped to carry out impartial justice. But, at the same time, we must have Judges who will bring to the Courts a present-day sense of the Constitution—Judges who will retain in the Courts the judicial functions of a court, and reject the legislative powers which the courts have today assumed.

Roosevelt's "court-packing" plan never went anywhere in Congress, but the Court's rulings grew much friendlier to the New Deal program soon after the plan was announced. That apparent shift began with *NLRB v. Jones & Laughlin Steel Corp.* (immediately below)—although some contend that the Justices' votes in *Jones & Laughlin* and the prior New Deal cases are actually fully explainable in terms of differences in the cases themselves. As you read *Jones & Laughlin*, consider the differences between the National Labor Relations Act and the other statutes that the Court had invalidated and how, if at all, *Jones & Laughlin* modified the Commerce Clause inquiry.*

NLRB v. Jones & Laughlin Steel Corp.

301 U.S. 1 (1937)



[The National Labor Relations Act (NLRA) of 1935 prohibited employers from engaging in unfair labor practices "affecting commerce" and created the National Labor Relations Board (NLRB) to enforce this prohibition. Shortly after the NLRA's enactment, the NLRB found Jones & Laughlin Steel Corporation in violation of the Act. The Board ordered Jones & Laughlin to stop discriminating against workers who sought to unionize and to rehire workers it had fired in retaliation for union activity. The Second Circuit denied enforcement of the NLRB's order on the ground that it went beyond Congress' authority.]

■ CHIEF JUSTICE HUGHES delivered the opinion of the Court.

[Jones & Laughlin] is engaged in the business of manufacturing iron and steel in plants situated in Pittsburgh and nearby Aliquippa, Pennsylvania. It manufactures and distributes a widely diversified line of steel and pig iron, being the fourth largest producer of steel in the United States. With its subsidiaries—nineteen in number—it is a completely integrated enterprise, owning and operating ore, coal and limestone properties, lake and river transportation facilities and terminal railroads located at its manufacturing plants. It owns or controls mines in Michigan and Minnesota. It operates four ore steamships on the Great Lakes. [It] owns coal mines in Pennsylvania. It operates towboats and steam barges used in carrying coal to its

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* We will see later in the course that a parallel shift unfolded in the Court's jurisprudence concerning individual rights—against both state and federal regulation—at the same time. See *infra* section IV.A.

factories. [It owns two railroads connecting its plants to major railway systems.] Much of its product is shipped to its warehouses in Chicago, Detroit, Cincinnati and Memphis—to the last two places by means of its own barges and transportation equipment. [Approximately] 75 per cent. of its product is shipped out of Pennsylvania.

Summarizing these operations, the Labor Board concluded that the works in Pittsburgh and Aliquippa "might be likened to the heart of a self-contained, highly integrated body. They draw in the raw materials from Michigan, Minnesota, West Virginia, Pennsylvania in part through arteries and by means controlled by the respondent; they transform the materials and then pump them out to all parts of the nation through the vast mechanism which the respondent has elaborated."

[The NLRA] is challenged in its entirety as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns. It is asserted [that] the Act is not a true regulation of [interstate and foreign] commerce or of matters which directly affect it but on the contrary has the fundamental object of placing under the compulsory supervision of the federal government all industrial labor relations within the nation. [The] authority of the federal government may not be pushed to such an extreme as to destroy the distinction [between] commerce "among the several States" and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.

[But we] think it clear that the [NLRA] may be construed so as to operate within the sphere of constitutional authority. The jurisdiction conferred upon the Board, and invoked in this instance, is found in § 10(a), which provides:

> "SEC. 10 (a). The Board is empowered [to] prevent any person from engaging in any unfair labor [practice] affecting commerce."

The critical words of this provision, prescribing the limits of the Board's authority in dealing with the labor practices, are "affecting commerce." The Act specifically defines the "commerce" to which it refers [as interstate or foreign commerce]. The Act also defines the term "affecting commerce":

> "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

This definition is one of exclusion as well as inclusion. The grant of authority to the Board [purports] to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes. [It] is the effect upon commerce, not the source of the injury, which is the criterion. [Whether] or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control [is] left by the statute to be determined as individual cases arise. We are thus to inquire whether in the instant case the constitutional boundary has been passed.

[Jones & Laughlin] says that whatever may be said of employees engaged in interstate commerce, the industrial relations and activities in the manufacturing department of [its] enterprise are not subject to federal regulation. [But the] congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. [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. Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree. [The] close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local.

[It] is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved. In the *Schechter* case [*supra*, p. II-32], we found that the effect there was so remote as to be beyond the federal power. To find "immediacy or directness" there was to find it "almost everywhere," a result inconsistent with the maintenance of our federal system.

[Here,] the stoppage of [Jones & Laughlin's] operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.

Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. [The] facts as to respondent's enterprise [present] in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce[.]

■ JUSTICE MCREYNOLDS, joined by JUSTICES VAN DEVANTER, SUTHERLAND, and BUTLER, dissenting.

The precise question for us to determine is whether in the circumstances disclosed Congress has power to authorize what the Labor Board commanded [Jones & Laughlin] to do. Stated otherwise, in the circumstances here existing could Congress by statute direct what the Board has ordered?

Manifestly that view of congressional power would extend it into almost every field of human industry. [Any] effect on interstate commerce by the discharge of employees shown here would be indirect and remote in the highest degree. In [this case] ten men out of ten thousand were [discharged]. A more remote and indirect interference with interstate commerce or a more definite invasion of the powers reserved to the states is difficult, if not impossible, to imagine.

[It] is gravely stated that experience teaches that if an employer discourages membership in [labor organizations], discontent may follow and this in turn may lead to a strike, and as the outcome of the strike there may be a block in the stream of interstate commerce. Therefore Congress may inhibit the discharge! Whatever effect any cause of discontent may ultimately have upon commerce is far too indirect to justify Congressional regulation. Almost anything—marriage, birth, death—may in some fashion affect commerce.

[The] things inhibited by the Labor Act relate to the management of a manufacturing plant—something distinct from commerce and subject to the authority of the state. And this may not be abridged because of some vague possibility of distant interference with commerce.

Within a few years after *Jones & Laughlin* (1937), each of the "four horsemen" who had most vigorously opposed the New Deal laws—Justices Butler, McReynolds, Sutherland, and Van Devanter (also the four dissenters in *Jones & Laughlin*)—had died or retired. Even without the court-packing plan, therefore, President Roosevelt was able to substantially reshape the Court.[*] In the early 1940s, the Court rendered a series of decisions—most notably *United States v. Darby* (1941) and *Wickard v. Filburn* (1942)—that consolidated federal power and, together with *Jones & Laughlin*, set the terms of the relationship between the Court and Congress for decades to come.

This regime is sometimes described as "the New Deal settlement," having emerged out of the conflict over the New Deal.[†] As you read *Darby* and *Wickard*, try to identify the main pillars of the new approach to the commerce power that they embody and how, analytically, these cases break with cases like *Dagenhart*, *Alton Railroad*, and *Schechter Poultry*.

United States v. Darby

312 U.S. 100 (1941)

[The Fair Labor Standards Act of 1938 established minimum wage and maximum hour requirements for employees producing goods in interstate commerce. Darby, a Georgia lumber manufacturer, was charged with violating the Act. The district court held the Act exceeded Congress' power to regulate interstate commerce, and the Federal Government appealed.]

■ JUSTICE STONE delivered the opinion of the Court.

The two principal questions [in] this case are, *first*, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and, *second*, whether it has power to prohibit the employment of workmen in the production of goods "for interstate commerce" at other than prescribed wages and hours. [The Act's purpose is] to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary

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[*] By the time Roosevelt left office in 1945, in fact, he had appointed eight of the nine Justices (and he had elevated the ninth—Harlan Fiske Stone—to Chief Justice).

[†] See, e.g., Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5, 121 (2001). The "New Deal settlement" also encompasses certain commitments with respect to individual rights (as opposed to the balance of state and federal power) that we will consider later in the semester.

for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states.

[The] prohibition of shipment of the proscribed goods in interstate commerce. Section 15(a)(1) prohibits [the] shipment in interstate commerce, of goods produced for interstate commerce by employees whose wages and hours of employment do not conform to the requirements of the Act. [The question is] whether Congress has the authority to prohibit [such shipments.]

While manufacture is not of itself interstate commerce the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power "to prescribe the rule by which commerce is governed." [Gibbons.] It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it. It is conceded that the power of Congress to prohibit transportation in interstate commerce includes noxious articles, stolen articles, kidnapped persons, and articles such as intoxicating liquor or convict-made goods, traffic in which is forbidden or restricted by the laws of the state of destination. [But] it is said that [while] the prohibition is nominally a regulation of the commerce its motive or purpose is regulation of wages and hours of persons engaged in manufacture, the control of which has been reserved to the states and upon which Georgia and some of the states of destination have placed no restriction[.] [Under] the guise of a regulation of interstate commerce, it undertakes to regulate wages and hours within the state contrary to the policy of the state[.]

The power of Congress over interstate commerce [can] neither be enlarged nor diminished by the exercise or non-exercise of state power. Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use. [*Lottery Case, supra*, p. II-28; *Hipolite Egg Co.; Hoke*].

Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles within the states of destination; and is not prohibited unless by other Constitutional provisions. [The] motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. [Whatever] their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Subject only to that limitation, [we] conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress.

[These] principles of constitutional interpretation have been so long and repeatedly recognized by this Court as applicable to the Commerce Clause, that there would be little occasion for repeating them now were it not for the decision of this Court twenty-two years ago in *Hammer v. Dagenhart*. In that case it was held by a bare majority of the Court over the powerful and now classic dissent of Justice Holmes [that] Congress was without power to exclude the products of child labor from interstate commerce. The reasoning and conclusion of the Court's opinion there cannot be reconciled with the conclusion which we have reached[.] *Hammer v. Dagenhart* has not been followed. The distinction on which the decision was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned. The thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the states of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force. [*Hammer*] was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision[.]It should be and now is overruled.

Validity of the wage and hour requirements. Section 15(a)(2) [requires] employers to conform to the wage and hour provisions with respect to all employees engaged in the production of goods for interstate commerce. As appellees' employees are not alleged to be "engaged in interstate commerce" the validity of the prohibition turns on the question whether the employment [of] employees engaged in the production of goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it.

[We] think the acts alleged in the indictment are within the sweep of the statute. The obvious purpose of the Act was [to] stop [production] with the purpose of [interstate transportation]. [There] remains the question whether such restriction on the production of goods for commerce is a permissible exercise of the commerce power. The power of Congress over interstate commerce extends [to] activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See *McCulloch* [*supra*, p. II-5].

[Having] by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, [Congress] may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. [A] familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled. *Shreveport Case* [*supra*, p. II-27]. Similarly Congress may require inspection and preventive treatment of all cattle in a disease infected area in order to prevent shipment in interstate commerce of some of the cattle without the treatment. It may prohibit the removal, at destination, of labels required by the Pure Food & Drugs Act to be affixed to articles transported in interstate commerce.

[We] think also that § 15(a)(2), now under consideration, is sustainable independently of [the prohibition on] transportation of the proscribed goods. [T]he evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as “unfair.” [The] Sherman Act and the National Labor Relations Act are familiar examples of the exertion of the commerce power to prohibit or control activities wholly intrastate because of their effect on interstate commerce.

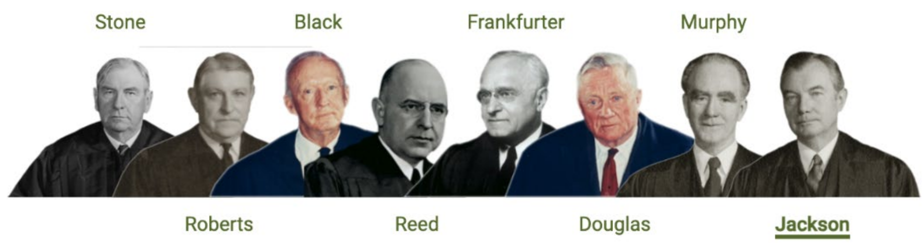
[Here, too, the] means adopted [is] so related to the commerce and so affects it as to be within the reach of the commerce power. Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. The legislation aimed at a whole embraces all its parts.

[Our] conclusion is unaffected by the Tenth Amendment[.] The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established [even before the amendment,] or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted[.] From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. [*McCulloch*; *Lottery Case*.]

[Reversed.]

Wickard v. Filburn

317 U.S. 111 (1942)



[The Agricultural Adjustment Act of 1938 sought to stabilize and support wheat prices by imposing quotas on wheat production and penalizing farmers who exceeded their quotas in a given year. In 1941, Filburn, a dairy farmer in Ohio, grew "a small acreage of winter wheat"—some of which he sold, some of which he fed to his livestock (which he in turn sold), some of which he used to make flour for his own household, and some of which he used as seed for the next season. The Act treated all of this wheat as subject to the production quota, and by that measure Filburn exceeded his allotment by 239 bushels. He sued the Secretary of Agriculture to enjoin enforcement of the resulting penalty.]

■ JUSTICE JACKSON delivered the opinion of the Court.

[It] is urged that under the Commerce [Clause], Congress does not possess the power it has in this instance sought to exercise. The question would merit little consideration since our decision in [*Darby*], except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm.

[Filburn] says that that this is a regulation of production and consumption of wheat. Such activities are, he urges, beyond the reach of Congressional power under the Commerce Clause, since they are local in character, and their effects upon interstate commerce are at most "indirect." In answer the Government argues that the statute regulates neither production nor consumption, but only marketing; and, in the alternative, that if the Act does go beyond the regulation of marketing it is sustainable as a "necessary and proper" implementation of the power of Congress over interstate commerce.

The Government's concern lest the Act be held to be a regulation of production or consumption, rather than of marketing, is attributable to a few dicta and decisions of this Court which might be understood to lay it down that activities such as "production," "manufacturing," and "mining" are strictly "local" and, except in special circumstances[,] cannot be regulated under the commerce power because their effects upon interstate commerce are, as matter of law, only "indirect." Even today, when this power has been held to have great latitude, there is no decision of this Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof. We believe that a review of the course of decision under the Commerce Clause will make plain, however, that questions of the power of Congress 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.

At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. *Gibbons*. He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes.

[It] was not until 1887, with the enactment of the Interstate Commerce Act, that [Congress began to enact important statutes under the commerce power]. When it first dealt with this new legislation, the Court [allowed] but little scope to the power of Congress. *United States* v. *Knight Co*. [*supra*, p. II-26]. [Even] while important opinions in this line of restrictive authority were being written, however, other cases called forth broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in *Gibbons.* [In] some cases sustaining the exercise of federal power over intrastate matters the term "direct" was used for the purpose of stating, rather than of reaching, a result; in others it was treated as synonymous with "substantial" or "material"; and in others it was not used at all. Of late its use has been abandoned in cases dealing with questions of federal power under the Commerce Clause.

In the *Shreveport Rate Cases*, the Court held that railroad rates of an admittedly intrastate character and fixed by authority of the state might, nevertheless, be revised by the Federal Government because of the economic effects which they had upon interstate commerce. The opinion of Mr. Justice Hughes found federal intervention constitutionally authorized because of "matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance."

The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause, exemplified by this statement, has made the mechanical application of legal formulas no longer feasible. Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be "production," nor can consideration of its economic effects be foreclosed by calling them "indirect." [Even] 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, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

[The] wheat industry has been a problem industry for some years. [The] decline in the export trade has left a large surplus in production which, in connection with an abnormally large supply of wheat and other grains in recent years, caused congestion in a number of markets[.] [In] the absence of regulation the price of wheat in the United States would be much affected by world conditions. [The] maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate [commodity prices] and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat, and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices. [Reversed.]

THE COMMERCE POWER AND THE CIVIL RIGHTS ACT OF 1964

Today, the Civil Rights Act of 1964 "occupies an exalted position in the nation's legal consciousness"—and "[p]erhaps none of the Act's provisions is held in higher esteem than Title II, the public accommodations measure that prohibits owners of hotels, motels, and restaurants from excluding black patrons."[*] When it was proposed, though, Title II was intensely controversial, and much of the opposition was framed in constitutional terms. In one high-profile speech, for example, Senator Barry Goldwater (who was poised to become the Republican Party's nominee for President) objected:

> I find no constitutional basis for the exercise of Federal regulatory authority in [the] areas [of public accommodations and employment]; and I believe the attempted usurpation of such power to be a grave threat to the very essence of our basic system of government, namely, that of a constitutional republic in which 50 sovereign states have reserved to themselves and to the people those powers not specifically granted to the central or Federal Government.

Robert Bork—an influential law professor whom President Reagan would later nominate for the Supreme Court—put it this way: "If Congress can dictate the selection of customers in a remote Georgia diner because the canned soup once crossed a state line, federalism—so far as it limits national power to control behavior through purported economic regulation—is dead."[†]

Once the bill was enacted, the same arguments reached the Supreme Court in two related cases: *Heart of Atlanta Motel v. United States* and *Katzenbach v. McClung*.[‡] The Heart of Atlanta Motel was a large Georgia motel located near several highways; McClung was the owner of Ollie's Barbecue, a restaurant in Birmingham, Alabama. By its terms, Title II applied to the motel because the motel "provide[d] lodging to transient guests," and the statute applied to Ollie's Barbecue on two different grounds: "it serve[d] or offer[ed] to serve interstate travelers," and "a substantial portion of the food which it serves . . . ha[d] moved in [interstate] commerce." The owners in each case objected to Title II's mandate to serve Black customers on equal terms. One district court rejected the motel's challenge, citing *Darby* and *McCulloch*, but another ruled in favor of the restaurant owner, reasoning as follows:

[*] Justin Driver, *Reactionary Rhetoric and Liberal Legal Academia*, 123 YALE L.J. 2616, 2618 (2014).

[†] Bork renounced his position when he was nominated to serve as Solicitor General in 1971.

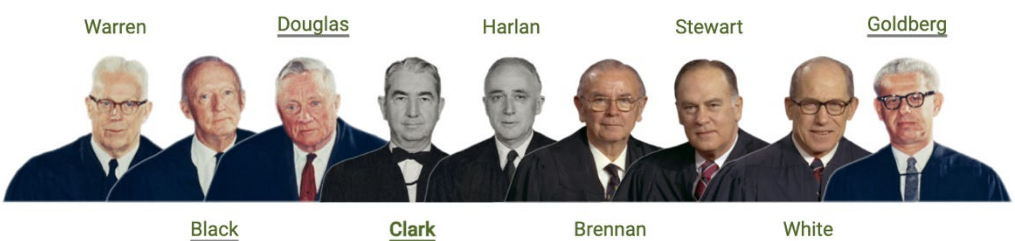
[‡] In principle, there was another possible constitutional basis for Title II: Congress's power to "enforce, by appropriate legislation," the Equal Protection Clause of the Fourteenth Amendment. As we will see later in the semester, however, the Court had held that the Fourteenth Amendment only reached discrimination by *state* actors, whereas Title II prohibited discrimination by private businesses.

> The simple truth of the matter is that Congress has sought to put an end to racial discrimination in all restaurants wherever situated regardless of whether there is any demonstrable causal connection between the activity of the particular restaurant against which enforcement of the act is sought and interstate commerce. [Congress] sought to achieve its end by the sophisticated means of [legislating] what is tantamount to a conclusive presumption that [a restaurant's] operations do affect commerce if it is proved either that it serves or offers to serve interstate travelers or that a substantial portion of the food which it serves has at some time, however remote, moved in commerce. [If] Congress has the naked power to do what it has attempted in title II of this act, there is no facet of human behavior which it may not control by mere legislative *ipse dixit*[*] that conduct "affect[s] commerce" when in fact it does not do so at all, and rights of the individual to liberty and property are in dire peril.[†]

In the Supreme Court, the cases were argued and decided as a pair, with the Court unanimously upholding the statute as applied in both settings. As you read these opinions, consider (1) how closely their conclusions follow from the prior cases; and (2) what, if anything, might lie beyond Congress's power to regulate under the conception of the commerce power that they reflect.

Heart of Atlanta Motel, Inc. v. United States

379 U.S. 241 (1964)



■ JUSTICE CLARK delivered the opinion of the Court.

The Basis of Congressional Action

[While] the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce. This testimony included the fact [that] Negroes in particular have been the subject of discrimination in transient accommodations [and] that these conditions had become so acute as to require the listing of available lodging

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[*] [*Ipse dixit* is a Latin phrase meaning "say so" or "bare assertion."]

[†] McClung v. Katzenbach, 233 F. Supp. 815, 825 (N.D. Ga. 1964).

for Negroes in a special guidebook which was itself "dramatic testimony to the difficulties" Negroes encounter in travel. These exclusionary practices were found to be nationwide [and to have] a qualitative as well as quantitative effect on interstate travel by Negroes. The former was the obvious impairment of the Negro traveler's pleasure and convenience that resulted when he continually was uncertain of finding lodging. As for the latter, there was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community. [We] shall not burden this opinion with further details since the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel.

The Power of Congress Over Interstate Travel

The power of Congress to deal with these obstructions depends on the meaning of the Commerce Clause. Its meaning was first enunciated 140 years ago by the great Chief Justice John Marshall in *Gibbons* v. *Ogden* in these words:

> "[The commerce power] may very properly be restricted to that commerce which concerns more States than one. . . . The genius and character of the whole government seem to be, that its action is to be applied to all the . . . internal concerns [of the Nation] which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.
>
> "We are now arrived at the inquiry—What is this power?
>
> "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. [The] wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is "commerce which concerns more States than one" and has a real and substantial relation to the national interest.

[Congress's] interest in protecting interstate commerce [has] prompted it to extend the exercise of its power to gambling, *Lottery Case,* 188 U. S. 321 (1903); [to] deceptive practices in the sale of products; to fraudulent security transactions; to misbranding of drugs; to wages and hours, *United States v. Darby,* 312 U. S. 100 (1941); [to] crop control, *Wickard v. Filburn*; [and to many other areeas].

That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States* v. *Women's Sportswear Mfrs. Assn.* (1949) [(upholding the application of the antitrust laws to an anti-competitive agreement among local stitching contractors)]. See *Labor Board v. Jones & Laughlin Steel Corp.* As Chief Justice Stone put it in *United States* v. *Darby:*

> "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See *McCulloch v. Maryland*."

Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may—as it has—prohibit racial discrimination by motels serving travelers, however "local" their operations may appear.

[We], therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years. It may be argued that Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy that rests entirely with the Congress not with the courts. How obstructions in commerce may be removed—what means are to be employed—is within the sound and exclusive discretion of the Congress. It is subject only to one caveat—that the means chosen by it must be reasonably adapted to the end permitted by the Constitution. We cannot say that its choice here was not so adapted. The Constitution requires no more.

Affirmed.

Katzenbach v. McClung

379 U.S. 294 (1964)

■ JUSTICE CLARK delivered the opinion of the Court.

[There] is no claim that interstate travelers frequented the restaurant. The sole question, therefore, narrows down to whether Title II, as applied to a restaurant annually receiving about $70,000 worth of food which has moved in commerce, is a valid exercise of the power of Congress.

As we noted in *Heart of Atlanta Motel* both Houses of Congress conducted prolonged hearings on the Act. [The] record is replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants. A comparison of per capita spending by Negroes in restaurants [showed] less spending [in] areas where discrimination is widely practiced. [This] diminutive spending springing from a refusal to serve Negroes and their total loss as customers has [a] close connection to interstate commerce. The fewer customers a restaurant enjoys the less food it sells and consequently the less it buys. In addition, the Attorney General testified that this type of discrimination imposed "an artificial restriction on the market" and interfered with the flow of merchandise. In addition, there were many references to discriminatory situations causing wide unrest and having a depressant effect on general business conditions in the respective communities.

Moreover there was an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes. [Inadequate access to prepared food] obviously discourages travel and obstructs interstate commerce for one can hardly travel without eating. Likewise, it was said, that discrimination deterred professional, as well as skilled, people from moving into areas where such practices occurred and thereby caused industry to be reluctant to establish there.

[It] goes without saying that, viewed in isolation, the volume of food purchased by Ollie's Barbecue from sources supplied from out of state was insignificant when compared with the total foodstuffs moving in commerce. But, as our late Brother Jackson said for the Court in *Wickard v. Filburn*:

> "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."

[We] must conclude that while the focus of the legislation was on the individual restaurant's relation to interstate commerce, Congress appropriately considered the importance of that connection with the knowledge that the discrimination was but "representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce."

Much is said about a restaurant business being local[.] [But] [t]he activities that are beyond the reach of Congress are "those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." *Gibbons v. Ogden*. This rule is as good today as it was when Chief Justice Marshall laid it down almost a century and a half ago.

[Finally,] [t]he appellees contend that Congress has arbitrarily created a conclusive presumption that all restaurants meeting the criteria set out in the Act "affect commerce." Stated another way, they object to the omission of a provision for a case-by-case determination—judicial or administrative—that racial discrimination in a particular restaurant affects commerce.

[But] Congress has determined for itself that refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally. Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.

[The] power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere. The Civil Rights Act of 1964, as here applied, we find to be plainly appropriate in the resolution of what the Congress found to be a national commercial problem of the first magnitude. We find it in no violation of any express limitations of the Constitution and we therefore declare it valid.

■ JUSTICE BLACK, concurring.*

[It] requires no novel or strained interpretation of the Commerce Clause to sustain Title II as applied in either of these cases. At least since *Gibbons v. Ogden,* [it] has been uniformly accepted that the power of Congress to regulate commerce among the States is plenary, "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." Nor is "Commerce" as used in the Commerce Clause to be limited to a narrow, technical concept. [That some parts or segments of interstate transactions] may take place only in one State cannot, of course, take from Congress its plenary power to regulate them in the national interest.

[Furthermore,] it has long been held that the Necessary and Proper Clause adds to the commerce power of Congress the power to regulate local instrumentalities operating within a single State if their activities burden the flow of commerce among the States. Thus in the *Shreveport Case*, this Court recognized that Congress could not fully carry out its responsibility to protect interstate commerce were its constitutional power to regulate that commerce to be strictly limited to prescribing the rules for controlling the things actually moving in such commerce or the contracts, transactions, and other activities, immediately concerning them. Regulation of purely intrastate railroad rates is primarily a local problem for state rather than national control. But the *Shreveport Case* sustained the power of Congress under the Commerce Clause and the Necessary and Proper Clause to control purely intrastate rates, even though reasonable, where the effect of such rates was found to impose a discrimination injurious to interstate commerce. This holding that Congress had power under these clauses, not merely to enact laws governing interstate activities and transactions, but also to regulate even purely local activities and transactions where necessary to foster and protect interstate commerce, was amply supported by [many] prior holdings of this Court extending back to *Gibbons.* And since the *Shreveport Case* this Court has steadfastly followed, and indeed has emphasized time and time again, that Congress has ample power to protect interstate commerce from activities adversely and injuriously affecting it, which but for this adverse effect on interstate commerce would be beyond the power of Congress to regulate.

[The] choice of policy is of course within the exclusive power of Congress; but whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court. I agree that as applied to this motel and this restaurant the Act is a valid exercise of congressional power, in the case of the motel because the record amply demonstrates that its practice of discrimination tended directly to interfere with interstate travel, and in the case of the restaurant because Congress had ample basis for concluding

* [This opinion applies to both *Heart of Atlanta* and *McClung.* —BE]

that a widespread practice of racial discrimination by restaurants buying as substantial a quantity of goods shipped from other States as this restaurant buys could distort or impede interstate trade.

The Heart of Atlanta Motel is a large 216-room establishment strategically located in relation to Atlanta and interstate travelers. It advertises extensively by signs along interstate highways[.] [Most] of the motel guests are transient interstate travelers. It is thus an important facility for use by interstate travelers who travel on highways[.]

[Ollie's Barbecue] is located in a residential and industrial section of Birmingham[.] Almost all, if not all, its patrons are local people rather than transients. [The] main commodity it purchases is meat, of which [an amount accounting for nearly half] of its total expenditures for supplies [had] been shipped into Alabama from outside the State. [Congress] concluded that restaurants which purchase a substantial quantity of goods from other States might well burden and disrupt the flow of interstate commerce if allowed to practice racial discrimination, because of the stifling and distorting effect that such discrimination on a wide scale might well have on the sale of goods shipped across state lines. Certainly this belief would not be irrational even had there not been a large body of evidence before the Congress to show the probability of this adverse effect.

The foregoing facts are more than enough, in my judgment, to [sustain the statute's applications here]. I recognize that every remote, possible, speculative effect on commerce should not be accepted as an adequate constitutional ground[.] I recognize too that some isolated and remote lunchroom which sells only to local people and buys almost all its supplies in the locality may possibly be beyond the reach of the power of Congress to regulate commerce, just as such an establishment is not covered by the present Act. But in deciding the constitutional power of Congress in cases like the two before us we do not consider the effect on interstate commerce of only one isolated, individual, local event, without regard to the fact that this single local event when added to many others of a similar nature may impose a burden on interstate commerce[.] *Wickard v. Filburn*; *United States v. Darby*. [Measuring], as this Court has so often held is required, by the aggregate effect of a great number of such acts of discrimination, I am of the opinion that Congress has constitutional power under the Commerce and Necessary and Proper Clauses to protect interstate commerce from the injuries bound to befall it from these discriminatory practices.*

Five years later, the Court held in ***Daniel v. Paul*** (1969) that the Lake Nixon Club—a "recreational facility" or "amusement area" in Arkansas—was also subject to Title II. The facility "affected commerce" within the meaning of the Act, the Court said, because it "leases 15 paddle boats on a

* [Concurrences by JUSTICE BLACK, JUSTICE DOUGLAS, and JUSTICE GOLDBERG are omitted. —BE]

royalty basis from an Oklahoma company" and its "juke box was manufactured outside Arkansas and plays records manufactured outside the State."* In what remains the only time a Supreme Court Justice has ever voted against applying Title II to any facility, Justice Black dissented:

> It seems clear to me that neither the paddle boats nor the locally leased juke box is sufficient to justify a holding that the operation of Lake Nixon affects interstate commerce within the meaning of the Act. While it is the duty of courts to enforce this important Act, we are not called on to hold nor should we hold subject to that Act this country people's recreation center, lying in what may be, so far as we know, a little "sleepy hollow" between Arkansas hills miles away from any interstate highway. This would be stretching the Commerce Clause so as to give the Federal Government complete control over every little remote country place of recreation in every nook and cranny of every precinct and county in every one of the 50 States. This goes too far for me.

B. The Commerce Power: In the Rehnquist and Roberts Courts

(34 PAGES)

INTRODUCTION TO *LOPEZ* AND THE "FEDERALISM REVOLUTION"

With the New Deal settlement in place, the Court went decades without invalidating any statute as beyond Congress's commerce power, even as the scope of federal regulation continued to grow. But in the 1980s, Republicans won three successive presidential elections on a platform of limiting the scale and scope of the Federal Government. Articulating the Reagan Administration's constitutional vision (and its aims for its judicial nominees), the Justice Department faulted the Court's "apparently limitless definition of the congressional powers granted in Article I" and expressed hope that "the Court [might] reverse its current course and place judicial limits [on] the authority of Congress [to] interfere in matters of state concern."† Between 1981 and 1991, the Court gained four Justices who seemed likely to sympathize with this vision—Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas. In addition, William Rehnquist was elevated to Chief Justice, inaugurating what is termed "the Rehnquist Court."

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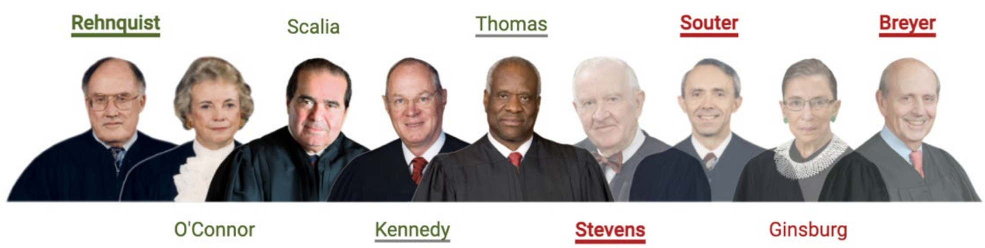
* *Cf.* 42 U.S.C. § 2000a(b)(3), (c) (covering "any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment," if that facility "customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce").

† *The Constitution in 2000*, p. 139. The report aimed to "communicat[e] to the public, the media and Members of Congress the growing importance of the judicial selection process" and to help them "to assess judicial nominees in the most thorough and informed manner possible." *Id.*, pp. iv-v.

The first test of the Rehnquist Court's approach to the Commerce Clause came a few years later, in *United States v. Lopez*. The Court's ruling in *Lopez* was pivotal in what came to be called "the federalism revolution." As you read the opinions, ask yourself whether the Court's account of the bounds of the commerce power is consistent with the prior cases; whether the particular limits that the majority draws make sense; and why, given the historical position that the Court found itself in, those particular limits might have been more appealing than possible alternatives. In addition to the majority opinion, you should pay particular attention to Justice Kennedy's concurrence, because he and Justice O'Connor (who joined the concurrence) were the two "swing" votes in this era—the least conservative members of the conservative majority. Although only the majority opinion is formally binding, anything extra that Kennedy and O'Connor felt the need to say helps to illuminate why the majority was a majority at all.

United States v. Lopez

514 U.S. 549 (1995)



[The Gun Free School Zones Act of 1990 made it a crime to knowingly possess a gun within a school zone. Lopez, a high school student, was convicted after he brought a concealed handgun to school. He challenged his conviction on the ground that the Act exceeded Congress' power under the Commerce Clause.]

■ CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote, "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45. This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft* (1991). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

[The] Court, through Chief Justice Marshall, first defined the nature of Congress' commerce power in *Gibbons v. Ogden*. [*Gibbons* defined the commerce power broadly but] acknowledged [that it did not extend to] "the exclusively internal commerce of a state." [In the years that followed, the Court held] that certain categories of activity such as "production," "manufacturing," and "mining" were within the province of state governments, and thus were beyond the power of Congress under the Commerce Clause.

[*Jones & Laughlin*, *Darby*, and *Wickard*] ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that one had been local or [regional] had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.

But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin,* the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government [and not] effectually obliterate the distinction between what is national and what is local[.]" See also *Darby* (Congress may regulate intrastate activity that has a "substantial effect" on interstate commerce); *Wickard* (Congress may regulate activity that "exerts a substantial economic effect on interstate commerce"). Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce. See, *e.g.*, [*Heart of Atlanta Motel*].

[Consistent] with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. See, *e.g.*, *Darby*[.] Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. See, *e.g.*, *Shreveport Rate Cases* [.] Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *Jones & Laughlin*, *i.e.*, those activities that substantially affect interstate commerce.

Within this final category, admittedly, our case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

We now turn to consider the power of Congress, in the light of this framework, to enact § 922(q). The first two categories of authority may be quickly disposed of: § 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if § 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.

First, we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Examples include the regulation of intrastate coal mining, intrastate extortionate credit transactions, restaurants utilizing substantial interstate supplies, *McClung*, inns and hotels catering to interstate guests, *Heart of Atlanta Motel*, and production and consumption of home-grown wheat, *Wickard*. These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not. [Section] 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which, viewed in the aggregate, substantially affects interstate commerce.

Second, § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce. For example, in *United States v. Bass* (1971), the Court interpreted [the possession component of] former 18 U.S.C. § 1202(a), which made it a crime for a felon to "receive, possess, or transport in commerce or affecting commerce [any] firearm," [to] require an additional nexus to interstate commerce. [Unlike] the statute in *Bass*, § 922(q) has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.

[The] Government concedes that "[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." [Congress] normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.

[The] Government's essential contention [is] that we may determine here that § 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. Cf. *Heart of Atlanta Motel*. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce.

We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. See Tr. of Oral Arg. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.

[Justice Breyer] rejects our reading of precedent and argues that "Congress . . . could rationally conclude that schools fall on the commercial side of the line." Under the dissent's rationale, Congress could just as easily look at child rearing as "fall[ing] on the commercial side of the line" because it provides a "valuable service—namely, to equip [children] with the skills they need to survive in life and, more specifically, in the workplace." We do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process. That authority, though broad, does not include the authority to regulate each and every aspect of local schools.

Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable power limits, congressional legislation under the Commerce Clause will always engender legal uncertainty. [The] Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation. Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the Judiciary's duty "to say what the law is." *Marbury*. Any possible benefit from eliminating this "legal uncertainty" would be at the expense of the Constitution's system of enumerated powers.

[The] possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. [To] uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do. [Affirmed.]

■ JUSTICE KENNEDY, with whom JUSTICE O'CONNOR joins, concurring.

[The] history of our Commerce Clause decisions contains at least two lessons of relevance to this case. The first [is] the imprecision of content-based boundaries [such as the manufacture-commerce distinction] used without more to define the limits of the Commerce Clause. The second, related to the first but of even greater consequence, is that the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. *Stare decisis* operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature. That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy[;] it also mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system. Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.

[It] does not follow, however, that in every instance the Court lacks the authority and responsibility to review congressional attempts to alter the federal balance. This case requires us to consider our place in the design of the Government and to appreciate the significance of federalism in the whole structure of the Constitution.

Of the various structural elements in the Constitution, separation of powers, checks and balances, judicial review, and federalism, only concerning the last does there seem to be much uncertainty respecting the existence, and the content, of standards that allow the Judiciary to play a significant role in maintaining the design contemplated by the Framers. [There] is irony in this, because of the four structural elements in the Constitution just mentioned, federalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.

[The] theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. If, as Madison expected, the Federal and State Governments are [to] hold each other in check by competing for the affections of the people, those citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function. [Were] the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.

To be sure, one conclusion that could be drawn from The Federalist Papers is that the balance between national and state power is entrusted in its entirety to the political process. [Whatever] the judicial role, it is axiomatic that Congress does have substantial discretion and control over the federal balance. [The] political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure. At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role.

■ JUSTICE THOMAS, concurring.

[Although] I join the majority, I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. [We] have said that Congress may regulate not only "Commerce [among] the several states," but also anything that has a "substantial effect" on such commerce. This test, if taken to its logical extreme, would give Congress a "police power" over all aspects of American life. [At] the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes. [As] one would expect, the term "commerce" was used in contradistinction to productive activities such as manufacturing and agriculture.

[Injecting] a modern sense of commerce into the Constitution generates significant textual and structural problems. [If] Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may enact bankruptcy laws, cl. 4, or coin money and fix the standard of weights and measures, cl. 5, or punish counterfeiters of United States coin and securities, cl. 6. [Much] if not all of Art. I, § 8 [would] be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct.

[Our] construction of the scope of congressional authority has the additional problem of coming close to turning the Tenth Amendment on its head. Our case law could be read to reserve to the United States all powers not expressly *prohibited* by the Constitution. Taken together, these fundamental textual problems should, at the very least, convince us that the "substantial effects" test should be reexamined.

[From] the time of the ratification of the Constitution to the mid-1930's, it was widely understood that the Constitution granted Congress only limited powers, notwithstanding the Commerce Clause. Moreover, there was no question that activities wholly separated from business, such as gun possession, were beyond the reach of the commerce power. [When] asked at oral argument if there were any limits to the Commerce Clause, the Government was at a loss for words. Likewise, the principal dissent insists that there are limits, but it cannot muster even one example.

[Discussion] of the original understanding and our first century and a half of case law does not necessarily require a wholesale abandonment of our more recent opinions.[8] It simply reveals that our substantial effects test is far removed from both the Constitution and from our early case law and that the Court's opinion should not be viewed as "radical" or another "wrong turn" that must be corrected in the future.

■ JUSTICE BREYER, with whom JUSTICES STEVENS, SOUTER, and GINSBURG join, dissenting.

In my view, [§ 922(q)] falls well within the scope of commerce power as this Court has understood that power over the last half century. [In] reaching this conclusion, I apply three basic principles of Commerce Clause interpretation. First, the power to "regulate Commerce [among] the several States" encompasses the power to regulate local activities insofar as they significantly affect interstate commerce. See, *e.g.*, *Gibbons*; *Wickard*.

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[8] Although I might be willing to return to the original understanding, I recognize that many believe it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean.

[Second,] in determining whether a local activity will likely have a significant effect upon interstate commerce, a court must consider, not the effect of an individual act (a single instance of gun possession), but rather the cumulative effect of all similar instances (*i.e.*, the effect of all guns possessed in or near schools).

[Third,] the Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove. Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce—both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words "rational basis" capture this leeway. Thus, the specific question before us, as the Court recognizes, is not whether the "regulated activity sufficiently affected interstate commerce," but, rather, whether Congress could have had "a rational basis" for so concluding.

[Applying] these principles to the case at hand, we must ask whether Congress could have had a rational basis for finding a significant (or substantial) connection between gun-related school violence and interstate commerce. [As] long as one views the commerce connection, not as a "technical legal conception," but as "a practical one," the answer to this question must be yes. [Reports], hearings, and other readily available literature make clear that the problem of guns in and around schools is widespread and extremely serious. [Congress] obviously could have thought that guns and learning are mutually exclusive. Congress could therefore have found a substantial educational problem—teachers unable to teach, students unable to learn—and concluded that guns near schools contribute substantially to the size and scope of that problem.

Having found that guns in schools significantly undermine the quality of education in our Nation's classrooms, Congress could also have found, given the effect of education upon interstate and foreign commerce, that gun-related violence in and around schools is a commercial, as well as a human, problem. Education, although far more than a matter of economics, has long been inextricably intertwined with the Nation's economy. [It is obvious that] a widespread, serious, and substantial physical threat to teaching and learning *also* substantially threatens the commerce to which that teaching and learning is inextricably tied[.] [In] sum, a holding that the particular statute before us falls within the commerce power would not expand the scope of that Clause. Rather, it simply would apply pre-existing law to changing economic circumstances. *See Heart of Atlanta Motel*.

[The] majority's [holding] creates three serious legal problems. First, the majority's holding runs contrary to modern Supreme Court cases that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence.

[Like] the local racial discrimination at issue in *McClung* and *Daniel v. Paul*, the local instances here, taken together and considered as a whole, create a problem that causes serious human and social harm, but also has nationally significant economic dimensions.

[The] second legal problem the Court creates comes from its apparent belief that it can reconcile its holding with earlier cases by making a critical distinction between "commercial" and noncommercial "transaction[s]." [This] approach fails to heed this Court's earlier warning not to turn "questions of the power of Congress" upon "formulas" that 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." *Wickard*. [More] importantly, if a distinction between commercial and noncommercial activities is to be made, this is not the case in which to make it. [Schools] that teach reading, writing, mathematics, and related basic skills serve *both* social and commercial purposes, and one cannot easily separate the one from the other. [Congress] could rationally conclude that schools fall on the commercial side of the line.

[The] third legal problem created by the Court's holding is that it threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled. Congress has enacted many statutes (more than 100 sections of the United States Code), including criminal statutes (at least 25 sections), that use the words "affecting commerce" to define their scope, and other statutes that contain no jurisdictional language at all. [The] legal uncertainty now created will restrict Congress' ability to enact criminal laws aimed at criminal behavior that, considered problem by problem rather than instance by instance, seriously threatens the economic, as well as social, well-being of Americans.[*]

THE IMPLICATIONS OF *LOPEZ*

1. The Violence Against Women Act

In 1994, shortly before the Court rendered its decision in *Lopez*, Congress enacted the Violence Against Women Act (VAWA). Among other things, the statute created a new federal cause of action for victims of gender-motivated violence to sue perpetrators for damages. In **United States v. Morrison**, 529 U.S. 598 (2000), the Court held that this provision, like the Gun-Free School Zones Act, was beyond the scope of Congress's commerce power.[†] Chief Justice Rehnquist, writing again for the Court, again emphasized the distinction between economic and noneconomic activities:

[*] [In addition to joining JUSTICE BREYER's dissent, JUSTICE STEVENS and JUSTICE SOUTER also wrote separate, shorter dissents of their own. JUSTICE STEVENS emphasized the national market for firearms and JUSTICE SOUTER argued for deference to legislative judgment. —BE]

[†] We will consider another question raised in *Morrison*—whether the same VAWA provision could be justified as an exercise of Congress's enforcement power under the Fourteenth Amendment—at the end of the semester.

> Gender-motivated crimes of violence are not in any sense of the phrase economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our nation's history our cases have upheld Commerce Clause regulation only where that activity is economic in nature. See, *e.g.,* [*Lopez*] and the cases cited therein.

One significant difference between *Lopez* and *Morrison*, as the Court acknowledged, was that VAWA included express congressional findings of a linkage between gender-motivated violence and interstate commerce:

> Congress found that gender-motivated violence affects interstate commerce "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." H. R. Conf. Rep. No. 103-711, at 385.

Nonetheless, the Court rejected this justification as resting upon "a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers." In fact, the Court said, Congress's findings (and the Government's arguments) showed that "the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority" was "well founded." The Court thus "reject[ed] the notion that Congress may regulate non-economic, violent criminal conduct based solely on that conduct's aggregate effects on interstate commerce."

2. "Jurisdictional Elements"

In *Lopez,* the Court highlighted that the statute "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." Likewise, in *Morrison*, the Court observed that "[a]lthough *Lopez* makes clear that such a jurisdictional element would lend support to the argument that [VAWA] is sufficiently tied to interstate commerce to come within Congress' authority, Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime."[*] Does the logic of these decisions imply that, to cure the constitutional defect, Congress need only add an "affecting commerce" element to the statutes? What exactly would a prosecutor (or plaintiff) need to prove to establish that element in a given case, at least if the element is to do the necessary constitutional work?

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[*] To the extent that this phrasing suggests that Congress knowingly flouted the Court's guidance in *Lopez*, it is misleading: VAWA was enacted before *Lopez*.

Consider in this light the current text of the Gun-Free School Zones Act, which, as amended after *Lopez*, reads as follows:

> "It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(2)(A).

While the Supreme Court has not considered this revised version of the statute, multiple circuit courts have found it constitutional. Are they right?

This question has immense stakes because, as Justice Breyer noted in his *Lopez* dissent, numerous federal statutes include similar jurisdictional elements. (Indeed, we saw several examples in section II.B, including the National Labor Relations Act and Title II of the Civil Rights Act.) Consider these additional examples:

- The federal carjacking statute, 18 U.S.C. § 2119, imposes criminal liability on "[w]hoever, with the intent to cause death or serious bodily harm[,] takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from [another person] by force."

- The Child Support Recovery Act, 18 U.S.C. § 228, makes it unlawful to "willfully fail[] to pay a support obligation with respect to a child who resides in another State."

◊ The Child Pornography Prevention Act, 18 U.S.C. § 2252A, makes it a crime to "knowingly possess[] . . . any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means."[*]

- Federal law makes it a crime for someone previously convicted of a violent felony to "to purchase, own, or possess body armor" (18 U.S.C. § 931), which is defined as "any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire."

Do these "hooks" to interstate commerce suffice under a fair reading of *Lopez* and *Morrison*?

[*] Note that, as construed by the courts, the "that has been mailed …" clause modifies the list of media and not the image. So the jurisdictional element is satisfied if a "computer disk" was transported in interstate commerce, even if the image it later comes to contain was not.

Gonzales v. Raich

545 U.S. 1 (2005)

■ JUSTICE STEVENS delivered the opinion of the Court.

California is one of at least nine States that authorize the use of marijuana for medicinal purposes. The question presented in this case is whether the power vested in Congress by Article I, §8, of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its authority to "regulate Commerce with foreign Nations, and among the several States" includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.

[California's] Compassionate Use Act of 1996 [creates] an exemption from criminal prosecution for physicians, as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician. [Respondents] are California residents who suffer from a variety of serious medical conditions and have sought to avail themselves of medical marijuana pursuant to the terms of the Compassionate Use Act. [They] brought this action [seeking to bar] enforcement of the federal Controlled Substances Act (CSA), to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use.

[Respondents] do not dispute that passage of the CSA [was] well within Congress' commerce power. Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority. Rather, [they] argue that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause.

[Our] case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. [*Wickard*] is of particular relevance. [*Wickard*] establishes that Congress can regulate purely intrastate activity that is not itself "commercial," in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.

The similarities between this case and *Wickard* are striking. Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed "to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses . . ." and consequently control the market price, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. [In] *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.

More concretely, one concern prompting inclusion of wheat grown for home consumption in the 1938 Act was that rising market prices could draw such wheat into the interstate market, resulting in lower market prices. *Wickard*. The parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market. While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety. In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.

[In] assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding. *Lopez* [at p. II-55]; see also *McClung*; *Heart of Atlanta Motel*. Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to "make all Laws which shall be necessary and proper" to "regulate Commerce ... among the several States." U. S. Const., Art. I, §8. That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.

To support their contrary submission, respondents rely heavily on two of our more recent Commerce Clause cases. In their myopic focus, they overlook the larger context of modern-era Commerce Clause jurisprudence preserved by those cases. Moreover, even in the narrow prism of respondents' creation, they read those cases far too broadly.

Those two cases, of course, are *Lopez* and *Morrison*. [But the] challenges at issue in those cases were markedly different. Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. [At] issue in *Lopez* was the validity of [a] brief, single-subject statute making it a crime for an individual to possess a gun in a school zone. The Act did not regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity. Distinguishing our earlier cases holding that comprehensive regulatory statutes may be validly applied to local conduct that does not, when viewed in isolation, have a significant impact on interstate commerce, we held the statute invalid.

[The] statutory scheme that the Government is defending in this litigation is at the opposite end of the regulatory spectrum. [The] CSA [is] a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of "controlled substances." [Classification of marijuana as a controlled substance] was merely one of many "essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*.[*] Our opinion in *Lopez* casts no doubt on the validity of such a program.

Nor does this Court's holding in *Morrison*. The Violence Against Women Act of 1994 created a federal civil remedy for the victims of gender-motivated crimes of violence. [Despite] congressional findings that such crimes had an adverse impact on interstate commerce, we held the statute unconstitutional because, like the statute in *Lopez*, it did not regulate economic activity.

[Unlike] those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." Webster's Third New International Dictionary (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is

[*] The principal dissent asserts that by "[s]eizing upon our language in *Lopez*," *i.e.*, giving effect to our well-established case law, Congress will now have an incentive to legislate broadly. Even putting aside the political checks that would generally curb Congress' power to enact a broad and comprehensive scheme for the purpose of targeting purely local activity, there is no suggestion that the CSA constitutes the type of "evasive" legislation the dissent fears, nor could such an argument plausibly be made.

an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product. * [Because] the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.

[Respondents contend that the specific class of activity at issue here—which they define as "the intrastate, non-commercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law"—is "different in kind from drug trafficking."] [But] the case for the exemption] comes down to the claim that a locally cultivated product that is used domestically rather than sold on the open market is not subject to federal regulation. Given the findings in the CSA and the undisputed magnitude of the commercial market for marijuana, our decisions in *Wickard* v. *Filburn* and the later cases endorsing its reasoning foreclose that claim.

■ JUSTICE SCALIA, concurring in the judgment.

I agree with the Court's holding that [CSA] may validly be applied to respondents' cultivation, distribution, and possession of marijuana for personal, medicinal use. I write separately because my understanding of the doctrinal foundation on which that holding rests is, if not inconsistent with that of the Court, at least more nuanced.

[Our] cases have mechanically recited that the Commerce Clause permits congressional regulation of three categories: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities that "substantially affect" interstate commerce. *Lopez*. The first two categories are self-evident, since they are the ingredients of interstate commerce itself. The third category, however, is different in kind, and its recitation without explanation is misleading and incomplete.

It is *misleading* because, unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, [Congress's] regulatory authority over intrastate activities that are not themselves part of interstate commerce [derives] from the Necessary and Proper Clause.

And the category of "activities that substantially affect interstate commerce," *Lopez*, is *incomplete* because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective,

* See 16 U.S.C. § 668(a) (bald and golden eagles); 18 U.S.C. §175(a) (biological weapons); §8 31(a) (nuclear material); § 842(n)(1) (certain plastic explosives); § 2342(a) (contraband cigarettes).

Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.

Our cases show that the regulation of intrastate activities may be necessary to and proper for the regulation of interstate commerce in two general circumstances. [First,] the commerce power permits Congress [to] facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants. See *Jones & Laughlin*; *McClung*; *Heart of Atlanta Motel*. [This] principle is not without limitation. In *Lopez* and *Morrison*, the Court—conscious of the potential of the "substantially affects" test to "obliterate the distinction between what is national and what is local—[rejected] the argument that Congress may regulate *noneconomic* activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences.

As we implicitly acknowledged in *Lopez*, however, Congress's authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce. Though the conduct in *Lopez* was not economic, the Court nevertheless recognized that it could be regulated as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." This statement referred to those cases permitting the regulation of intrastate activities "which in a substantial way interfere with or obstruct the exercise of the granted power." [See *Darby*; *Shreveport Rate Cases*.]

Although this power "to make ... regulation effective,"[*] commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce,[2] and may in some cases have been confused with that authority, the two are distinct. [The] relevant question is simply whether the means chosen are "reasonably adapted" to the attainment of a legitimate end under the commerce power. See *Darby*.

[The] application of these principles to the case before us is straightforward. In the CSA, Congress has undertaken to extinguish the interstate market in Schedule I controlled substances, including marijuana. The Commerce Clause unquestionably permits this. [To] effectuate its objective, Congress has prohibited almost all intrastate activities related to Schedule I

[*] [*United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942): "Congress plainly has power to regulate the price of milk distributed through the medium of interstate commerce [and] it possesses every power needed to make that regulation effective. The commerce power [extends] to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. See *McCulloch* v. *Maryland*."]

[2] [*Wickard*] presented such a case. Because the unregulated production of wheat for personal consumption diminished demand in the regulated wheat market, the Court said, it carried with it the potential to disrupt Congress's price regulation by driving down prices in the market. This potential disruption of Congress's interstate regulation, and not only the effect that personal consumption of wheat had on interstate commerce, justified Congress's regulation of that conduct.

substances—both economic activities (manufacture, distribution, possession with the intent to distribute) and noneconomic activities (simple possession). That simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation.

[By] this measure, I think the regulation must be sustained. Not only is it impossible to distinguish "controlled substances manufactured and distributed intrastate" from "controlled substances manufactured and distributed interstate," but it hardly makes sense to speak in such terms. Drugs like marijuana are fungible commodities. [Congress] need not accept on faith that state law will be effective in maintaining a strict division between a lawful market for "medical" marijuana and the more general marijuana market. "To impose on [Congress] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution." *McCulloch*.

Finally, neither respondents nor the dissenters suggest any violation of state sovereignty of the sort that would render this regulation "inappropriate," *McCulloch*—except to argue that the CSA regulates an area typically left to state regulation. That is not enough to render federal regulation an inappropriate means. [At] bottom, respondents' state-sovereignty argument reduces to the contention that federal regulation of the activities permitted by California's Compassionate Use Act is not sufficiently necessary to be "necessary and proper" to Congress's regulation of the interstate market. For the reasons given above and in the Court's opinion, I cannot agree.

■ JUSTICE O'CONNOR, with whom [CHIEF JUSTICE REHNQUIST] and JUSTICE THOMAS join as to all but Part III, dissenting.

We enforce the "outer limits" of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government. One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann* (1932) (Brandeis, J., dissenting).

This case exemplifies the role of States as laboratories. The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering.

Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation.

I.

In *Lopez*, [we] explained that "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce ..., *i.e.*, those activities that substantially affect interstate commerce." This power derives from the conjunction of the Commerce Clause and the Necessary and Proper Clause. *Garcia v. San Antonio Metropolitan Transit Authority* (1985) (O'Connor, J., dissenting) [*infra*, p. II-93] (explaining that *Darby* [and] *Wickard* based their expansion of the commerce power on the Necessary and Proper Clause, and that "the reasoning of these cases underlies every recent decision concerning the reach of Congress to activities affecting interstate commerce"); *ante* (Scalia, J., concurring in judgment).

[Our decision in *Lopez*] turned on four considerations. First, we observed that our "substantial effects" cases generally have upheld federal regulation of economic activity that affected interstate commerce. [Second,] we noted that the statute contained no express jurisdictional requirement establishing its connection to interstate commerce.

Third, we found telling the absence of legislative findings about the regulated conduct's impact on interstate commerce. [Finally,] we rejected as too attenuated the Government's argument that firearm possession in school zones could result in violent crime which in turn could adversely affect the national economy.

[In] my view, the case before us is materially indistinguishable from *Lopez* and *Morrison* when the same considerations are taken into account.

II.

What is the relevant conduct subject to Commerce Clause analysis in this case? The Court takes its cues from Congress, applying the above considerations to the activity regulated by the [CSA] in general. [Today's] decision suggests that the federal regulation of local activity is immune to Commerce Clause challenge because Congress chose to act with an ambitious, all-encompassing statute, rather than piecemeal. In my view, allowing Congress to set the terms of the constitutional debate in this way [is] tantamount to removing meaningful limits on the Commerce Clause.

Seizing upon our language in *Lopez* that the statute prohibiting gun possession in school zones was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," the Court appears to reason that the placement of local activity in a comprehensive scheme confirms that it is essential to that scheme. If the Court is right, then *Lopez* stands for nothing more than a drafting guide: Congress should have described the relevant crime as "transfer or possession of a firearm anywhere in the nation" — thus including commercial and noncommercial activity, and clearly encompassing some activity with assuredly substantial effect on interstate commerce.

[Here,] respondents challenge the constitutionality of the CSA as applied to them and those similarly situated. I agree with the Court that we must look beyond respondents' own activities. Otherwise, individual litigants could always exempt themselves from Commerce Clause regulation merely by pointing to the obvious — that their personal activities do not have a substantial effect on interstate commerce. The task is to identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress set the terms of analysis).

A number of objective markers are available to confine the scope of constitutional review here. Both federal and state legislation — including the CSA itself, the California Compassionate Use Act, and other state medical marijuana legislation — recognize that medical and nonmedical (i. e., recreational) uses of drugs are realistically distinct and can be segregated, and regulate them differently. Moreover, because fundamental structural concerns about dual sovereignty animate our Commerce Clause cases, it is relevant that this case involves the interplay of federal and state regulation in areas of criminal law and social policy, where "States lay claim by right of history and expertise." *Lopez*, (Kennedy, J., concurring). California, like other States, has drawn on its reserved powers to distinguish the regulation of medicinal marijuana. To ascertain whether Congress' encroachment is constitutionally justified in this case, then, I would focus here on the personal cultivation, possession, and use of marijuana for medicinal purposes.

Having thus defined the relevant conduct, we must determine whether, under our precedents, the conduct is economic and, in the aggregate, substantially affects interstate commerce. [The] Court's definition of economic activity is breathtaking [and] threatens to sweep all of productive human activity into federal regulatory reach. The Court uses a dictionary definition of economics to skirt the real problem of drawing a meaningful line between "what is national and what is local," *Jones & Laughlin*. It will not do to say that Congress may regulate noncommercial activity simply because it may have an effect on the demand for commercial goods, or because the noncommercial endeavor can, in some sense, substitute for commercial activity. Most commercial goods or services have some sort of privately producible analogue. Home care substitutes for daycare. Charades games substitute for movie tickets. Backyard or windowsill gardening substitutes for going to the supermarket. To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic. We have already rejected the result that would follow—a federal police power. *Lopez*.

[In] *Lopez* and *Morrison*, we suggested that economic activity usually relates directly to commercial activity. The homegrown cultivation and personal possession and use of marijuana for medicinal purposes has no apparent commercial character. [*Lopez]* makes clear that possession is not itself commercial activity. And respondents have not come into possession by means of any commercial transaction; they have simply grown, in their own homes, marijuana for their own use, without acquiring, buying, selling, or bartering a thing of value.

The Court suggests that *Wickard* [established] federal regulatory power over any home consumption of a commodity for which a national market exists. I disagree. [In] contrast to the CSA's limitless assertion of power, Congress provided an exemption within the AAA for small producers. When Filburn planted the wheat at issue in *Wickard*, the statute exempted plantings less than 200 bushels (about six tons), and when he harvested his wheat it exempted plantings less than six acres. *Wickard*, then, did not extend Commerce Clause authority to something as modest as the home cook's herb garden. [*Wickard*] did not hold or imply that small-scale production of commodities is always economic, and automatically within Congress' reach.

Even assuming that economic activity is at issue in this case, the Government has made no showing in fact that the possession and use of homegrown marijuana for medical purposes, in California or elsewhere, has a substantial effect on interstate commerce. Similarly, the Government has not shown that regulating such activity is necessary to an interstate regulatory scheme. Whatever the specific theory of "substantial effects" at issue (*i.e.*, whether the activity substantially affects interstate commerce, whether its regulation is necessary to an interstate regulatory scheme, or both), a concern for dual sovereignty requires that Congress' excursion into the traditional domain of States be justified.

That is why characterizing this as a case about the Necessary and Proper Clause does not change the analysis significantly. Congress must exercise its authority under the Necessary and Proper Clause in a manner consistent with basic constitutional principles. [Congress] cannot use its authority under the Clause to contravene the principle of state sovereignty embodied in the Tenth Amendment. [Something] more than mere assertion is required when Congress purports to have power over local activity whose connection to an interstate market is not self-evident. Otherwise, the Necessary and Proper Clause will always be a back door for unconstitutional federal regulation. [(According] to the Court's and the concurrence's logic, for example, the Lopez court should have reasoned that the prohibition on gun possession in school zones could be an appropriate means of effectuating a related prohibition on "sell[ing]" or "deliver[ing]" firearms or ammunition to "any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age." 18 U.S.C. § 922(b)(1).)

There is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market—or otherwise to threaten the CSA regime. [Common] sense suggests that medical marijuana users may be limited in number and that California's Compassionate Use Act and similar state legislation may well isolate activities relating to medicinal marijuana from the illicit market[.] [In *Wickard*,] the Court was able to consider "actual effects" because the parties had "stipulated a summary of the economics of the wheat industry." [The CSA's] bare [legislative] declarations cannot be compared to the record before the Court in *Wickard*. [They] are asserted without any supporting evidence—descriptive, statistical, or otherwise.

III.

[Relying] on Congress' abstract assertions, the Court has endorsed making it a federal crime to grow small amounts of marijuana in one's own home for one's own medicinal use. This overreaching stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently. If I were a California citizen, I would not have voted for the medical marijuana ballot initiative; if I were a California legislator I would not have supported the Compassionate Use Act. But whatever the wisdom of California's experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case.

■ JUSTICE THOMAS, dissenting.

[If] Congress can regulate [respondents' activity] under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers. Respondents' local cultivation and consumption of marijuana is not "Commerce . . . among the several States." [No] evidence from the founding suggests that "commerce" included the mere possession of a good or some purely personal activity that did not involve trade or exchange for value. [The] majority's treatment of the substantial effects test is malleable, because the majority expands the relevant conduct. By defining the class at a high level of generality (as interstate manufacture and possession of marijuana), the majority overlooks that individuals authorized by state law to manufacture and possess medical marijuana exert no demonstrable effect on the interstate drug market.

[If] the majority is taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 states. This makes a mockery of Madison's assurance to the people of New York that the "powers delegated" to the Federal Government are "few and defined," while those of the States are "numerous and indefinite." The Federalist, No. 45.

INTRODUCTION TO THE AFFORDABLE CARE ACT

The most dramatic test of the Court's post-*Lopez* approach to the Commerce Power—and, indeed, of the Court's modern approach to federal power in general—came in a set of challenges to the Affordable Care Act (ACA) of 2010, President Obama's signature domestic-policy achievement. These cases were decided together under the caption of *National Federation of Independent Business (NFIB) v. Sebelius* in 2012.

As you will see immediately below, the Court held by a vote of 5-4 that the ACA's "individual mandate" provision was *not* a valid exercise of the Commerce Power or the Necessary and Proper Power. But the provision survived because, as we'll see later (in section II.E), the Court also held, by another vote of 5-4, that the same provision *was* valid as an exercise of Congress's distinct power to impose taxes. Chief Justice Roberts was the only member of both majorities. (We will also consider in section II.E the distinct challenge to the ACA's expansion of the Medicaid program, which was claimed to go beyond the scope of Congress's power to spend federal funds for the general welfare.)

As you read *NFIB*, notice the special effort that Chief Justice Roberts makes to explain the "basic principles" that form the "background" for considering the question presented. Why do you think he does that? Does his account strike you as faithful to the seminal cases that he invokes (and that you've now read)? What is the thrust of Justice Ginsburg's countervailing narrative in her dissent? And how do these different understandings of the "principles" of our constitutional tradition inform the different Justices' more granular arguments about the meanings of texts or the contours of precedents? Who has the better of the argument on each of those fronts?

National Federation of Independent Business v. Sebelius

567 U.S. 519 (2012)

■ CHIEF JUSTICE ROBERTS announced the judgment of the Court and delivered the opinion of the Court [with respect to the Commerce Clause and Necessary and Proper Clause].

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.* 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* [*supra*, p. II-24]. 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. [The] Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions. See, *e.g., United States v. Comstock* (2010).

The same does not apply to the States, because the Constitution is not the source of their power. The Constitution may restrict state governments—as it does, for example, by forbidding them to deny any person the equal protection of the laws. But where such prohibitions do not apply, state governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution's text does not authorize any government to do so. Our cases refer to this general

* [This excerpt is limited to the first issue. We will consider the Spending Clause issue in section II.E.]

power of governing, possessed by the States but not by the Federal Government, as the "police power." See, *e.g., United States v. Morrison* (2000).

[This] case concerns two powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to the police power. The Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, §8, cl. 3. Our precedents read that to mean that Congress may regulate "the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." 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[.] See *Wickard*.

[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* [*supra*, p. II-12].

Our permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Nation's elected leaders. 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* [*supra*, p. I-8]. 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] questions before us must be considered against the background of these basic principles.

III

A

[The Government argues] 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[, imposing an average burden of $1,000 per family per year].

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

The guaranteed-issue and community-rating reforms[,] however, [provide] an [even stronger] incentive for individuals to delay purchasing health insurance until they become sick, relying on the promise of guaranteed and affordable coverage. The reforms also threaten to impose massive new costs on insurers, who are required to accept unhealthy individuals but prohibited from charging them rates necessary to pay for their coverage. This will lead insurers to significantly increase premiums on everyone.

The individual mandate was Congress's solution to these problems. By requiring that individuals purchase health insurance, the mandate prevents cost shifting by those who would otherwise go without it. [In addition, by putting more healthy people in the insurance pool, the mandate effectively subsidizes the extra costs that insurers bear in covering unhealthy people]. 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 [commerce] 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,* 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*.

[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." The power to *regulate* commerce presupposes the existence of commercial activity to be regulated.

[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." See, *e.g., Lopez* ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained"); *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"); *Jones & Laughlin*.

[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.

[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.

[That] is not the country the Framers of our Constitution envisioned. [Accepting] the Government's theory would give Congress the [vast] license

[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.

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. [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 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. See, *e.g., Heart of Atlanta Motel* (prohibiting discrimination by hotel operators); *Katzenbach* (prohibiting discrimination by restaurant owners). But we have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce. Each one of our cases [involved] pre-existing economic activity. See, *e.g., Wickard* (producing wheat); *Raich* (growing marijuana). [The] individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to "regulate Commerce."

2

The Government next contends that Congress has the power under the Necessary and Proper Clause to enact the individual mandate because the mandate is an "integral part of a comprehensive scheme of economic regulation[."] Under this argument, it is not necessary to consider the effect that an individual's inactivity may have on interstate commerce; it is enough that Congress regulate commercial activity in a way that requires regulation of inactivity to be effective.

The power to "make all Laws which shall be necessary and proper for carrying into Execution" the powers enumerated in the Constitution, Art. I, § 8, cl. 18, vests Congress with authority to enact provisions "incidental to the [enumerated] power, and conducive to its beneficial exercise," *McCulloch*. 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. *McCulloch* [*supra*, p. II-9].

[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* [*supra*, p. II-12], are not "*proper* [means] for carrying into Execution" Congress's enumerated powers. [See] *Comstock* [*supra*, p. II-21] (Kennedy, J., concurring in judgment) ("It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause . . . ").

Applying these principles, the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. For example, we have upheld provisions permitting continued confinement of those *already in federal custody* when they could not be safely released, *Comstock*; criminalizing bribes involving organizations *receiving federal funds*, and tolling state statutes of limitations while cases are *pending in federal court*. 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*. [No] longer would Congress be limited to regulating under the Commerce Clause those who by some pre-existing 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. [Because] marijuana is a fungible commodity, [Congress's] attempt to regulate the interstate market [would] 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* [*supra*, p. II-9], 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. The commerce power thus does not authorize the mandate.

■ JUSTICE GINSBURG, with whom [JUSTICES BREYER, SOTOMAYOR, AND KAGAN join as to the Commerce Clause issue,] dissenting in [relevant] part.

I

[Since] 1937, our precedent has recognized Congress' large authority to set the Nation's course in the economic and social welfare realm. See *Darby*; *Jones & Laughlin.* The Chief Justice's crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress' efforts to regulate the national economy in the interest of those who labor to sustain it. See, *e.g., Railroad Retirement Bd. v. Alton R. Co.* It is a reading that should not have staying power.

[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* (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. [Congress'] intervention was needed to overcome this collective-action impasse.

II

The Commerce Clause, it is widely acknowledged, "was the Framers' response to the central problem that gave rise to the Constitution itself." [Under the Articles of Confederation,] the individual States, understandably focused on their own economic interests, often failed to take actions critical to the success of the Nation as a whole. [The] Framers' solution was the Commerce Clause, which, as they perceived it, granted Congress the authority to enact economic legislation "in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent."[†]

[The] Framers understood that the "general Interests of the Union" would change over time, in ways they could not anticipate. [Consistent]

[*] [*Helvering* rejected a constitutional challenge to the Social Security Act of 1935. —BE]

[†] [In 1787, the Constitutional Convention approved several resolutions that were supposed to guide the Committee of Detail in drafting the proposed constitutional text. JUSTICE GINSBURG is quoting one of these, Resolution VI, which provided that Congress should have power to legislate "in all cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation." —BE]

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.*

[Until] today, this Court's pragmatic approach to judging whether Congress validly exercised its commerce power was guided by two familiar principles. First, Congress has the power to regulate economic activities "that substantially affect interstate commerce." *Gonzales v. Raich*. This capacious power extends even to local activities that, viewed in the aggregate, have a substantial impact on interstate commerce. [Second,] we owe a large measure of respect to Congress when it frames and enacts economic and social legislation. 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." [See] *Raich*; *Lopez*; *Katzenbach v. McClung*; *Heart of Atlanta Motel*.

[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. [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. [I]f 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. [A]ll U.S. residents participate in the market for health services over the course of their lives. [In] requiring individuals to obtain insurance, [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).

In any event, [nothing] in [Article I, § 8] 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. See *Wickard* [*supra*, p. II-44] ("The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon."). Thus, the "something to be regulated" was surely there when Congress created the minimum coverage provision.

[Nor] does our case law toe the activity versus inactivity line. "[F]orcing some farmers into the market to buy what they could provide for themselves" was, the [*Wickard*] Court held, a valid means of regulating commerce. [More broadly, this] Court's former endeavors to impose categorical limits on the commerce power have not fared well.

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

[Supplementing] these legal restraints is a formidable check on congressional power: the democratic process. See *Raich*; *Wickard* [*supra*, p. II-43] (repeating Chief Justice Marshall's "warning that effective restraints on [the commerce power's] exercise must proceed from political rather than judicial processes" (citing *Gibbons*)).

[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 [think this is 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. Robert 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.").

III

[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). [The] minimum coverage provision [is] an "essential par[t] of a larger regulation of economic activity"; without the provision, "the regulatory scheme [w]ould be undercut." *Raich*.

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[9] The failure to purchase vegetables in THE CHIEF JUSTICE's hypothetical, then, is *not* what leads to higher health-care costs for others; rather, it is the failure of individuals to maintain a healthy diet, and the resulting obesity, that creates the cost shifting problem. Requiring individuals to purchase vegetables is thus several steps removed from solving the problem. The failure to obtain health insurance, by contrast, is the *immediate cause* of the cost shifting Congress sought to address through the ACA. Requiring individuals to obtain insurance attacks the source of the problem directly, in a single step.

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. [He] 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. [But he does not] 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 [the] power to enact criminal laws; the power to imprison, including civil imprisonment; [or] the power to create a national bank.

[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. The crisis created by the large number of U.S. residents who lack health insurance is one of national dimension that States are "separately incompetent" to handle. 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.*

SOME FURTHER QUESTIONS ABOUT *NFIB*

1. "Regulation of Inactivity"

With *NFIB* now on the books, how does one draw the distinction between regulating a pre-existing activity (permitted) and "regulation of inactivity" (forbidden)? Consider Justice Gorsuch's observation, in another context, that "the line between acts and omissions can blur when stared at too long, leaving us to ask (for example) whether the man who drowns by awaiting the incoming tide does so by act (coming upon the sea) or omission (allowing the sea to come upon him)."† Is there a principled way to draw the distinction that *NFIB* announces? (Are the Court's earlier Commerce Clause holdings of any help?)

In the decade or so since *NFIB*, there has been relatively little litigation over the activity/inactivity issue. But a notable exception arose from the Biden Administration's short-lived "vaccine-or-test" rule, which required covered employers to "adopt a policy requiring employees to either get vaccinated or elect to undergo regular COVID-19 testing."‡ In *BST Holdings,*

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* [JUSTICES SCALIA, KENNEDY, THOMAS, and ALITO filed a joint opinion that agreed with CHIEF JUSTICE ROBERTS's analysis of the Commerce Clause and Necessary and Proper Clause issues. —BE]

† *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2025–26 (2017).

‡ 86 Fed. Reg. 61402 (2021)

LLC v. OSHA, 17 F.4th 604 (5th Cir. 2021), the Fifth Circuit ruled that "the Mandate likely exceeds the federal government's authority under the Commerce Clause because it regulates noneconomic inactivity that falls squarely within the States' police power." In a parallel case, *In re MCP No. 165*, 21 F.4th 357 (6th Cir. 2021), the Sixth Circuit disagreed: "The [rule] regulates [covered employers], not individuals. It is indisputable that those employers are engaged in commercial activity that Congress has the power to regulate when hiring employees, producing, selling and buying goods, etc." Which circuit had the more convincing reading of *NFIB*? (The Supreme Court ultimately held that the relevant agency lacked statutory authority to impose the requirement in the first place, so it never reached the Commerce Clause issue.)

2. The Commerce Clause and Collective Action Problems

In her *NFIB* dissent, Justice Ginsburg emphasized that the individual mandate "was needed to overcome [a] collective-action impasse [among the states]." And, more broadly, she linked the scope of the commerce power to the resolution, adopted by the Constitutional Convention, that Congress should be empowered to legislate "in all Cases for the general Interests of the Union, and also in those Cases to which the States are *separately incompetent*" (*supra*, p. II-82; emphasis added).

Those ideas capture and draw on an influential line of thought about the commerce power that sees it as fundamentally a power to solve "collective action" problems.[*] In broad strokes, the idea is that Congress should have the power to address problems that states could not effectively resolve for themselves—each as they individually see fit—because the very existence of other states (and the competitive dynamics that result) make this impossible. Justice Ginsburg's economic argument about mobility, taxation, and welfare spending is a clear example of this genre.

In a recent book, one of the leading proponents of the broader theory—sometimes termed "collective action federalism"—argues that it "explains why the contemporary Court has so far decided most, although not all, of its interstate-commerce cases correctly, albeit for reasons other than what its doctrine expressly states."[†] How would others of the cases we read—such as *Wickard*, *Lopez*, or *Heart of Atlanta Motel*—fare under this theory? What advantages or disadvantages might it have compared to the "economic/noneconomic" distinction tracing to *Lopez* (or the "activity/inactivity" distinction deployed in *NFIB*)?

[*] See, e.g., Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 6 (2010). For a synthesis and critique of this body of work, see Aziz Z. Huq, *Does the Logic of Collective Action Explain Federalism Doctrine?*, 66 STAN. L. REV. 217 (2014).

[†] Neil Siegel, *The Collective Action Constitution*, ch. 5 (2024).

C. The Tenth Amendment and State Immunities (34 PAGES)

The Tenth Amendment, ratified in 1791 as part of the Bill of Rights, provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

As we have seen already, debates about the scope of Congress's powers—e.g., under the Commerce Clause or the Necessary and Proper Clause—often also touch on the meaning or significance of this "reserv[ation]" of powers. Still, the relationship between the Tenth Amendment and Congress's enumerated powers is not entirely clear—and this poses some conceptual and organizational challenges for anybody trying to track the different strands of the case law.

On its face, after all, a declaration about the fate of "powers *not* delegated to the United States by the Constitution" does not seem to tell us anything about *which* powers those are. So, as Chief Justice Marshall observed in *McCulloch*, the amendment might seem to leave "the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument" (*supra*, p. II-7). If that is right, then one could see the kinds of limits on federal power articulated in *Lopez* or *NFIB* as "Tenth Amendment limits" in the only meaningful sense.

Nonetheless, over the past several decades, certain other judicially implied limits on federal power have come to be seen as grounded in, or at least distinctly associated with, the Tenth Amendment. The distinguishing feature of these doctrines is that they concern state *immunities* from federal power. In other words, they involve special limits on Congress's power to regulate *states*—not (like the other cases we have read so far) the allocation between Congress and states of power to regulate everyone else. We consider them here because they are, in effect, limits on Congress's enumerated powers (most commonly, the Commerce Power) and because, like the other cases in section II, they are fundamentally about the state-federal balance. We will consider two Tenth Amendment doctrines in particular: one potentially limiting Congress's authority to regulate states in their capacities as employers or service providers, and the other limiting Congress's authority to regulate the states in their capacities as regulators themselves.*

* There is a third state-immunity doctrine that we will not cover in this class but that bears mentioning. In **Alden v. Maine**, 527 U.S. 706 (1999), the Court held that Congress may not authorize private individuals to sue states in state courts for violations of federal law. Even though federal wage-and-hour laws constitutionally applied to state probation officers, therefore, they could not sue the state for damages (although the United States itself, which is not bound by sovereign immunity, could theoretically sue on their behalf).

As you consider the issues raised in this section, try to keep one methodological and one substantive question in view. Methodologically, what role does the Tenth Amendment play in the Court's analysis, both strictly speaking and as a rhetorical or argumentative device? And more substantively, what values do the proponents of robust Tenth Amendment limits take them to advance, and how convincing do you find those claims?

National League of Cities v. Usery

426 U.S. 833 (1976)

■ JUSTICE REHNQUIST delivered the opinion of the Court.

[It] is established beyond peradventure that the Commerce Clause of Art. I of the Constitution is a grant of plenary authority to Congress. That authority is, in the words of Mr. Chief Justice Marshall in *Gibbons* v. *Ogden,* "the power to regulate; that is, to prescribe the rule by which commerce is to be governed."

[The cities here] in no way challenge [our] decisions establishing the breadth of authority granted Congress under the commerce power. Their contention, on the contrary, is that when Congress seeks to regulate directly the activities of States as public employers [as it did here by extending the Fair Labor Standards Act to public employees], it transgresses an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations contained in the Constitution. Congressional enactments which may be fully within the grant of legislative authority contained in the Commerce Clause may nonetheless be invalid because found to offend against the right to trial by jury contained in the Sixth Amendment or the Due Process Clause of the Fifth Amendment. Appellants' essential contention is that the 1974 amendments to the Act, while undoubtedly within the scope of the Commerce Clause, encounter a similar constitutional barrier because they are to be applied directly to the States and subdivisions of States as employers.

[We have recognized that] "[w]hile the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' *United States* v. *Darby* (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."

[The] Secretary [of Labor] argues that the cases in which this Court has upheld sweeping exercises of authority by Congress, even though those exercises pre-empted state regulation of the private sector, have already curtailed the sovereignty of the States quite as much as the [amendments to the FLSA]. We do not agree. It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner. In *Coyle* v. *Oklahoma* (1911), the Court gave this example of such an attribute:

> "The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen States could now be shorn of such powers by an act of Congress would not be for a moment entertained."

One undoubted attribute of state sovereignty is the State's power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime. The question we must resolve here, then, is whether these determinations are functions essential to "separate and independent existence," *id.*, so that Congress may not abrogate the States' otherwise plenary authority to make them.

Judged solely in terms of increased costs in dollars, [the cities'] allegations show a significant impact on the functioning of the governmental bodies involved. The Metropolitan Government of Nashville and Davidson County, Tenn., for example, asserted that the Act will increase its costs of providing essential police and fire protection, without any increase in service or in current salary levels, by $938,000 per year. [California] asserted that it could not comply with the overtime costs (approximately $750,000 per year) which the Act required to be paid to California Highway Patrol cadets during their academy training program. California reported that it had thus been forced to reduce its academy training program from 2,080 hours to only 960 hours, a compromise undoubtedly of substantial importance to those whose safety and welfare may depend upon the preparedness of the California Highway Patrol.

[Moreover, the Act's] federal [minimum wage] requirement directly supplants the considered policy choices of the States' elected officials and administrators as to how they wish to structure pay scales in state employment. The State might wish to employ persons with little or no training, or those who wish to work on a casual basis, or those who for some other reason do not possess minimum employment requirements, and pay them less than the federally prescribed minimum wage. It may wish to offer part-time or summer employment to teenagers at a figure less than the minimum wage, and if unable to do so may decline to offer such employment at all. But the Act would forbid such choices by the States.

This dilemma presented by the minimum wage restrictions may seem not immediately different from that faced by private employers[.] The difference, however, is that a State is not merely a factor in the "shifting economic arrangements" of the private sector of the economy, but is itself a coordinate element in the system established by the Framers for governing our Federal Union. [The] vice of the Act as sought to be applied here is that it directly penalizes the States for choosing to hire governmental employees on terms different from those which Congress has sought to impose.

We do not believe particularized assessments of actual impact are crucial to resolution of the issue presented, however. For even if we accept appellee's assessments concerning the impact of the amendments, their application will nonetheless significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services.[16] Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' "separate and independent existence." *Coyle.* [This] exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, §8, cl. 3.[17]

■ JUSTICE BLACKMUN, concurring.

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[16] These examples are obviously not an exhaustive catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments.

[17] We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, §8, cl. 1, or § 5 of the Fourteenth Amendment.

[Although] I am not untroubled by certain possible implications of the Court's opinion—some of them suggested by the dissents—I do not read the opinion so despairingly as does my Brother BRENNAN. [I] may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential. With this understanding on my part of the Court's opinion, I join it.

■ JUSTICE BRENNAN, with whom JUSTICE WHITE and JUSTICE MARSHALL join, dissenting.

The Court concedes, as of course it must, that Congress enacted the 1974 amendments pursuant to its exclusive power under Art. I, §8, cl. 3, of the Constitution "[t]o regulate Commerce . . . among the several States." It must therefore be surprising that my Brethren should choose this bicentennial year of our independence to repudiate principles governing judicial interpretation of our Constitution settled since the time of Mr. Chief Justice John Marshall, discarding his postulate that the Constitution contemplates that restraints upon exercise by Congress of its plenary commerce power lie in the political process and not in the judicial process. For 152 years ago Mr. Chief Justice Marshall enunciated that principle to which, until today, his successors on this Court have been faithful.

> "[T]he power over commerce . . . is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. *The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.*" *Gibbons* v. *Ogden* (1824) (emphasis added).

Only 34 years ago, *Wickard v. Filburn* reaffirmed that "[a]t the beginning Chief Justice Marshall . . . made emphatic the embracing and penetrating nature of [Congress' commerce] power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes."

My Brethren do not successfully obscure today's patent usurpation of the role reserved for the political process by their purported discovery in the Constitution of a restraint derived from sovereignty of the States on Congress' exercise of the commerce power. Mr. Chief Justice Marshall recognized that limitations "prescribed in the constitution," *Gibbons*, restrain Congress' exercise of the power. But there is no restraint based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution; our decisions over the last century and a half have explicitly rejected the existence of any such restraint on the commerce power.

[My] Brethren thus have today manufactured an abstraction without substance, founded neither in the words of the Constitution nor on precedent. An abstraction having such profoundly pernicious consequences is not made less so by characterizing the 1974 amendments as legislation directed against the "States *qua* States." [The] reliance of my Brethren upon the Tenth Amendment as "an express declaration of [a state sovereignty] limitation," not only suggests that they overrule governing decisions of this Court that address this question but must astound scholars of the Constitution. For not only early decisions, [including] *Gibbons* [and] *McCulloch*, hold that nothing in the Tenth Amendment constitutes a limitation on congressional exercise of powers delegated by the Constitution to Congress. Rather, as the Tenth Amendment's significance was more recently summarized:

> "The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. . . .
>
> "From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end."
>
> *United States* v. *Darby*.

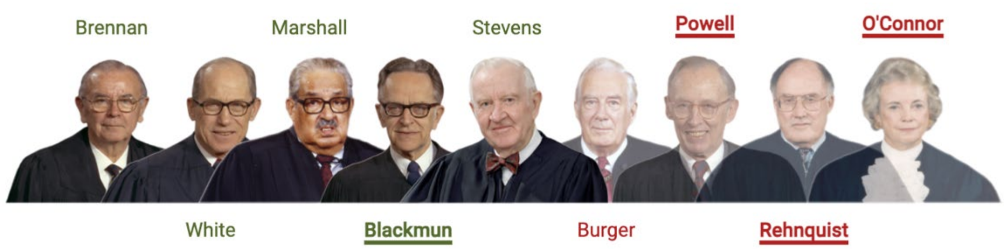
[My] Brethren do more than turn aside longstanding constitutional jurisprudence that emphatically rejects today's conclusion. More alarming is the startling restructuring of our federal system, and the role they create therein for the federal judiciary. This Court is simply not at liberty to erect a mirror of its own conception of a desirable governmental structure. If the 1974 amendments have any "vice," my Brother STEVENS is surely right that it represents "merely . . . a policy issue which has been firmly resolved by the branches of government having power to decide such questions." It bears repeating "that effective restraints on . . . exercise [of the commerce power] must proceed from political rather than from judicial processes." *Wickard*.

It is unacceptable that the judicial process should be thought superior to the political process in this area. Under the Constitution the Judiciary has no role to play beyond finding that Congress has not made an unreasonable legislative judgment respecting what is "commerce." My Brother BLACKMUN suggests that controlling judicial supervision of the relationship between the States and our National Government by use of a balancing approach diminishes the ominous implications of today's decision. Such an approach, however, is a thinly veiled rationalization for judicial supervision of a policy judgment that our system of government reserves to Congress.

Judicial restraint in this area merely recognizes that the political branches of our Government are structured to protect the interests of the States, as well as the Nation as a whole, and that the States are fully able to protect their own interests in the premises. Congress is constituted of representatives in both the Senate and House *elected from the States.* Decisions upon the extent of federal intervention under the Commerce Clause into the affairs of the States are in that sense decisions of the States themselves. Judicial redistribution of powers granted the National Government by the terms of the Constitution violates the fundamental tenet of our federalism that the extent of federal intervention into the States' affairs in the exercise of delegated powers shall be determined by the States' exercise of political power through their representatives in Congress. See Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Col. L. Rev. 543 (1954).[*]

Garcia v. San Antonio Metropolitan Transit Authority

469 U.S. 528 (1985)



■ JUSTICE BLACKMUN delivered the opinion of the Court.

We revisit in these cases an issue raised in *National League of Cities* v. *Usery* (1976). In that litigation, this Court, by a sharply divided vote, ruled that the Commerce Clause does not empower Congress to [regulate] the States "in areas of traditional governmental functions." Although *National League of Cities* supplied some examples of "traditional governmental functions," it did not offer a general explanation of how a "traditional" function is to be distinguished from a "nontraditional" one. Since then, federal and state courts have struggled with the task, thus imposed, of identifying a traditional function for purposes of state immunity under the Commerce Clause.

[*] [A short separate dissent by JUSTICE STEVENS is omitted. —BE]

In the present cases, a Federal District Court concluded that municipal ownership and operation of a mass-transit system is a traditional governmental function and thus, under *National League of Cities,* is exempt from the obligations imposed by the FLSA. Faced with the identical question, three Federal Courts of Appeals and one state appellate court have reached the opposite conclusion.

Our examination of this "function" standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental function" is not only unworkable but is also inconsistent with established principles of federalism[.] [*National League of Cities*], accordingly, is overruled.

[Just] how troublesome the task has been is revealed by the results reached in other federal cases. Thus, courts have held that regulating ambulance services, licensing automobile drivers, operating a municipal airport, performing solid waste disposal, and operating a highway authority, are functions *protected* under *National League of Cities.* At the same time, courts have held that issuance of industrial development bonds, regulation of intrastate natural gas sales, regulation of traffic on public roads, regulation of air transportation, operation of a telephone system, leasing and sale of natural gas, operation of a mental health facility, and provision of in-house domestic services for the aged and handicapped, are *not* entitled to immunity. We find it difficult, if not impossible, to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side. The constitutional distinction between licensing drivers and regulating traffic, for example, or between operating a highway authority and operating a mental health facility, is elusive at best.

[In our one prior case addressing this issue,] [we] relied in large part [on] "the *historical reality* that the operation of railroads is not among the functions *traditionally* performed by state and local governments," but we simultaneously disavowed "a static historical view of state functions generally immune from federal regulation." We held that the inquiry into a particular function's "traditional" nature was merely a means of determining whether the federal statute at issue unduly handicaps "basic state prerogatives," but we did not offer an explanation of what makes one state function a "basic prerogative" and another function not basic. [Reliance] on history as an organizing principle results in line-drawing of the most arbitrary sort; the genesis of state governmental functions stretches over a historical continuum from before the Revolution to the present, and courts would have to decide by fiat precisely how longstanding a pattern of state involvement had to be for federal regulatory authority to be defeated.

[We] believe, however, that there is a more fundamental problem at work here[.] The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be. Any rule of state immunity that looks to the "traditional," "integral," or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.

[We] therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." [We] accordingly return to the underlying issue that confronted this Court in *National League of Cities* — the manner in which the Constitution insulates States from the reach of Congress' power under the Commerce Clause.

We doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty. [When] we look for the States' "residuary and inviolable sovereignty," The Federalist No. 39 (J. Madison), in the shape of the constitutional scheme rather than in predetermined notions of sovereign power, a different measure of state sovereignty emerges. Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress. The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential elections. U. S. Const., Art. I, §2, and Art. II, §1. They were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State. Art. I, §3. The significance attached to the States' equal representation in the Senate is underscored by the prohibition of any constitutional amendment divesting a State of equal representation without the State's consent. Art. V.

[The] effectiveness of the federal political process in preserving the States' interests is apparent even today in the course of federal legislation. On the one hand, the States have been able to direct a substantial proportion of federal revenues into their own treasuries in the form of general and program-specific grants in aid. [Moreover,] at the same time that the States have exercised their influence to obtain federal support, they have been able to exempt themselves from a wide variety of obligations imposed by Congress under the Commerce Clause.

[Against] this background, we are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."

Insofar as the present cases are concerned, then, we need go no further than to state that we perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. SAMTA faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet.[*]

Many observers thought that, as the Court's conservative majority solidified, the pendulum that had swung from *National League of Cities* to *Garcia* would swing back again. In fact, in his *Garcia* dissent, Justice Rehnquist wrote: "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court." Surprisingly, perhaps, that has not happened (yet). Why not?

One reason might be that the Court has partially achieved the same result under the guise of statutory interpretation. In **Gregory v. Ashcroft** (1991), which you will probably read in Leg Reg, the Court held that the Age Discrimination in Employment Act (ADEA) did not protect Missouri judges from the state's mandatory retirement rule. Writing for the Court, Justice O'Connor offered an extended account of the importance of state sovereignty—reminiscent of the majority opinion in *National League of Cities* (and her own *Garcia* dissent)—and then explained:

> As against Congress' powers "[t]o regulate Commerce . . . among the several States," the authority of the people of the States to determine the qualifications of their government officials may be inviolate.
>
> We are constrained in our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause. See *Garcia* v. *San Antonio Metropolitan Transit Authority* (1985) (declining to review limitations placed on Congress' Commerce Clause powers by our federal system). But there is no need to do so if we hold that the ADEA does not apply to state

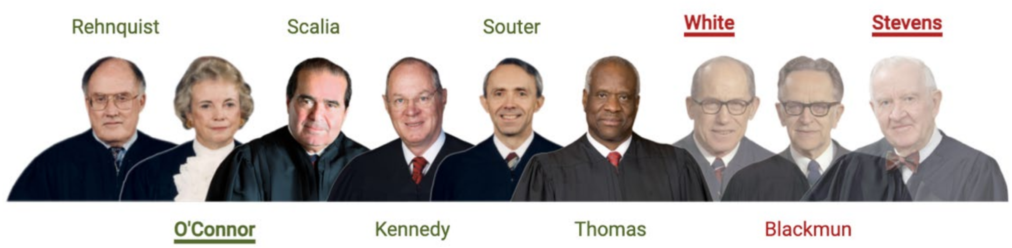
[*] [Dissents by Justice Powell, Justice Rehnquist, and Justice O'Connor—substantially overlapping with the majority's reasoning in *National League of Cities*—are omitted. —BE]

> judges. Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." L. Tribe, *American Constitutional Law* §6-25, p. 480 (2d ed. 1988).

Is this approach in the spirit of *Garcia*, as Justice O'Connor suggests? Should we be troubled by the use of interpretive canons to approximate constitutional rulings that are foreclosed by constitutional precedents?[*]

New York v. United States

505 U.S. 144 (1992)



■ JUSTICE O'CONNOR delivered the opinion of the Court.

[We] live in a world full of low level radioactive waste. Radioactive material is present in luminous watch dials, smoke alarms, measurement devices, medical fluids, research materials, and the protective gear and construction materials used by workers at nuclear power plants. [Millions] of cubic feet of low level radioactive waste must be disposed of each year. [In 1985, Congress] took up the issue of waste disposal, [ultimately enacting a statute that was] based largely on a proposal submitted by the National Governors' Association. [The statute imposes on each state a] statutory obligation to provide for the disposal of waste generated within [its] borders, [either by establishing its own disposal sites or by entering into a regional compact with other states that have disposal sites]. [In order to ensure compliance,] the Act provides:

[*] For a critical discussion of this sort of constitutional decisionmaking, see Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 567–71 (2023).

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste ... and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste ....

[New York] filed this suit against the United States in 1990[, seeking] a declaratory judgment that the Act is inconsistent with the Tenth [Amendment, as well as assorted other constitutional provisions].

[Federalism] questions can be viewed in either of two ways. In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution. See, *e.g.*, *McCulloch*. In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment. See, *e.g.*, *Garcia*. In a case like [this one,] the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress. [The] Tenth Amendment [thus] restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which [is] essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. [Our] task [consists] of understanding and applying the framework set forth in the Constitution.

[Petitioners] do not contend that Congress lacks the power to regulate the disposal of low level radioactive waste. [They] contend only that the Tenth Amendment limits the power of Congress to regulate in the way it has chosen. Rather than addressing the problem of waste disposal by directly regulating the generators and disposers of waste, petitioners argue, Congress has impermissibly directed the States to regulate in this field. Most of our recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws. See *National League of Cities*; *Garcia*. This case presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties. This case instead concerns the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way.

[As] an initial matter, Congress may not simply "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." [T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions. [Indeed,] the question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers. Under the Articles of Confederation, Congress lacked the authority in most respects to govern the people directly. [The] inadequacy of this governmental structure was responsible in part for the Constitutional Convention. Alexander Hamilton observed: "The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist." *The Federalist*, No. 15. As Hamilton saw it, "[we] must extend the authority of the Union to the persons of the citizens—the only proper objects of government."

[The] Convention generated a great number of proposals for the structure of the new Government, but two quickly took center stage. Under the Virginia Plan, [Congress] would exercise legislative authority directly upon individuals, without employing the States as intermediaries. Under the New Jersey Plan, [Congress] would continue to require the approval of the States before legislating, as [under] the Articles of Confederation. [One] frequently expressed objection to the New Jersey Plan was that it might require the Federal Government to coerce the States into implementing legislation. [Edmund Randolph, who introduced the Virginia Plan, described such coercion as] "*impracticable, expensive, cruel to individuals* . . . We must resort therefore to a national *Legislation over individuals*."

[In] the end, the Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States; [it] rejected the New Jersey Plan in favor of the Virginia Plan. This choice was made clear to the subsequent state ratifying conventions.

[In] providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. [The] allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce. This is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices. Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests. [Under] Congress' spending power, "Congress may attach conditions on the receipt of federal funds." [And] where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation. This arrangement, which has been termed "a program of cooperative federalism," is replicated in numerous federal statutory schemes.

[By] either of these two methods, [the] residents of the State retain the ultimate decision as to whether or not the State will comply. If a State's local citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If [they] would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program[.] Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.

By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be preempted under the Supremacy Clause if is contrary to the national view, but in such a case 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. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation.

[With the "take title"] provision [at issue here], Congress has crossed the line distinguishing encouragement from coercion. [The] take title provision offers state governments a "choice" of either accepting ownership of waste or regulating according to the instructions of Congress. [The Government does] not claim that the Constitution would authorize Congress to impose either option as a freestanding requirement. [The] Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments. Such a forced transfer, standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers. The same is true of the provision requiring the States to become liable for the generators' damages. Standing alone, this provision would be indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents. Either type of federal action would "commandeer" state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments. [The] second alternative held out to state governments—regulating pursuant to Congress' direction—would, standing alone, present a simple command to state governments to implement legislation enacted by Congress. [The] Constitution does not empower Congress to subject state governments to this type of instruction.

Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two. [A] choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, "the Act commanders the legislative process by directly compelling them to act an enforce a regulatory program," an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution. [Whether] one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution.

[The State respondents with disposal sites (termed "sited States")] observe that [the] Act embodies a bargain among the sited and unsited States, a compromise to which New York was a willing participant and from which New York has reaped much benefit. Respondents then pose what appears at first to be a troubling question: How can a federal statute be found an unconstitutional infringement of state sovereignty when state officials consented to the statute's enactment? The answer follows from an understanding of the fundamental purpose served by our Government's federal structure. The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."

[Where] Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the "consent" of state officials. [Indeed,] the facts of these cases raise the possibility that powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests. Most citizens recognize the need for radioactive waste disposal sites, but few want sites near their homes. As a result, [it] is likely to be in the political interest of each individual official to avoid being held accountable to the voters for the choice of location. [The] interests of public officials thus may not coincide with the Constitution's intergovernmental allocation of authority.

[Whatever] the outer limits of [State] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program. The Constitution permits both the

Federal Government and the States to enact legislation regarding the disposal of low level radioactive waste. [It] does not, however, authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated in their borders. [Affirmed in part and reversed in part.]

■ JUSTICE WHITE, with whom JUSTICES BLACKMUN and STEVENS join, [dissenting in relevant part].

Unlike legislation that directs action from the Federal Government to the States, the [statutory provisions at issue here] reflected hard-fought agreements among States as refereed by Congress. The distinction is key, and the Court's failure properly to characterize this legislation ultimately affects its analysis of the take title provision's constitutionality.

[The statute was] enacted against a backdrop of national concern over the availability of additional low-level radioactive waste disposal facilities. Congress could have pre-empted the field by directly regulating the disposal of this waste pursuant to its powers under the Commerce and Spending Clauses[.] [But the] States wished to take the lead in achieving a solution to this problem and agreed among themselves to the various incentives and penalties implemented by Congress to ensure adherence to the various deadlines and goals. The chief executives of the States proposed this approach, and I am unmoved by the Court's vehemence in taking away Congress' authority to sanction a recalcitrant unsited State now that New York has reaped the benefits of the sited States' concessions. [The] Court's refusal to force New York to accept responsibility for its own problem inevitably means that some other State's sovereignty will be impinged by it being forced, for public health reasons, to accept New York's low-level radioactive waste. I do not understand the principle of federalism to impede the National Government from acting as referee among the States to prohibit one from bullying another.

Moreover, it is utterly reasonable that, in crafting a delicate compromise between the three overburdened States that provided low-level radioactive waste disposal facilities and the rest of the States, Congress would have to ratify some punitive measure as the ultimate sanction for noncompliance. The take title provision, though surely onerous, does *not* take effect if the [State] lives up to its bargain of providing a waste disposal facility either within the State or in another State pursuant to a regional compact arrangement or a separate contract.

III

The Court announces that it has no occasion to revisit such decisions as [*Garcia*] because "this is not a case in which Congress has subjected a State to the same legislation applicable to private parties." Although this statement sends the welcome signal that the Court does not intend to cut a wide swath through our recent Tenth Amendment precedents, it nevertheless is unpersuasive. [The] Court's distinction between a federal statute's regulation of States and private parties for general purposes, as opposed to a regulation solely on the activities of States, is unsupported by our recent Tenth Amendment cases. In no case has the Court rested its holding on such a distinction. Moreover, the Court makes no effort to explain why this purported distinction should affect the analysis of Congress' power under general principles of federalism and the Tenth Amendment. [Certainly] one would be hard pressed to read the spirited exchanges between the Court and dissenting Justices in *National League of Cities* and in [*Garcia*] as having been based on the distinction now drawn by the Court. An incursion on state sovereignty hardly seems more constitutionally acceptable if the federal statute that "commands" specific action also applies to private parties. The alleged diminution in state authority over its own affairs is not any less because the federal mandate restricts the activities of private parties.

[Rather than turning to the majority's "anti-commandeering" principle,] the more appropriate analysis should flow from *Garcia*, even if these cases do not involve a congressional law generally applicable to both States and private parties. In *Garcia*, we stated the proper inquiry: "[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result.["]

[The] Court tacitly concedes that a failing of the political process cannot be shown in this case because [the] States were well able to look after themselves in the legislative process that culminated in the 1985 Act's passage. [Instead, the] Court rejects this process-based argument by resorting to generalities and platitudes about the purpose of federalism being to protect individual rights.

Ultimately, I suppose, the entire structure of our federal constitutional government can be traced to an interest in establishing checks and balances to prevent the exercise of tyranny against individuals. But these fears seem extremely far distant to me in a situation such as this. We face a crisis of national proportions in the disposal of low-level radioactive waste, and Congress has acceded to the wishes of the States by permitting local decisionmaking rather than imposing a solution from Washington. New York itself participated and supported passage of this legislation at both the gubernatorial and federal representative levels, and then enacted state laws specifically to comply with the deadlines and timetables agreed upon by the States in the 1985 Act. For me, the Court's civics lecture has a decidedly hollow ring at a time when action, rather than rhetoric, is needed to solve a national problem. [The] ultimate irony of the decision today is that in its formalistically rigid obeisance to "federalism," the Court gives Congress fewer incentives to defer to the wishes of state officials in achieving local solutions to local problems.

■ JUSTICE STEVENS, [dissenting in relevant part].

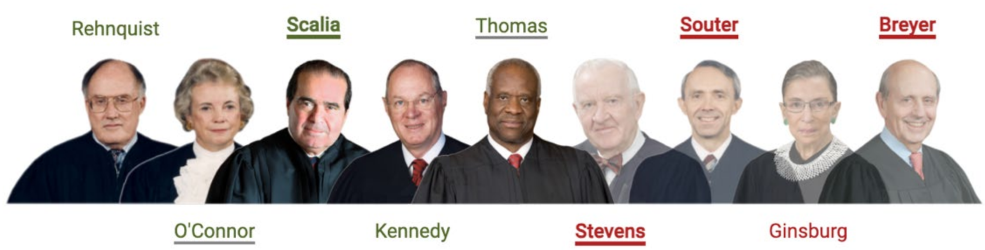
[The] notion that Congress does not have the power to issue "a simple command to state governments to implement legislation enacted by Congress" is incorrect and unsound. There is no such limitation in the Constitution. The Tenth Amendment surely does not impose any limit on Congress' exercise of the powers delegated to it by Article I. Nor does the structure of the constitutional order or the values of federalism mandate such a formal rule. To the contrary, the Federal Government directs state governments in many realms. The Government regulates state-operated railroads, state school systems, state prisons, state elections, and a host of other state functions. [I] see no reason why Congress may not also command the States to enforce federal water and air quality standards or federal standards for the disposition of low-level radioactive [wastes].

[Indeed,] even if the statute had never been passed, if one State's radioactive waste created a nuisance that harmed its neighbors, it seems clear that we would have had the power to command the offending State to take remedial action. If this Court has such authority, surely Congress has similar authority.

For these reasons, as well as those set forth by Justice White, I respectfully dissent.

Printz v. United States

521 U.S. 898 (1997)



■ JUSTICE SCALIA delivered the opinion of the Court.

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

I

The Act requires the Attorney General to establish a national instant background-check system [and] immediately puts in place certain interim provisions until that system becomes operative. Under the interim provisions, a firearms dealer [must] provide the "chief law enforcement officer" (CLEO) of the [buyer's] residence with [certain information about the sale].

[Then,] the CLEO must "make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available[.]"

II

From the description set forth above, it is apparent that the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme. Petitioners here object to being pressed into federal service, and contend that congressional action compelling state officers to execute federal laws is unconstitutional. Because there is no constitutional text speaking to this precise question, the answer to the CLEOs' challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court. We treat those three sources, in that order, in this and the next two sections of this opinion.

[As to history,] the Government contends [that] "the earliest Congresses enacted statutes that required the participation of state officials in the implementation of federal laws." The Government's contention demands our careful consideration, since early congressional enactments "provide contemporaneous and weighty evidence of the Constitution's meaning." Indeed, such "contemporaneous legislative exposition of the Constitution, acquiesced in for a long term of years, fixes the construction to be given its provisions." *Myers v. United States* (1926) (citing numerous cases). Conversely if, as petitioners contend, earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist.

[The Government's main evidence is a set of statutes from the 1790s that] at least arguably required state courts to perform [various] functions[,] such as resolving controversies between a captain and the crew of his ship concerning the seaworthiness of the vessel, hearing the claims of slave owners who had apprehended fugitive slaves [in the state], taking proof of the claims of Canadian refugees who had assisted the United States during the Revolutionary War, and ordering the deportation of alien enemies in times of war.

These early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power. It is understandable why courts should have been viewed distinctively[;] unlike legislatures and executives, they applied the law of other sovereigns all the time. [W]e do not think the early statutes imposing obligations on state courts imply a power of Congress to impress the state executive into its service. Indeed, it can be argued that the numerousness of these statutes, contrasted with the utter lack of statutes imposing obligations on the States' executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence* of such power.

[In fact,] the enactments of the early Congresses [contain] some indication of precisely [that] assumption. [In 1789,] the First Congress enacted a law aimed at obtaining state assistance[:] the holding of federal prisoners in state jails at federal expense. Significantly, the law issued not a command to the States' executive, but a recommendation to their legislatures "[to] pass laws, making it expressly the duty of the keepers of their [jails], to receive and safe keep therein all prisoners committed under the authority of the United States," and offered to pay 50 cents per month for each prisoner.

In addition to early legislation, the Government also [invokes] *The Federalist*'s general observations [to the effect] that the Constitution would "enable the [national] government to employ the ordinary magistracy of each [State] in the execution of its laws." No. 27 (A. Hamilton). [But] none of these statements necessarily implies—what is the critical point here—that Congress could impose these responsibilities *without the consent of the States.*

To complete the historical record, we must note that there is not only an absence of executive-commandeering statutes in the early Congresses, but there is an absence of them in our later history as well, at least until very recent years. Some of these [more recent examples] are connected to federal funding measures, and can perhaps be more accurately described as conditions upon the grant of federal funding than as mandates to the States; others [require] only the provision of information to the Federal Government. We of course do not address these or other currently operative enactments that are not before us[.] [Even] assuming they represent assertion of the very same congressional power challenged here, they are of such recent vintage that they are no more probative than the statute before us of a constitutional tradition that lends meaning to the text.

III

The constitutional practice we have examined above tends to negate the existence of the congressional power asserted here, but is not conclusive. We turn next to consideration of the structure of the Constitution, to see if we can discern among its "essential postulates" a principle that controls the present cases.

It is incontestible that the Constitution established a system of "dual sovereignty." Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty[.]" This is reflected throughout the Constitution's text, including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, §3; the Judicial Power Clause, Art. III, §2, and the Privileges and Immunities Clause, Art. IV, §2, which speak of the "Citizens" of the States; [and] the amendment provision, Article

V, which requires the votes of three-fourths of the States to amend the Constitution[.] Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, §8, which implication was rendered express by the Tenth Amendment[.]

The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict. We have set forth the historical record in more detail elsewhere, see *New York v. United States,* and need not repeat it here. It suffices to repeat the conclusion: "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens. See *New York*; *United States v. Lopez* (1995) (Kennedy, J., concurring) [*supra*, p. II-58].This separation of the two spheres is one of the Constitution's structural protections of liberty. [The] power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States.

[Federal] control of state officers [would also affect] the separation and equilibration of powers between the three branches of the Federal Government itself. The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed," Art. II, §3, personally and through officers whom he appoints. The Brady Act effectively transfers this responsibility to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control[.] The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known. See The Federalist No. 70 (A. Hamilton)[.] That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.

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

[*] [*Ultra vires* is Latin for "beyond the powers"; it is usually used to describe actions of governments or corporate officials that exceed some grant of authority, like a law or a corporate charter. —BE]

itself. When a "La[w] . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, it is not a "La[w] . . . *proper* for carrying into Execution the Commerce Clause." [We recognized in *New York* that] "[e]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts [(for instance, under the Commerce Clause)], it lacks the power directly to compel the States to require or prohibit those acts[."]

IV

Finally, [we] turn to the prior jurisprudence of this Court. Federal commandeering of state governments is such a novel phenomenon that this Court's first experience with it did not occur until [recently]. In *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.* (1981) and *FERC* v. *Mississippi* (1982), we sustained statutes against constitutional challenge only after assuring ourselves that they did not require the States to enforce federal law. [In *FERC*, for instance, the Court] construed the most troubling provisions of the Public Utility Regulatory Policies Act of 1978 to [impose only a] precondition to continued state regulation of an otherwise preempted field. We warned that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations."

When [in *New York*] we were at last confronted squarely with a federal statute that unambiguously required the States to enact or administer a federal regulatory program, our decision should have come as no surprise. "The Federal Government," we held, "may not compel the States to enact or administer a federal regulatory program."

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

The] Government's distinction between "making" law and merely "enforcing" it [is] an interesting one. [Executive] action that has utterly no policy making component is rare, particularly at an executive level as high as a jurisdiction's chief law enforcement officer. Is it really true that there is no policymaking involved in deciding, for example, what "reasonable efforts" shall be expended to conduct a background check? [Is] this decision whether to devote maximum "reasonable efforts" or minimum "reasonable efforts" not preeminently a matter of policy? It is quite impossible, in short, to draw the Government's proposed line at "no policymaking," and we would have to fall back upon a line of "not too much policymaking." How much is too much is not likely to be answered precisely; and an imprecise barrier against federal intrusion upon state authority is not likely to be an effective one.

Even assuming, moreover, that the Brady Act leaves no "policymaking" discretion with the States, we fail to see how that improves rather than worsens the intrusion upon state sovereignty. Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields than by "reducing [them] to puppets of a ventriloquist Congress." It is no more compatible with this independence and autonomy that their officers be "dragooned" into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.

The Government purports to find support for its proffered distinction of *New York* [in] *Testa* v. *Katt* (1947) [and related cases]. *Testa* stands for the proposition that state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause ("the Judges in every State shall be bound [by federal law]"). As we have suggested earlier, that says nothing about whether state executive officers must administer federal law.

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

Finally, the Government puts forward a cluster of arguments that can be grouped under the heading: "The Brady Act serves very important purposes, is most efficiently administered by CLEOs during the interim period, and places a minimal and only temporary burden upon state officers." [Assuming] *all* the mentioned factors were true, they might be relevant if we were evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments. See, *e. g., National League of Cities* v. *Usery* (1976) (overruled by *Garcia* v. *San Antonio Metropolitan Transit Authority* (1985)). But where, as here, it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a "balancing" analysis is inappropriate.

[We] held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. [Reversed.]

■ JUSTICE O'CONNOR, concurring.

[Our] holding, of course, does not spell the end of the objectives of the Brady Act. States and chief law enforcement officers may voluntarily continue to participate in the federal program. Congress is also free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs.

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

■ JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

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

[This] case[] do[es] not implicate the more difficult questions associated with congressional coercion of state legislatures addressed in *New York* v. *United States*. The question is whether Congress, acting on behalf of the people of the entire Nation, may require local law enforcement officers to perform certain duties during the interim needed for the development of a federal gun control program.

* [JUSTICE THOMAS wrote a concurrence noting that, in his view, Congress does not have the authority to regulate intrastate gun sales under the Commerce Clause—and thus it "surely lacks the corollary power" to require state law enforcement to administer such regulations. —BE]

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

Perhaps today's majority would suggest that no such emergency is presented by the facts of these cases. But such a suggestion is itself an expression of a policy judgment. [The] Brady Act was passed in response to what Congress described as an "epidemic of gun violence." [Whether] or not the evaluation reflected in the enactment of the Brady Act is correct as to the extent of the danger and the efficacy of the legislation, the congressional decision surely warrants more respect than it is accorded in today's unprecedented decision.

[The] text of the Constitution provides a sufficient basis for a correct disposition of these cases. [There] can be no question that [the Commerce Clause] adequately supports the regulation of commerce in handguns effected by the Brady Act. Moreover, the additional grant of authority in [the Necessary and Proper Clause] is surely adequate to support the temporary enlistment of local police officers in the process of identifying persons who should not be entrusted with the possession of handguns. In short, the affirmative delegation of power in [Article] I provides ample authority for the congressional enactment.

Unlike the First Amendment, which prohibits the enactment of a category of laws that would otherwise be authorized by Article I, the Tenth Amendment imposes no restriction on the exercise of delegated powers. [It] confirms the principle that the powers of the Federal Government are limited to those affirmatively granted by the Constitution, but it does not purport to limit the scope or the effectiveness of the exercise of powers that are delegated to Congress. See *New York* ("In a case . . . involving the division of authority between federal and state governments, the two inquiries are mirror images of each other"). Thus, the Amendment provides no support for a rule that immunizes local officials from obligations that might be imposed on ordinary citizens.

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

Article VI unambiguously provides that federal law "shall be the supreme Law of the Land," binding in every State. Thus, not only the Constitution, but every law enacted by Congress as well, establishes policy for the States just as firmly as do laws enacted by state legislatures. The reasoning in our unanimous opinion explaining why state tribunals with ordinary jurisdiction over tort litigation can be required to hear cases arising under the Federal Employers' Liability Act applies equally to local law enforcement officers whose ordinary duties parallel the modest obligations imposed by the Brady Act:

> The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State. [The] United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty." *Second Employers' Liability Cases* (1912).

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

[Under] the Articles of Confederation the National Government had the power to issue commands to the several sovereign States, but it had no authority to govern individuals directly. [That] method of governing proved to be unacceptable, not because it demeaned the sovereign character of the several States, but rather because it was cumbersome and inefficient. [The] basic change in the character of the government that the Framers conceived was designed to enhance the power of the National Government, not to provide some new, unmentioned immunity for state officers.

[Indeed,] the historical materials strongly suggest that the founders intended to enhance the capacity of the Federal Government by empowering it—as a part of the new authority to make demands directly on individual citizens—to act through local officials. [For example,] during the debates concerning the ratification of the Constitution, it was assumed that state agents would act as tax collectors for the Federal Government. Opponents of the Constitution had repeatedly expressed fears that the new Federal Government's ability to impose taxes directly on the citizenry would result in an overbearing presence of federal tax collectors in the States. Federalists rejoined that this problem would not arise because, as Hamilton explained, "the United States . . . will make use of the State officers and State regulations for collecting" certain taxes. Similarly, Madison made clear that the new central Government's power to raise taxes directly from the citizenry would "not be resorted to, except for supplemental purposes of revenue . . . and that the eventual collection, under the immediate authority of the Union, will generally be made by the officers . . . appointed by the several States."

The Court's response to this powerful historical evidence is weak. The majority suggests that "none of these statements necessarily implies . . . Congress could impose these responsibilities without the consent of the States." No fair reading of these materials can justify such an interpretation. As Hamilton explained, the power of the Government to act on "individual citizens"—including "employ[ing] the ordinary magistracy" of the States—was an answer to the problems faced by a central Government that could act only directly "upon the States in their political or collective capacities." The Federalist, No. 27. The new Constitution would avoid this problem, resulting in "a regular and peaceable execution of the laws of the Union."[6]

[Bereft] of support in the history of the founding, the Court rests its conclusion on the claim that there is little evidence the National Government actually exercised such a power in the early years of the Republic. This reasoning is misguided in principle and in fact. While we have indicated that the express consideration and resolution of difficult constitutional issues by the First Congress in particular "provides 'contemporaneous and weighty evidence' of the Constitution's meaning since many of [its] Members . . . 'had taken part in framing that instrument,' " we have never suggested that the failure of the early Congresses to address the scope of federal power in a particular area or to exercise a particular authority was an argument against its existence. That position, if correct, would undermine most of our

[6] Antifederalists acknowledged this response, and recognized the likelihood that the Federal Government would rely on state officials to collect its taxes. The wide acceptance of this point by all participants in the framing casts serious doubt on the majority's [interpretation].

post-New Deal Commerce Clause jurisprudence. As Justice O'Connor quite properly noted in *New York,* "[t]he Federal Government undertakes activities today that would have been unimaginable to the Framers."

More importantly, the fact that Congress did elect to rely on state judges and the clerks of state courts to perform a variety of executive functions is surely evidence of a contemporary understanding that their status as state officials did not immunize them from federal service. The majority's description of these early statutes is both incomplete and at times misleading. [For example], the First Congress enacted legislation requiring state courts to serve, functionally, like contemporary regulatory agencies in certifying the seaworthiness of vessels. The law provided that upon a complaint raised by a ship's crew members, the state courts were [to] appoint an investigative committee of three persons "most skilful in maritime affairs" to report back. On this basis, the judge was to determine whether the ship was fit for its intended voyage. The statute sets forth, in essence, procedures for an expert inquisitorial proceeding, supervised by a judge but otherwise more characteristic of executive activity.

The Court assumes that the imposition of such essentially executive duties on state judges and their clerks sheds no light on the question whether executive officials might have an immunity from federal obligations. [But we] are far truer to the historical record by applying a functional approach in assessing the role played by these early state officials. [As] one scholar has noted, "two centuries ago, state and local judges and associated judicial personnel performed many of the functions today performed by executive officers, including such varied tasks as laying city streets and ensuring the seaworthiness of vessels." Caminker, State Sovereignty and Subordinacy (1995). [The] majority's insistence that [early statutes are] irrelevant simply because the assistance of "judges" was at issue rests on empty formalistic reasoning of the highest order.

The Court's evaluation of the historical evidence, furthermore, fails to acknowledge the important difference between policy decisions that may have been influenced by respect for state sovereignty concerns, and decisions that are compelled by the Constitution. [Footnote relocated to text:] Indeed, an entirely appropriate concern for the prerogatives of state government readily explains Congress' sparing use of this otherwise "highly attractive" power.

The Court's "structural" arguments are [also unpersuasive.] The fact that the Framers intended to preserve the sovereignty of the several States simply does not speak to the question whether individual state employees may be required to perform federal obligations, such as registering young adults for the draft, creating state emergency response commissions designed to manage the release of hazardous substances, collecting and reporting data on underground storage tanks that may pose an environmental hazard, and reporting traffic fatalities and missing children to a federal agency. [Citations to these statutes omitted. —BE]

As we explained in [*Garcia*]: "[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."[It] is quite unrealistic to assume that [Members of Congress] will ignore the sovereignty concerns of their constituents. It is far more reasonable to presume that their decisions to impose modest burdens on state officials from time to time reflect a considered judgment that the people in each of the States will benefit therefrom.

[Perversely,] the majority's rule seems more likely to damage than to preserve the safeguards against tyranny provided by the existence of vital state governments. By limiting the ability of the Federal Government to enlist state officials in the implementation of its programs, the Court creates incentives for the National Government to aggrandize itself.[21]

With colorful hyperbole, the Court suggests that the unity in the Executive Branch of the Federal Government "would be shattered, and the power of the President would be subject to reduction, if Congress could . . . requir[e] state officers to execute its laws." *Ante,* at 923. [This] contradicts *New York v. United States*, [which] disapproved of a particular *method* of putting [cooperative federalism] programs into place, not the *existence* of federal programs implemented locally. [As *New York* recognized, Congress] may require the States to implement its programs as a condition of federal spending, in order to avoid the threat of unilateral federal action in the area, or as a part of a program that affects States and private parties alike.

Nor is there force to the assumption under girding the Court's entire opinion that if this trivial burden on state sovereignty is permissible, the entire structure of federalism will soon collapse. These cases do not involve any mandate to state legislatures to enact new rules. [Indeed], the Court does not disturb the conclusion that flows directly from our prior holdings that the burden on police officers would be permissible if a similar burden were also imposed on private parties with access to relevant data. *See New York*; *Garcia*. A structural problem that vanishes when the statute affects private individuals as well as public officials is not much of a structural problem. [Finally,] the Court advises us that the "prior jurisprudence of this Court" is the most conclusive support for its position. That "prior jurisprudence" is *New York* v. *United States*. Our statements [there], taken in context, clearly did not decide the question presented here, whether state executive officials—as opposed to state legislators—may in appropriate circumstances be enlisted to implement federal policy. [The majority also gives short shrift to other relevant precedents.]

[For example,] the majority provides an incomplete explanation of our decision in *Testa v. Katt* (1947) and demeans its importance. In that case the

[21] The Court raises the specter that the National Government seeks the authority "to impress into its service . . . the police officers of the 50 States." But it is difficult to see how state sovereignty and individual liberty are more seriously threatened by federal reliance on state police officers to fulfill this minimal request than by the aggrandizement of a national police force.

Court unanimously held that state courts of appropriate jurisdiction must occupy themselves adjudicating claims brought by private litigants under the federal Emergency Price Control Act of 1942, regardless of how otherwise crowded their dockets might be with state-law matters. That is a much greater imposition on state sovereignty than the Court's characterization of the case as merely holding that "state courts cannot refuse to apply federal law." That characterization describes only the narrower duty to apply federal law in cases that the state courts have consented to entertain.

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

Hence, the Court's textual argument is quite misguided. The majority focuses on the Clause's specific attention to the point that "Judges in every State shall be bound." That language commands state judges to "apply federal law" in cases that they entertain, but it is not the source of their duty to accept jurisdiction of federal claims that they would prefer to ignore. Our opinions in *Testa,* and earlier the *Second Employers' Liability Cases,* rested generally on the language of the Supremacy Clause, without any specific focus on the reference to judges. [And] the notion that the Framers would have had no reluctance to "press state judges into federal service" against their will but would have regarded the imposition of a similar—indeed, far lesser— burden on town constables as an intolerable affront to principles of state sovereignty can only be considered perverse.

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

Accordingly, I respectfully dissent.*

* [JUSTICE SOUTER wrote a dissent arguing that "the most straightforward reading" of Federalist No. 27 supported the Government's position. JUSTICE BREYER wrote a dissent (joined by JUSTICE STEVENS) criticizing the Court's holding based on the experience of foreign jurisdictions with federal structures. —BE]

Murphy v. NCAA

138 S. Ct. 1461 (2018)

■ JUSTICE ALITO delivered the opinion of the Court.

The State of New Jersey wants to legalize sports gambling at casinos and horseracing tracks, but a federal law, the Professional and Amateur Sports Protection Act (PASPA), generally makes it unlawful for a State to "authorize" sports gambling schemes. [In particular, PASPA] makes it "unlawful" for a State or any of its subdivisions "to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on" competitive sporting events. PASPA does not make sports gambling a federal crime (and thus was not anticipated to impose a significant law enforcement burden on the Federal Government).[24] Instead, PASPA allows the Attorney General, as well as professional and amateur sports organizations, to bring civil actions to enjoin violations. § 3703.

[The] anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.,* the decision to withhold from Congress the power to issue orders directly to the States. [The] Constitution limited but did not abolish the sovereign powers of the States[.] Thus, both the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of "dual sovereignty." *Gregory v. Ashcroft* (1991).

The Constitution limits state sovereignty in several ways[, including] by granting certain legislative powers to Congress, see Art. I, §8, while providing in the Supremacy Clause that federal law is the "supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," Art. VI, cl. 2. This means that when federal and state law conflict, federal law prevails and state law is preempted. [But] conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority.

[24] The Congressional Budget Office estimated that PASPA would not require the appropriation of any federal funds.

[The] PASPA provision at issue here—prohibiting state authorization of sports gambling—violates the anticommandeering rule. That provision unequivocally dictates what a state legislature may and may not do. [It] is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.

Neither respondents nor the United States contends that Congress can compel a State to enact legislation, but they say that prohibiting a State from enacting new laws is another matter. Noting that the laws challenged in *New York* and *Printz* "told states what they must do instead of what they must not do," respondents contend that commandeering occurs "only when Congress goes beyond precluding state action and affirmatively commands it."

This distinction is empty. It was a matter of happenstance that the laws challenged in *New York* and *Printz* commanded "affirmative" action as opposed to imposing a prohibition. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event.

[Respondents] and the United States claim that prior decisions of this Court show that PASPA's anti-authorization provision is constitutional, but they misread those cases. [Cases such as *Reno v. Condon* (2000) simply demonstrate that the] anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage. [*Condon*] concerned a federal law restricting the disclosure and dissemination of personal information provided in applications for driver's licenses. The law applied equally to state and private actors. It did not regulate the States' sovereign authority to "regulate their own citizens."

[Respondents] and the United States [also] defend the anti-authorization prohibition on the ground that it constitutes a valid preemption provision, but it is no such thing. Preemption is based on the Supremacy Clause, and that Clause is not an independent grant of legislative power to Congress. Instead, it simply provides [that] federal law is supreme in case of a conflict with state law. [Our] cases have identified [various] types of preemption[, but] all of them work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted.

[A] recent example is *Mutual Pharmaceutical Co. v. Bartlett* (2013). In that case, a federal law enacted under the Commerce Clause regulated manufacturers of generic drugs, prohibiting them from altering either the composition or labeling approved by the FDA. A State's tort law, however, effectively required a manufacturer to supplement the warnings included in the FDA-approved label. We held that the state law was preempted because it imposed a duty that was inconsistent—*i.e.,* in conflict—with federal law.

[Other preemption cases reflect the same logic, although this is sometimes] obscured by the language used by Congress in framing preemption provisions. The provision at issue in *Morales v. Trans World Airlines, Inc.* (1992) is illustrative. The Airline Deregulation Act of 1978 lifted prior federal regulations of airlines, and "[t]o ensure that the States would not undo federal deregulation with regulation of their own," the Act provided that "no State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any [covered] air carrier." 49 U.S.C. App. §1305(a)(1) (1988 ed.).

This language might appear to operate directly on the States, but it is a mistake to be confused by the way in which a preemption provision is phrased. As we recently explained, "we do not require Congress to employ a particular linguistic formulation when preempting state law." And if we look beyond the phrasing employed in the Airline Deregulation Act's preemption provision, it is clear that this provision operates just like any other federal law with preemptive effect. It confers on private entities (*i.e.,* covered carriers) a federal right to engage in certain conduct subject only to certain (federal) constraints.

[Once] this is understood, it is clear that the PASPA provision prohibiting state authorization of sports gambling is not a preemption provision because there is no way in which this provision can be understood as a regulation of private actors. [Thus,] there is simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States.

Having concluded that § 3702(1) violates the anticommandeering doctrine, we consider [whether] our [decision] dooms the remainder of PASPA. [Under the statute], States are [also] prohibited from "operat[ing]," "sponsor[ing]," or "promot[ing]" sports gambling schemes. If the [prohibition on] state authorization [is] stricken but the prohibition on state "operat[ion]" is left standing, the result would be a scheme sharply different from what Congress contemplated when PASPA was enacted. [If] Congress had known that States would be free to authorize sports gambling in privately owned casinos, would it have nevertheless wanted to prevent States from running sports lotteries?

That seems most unlikely. [State-run] lotteries, which sold tickets costing only a few dollars, were thought more benign than other forms of gambling, and that is why they had been adopted in many States. [Moreover, p]rohibiting the States from engaging in commercial activities that are permitted for private parties would also have been unusual, and it is unclear what might justify such disparate treatment. [Accordingly,] we do not think that the provision barring state operation of sports gambling can be severed.

* * *

[The] legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own. [PASPA] "regulate[s] state governments' regulation" of their citizens, *New York*. The Constitution gives Congress no such power.

[Reversed.][*]

QUESTIONS ABOUT COMMANDEERING AND PREEMPTION

1. Ever since the Court embraced the "anti-commandeering" rule in *New York*, commentators have puzzled about the relationship between this rule, on the one hand, and Congress's undisputed power to preempt inconsistent state law, on the other. After all, both involve Congress, acting within the scope of its enumerated powers, circumscribing the states' baseline discretion over the operative contents of state law. Is "[p]rohibiting commandeering but not preemption in the name of securing the accountability of state government . . . simply arbitrary"?[†]

2. Regardless of whether there are good *reasons* for prohibiting commandeering but not preemption, is it at least clear when a statute falls on each side of that conceptual line? In *Murphy*, the Court addresses this issue most directly when it distinguishes PASPA from the Airline Deregulation Act. Why can the latter, but not the former, "be understood as a regulation of private actors" (*supra*, p. II-119)? Can you reframe PASPA as conferring a federal right—and if so, how do you think the Court might distinguish that right from the one conferred in the Airline Deregulation Act?

3. Over the past few years, the anti-commandeering rule has been raised in several cases involving sanctuary jurisdictions—i.e., cities or states that decline to cooperate with federal immigration enforcement—although only a few courts have answered the constitutional question on its merits thus far. The main statute at issue is 8 U.S.C. §1373(a), which provides:

> Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [the Department of Homeland Security] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

Is that statute constitutional?

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[*] [JUSTICE THOMAS, JUSTICE BREYER, and JUSTICE GINSBURG (joined by JUSTICE SOTOMAYOR and JUSTICE BREYER) each filed separate opinions addressing only the severability question. —BE]

[†] Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1054-55 (1995).

D. Taxing and Spending Powers (24 PAGES)

Apart from the Commerce Power, Congress's most important powers—at least domestically—are the powers to impose taxes and to spend money. Those powers are conferred in the very first clause of Article I, § 8, which reads:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .

Historically, there were two important and quite different views about the scope of this provision. One view, associated with James Madison, was that it merely conferred the power to raise and spend money *in service of* some other enumerated power of Congress.[*] Alexander Hamilton and Justice Joseph Story, on the other hand, thought that the powers were freestanding: Congress could tax and spend to "provide for the common Defence and general Welfare of the United States," even if this meant undertaking projects not otherwise within its authority. We won't dig into this debate, so suffice it to say that, in 1936, the Court definitively "conclude[d] that the reading advocated by Mr. Justice Story is the correct one." *United States v. Butler*, 297 U.S. 1, 66 (1936).

Under this view of the power, its only real textual limit—apart from some rules about the form of taxes, which we won't consider here—is that the funds must be spent for the "general Welfare of the United States." The Court's most important treatment of that issue came in **Helvering v. Davis**, 301 U.S. 619 (1937). In *Helvering*, the Court upheld the Social Security Act (which created a taxing and spending program to provide support for the elderly) against a claim that this didn't really provide for the *general* welfare.[†] Justice Cardozo wrote for the majority:

> The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.

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[*] Under that reading, wouldn't the Necessary and Proper Clause make the provision superfluous? Maybe—but recall Chief Justice Marshall's observation that "[t]he power of creating a corporation . . . is not, like the power of making war, or *levying taxes*, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers." *McCulloch* [*supra*, p. 8] (emphasis added).

[†] *Helvering* was decided shortly after *Jones & Laughlin* (and President Roosevelt's landslide re-election in 1936).

When Congress's power to tax and spend is understood in this way—first, as a freestanding authority untethered from the other enumerated powers, and second, with great deference to Congress's judgments about what implicates the "general welfare"—it might seem an obvious threat to the same balance between federal and state authority that we have seen the Court trying to preserve in other areas. As you read the cases in this section, think about similarities and differences between the way that issue presents here and the way it presented in connection with the Commerce Power.

Bailey v. Drexel Furniture Co.
[Child Labor Tax Case]
259 U.S. 20 (1922)

[A few months after Congress's attempt to regulate child labor was held unconstitutional in *Hammer v. Dagenhart*, it enacted the Child Labor Tax Law of 1919. The law's provisions are described in the Court's opinion below.]

■ CHIEF JUSTICE TAFT delivered the opinion of the Court.

[The child labor tax] law is attacked on the ground that it is a regulation of the employment of child labor in the States—an exclusively state function under the Federal Constitution and within the reservations of the Tenth Amendment. It is defended on the ground that it is a mere excise tax levied by the Congress of the United States under its broad power of taxation conferred by § 8, Article I, of the Federal Constitution. We must construe the law and interpret the intent and meaning of Congress from the language of the act. [Does] this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty?

If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. That course of conduct is that employers shall employ in mines and quarries, children of an age greater than 16 years; in mills and factories, children of an age greater than 14 years, and shall prevent children of less than 16 years in mills and factories from working more than 8 hours a day or 6 days in a week. If an employer departs from its prescribed course of business, he is to pay the government one-tenth of his entire net income in the business for a full year. The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one child for a day. Moreover, if he does not know the child is within the named age limit, he is not to pay; that is to say, it is only where he knowingly departs from the prescribed course that payment is to be exacted.

Scienter* is associated with penalties not with taxes. The employer's factory is to be subject to inspection at any time not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates whose normal function is the advancement and protection of the welfare of the workers. In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?

[Out of] a proper respect for the acts of a coordinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But, in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of the provisions. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, [reserved to the States by] the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.

[Where] the sovereign enacting the law has power to impose both tax and penalty the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us.

The case before us can not be distinguished from that of *Hammer v. Dagenhart*. [This] case requires as did the *Dagenhart Case* the application of the principle announced by Chief Justice Marshall in *McCulloch v. Maryland*, in a much quoted passage [*supra*, p. II-13]:

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the

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* ["Scienter" generally refers to a requirement that a legal violation be knowing rather than inadvertent. —BE]

> accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land."

But it is pressed upon us that this court has gone so far in sustaining taxing measures the effect or tendency of which was to accomplish purposes not directly within congressional power that we are bound by authority to maintain this law.

The first of these is *Veazie Bank v. Fenno* [(1869)]. In that case, [a] law which increased a tax on the circulating notes of persons and state banks from one per centum to ten per centum was [upheld]. It will be observed that the sole objection to the tax there was its excessive character. [There] were no elaborate specifications on the face of the act, as here, indicating the purpose to regulate matters of state concern and jurisdiction through an exaction so applied as to give it the qualities of a penalty for violation of law rather than a tax. [But] more than this, what was charged to be the object of the excessive tax was within the congressional authority[.] After having pointed out the legitimate means taken by Congress to secure a national medium or currency, the court said:

> "Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, [Congress] may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority."

[Finally], United States v. Doremus, 249 U.S. 86 [1919], involved the validity of [a] special tax on [dealing in] opium or coca leaves[.] It required every person subject to the special tax to register with the [IRS] his name and place of business and forbade him to sell except upon the written order of the [buyer] on a form prescribed by the [IRS]. The provisions for subjecting the sale and distribution of the drugs to official supervision [were] held to have a reasonable relation to the enforcement of the [tax]. The court said that the act could not be declared invalid just because another motive than taxation, not shown on the face of the act, might have contributed to its passage. This case does not militate against the conclusion we have reached in respect of the law now before us.

[Affirmed.]

The Affordable Care Act, the "Individual Mandate," and the Taxing Power

As we saw earlier in the semester, the Supreme Court held that the Affordable Care Act's individual mandate (which requires most adult citizens to have health insurance) was not a valid exercise of the Commerce Power or the Necessary and Proper Power. The Court held, however, that the same provision of the statute *could* be justified as an exercise of Congress's taxing power. Before turning to the opinions debating that question in *NFIB*, take a moment to read the statute itself, reproduced in relevant part below. Applying *Drexel Furniture* (which, unlike *Hammer v. Dagenhart*, has never been overruled), is this statute a valid exercise of the Taxing Power?

§ 5000A. Requirement to maintain minimum essential coverage

(a) Requirement to maintain minimum essential coverage

An 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 for such month.

(b) Shared Responsibility Payment

(1) In general

If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (c), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c).

(2) Inclusion with return

Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return under chapter 1 for the taxable year which includes such month.

(3) Payment of penalty

If an individual with respect to whom a penalty is imposed by this section for any month—

(A) is a dependent (as defined in section 152) of another taxpayer for the other taxpayer's taxable year including such month, such other taxpayer shall be liable for such penalty, or

(B) files a joint return for the taxable year including such month, such individual and the spouse of such individual shall be jointly liable for such penalty.

(c) Amount of Penalty

(1) In general

> The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to failures described in subsection (b)(1) shall be equal to . . .

National Federation of Independent Business v. Sebelius

567 U.S. 519 (2012)

■ CHIEF JUSTICE ROBERTS announced the judgment of the Court and delivered the opinion of the Court with respect to Part III-C, in which JUSTICES GINSBURG, BREYER, SOTOMAYOR, and KAGAN joined; and an opinion with respect to Parts III-B, and III-D.

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. [And] it is well established that if a statute has two possible meanings, one of which does violates the Constitution, courts should adopt the meaning that does not do so. [The] most straightforward reading of the mandate is that it commands individuals to purchase insurance. [But it is] 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.

[Granting] the Act the full measure of deference owed to federal statutes, it can so be 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. [The] requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which [must] assess and collect it "in the same manner as taxes." This process yields the essential feature of any tax: it produces at least some revenue for the Government. [It] is of course true that the Act describes the payment as a "penalty," not a "tax." [But] that label [does] not determine whether the payment may be viewed as an exercise of Congress's taxing power.

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[.] The reasons the Court in *Drexel Furniture* held that what was called a "tax" there was a penalty support the conclusion that what is called a "penalty" here may be viewed as a tax.[9]

None of this is to say that the payment is not intended to affect individual conduct. Although the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage. But taxes that seek to influence conduct are nothing new. Some of our earliest federal taxes sought to deter the purchase of imported manufactured goods in order to foster the growth of domestic industry. 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. [Indeed,] "[e]very tax is in some measure regulatory." That § 5000A seeks to shape decisions about whether to buy health insurance does not mean that it cannot be a valid exercise of the taxing power.

In distinguishing penalties from taxes, this Court has explained that "if the concept of penalty means anything, it means punishment for an unlawful act or omission." While the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful. Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. [Our] precedent demonstrates that Congress had the power to impose [the mandate] and that [it] need not be read to do more than impose a tax. That is sufficient to sustain it. The "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."

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

[Three] considerations allay this concern. First, and most importantly, it is abundantly clear the Constitution does not guarantee that individuals may avoid taxation through inactivity. A capitation, after all, is a tax that everyone must pay simply for existing, and capitations are expressly contemplated by the Constitution. [See Art. I, § 9, cl. 4.] [Thus, 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

[9] We do not suggest that any exaction lacking a scienter requirement and enforced by the IRS is within the taxing power. Congress could not, for example, expand its authority to impose criminal fines by creating strict liability offenses enforced by the IRS rather than the FBI. But the fact that the exaction here is paid like a tax, to the agency that collects taxes—rather than, for example, exacted by Department of Labor inspectors after ferreting out willful malfeasance—suggests that this exaction may be viewed as a tax.

is not without limits. A few of our cases policed these limits aggressively, invalidating punitive exactions obviously designed to regulate behavior otherwise regarded at the time as beyond federal authority. *See, e.g., Drexel Furniture*. [Because] the tax at hand is within even those strict limits, we need not here decide the precise point at which an exaction becomes so punitive that the taxing power does not authorize it.

[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[, imposing commands and] criminal sanctions. [By] contrast, Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. If a tax is properly paid, the Government has no power to compel or punish individuals subject to it.[11]

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

■ JUSTICES SCALIA, KENNEDY, THOMAS, and ALITO, dissenting.

Congress has attempted to regulate beyond the scope of its Commerce Clause authority, and § 5000A is therefore invalid. [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, the] issue is not whether Congress had the *power* to frame the minimum-coverage provision as a tax, but whether it *did* so. [In] this case, there is simply no way, "without doing violence to the fair meaning of the words used," to escape what Congress enacted: a mandate that individuals maintain minimum essential coverage, enforced by a penalty.

[Our] cases establish a clear line between a tax and a penalty: "'[A] tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act.'" 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 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

[11] Of course, individuals do not have a lawful choice not to pay a tax due, and may sometimes face prosecution for failing to do so[.] [Still,] those subject to the individual mandate may lawfully forgo health insurance and pay higher taxes, or buy health insurance and pay lower taxes. The only thing they may not lawfully do is buy health insurance and not pay the resulting tax.

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. The minimum coverage provision is found in 26 U.S.C. § 5000A, entitled "*Requirement* to maintain minimum essential coverage." It commands that every "applicable individual *shall*" [have minimum coverage]. [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. [The] fact that Congress (in its own words) "imposed . . . a penalty," § 5000A(b)(1), for failure to buy insurance is alone sufficient to render that failure unlawful.

[Against] the mountain of evidence that the minimum coverage requirement is what the statute calls it—a requirement— and that the penalty for its violation is what the statute calls it—a penalty—the Government brings forward the flimsiest of indications to the contrary. [The] manner of collection could perhaps suggest a tax if IRS penalty-collection were unheard of or rare. It is not. *See, e.g.*, [statutes providing for IRS-collectible penalties for various acts, such as failing to make campaign-finance disclosures]. Moreover, while the penalty is assessed and collected by the IRS, [the Department of Health and Human Services] is responsible for defining [the] substantive scope [of the required coverage]—a feature that would be quite extraordinary for taxes. [And] varying a penalty according to ability to pay is an utterly familiar practice. [Finally,] the *presence* of [a scienter] 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.

For all these reasons, to say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it. Judicial tax-writing is particularly troubling. Taxes have never been popular, see, *e.g.,* Stamp Act of 1765, and in part for that reason, the Constitution requires tax increases to originate in the House of Representatives. See Art. I, § 7, cl. 1. That is to say, they must originate in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next election, which is never more than two years off. [We] have no doubt that Congress knew precisely what it was doing when it rejected an earlier version of this legislation that imposed a tax instead of a requirement-with-penalty. 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.*

In the balance of this section, we'll turn from Congress's power to raise revenue through taxes to its power to "pay the Debts and provide for the common Defence and general Welfare of the United States." As noted earlier, the Court settled long ago that the notion of the "general Welfare" does not impose a meaningful, judicially enforceable constraint. See *supra*, p. II-121. Unsurprisingly, then, serious challenges to Congress's use of its spending power have been very rare in the modern era. Below, you'll read the two exceptions—*South Dakota v. Dole* (1987), in which the Court rebuffed a Spending Clause challenge over Justice O'Connor's dissent; and a final excerpt of *NFIB*, where the Court held that the ACA's Medicaid expansion did exceed Congress's spending authority.

South Dakota v. Dole

483 U.S. 203 (1987)

■ CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner South Dakota permits persons 19 years of age or older to purchase beer containing up to 3.2% alcohol. In 1984 Congress enacted 23 U.S.C. § 158, which directs the Secretary of Transportation to withhold [five percent of otherwise available] federal highway funds [from] States "in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful." The State [seeks] a declaratory judgment that § 158 violates the constitutional limitations on congressional exercise of the spending power[.]

[We] need not decide in this case whether [the Twenty-first] Amendment would prohibit an attempt by Congress to legislate directly a national

* [The Tax Cuts and Jobs Act of 2017, signed into law by President Trump, amended the Affordable Care Act to reduce the penalty for violating the individual mandate to zero dollars. Following this, several states sued to again challenge the Act's constitutionality, arguing that a zero-dollar penalty could not be characterized as a tax. In *California v. Texas*, 141 S. Ct. 2104 (2021), the Supreme Court held that the plaintiffs lacked "standing" under Article III to challenge the statute because they had not shown an injury traceable to it. The Court did not directly address the statute's constitutionality. —BE]

minimum drinking age.* Here, Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages. As we explain below, we find this legislative effort within constitutional bounds even if Congress may not regulate drinking ages directly.

The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." Art. I, § 8, cl. 1. Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with [federal] directives." The breadth of this power was made clear in *United States v. Butler* (1936) [*supra*, p. II-121], where the Court, resolving a longstanding debate over the scope of the Spending Clause, determined that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." Thus, objectives not thought to be within Article I's "enumerated legislative fields" may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

The spending power is of course not unlimited. [First,] the exercise of the spending power must be in pursuit of "the general welfare," [although] courts should defer substantially to the judgment of Congress [on that issue]. Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds.

South Dakota does not seriously claim that § 158 is inconsistent with any of the first three restrictions mentioned above. [Congress] found that the differing drinking ages in the States created particular incentives for young persons to combine their desire to drink with their ability to drive, and that this interstate problem required a national solution. The means it chose to address this dangerous situation were reasonably calculated to advance the general welfare. The conditions upon which States receive the funds, moreover, could not be more clearly stated by Congress. And the State [concedes] the germaneness of the condition to federal purposes[.] Indeed, the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel. This goal of the interstate highway system had been frustrated by varying drinking ages among the States. [By] enacting § 158, Congress

* [South Dakota had also argued that the statute violated the Twenty-first Amendment, but we are only considering the spending power issue. —BE]

conditioned the receipt of federal funds in a way reasonably calculated to address this particular impediment to a purpose for which the funds are expended.

[Finally,] the "independent constitutional bar" limitation on the spending power is not [a] prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, [it] stands for the unexceptional proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power. But no such claim can be or is made here. Were South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State's action in so doing would not violate the constitutional rights of anyone.

Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion." *Steward Machine Co. v. Davis* (1937).* Here, however, Congress has directed only that a State desiring to establish a minimum drinking age lower than 21 lose a relatively small percentage of certain federal highway funds. Petitioner contends that the coercive nature of this program is evident from the degree of success it has achieved. We cannot conclude, however, that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective.

When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact. "[E]very rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. [The law should be] guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems." *Steward Machine*.

Here Congress has offered a relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory but in fact. Even if Congress might lack the power

* [*Steward Machine* upheld the tax that the Social Security Act imposed on employers to fund unemployment compensation. Under the Act, employers received a credit against that tax for any payments into a qualifying *state* unemployment insurance program. The Court rejected the argument that this scheme "coerc[ed] the States" to adopt qualifying uninsurance programs "in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government." —BE]

to impose a national minimum drinking age directly, we conclude that encouragement to state action found in § 158 is a valid use of the spending power.

[Affirmed.]

■ JUSTICE O'CONNOR, dissenting.

[Section] 158 is not a condition on spending reasonably related to the expenditure of federal funds and cannot be justified on that ground. Rather, it is an attempt to regulate the sale of liquor, an attempt that lies outside Congress' power to regulate commerce because it falls within the ambit of § 2 of the Twenty-first Amendment.

[I] agree with the Court that Congress may attach conditions on the receipt of federal funds to further "the federal interest in particular national projects or programs." [But] the Court's application of the requirement that the condition imposed be reasonably related to the purpose for which the funds are expended is cursory and unconvincing. [In] my view, establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose.

[The] Court reasons that Congress wishes that the roads it builds may be used safely, that drunken drivers threaten highway safety, and that young people are more likely to drive while under the influence of alcohol under existing law than would be the case if there were a uniform national drinking age of 21. It hardly needs saying, however, that if the purpose of § 158 is to deter drunken driving, it is far too over- and under-inclusive. It is over-inclusive because it stops teenagers from drinking even when they are not about to drive on interstate highways. It is under-inclusive because teenagers pose only a small part of the drunken driving problem in this Nation.

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

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

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

[If] the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed." This, of course, [was] not the Framers' plan and it is not the meaning of the Spending Clause.*

National Federation of Independent Business v. Sebelius

567 U.S. 519 (2012)

* [JUSTICE BRENNAN filed a brief dissent asserting that, under the Twenty-first Amendment, only States are permitted to set a drinking age, and that the statute in effect abridged that right. —BE]

■ CHIEF JUSTICE ROBERTS announced the judgment of the Court and delivered an opinion with respect to Part IV, in which JUSTICES BREYER and KAGAN join.*

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. For example, the Act requires state programs to provide Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level, whereas many States now cover adults with children only if their income is considerably lower, and do not cover childless adults at all. The Act increases federal funding to cover the States' costs in expanding Medicaid coverage, although States will bear a portion of the costs on their own. 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[.]

IV.

A.

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

[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'

* [JUSTICES SCALIA, KENNEDY, THOMAS, and ALITO filed a joint opinion (reproduced in part below) that is styled as a dissent, but that agreed with CHIEF JUSTICE ROBERTS's analysis of the merits of the Spending Clause issue, making a majority for that holding (and leaving JUSTICE GINSBURG and JUSTICE SOTOMAYOR as the only dissenters from it). JUSTICES SCALIA, KENNEDY, THOMAS, and ALITO dissented from the Court's ultimate disposition of the challenge to the Medicaid expansion because they disagreed with CHIEF JUSTICE ROBERTS about the proper remedy for the constitutional violation. See *infra*, p. II-143. —BE]

"taking certain actions that Congress could not require them to take." [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.*'" 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.'" 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. [This] Court [has thus] scrutinize[d] Spending Clause legislation to ensure that Congress is not using financial inducements to exert a "power akin to undue influence." 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* [*supra*, p. II-97]. 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 a 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.

[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. The States are separate and independent sovereigns. Sometimes they have to act like it.

The States [here], however, argue that the Medicaid expansion is far from the typical case. They object that Congress has "crossed the line distinguishing encouragement from coercion," *New York* [*supra*, p. II-100], 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] 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.'" [We] found that the inducement was not impermissibly coercive, because Congress was offering only "relatively mild encouragement to the States." We observed that "all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5%" of her highway funds. In fact, the federal funds at stake constituted less than half of one percent of South Dakota's budget at the time.

[In] this case, the financial "inducement" Congress has chosen is much more than "relatively mild encouragement"—it is a gun to the head. Section 1396c of the Medicaid Act provides that if a State's Medicaid plan does not comply with the Act's requirements, the Secretary of Health and Human Services may declare that "further payments will not be made to the State." A State that opts out of the [ACA'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. 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. [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 expansion.[12]

Justice Ginsburg claims that *Dole* is distinguishable because here "Congress has not threatened to withhold funds earmarked for any other program." But that begs the question: The States contend that the expansion is in reality a new program and that Congress is forcing them to accept

[12] JUSTICE GINSBURG observes that state Medicaid spending will increase only by 0.8 percent after the expansion. [But] the size of the new financial burden imposed on a State is irrelevant in analyzing whether the State has been coerced into accepting that burden. "Your money or your life" is a coercive proposition, whether you have a single dollar in your pocket or $500.

it by threatening the funds for the existing Medicaid program. [If] the expansion is not properly viewed as a modification of the existing Medicaid program, Congress's decision to so title it is irrelevant.

Here, the Government claims that the Medicaid expansion is properly viewed merely as a modification of the existing program because the States agreed that Congress could change the terms of Medicaid when they signed on in the first place. But "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." A State confronted with [the original] statutory language reserving the right to "alter" or "amend" the pertinent provisions of the Social Security Act might reasonably assume that Congress was entitled to make adjustments to the Medicaid program as it developed. [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. [Now], 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. [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. The Court found it "[e]nough for present purposes that wherever the line may be, this statute is within it." 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," and that is what it is attempting to do with the Medicaid expansion.

■ JUSTICE GINSBURG, joined by JUSTICE SOTOMAYOR, concurring in part, concurring in the judgment in part, and dissenting in part.

[The] Chief Justice [concludes] that the 2010 expansion is unduly coercive [because] the threatened loss of funding is so large that the States have no real choice but to participate[.] The Chief Justice therefore—*for the first time ever*—finds an exercise of Congress' spending power unconstitutionally coercive. [But] States have no entitlement to receive any Medicaid funds; they enjoy only the opportunity to accept funds on Congress' terms. Future Congresses are not bound by their predecessors' dispositions; they have authority to spend federal revenue as they see fit. The Federal Government, therefore, is not, as The Chief Justice charges, threatening States with the loss of "existing" funds from one spending program in order to induce them to opt into another program. Congress is simply requiring States to do what States have long been required to do to receive Medicaid funding: comply with the conditions Congress prescribes for participation.

B.

[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. [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. In the leading decision in this area, *South Dakota v. Dole*, the Court identified four criteria [for funding conditions:] (1) promote the "general welfare," (2) "unambiguously" inform States what is demanded of them, (3) be germane "to the federal interest in particular national projects or programs," and (4) not "induce the States to engage in activities that would themselves be unconstitutional. The Court in *Dole* mentioned, but did not adopt, a further limitation, one hypothetically raised a half-century earlier: In "some circumstances," Congress might be prohibited from offering a "financial inducement . . . so coercive as to pass the point at which 'pressure turns into compulsion.'" 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.

[This] litigation does not present the concerns that led the Court in *Dole* even to consider the prospect of coercion. In *Dole*, the condition—set 21 as the minimum drinking age—did not tell the States how to use funds Congress provided for highway construction. Further, in view of the Twenty-First Amendment, it was an open question whether Congress could directly impose a national minimum drinking age. The ACA, in contrast, relates solely to the federally funded Medicaid program; if States choose not to comply, Congress has not threatened to withhold funds earmarked for any other program. Nor does the ACA use Medicaid funding to induce States to take action Congress itself could not undertake. The Federal Government undoubtedly could operate its own health-care program for poor persons, just as it operates Medicare for seniors' health care.

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

[According to the Chief Justice,] the ACA did not really "extend" Medicaid; instead, Congress created an entirely new program to coexist with the old. [But] in truth, [the ACA] simply reaches more of America's poor than Congress originally covered. Medicaid was created to enable States to provide medical assistance to "needy persons." By bringing health care within the reach of a larger population of Americans unable to afford it, the Medicaid expansion is an extension of that basic aim.

[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?

[Consider] also that Congress could have repealed Medicaid. Thereafter, Congress could have enacted Medicaid II, a new program combining the pre-2010 coverage with the expanded coverage required by the ACA. By what right does a court stop Congress from building up without first tearing down?

2

[The] Chief Justice finds the Medicaid expansion vulnerable because it took participating States by surprise. ["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. [The change] 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. [Conditions] on federal funds [must] 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.

3

[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. [At] bottom, my colleagues' position is that the States' reliance on federal funds limits Congress' authority to alter its spending programs. This gets things backwards: Congress, not the States, is tasked with spending federal money in service of the general welfare. And each successive Congress is empowered to appropriate funds as it sees fit. When the 110th Congress reached a conclusion about Medicaid funds that differed from its predecessors' views, it abridged no State's right to "existing" or "pre-existing" funds. For, in fact, there are no such funds. There is only money States *anticipate* receiving from future Congresses.

■ JUSTICES SCALIA, KENNEDY, THOMAS, and ALITO, dissenting.

[The] 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. [Recognizing] this potential for abuse, our cases have long held that the power to attach conditions to grants to the States has limits. [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. [The] Federal Government suggests that it is sufficient is States are "free, *as a matter of law*, to turn down" federal funds. [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.

[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. [Moreover, in] crafting the ACA, Congress clearly expressed its informed view that no State could possibly refuse the offer that the ACA extends. The stated goal of the ACA is near-universal health care coverage. [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.

[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. [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.

Seven Members of the Court agree that the Medicaid Expansion, as enacted by Congress, is unconstitutional. [The] most natural remedy would be to invalidate the Medicaid Expansion. [But] the Government [suggests, and the majority agrees, that the Court should simply allow] States that reject [the expansion] to retain their pre-existing Medicaid funds. [This] remedy introduces a new dynamic: States must choose between expanding Medicaid or paying huge tax sums to the federal fisc for the sole benefit of expanding Medicaid in other States. [The Court's holding] takes the ACA and this Nation in a new direction and charts a course for federalism that the Court, not the Congress, has chosen; but under the Constitution, that power and authority do not rest with this Court.

COERCION AND "UNCONSTITUTIONAL CONDITIONS"

Making sense of the *NFIB* Court's coercion holding seems to require some account of the difference between a coercive threat, on the one hand, and a tempting offer, on the other. Yet it also seems clear that the difference cannot ride on the sheer magnitude of the "financial inducement" (or the corresponding degree of felt "compulsion"). After all, a generous offer will often exert more influence on a decision than a mild threat. Compare these propositions:

1. If you wash my car, I'll give you $10 million. (If you don't, I won't.)
2. If you wash my car, I'll grade your exam for this class. (If you don't, I'll skip your exam and automatically give you a P.)

Which proposal gives you a stronger motive to wash my car? But which one is more aptly described as a threat or attempt at coercion?

This contrast might suggest that, instead of distinguishing threats from offers based on the magnitude of the inducement, we should ground the distinction in some baseline assessment of the recipient's entitlements. And Chief Justice Roberts's opinion does seem at times to be positing an entitlement, on the part of the states, to participate in the pre-existing Medicaid program—a right akin to your pre-existing right that I grade your exam. If there were such a right, that would cleanly explain why conditioning the pre-existing Medicaid funds on a new obligation is a coercive threat.

The problem is that, as Justice Ginsburg emphasized, it is very implausible that states *do* have a constitutional entitlement to the indefinite continuation of this particular federal spending program. Does Chief Justice Roberts really think that, if an ultra-conservative Congress decided to get out of the business of funding health insurance for poor people, the repeal of Medicaid would violate some constitutional right of the states? Notice, too, that neither Roberts's opinion nor the joint dissent ever disputes Justice Ginsburg's assertion that Congress could repeal and later replace Medicaid if it so chose.

Is there another way to charitably reconstruct the logic of the Court's Medicaid holding then—one that avoids relying solely on the magnitude of the incentive, but also avoids positing a perpetual entitlement to the Medicaid status quo? According to one notable suggestion in the literature, the key is recognizing the conditional spending problem in *NFIB* (and *Dole*) as "just an instance of the more general problem of 'unconstitutional conditions'"—that is, the recurring "puzzle regarding whether and under what circumstances it is constitutionally permissible for government to condition a benefit on an offeree's exercising or not exercising its constitutional rights in some preferred way."[*]

Consider, for instance, a federal program that made grants to nonprofit organizations to combat HIV/AIDS but required all funding recipients to "have a policy explicitly opposing prostitution."[†] Mandating such a position statement outright (as opposed to making it a funding condition) would plainly violate the First Amendment. And in a case decided just a year after *NFIB*, the Court held that imposing the grant condition was unconstitutional as well.[‡] Summarizing the Court's unconstitutional conditions cases in the First Amendment context, Chief Justice Roberts posited that "the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself." Is that a useful analogy for thinking about the propriety of the conditional offers at issue in *Dole* and *NFIB*?

[*] Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in Unconstitutional Conditions*, 91 Tex. L. Rev. 1283, 1287–88 (2013). The discussion here draws on that paper and a precursor, Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 Geo. L.J. 1 (2001).

[†] 22 U.S.C. § 7631(f).

[‡] U.S. Agency for Int'l Development v. Alliance for Open Society Int'l, 133 S. Ct. 2321, 2328 (2013).