CONSTITUTIONAL LAW: STUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM

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TABLE OF CONTENTS

CHAPTER 2

SEPARATION OF POWERS: CONSTITUTIONAL CHECKS AND BALANCES

Page 169: [Add as new section §2.03[G]]:

§2.03 [G] Controlling the Removal of Officials

FREE ENTERPRISE FUND v. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

United States Supreme Court.
__ U.S. __, *130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010)*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court. . . .

We are asked. . . to consider a new situation not yet encountered by the Court. The question is whether these separate layers of protection may be combined. May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?

We hold that such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President. The President cannot "take Care that the Laws be faithfully executed" if he cannot oversee the faithfulness of the officers who execute them. Here the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President's determination, and whom the President cannot remove simply because that officer disagrees with him. This contravenes the President's "constitutional obligation to ensure the faithful execution of the laws." *Id.*, at 693.

I

A

After a series of celebrated accounting debacles, Congress enacted the Sarbanes-Oxley Act of 2002 (or Act), 116 Stat. 745. Among other measures, the Act introduced tighter regulation of the accounting industry under a new Public Company Accounting Oversight Board. The Board is composed of five members, appointed to staggered 5-year terms by the Securities and Exchange Commission. It was modeled on private self-regulatory organizations in the securities industry—such as the New York Stock Exchange—that investigate and discipline their own members

subject to Commission oversight. Congress created the Board as a private "nonprofit corporation," and Board members and employees are not considered Government "officer[s] or employee[s]" for statutory purposes. 15 U. S. C. §§7211(a), (b). The Board can thus recruit its members and employees from the private sector by paying salaries far above the standard Government pay scale.

Unlike the self-regulatory organizations, however, the Board is a Government-created, Government-appointed entity, with expansive powers to govern an entire industry. Every accounting firm—both foreign and domestic—that participates in auditing public companies under the securities laws must register with the Board, pay it an annual fee, and comply with its rules and oversight. §§7211(a), 7212(a), (f), 7213, 7216(a)(1). The Board is charged with enforcing the Sarbanes-Oxley Act, the securities laws, the Commission's rules, its own rules, and professional accounting standards. §§7215(b)(1), (c)(4). To this end, the Board may regulate every detail of an accounting firm's practice, including hiring and professional development, promotion, supervision of audit work, the acceptance of new business and the continuation of old, internal inspection procedures, professional ethics rules, and "such other requirements as the Board may prescribe." §7213(a)(2)(B).

The Board promulgates auditing and ethics standards, performs routine inspections of all accounting firms, demands documents and testimony, and initiates formal investigations and disciplinary proceedings. §§7213–7215 (2006 ed. and Supp. II). The willful violation of any Board rule is treated as a willful violation of the Securities Exchange Act of 1934, 48 Stat. 881, 15 U. S. C. §78a *et seq.*—a federal crime punishable by up to 20 years' imprisonment or $25 million in fines ($5 million for a natural person). §§78ff(a), 7202(b)(1) (2006 ed.). And the Board itself can issue severe sanctions in its disciplinary proceedings, up to and including the permanent revocation of a firm's registration, a permanent ban on a person's associating with any registered firm, and money penalties of $15 million ($750,000 for a natural person). §7215(c)(4). Despite the provisions specifying that Board members are not Government officials for statutory purposes, the parties agree that the Board is "part of the Government" for constitutional purposes, *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 397 (1995), and that its members are " 'Officers of the United States' " who "exercis[e] significant authority pursuant to the laws of the United States," *Buckley* v. *Valeo*, 424 U. S. 1, 125–126 (1976) (*per curiam*) (quoting Art. II, §2, cl. 2).

The Act places the Board under the SEC's oversight, particularly with respect to the issuance of rules or the imposition of sanctions (both of which are subject to Commission approval and alteration). §§7217(b)–(c). But the individual members of the Board—like the officers and directors of the self-regulatory organizations—are substantially insulated from the Commission's control. The Commission cannot remove Board members at will, but only "for good cause shown," "in accordance with" certain procedures. §7211(e)(6).

Those procedures require a Commission finding, "on the record" and "after notice and opportunity for a hearing," that the Board member

"(A) has willfully violated any provision of th[e] Act, the rules of the Board, or the securities laws;

"(B) has willfully abused the authority of that member; or

"(C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof." §7217(d)(3).

Removal of a Board member requires a formal Commission order and is subject to judicial review. See 5 U. S. C. §§554(a), 556(a), 557(a), (c)(B); 15 U. S. C. §78y(a)(1). Similar procedures govern the Commission's removal of officers and directors of the private self-regulatory organizations. See §78s(h)(4). The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of "inefficiency, neglect of duty, or malfeasance in office," 295 U. S., at 620 (internal quotation marks omitted); and we decide the case with that understanding.

B

Beckstead and Watts, LLP, is a Nevada accounting firm registered with the Board. The Board inspected the firm, released a report critical of its auditing procedures, and began a formal investigation. Beckstead and Watts and the Free Enterprise Fund, a nonprofit organization of which the firm is a member, then sued the Board and its members, seeking (among other things) a declaratory judgment that the Board is unconstitutional and an injunction preventing the Board from exercising its powers.

Before the District Court, petitioners argued that the Sarbanes-Oxley Act contravened the separation of powers by conferring wide-ranging executive power on Board members without subjecting them to Presidential control. Petitioners also challenged the Act under the Appointments Clause, which requires "Officers of the United States" to be appointed by the President with the Senate's advice and consent. Art. II, §2, cl. 2. The Clause provides an exception for "inferior Officers," whose appointment Congress may choose to vest "in the President alone, in the Courts of Law, or in the Heads of Departments." *Ibid.* Because the Board is appointed by the SEC, petitioners argued that (1) Board members are not "inferior Officers" who may be appointed by "Heads of Departments"; (2) even if they are, the Commission is not a "Departmen[t]"; and (3) even if it is, the several Commissioners (as opposed to the Chairman) are not its "Hea[d]." The United States intervened to defend the Act's constitutionality. Both sides moved for summary judgment; the District Court determined that it had jurisdiction and granted summary judgment to respondents.

A divided Court of Appeals affirmed. 537 F. 3d 667 (CADC 2008). It agreed that the District Court had jurisdiction over petitioners' claims. *Id.*, at 671. On the merits, the Court of Appeals recognized that the removal issue was "a question of first impression," as neither that court nor this one "ha[d] considered a situation where a restriction on removal passes through two levels of control." *Id.*, at 679. It ruled that the dual restraints on Board members' removal are permissible because they do not "render the President unable to perform his constitutional duties." *Id.*, at 683. The majority reasoned that although the President "does not directly select or supervise the Board's members," *id.*, at 681, the Board is subject to the comprehensive control of the

Commission, and thus the President's influence over the Commission implies a constitutionally sufficient influence over the Board as well. *Id.*, at 682–683. The majority also held that Board members are inferior officers subject to the Commission's direction and supervision, *id.*, at 672–676, and that their appointment is otherwise consistent with the Appointments Clause, *id.*, at 676–678. . . .

II . . .

[The Court first held that the federal courts had jurisdiction to consider petitioners' claims.]

III

We hold that the dual for-cause limitations on the removal of Board members contravene the Constitution's separation of powers.

A . . .

The removal of executive officers was discussed extensively in Congress when the first executive departments were created. The view that "prevailed, as most consonant to the text of the Constitution" and "to the requisite responsibility and harmony in the Executive Department," was that the executive power included a power to oversee executive officers through removal; because that traditional executive power was not "expressly taken away, it remained with the President." Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 Documentary History of the First Federal Congress 893 (2004). "This Decision of 1789 provides contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument." *Bowsher* v. *Synar*, 478 U. S. 714, 723–724 (1986) (internal quotation marks omitted). And it soon became the "settled and well understood construction of the Constitution." *Ex parte Hennen*, 13 Pet. 230, 259 (1839).

The landmark case of *Myers* v. *United States* reaffirmed the principle that Article II confers on the President "the general administrative control of those executing the laws." 272 U. S., at 164. It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman's famous phrase. As we explained in *Myers*, the President therefore must have some "power of removing those for whom he can not continue to be responsible." *Id.*, at 117.

Nearly a decade later in *Humphrey's Executor*, this Court held that *Myers* did not prevent Congress from conferring good-cause tenure on the principal officers of certain independent agencies. That case concerned the members of the Federal Trade Commission, who held 7-year terms and could not be removed by the President except for " 'inefficiency, neglect of duty, or malfeasance in office.' " 295 U. S., at 620 (quoting 15 U. S. C. §41). The Court distinguished *Myers* on the ground that *Myers* concerned "an officer [who] is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is." 295 U. S., at 627. By contrast,

the Court characterized the FTC as "quasi-legislative and quasi-judicial" rather than "purely executive," and held that Congress could require it "to act … independently of executive control." *Id.*, at 627–629. Because "one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will," the Court held that Congress had power to "fix the period during which [the Commissioners] shall continue in office, and to forbid their removal except for cause in the meantime." *Id.*, at 629.

Humphrey's Executor did not address the removal of inferior officers, whose appointment Congress may vest in heads of departments. If Congress does so, it is ordinarily the department head, rather than the President, who enjoys the power of removal. See *Myers*, *supra*, at 119, 127; *Hennen*, *supra*, at 259–260. This Court has upheld for-cause limitations on that power as well. . . .

We again considered the status of inferior officers in *Morrison*. . . . We recognized that the independent counsel was undoubtedly an executive officer, rather than " 'quasi-legislative' " or " 'quasi-judicial,' " but we stated as "our present considered view" that Congress had power to impose good-cause restrictions on her removal. 487 U. S., at 689–691. The Court noted that the statute "g[a]ve the Attorney General," an officer directly responsible to the President and "through [whom]" the President could act, "several means of supervising or controlling" the independent counsel—"[m]ost importantly … the power to remove the counsel for good cause." *Id.*, at 695–696 (internal quotation marks omitted). Under those circumstances, the Court sustained the statute. *Morrison* did not, however, address the consequences of more than one level of good-cause tenure—leaving the issue, as both the court and dissent below recognized, "a question of first impression" in this Court. 537 F. 3d, at 679; see *id.*, at 698 (dissenting opinion).

B

As explained, we have previously upheld limited restrictions on the President's removal power. In those cases, however, only one level of protected tenure separated the President from an officer exercising executive power. It was the President — or a subordinate he could remove at will — who decided whether the officer's conduct merited removal under the good-cause standard.

The Act before us does something quite different. It not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President's direct control. The result is a Board that is not accountable to the President, and a President who is not responsible for the Board.

The added layer of tenure protection makes a difference. Without a layer of insulation between the Commission and the Board, the Commission could remove a Board member at any time, and therefore would be fully responsible for what the Board does. The President could then hold the Commission to account for its supervision of the Board, to the same extent that he may hold the Commission to account for everything else it does.

A second level of tenure protection changes the nature of the President's review. Now the

Commission cannot remove a Board member at will. The President therefore cannot hold the Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else that it does. The Commissioners are not responsible for the Board's actions. They are only responsible for their own determination of whether the Act's rigorous good-cause standard is met. And even if the President disagrees with their determination, he is powerless to intervene—unless that determination is so unreasonable as to constitute "inefficiency, neglect of duty, or malfeasance in office." *Humphrey's Executor*, 295 U. S., at 620 (internal quotation marks omitted).

This novel structure does not merely add to the Board's independence, but transforms it. Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.

That arrangement is contrary to Article II's vesting of the executive power in the President. Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct. He is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. This violates the basic principle that the President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions of the Executive Branch." *Clinton* v. *Jones*, 520 U. S. 681, 712–713 (1997) (Breyer, J., concurring in judgment).

Indeed, if allowed to stand, this dispersion of responsibility could be multiplied. If Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third? At oral argument, the Government was unwilling to concede that even *five* layers between the President and the Board would be too many. The officers of such an agency—safely encased within a Matryoshka doll of tenure protections—would be immune from Presidential oversight, even as they exercised power in the people's name.

Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents, see *Freytag* v. *Commissioner*, 501 U. S. 868, 879–880 (1991), nor on whether "the encroached-upon branch approves the encroachment," *New York* v. *United States*, 505 U. S. 144, 182 (1992). The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own.

The diffusion of power carries with it a diffusion of accountability. The people do not vote for the "Officers of the United States." Art. II, §2, cl. 2. They instead look to the President to guide the "assistants or deputies … subject to his superintendence." The Federalist No. 72, p. 487 (J. Cooke ed. 1961) (A. Hamilton). Without a clear and effective chain of command, the public cannot "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." *Id.*, No. 70, at 476 (same). That is why the Framers

sought to ensure that "those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." 1 Annals of Cong., at 499 (J. Madison).

By granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers.

C

Respondents and the dissent resist this conclusion, portraying the Board as "the kind of practical accommodation between the Legislature and the Executive that should be permitted in a 'workable government.' " *Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U. S. 252, 276 (1991) (*MWAA*) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring)); see, *e.g.*, *post*, at 6 (opinion of Breyer, J.). . . .

No one doubts Congress's power to create a vast and varied federal bureaucracy. But where, in all this, is the role for oversight by an elected President? The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws. And the " 'fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution,' " for " '[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.' " *Bowsher*, 478 U. S., at 736 (quoting *Chadha*, 462 U. S., at 944).

One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people. This concern is largely absent from the dissent's paean to the administrative state. . . .

In fact, the multilevel protection that the dissent endorses "provides a blueprint for extensive expansion of the legislative power." *MWAA*, *supra*, at 277. In a system of checks and balances, "[p]ower abhors a vacuum," and one branch's handicap is another's strength. 537 F. 3d, at 695, n. 4 (Kavanaugh, J., dissenting) (internal quotation marks omitted). "Even when a branch does not arrogate power to itself," therefore, it must not "impair another in the performance of its constitutional duties." *Loving* v. *United States*, 517 U. S. 748, 757 (1996). Congress has plenary control over the salary, duties, and even existence of executive offices. Only Presidential oversight can counter its influence. That is why the Constitution vests certain powers in the President that "the Legislature has no right to diminish or modify." 1 Annals of Cong., at 463 (J. Madison).

The Framers created a structure in which "[a] dependence on the people" would be the "primary

controul on the government." The Federalist No. 51, at 349 (J. Madison). That dependence is maintained, not just by "parchment barriers," *id.*, No. 48, at 333 (same), but by letting "[a]mbition … counteract ambition," giving each branch "the necessary constitutional means, and personal motives, to resist encroachments of the others," *id.*, No. 51, at 349. A key "constitutional means" vested in the President — perhaps *the* key means — was "the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong., at 463. And while a government of "opposite and rival interests" may sometimes inhibit the smooth functioning of administration, The Federalist No. 51, at 349, "[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Bowsher*, *supra*, at 730.

Calls to abandon those protections in light of "the era's perceived necessity," *New York*, 505 U. S., at 187, are not unusual. Nor is the argument from bureaucratic expertise limited only to the field of accounting. The failures of accounting regulation may be a "pressing national problem," but "a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse." *Id.*, at 187–188. Neither respondents nor the dissent explains why the Board's task, unlike so many others, requires *more* than one layer of insulation from the President—or, for that matter, why only two. The point is not to take issue with for-cause limitations in general; we do not do that. The question here is far more modest. We deal with the unusual situation, never before addressed by the Court, of two layers of for-cause tenure. And though it may be criticized as "elementary arithmetical logic," two layers are not the same as one.

The President has been given the power to oversee executive officers; he is not limited, as in Harry Truman's lament, to "persuad[ing]" his unelected subordinates "to do what they ought to do without persuasion." In its pursuit of a "workable government," Congress cannot reduce the Chief Magistrate to a cajoler-in-chief.

D

The United States concedes that some constraints on the removal of inferior executive officers might violate the Constitution. It contends, however, that the removal restrictions at issue here do not.

To begin with, the Government argues that the Commission's removal power over the Board is "broad," and could be construed as broader still, if necessary to avoid invalidation. But the Government does not contend that simple disagreement with the Board's policies or priorities could constitute "good cause" for its removal. Nor do our precedents suggest as much. *Humphrey's Executor*, for example, rejected a removal premised on a lack of agreement " 'on either the policies or the administering of the Federal Trade Commission,' " because the FTC was designed to be " 'independent in character,' " "free from 'political domination or control,' " and not " 'subject to anybody in the government' " or " 'to the orders of the President.' " 295 U. S., at 619, 625. Accord, *Morrison*, 487 U. S., at 693 (noting that "the congressional determination to limit the removal power of the Attorney General was essential . . . to establish the necessary independence of the office"); *Wiener* v. *United States*, 357 U. S. 349, 356 (1958) (describing for-cause removal as "involving the rectitude" of an officer). And here there is

judicial review of any effort to remove Board members, see 15 U. S. C. §78y(a)(1), so the Commission will not have the final word on the propriety of its own removal orders. The removal restrictions set forth in the statute mean what they say.

Indeed, this case presents an even more serious threat to executive control than an "ordinary" dual for-cause standard. Congress enacted an unusually high standard that must be met before Board members may be removed. A Board member cannot be removed except for willful violations of the Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance—as determined in a formal Commission order, rendered on the record and after notice and an opportunity for a hearing. §7217(d)(3); see §78y(a). The Act does not even give the Commission power to fire Board members for violations of *other* laws that do not relate to the Act, the securities laws, or the Board's authority. The President might have less than full confidence in, say, a Board member who cheats on his taxes; but that discovery is not listed among the grounds for removal under §7217(d)(3).

The rigorous standard that must be met before a Board member may be removed was drawn from statutes concerning private organizations like the New York Stock Exchange. Cf. §§78s(h)(4), 7217(d)(3). While we need not decide the question here, a removal standard appropriate for limiting Government control over private bodies may be inappropriate for officers wielding the executive power of the United States.

Alternatively, respondents portray the Act's limitations on removal as irrelevant, because—as the Court of Appeals held—the Commission wields "at-will removal power over Board *functions* if not Board members." 537 F. 3d, at 683 (emphasis added). The Commission's general "oversight and enforcement authority over the Board," §7217(a), is said to "blun[t] the constitutional impact of for-cause removal," 537 F. 3d, at 683, and to leave the President no worse off than "if Congress had lodged the Board's functions in the SEC's own staff."

Broad power over Board functions is not equivalent to the power to remove Board members. The Commission may, for example, approve the Board's budget, §7219(b), issue binding regulations, §§7202(a), 7217(b)(5), relieve the Board of authority, §7217(d)(1), amend Board sanctions, §7217(c), or enforce Board rules on its own, §§7202(b)(1), (c). But altering the budget or powers of an agency as a whole is a problematic way to control an inferior officer. The Commission cannot wield a free hand to supervise individual members if it must destroy the Board in order to fix it.

Even if Commission power over Board activities could substitute for authority over its members, we would still reject respondents' premise that the Commission's power in this regard is plenary. As described above, the Board is empowered to take significant enforcement actions, and does so largely independently of the Commission. Its powers are, of course, subject to some latent Commission control. But the Act nowhere gives the Commission effective power to start, stop, or alter individual Board investigations, executive activities typically carried out by officials within the Executive Branch.

The Government and the dissent suggest that the Commission could govern and direct the Board's daily exercise of prosecutorial discretion by promulgating new SEC rules, or by

amending those of the Board. Enacting general rules through the required notice and comment procedures is obviously a poor means of micromanaging the Board's affairs. So the Government offers another proposal, that the Commission require the Board by rule to "secure SEC approval for any actions that it now may take itself." That would surely constitute one of the "limitations upon the activities, functions, and operations of the Board" that the Act forbids, at least without Commission findings equivalent to those required to fire the Board instead. §7217(d)(2). The Board thus has significant independence in determining its priorities and intervening in the affairs of regulated firms (and the lives of their associated persons) without Commission preapproval or direction.

Finally, respondents suggest that our conclusion is contradicted by the past practice of Congress. But the Sarbanes-Oxley Act is highly unusual in committing substantial executive authority to officers protected by two layers of for-cause removal—including at one level a sharply circumscribed definition of what constitutes "good cause," and rigorous procedures that must be followed prior to removal.

The parties have identified only a handful of isolated positions in which inferior officers might be protected by two levels of good-cause tenure. . . . The dissent here suggests that other such positions might exist, and complains that we do not resolve their status in this opinion. The dissent itself, however, stresses the very size and variety of the Federal Government, and those features discourage general pronouncements on matters neither briefed nor argued here. In any event, the dissent fails to support its premonitions of doom; none of the positions it identifies are similarly situated to the Board. . . .

Finally, the dissent wanders far afield when it suggests that today's opinion might increase the President's authority to remove military officers. Without expressing any view whatever on the scope of that authority, it is enough to note that we see little analogy between our Nation's armed services and the Public Company Accounting Oversight Board. . . .

IV

Petitioners' complaint argued that the Board's "freedom from Presidential oversight and control" rendered it "and all power and authority exercised by it" in violation of the Constitution. We reject such a broad holding. Instead, we agree with the Government that the unconstitutional tenure provisions are severable from the remainder of the statute. . . .

V

Petitioners raise three more challenges to the Board under the Appointments Clause. None has merit.

First, petitioners argue that Board members are principal officers requiring Presidential appointment with the Senate's advice and consent. We held in *Edmond* v. *United States*, 520 U. S. 651, 662–663 (1997), that "[w]hether one is an 'inferior' officer depends on whether he has a superior," and that " 'inferior officers' are officers whose work is directed and supervised at some level" by other officers appointed by the President with the Senate's consent. In particular,

we noted that "[t]he power to remove officers" at will and without cause "is a powerful tool for control" of an inferior. *Id.*, at 664. As explained above, the statutory restrictions on the Commission's power to remove Board members are unconstitutional and void. Given that the Commission is properly viewed, under the Constitution, as possessing the power to remove Board members at will, and given the Commission's other oversight authority, we have no hesitation in concluding that under *Edmond* the Board members are inferior officers whose appointment Congress may permissibly vest in a "Hea[d] of Departmen[t]."

But, petitioners argue, the Commission is not a "Departmen[t]" like the "Executive departments" (*e.g.*, State, Treasury, Defense) listed in 5 U. S. C. §101. In *Freytag*, 501 U. S., at 887, n. 4, we specifically reserved the question whether a "principal agenc[y], such as … the Securities and Exchange Commission," is a "Departmen[t]" under the Appointments Clause. Four Justices, however, would have concluded that the Commission is indeed such a "Departmen[t]," see *id.*, at 918 (SCALIA, J., concurring in part and concurring in judgment), because it is a "free-standing, self-contained entity in the Executive Branch," *id.*, at 915.

Respondents urge us to adopt this reasoning as to those entities not addressed by our opinion in *Freytag*, and we do. Respondents' reading of the Appointments Clause is consistent with the common, near-contemporary definition of a "department" as a "separate allotment or part of business; a distinct province, in which a class of duties are allotted to a particular person." 1 N. Webster, American Dictionary of the English Language (1828) (def. 2) (1995 facsimile ed.). It is also consistent with the early practice of Congress, which in 1792 authorized the Postmaster General to appoint "an assistant, and deputy postmasters, at all places where such shall be found necessary," §3, 1 Stat. 234—thus treating him as the "Hea[d] of [a] Departmen[t]" without the title of Secretary or any role in the President's Cabinet. And it is consistent with our prior cases, which have never invalidated an appointment made by the head of such an establishment. See *Freytag*, *supra*, at 917; cf. *Burnap* v. *United States*, 252 U. S. 512, 515 (1920); *United States* v. *Germaine*, 99 U. S. 508, 511 (1879). Because the Commission is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a "Departmen[t]" for the purposes of the Appointments Clause.

But petitioners are not done yet. They argue that the full Commission cannot constitutionally appoint Board members, because only the Chairman of the Commission is the Commission's "Hea[d]." The Commission's powers, however, are generally vested in the Commissioners jointly, not the Chairman alone. See, *e.g.*, 15 U. S. C. §§77s, 77t, 78u, 78w. The Commissioners do not report to the Chairman, who exercises administrative and executive functions subject to the full Commission's policies. See Reorg. Plan No. 10 of 1950, §1(b)(1), 64 Stat. 1265. The Chairman is also appointed from among the Commissioners by the President alone, *id.*, §3, at 1266, which means that he cannot be regarded as "the head of an agency" for purposes of the Reorganization Act. See 5 U. S. C. §904. (The Commission as a whole, on the other hand, does meet the requirements of the Act, including its provision that "the head of an agency [may] be an individual or a commission or board with more than one member.")

As a constitutional matter, we see no reason why a multimember body may not be the "Hea[d]" of a "Departmen[t]" that it governs. The Appointments Clause necessarily contemplates collective appointments by the "Courts of Law," Art. II, §2, cl. 2, and each House of Congress,

too, appoints its officers collectively, see Art. I, §2, cl. 5; *id.*, §3, cl. 5. Petitioners argue that the Framers vested the nomination of principal officers in the President to avoid the perceived evils of collective appointments, but they reveal no similar concern with respect to inferior officers, whose appointments may be vested elsewhere, including in multimember bodies. Practice has also sanctioned the appointment of inferior officers by multimember agencies. See *Freytag*, *supra*, at 918 (SCALIA, J., concurring in part and concurring in judgment); see also Classification Act of 1923, ch. 265, §2, 42 Stat. 1488 (defining "the head of the department" to mean "the officer *or group of officers* … who are not subordinate or responsible to any other officer of the department" (emphasis added)); 37 Op. Atty. Gen. 227, 231 (1933) (endorsing collective appointment by the Civil Service Commission). We conclude that the Board members have been validly appointed by the full Commission.

In light of the foregoing, petitioners are not entitled to broad injunctive relief against the Board's continued operations. But they are entitled to declaratory relief sufficient to ensure that the reporting requirements and auditing standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive. See *Bowsher*, 478 U. S., at 727, n. 5 (concluding that a separation of powers violation may create a "here-and-now" injury that can be remedied by a court (internal quotation marks omitted)).

* * *

The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else. Such diffusion of authority "would greatly diminish the intended and necessary responsibility of the chief magistrate himself." The Federalist No. 70, at 478.

While we have sustained in certain cases limits on the President's removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President's authority in this way.

The judgment of the United States Court of Appeals for the District of Columbia Circuit is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE SOTOMAYOR join, Dissenting. . . .

I agree that the Accounting Board members are inferior officers. See *ante*, at 28–29. But in my view the statute does not significantly interfere with the President's "executive Power." Art. II, §1. It violates no separation-of-powers principle. And the Court's contrary holding threatens to disrupt severely the fair and efficient administration of the laws. I consequently dissent.

I

A

The legal question before us arises at the intersection of two general constitutional principles. On the one hand, Congress has broad power to enact statutes "necessary and proper" to the exercise of its specifically enumerated constitutional authority. Art. I, §8, cl. 18. As Chief Justice Marshall wrote for the Court nearly 200 years ago, the Necessary and Proper Clause reflects the Framers' efforts to create a Constitution that would "endure for ages to come." *McCulloch* v. *Maryland*, 4 Wheat. 316, 415 (1819). It embodies their recognition that it would be "unwise" to prescribe "the means by which government should, in all future time, execute its powers." *Ibid.* Such "immutable rules" would deprive the Government of the needed flexibility to respond to future "exigencies which, if foreseen at all, must have been seen dimly." *Ibid.* Thus the Necessary and Proper Clause affords Congress broad authority to "create" governmental " 'offices' " and to structure those offices "as it chooses." *Buckley* v. *Valeo*, 424 U. S. 1, 138 (1976) *(per curiam);* cf. *Lottery Case*, 188 U. S. 321, 355 (1903). And Congress has drawn on that power over the past century to create numerous federal agencies in response to "various crises of human affairs" as they have arisen. *McCulloch*, *supra*, at 415 (emphasis deleted). Cf. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 36–37 (1950).

On the other hand, the opening sections of Articles I, II, and III of the Constitution separately and respectively vest "all legislative Powers" in Congress, the "executive Power" in the President, and the "judicial Power" in the Supreme Court (and such "inferior Courts as Congress may from time to time ordain and establish"). In doing so, these provisions imply a structural separation-of-powers principle. See, *e.g.*, *Miller* v. *French*, 530 U. S. 327, 341–342 (2000). And that principle, along with the instruction in Article II, §3 that the President "shall take Care that the Laws be faithfully executed," limits Congress' power to structure the Federal Government. See, *e.g.*, *INS* v. *Chadha*, 462 U. S. 919, 946 (1983); *Freytag* v. *Commissioner*, 501 U. S. 868, 878 (1991); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 64 (1982); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 859–860 (1986). Indeed, this Court has held that the separation-of-powers principle guarantees the President the authority to dismiss certain Executive Branch officials at will. *Myers* v. *United States*, 272 U. S. 52 (1926).

But neither of these two principles is absolute in its application to removal cases. The Necessary and Proper Clause does not grant Congress power to free *all* Executive Branch officials from dismissal at the will of the President. *Ibid.* Nor does the separation-of-powers principle grant the President an absolute authority to remove *any and all* Executive Branch officials at will. Rather, depending on, say, the nature of the office, its function, or its subject matter, Congress sometimes may, consistent with the Constitution, limit the President's authority to remove an officer from his post. See *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), overruling in part *Myers*, *supra*; *Morrison* v. *Olson*, 487 U. S. 654 (1988). And we must here decide whether the circumstances surrounding the statute at issue justify such a limitation.

In answering the question presented, we cannot look to more specific constitutional text, such as the text of the Appointments Clause or the Presentment Clause, upon which the Court has relied

in other separation-of-powers cases. See, *e.g., Chadha, supra,* at 946; *Buckley, supra,* at 124–125. That is because, with the exception of the general "vesting" and "take care" language, the Constitution is completely "silent with respect to the power of removal from office." *Ex parte Hennen*, 13 Pet. 230, 258 (1839); see also *Morrison, supra*, at 723 (SCALIA, J., dissenting) ("There is, of course, no provision in the Constitution stating who may remove executive officers … ").

Nor does history offer significant help. The President's power to remove Executive Branch officers "was not discussed in the Constitutional Convention." *Myers, supra,* at 109–110. The First Congress enacted federal statutes that limited the President's ability to *oversee* Executive Branch officials, including the Comptroller of the United States, federal district attorneys (precursors to today's United States Attorneys), and, to a lesser extent, the Secretary of the Treasury. See, *e.g.*, Lessig, Readings By Our Unitary Executive, 15 Cardozo L. Rev. 175, 183–184 (1993); Teifer, The Constitutionality of Independent Officers as Checks on Abuses of Executive Power, 63 B. U. L. Rev. 59, 74–75 (1983); Casper, An Essay in Separation of Powers: Some Early Versions and Practices, 30 Wm. & Mary L. Rev. 211, 240–241 (1989) (hereinafter Casper); H. Bruff, Balance of Forces: Separation of Powers in the Administrative State 414–417 (2006). But those statutes did not directly limit the President's authority to *remove* any of those officials—"a subject" that was "much disputed" during "the early history of this government," "and upon which a great diversity of opinion was entertained." *Hennen, supra*, at 259; see also *United States ex rel. Goodrich* v. *Guthrie*, 17 How. 284, 306 (1855) (McLean, J., dissenting); Casper 233–237 (recounting the Debate of 1789). Scholars, like Members of this Court, have continued to disagree, not only about the inferences that should be drawn from the inconclusive historical record, but also about the nature of the original disagreement. Compare *ante*, at 11; *Myers, supra*, at 114 (majority opinion of Taft, C. J.); and Prakash, New Light on the Decision of 1789, 91 Cornell L. Rev. 1021 (2006), with, *e.g., Myers, supra,* at 194 (McReynolds, J., dissenting); Corwin, Tenure of Office and the Removal Power Under the Constitution, 27 Colum. L. Rev. 353, 369 (1927); Lessig & Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 25–26 (1994) (hereinafter Lessig & Sunstein); and L. Fisher, President and Congress: Power and Policy 86–89 (1972).

Nor does this Court's precedent fully answer the question presented. At least it does not clearly invalidate the provision in dispute. . . .

B

When previously deciding this kind of nontextual question, the Court has emphasized the importance of examining how a particular provision, taken in context, is likely to function. Thus, in *Crowell* v. *Benson*, 285 U. S. 22, 53 (1932), a foundational separation-of-powers case, the Court said that "regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form, but to the substance of what is required." The Court repeated this injunction in *Schor* and again in *Morrison.* See *Schor, supra, at* 854 (stating that the Court must look " 'beyond form to the substance of what' Congress has done"); *Morrison*, 487 U. S., at 689–690 ("The analysis contained in our removal cases is designed *not to define rigid categories* of those officials who may or may not be removed at will by the President," but rather asks whether, given the "functions of the officials in question," a removal provision "interfere[s] with the President's exercise of the 'executive power' " (emphasis added)). The Court has thereby

written into law Justice Jackson's wise perception that "the Constitution … contemplates that practice will integrate the dispersed powers into *a workable government.*" *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (opinion concurring in judgment) (emphasis added). See also *ibid.* ("The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context").

It is not surprising that the Court in these circumstances has looked to function and context, and not to bright-line rules. For one thing, that approach embodies the intent of the Framers. As Chief Justice Marshall long ago observed, our Constitution is fashioned so as to allow the three coordinate branches, including this Court, to exercise practical judgment in response to changing conditions and "exigencies," which at the time of the founding could be seen only "dimly," and perhaps not at all. *McCulloch*, 4 Wheat., at 415.

For another, a functional approach permits Congress and the President the flexibility needed to adapt statutory law to changing circumstances. That is why the "powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role" over time. *New York* v. *United States*, 505 U. S. 144, 157 (1992). . . .

Federal statutes now require or permit Government officials to provide, regulate, or otherwise administer, not only foreign affairs and defense, but also a wide variety of such subjects as taxes, welfare, social security, medicine, pharmaceutical drugs, education, highways, railroads, electricity, natural gas, nuclear power, financial instruments, banking, medical care, public health and safety, the environment, fair employment practices, consumer protection and much else besides. Those statutes create a host of different organizational structures. . . .

The upshot is that today vast numbers of statutes governing vast numbers of subjects, concerned with vast numbers of different problems, provide for, or foresee, their execution or administration through the work of administrators organized within many different kinds of administrative structures, exercising different kinds of administrative authority, to achieve their legislatively mandated objectives. And, given the nature of the Government's work, it is not surprising that administrative units come in many different shapes and sizes.

The functional approach required by our precedents recognizes this administrative complexity and, more importantly, recognizes the various ways presidential power operates within this context—and the various ways in which a removal provision might affect that power. As human beings have known ever since Ulysses tied himself to the mast so as safely to hear the Sirens' song, sometimes it is necessary to disable oneself in order to achieve a broader objective. Thus, legally enforceable commitments—such as contracts, statutes that cannot instantly be changed, and, as in the case before us, the establishment of independent administrative institutions—hold the potential to empower precisely because of their ability to constrain. If the President seeks to regulate through impartial adjudication, then insulation of the adjudicator from removal at will can help him achieve that goal. And to free a technical decisionmaker from the fear of removal without cause can similarly help create legitimacy with respect to that official's regulatory actions by helping to insulate his technical decisions from nontechnical political pressure.

Neither is power always susceptible to the equations of elementary arithmetic. A rule that takes power from a President's friends and allies may weaken him. But a rule that takes power from the President's opponents may strengthen him. And what if the rule takes power from a functionally *neutral* independent authority? In that case, it is difficult to predict how the President's power is affected in the abstract. . . .

II

A

To what extent then is the Act's "for cause" provision likely, as a practical matter, to limit the President's exercise of executive authority? In practical terms no "for cause" provision can, in isolation, define the full measure of executive power. This is because a legislative decision to place ultimate administrative authority in, say, the Secretary of Agriculture rather than the President, the way in which the statute defines the scope of the power the relevant administrator can exercise, the decision as to who controls the agency's budget requests and funding, the relationships between one agency or department and another, as well as more purely political factors (including Congress' ability to assert influence) are more likely to affect the President's power to get something done. . . .

Indeed, notwithstanding the majority's assertion that the removal authority is "*the* key" mechanism by which the President oversees inferior officers in the independent agencies, it appears that no President has ever actually sought to exercise that power by testing the scope of a "for cause" provision.

But even if we put all these other matters to the side, we should still conclude that the "for cause" restriction before us will not restrict presidential power significantly. For one thing, the restriction directly limits, not the President's power, but the power of an already independent agency. The Court seems to have forgotten that fact when it identifies its central constitutional problem: According to the Court, the President "is powerless to intervene" if he has determined that the Board members' "conduct merit[s] removal" because "[t]hat decision is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President's direct control." But so long as the President is *legitimately* foreclosed from removing the *Commissioners* except for cause (as the majority assumes), nullifying the Commission's power to remove Board members only for cause will not resolve the problem the Court has identified: The President will *still* be "powerless to intervene" by removing the Board members if the Commission reasonably decides not to do so.

In other words, the Court fails to show why *two* layers of "for cause" protection—Layer One insulating the Commissioners from the President, and Layer Two insulating the Board from the Commissioners—impose any more serious limitation upon the *President's* powers than *one* layer. Consider the four scenarios that might arise:

1. The President and the Commission both want to keep a Board member in office. Neither layer is relevant.

2. The President and the Commission both want to dismiss a Board member. Layer Two stops them both from doing so without cause. The President's ability to remove the Commission (Layer One) is irrelevant, for he and the Commission are in agreement.

3. The President wants to dismiss a Board member, but the Commission wants to keep the member. Layer One allows the Commission to make that determination notwithstanding the President's contrary view. Layer Two is irrelevant because the Commission does not seek to remove the Board member.

4. The President wants to keep a Board member, but the Commission wants to dismiss the Board member. Here, Layer Two *helps the President*, for it hinders the Commission's ability to dismiss a Board member whom the President wants to keep in place.

Thus, the majority's decision to eliminate only *Layer Two* accomplishes virtually nothing. And that is because a removal restriction's effect upon presidential power depends not on the presence of a "double-layer" of for-cause removal, as the majority pretends, but rather on the real-world nature of the President's relationship with the Commission. If the President confronts a Commission that seeks to *resist* his policy preferences—a distinct possibility when, as here, a Commission's membership must reflect both political parties, 15 U. S. C. §78d(a)—the restriction on the *Commission's* ability to remove a Board member is either irrelevant (as in scenario 3) or may actually help the President (as in scenario 4). And if the President faces a Commission that seeks to *implement* his policy preferences, Layer One is irrelevant, for the President and Commission see eye to eye.

In order to avoid this elementary logic, the Court creates two alternative scenarios. In the first, the Commission and the President *both* want to remove a Board member, but have varying judgments as to whether they have good "cause" to do so—*i.e.*, the President and the Commission both conclude that a Board member should be removed, but disagree as to whether that conclusion (which they have both reached) is *reasonable*. In the second, the President wants to remove a Board member and the Commission disagrees; but, notwithstanding its freedom to make reasonable decisions independent of the President (afforded by Layer One), the Commission (while apparently telling the President that it agrees with him and would like to remove the Board member) uses Layer Two as an "excuse" to pursue its actual aims—an excuse which, given Layer One, it does not need.

Both of these circumstances seem unusual. I do not know if they have ever occurred. But I do not deny their logical possibility. I simply doubt their importance. And the fact that, with respect to the President's power, the double layer of for-cause removal sometimes might help, sometimes might hurt, leads me to conclude that its overall effect is at most indeterminate.

But once we leave the realm of hypothetical logic and view the removal provision at issue in the context of the entire Act, its lack of practical effect becomes readily apparent. That is because the statute provides the Commission with full authority and virtually comprehensive control over all of the Board's functions. Those who created the Accounting Board modeled it, in terms of structure and authority, upon the semiprivate regulatory bodies prevalent in the area of financial

regulation, such as the New York Stock Exchange and other similar self-regulating organizations. And those organizations—which rely on private financing and on officers drawn from the private sector—exercise rulemaking and adjudicatory authority that is pervasively controlled by, and is indeed "entirely derivative" of, the SEC. See *National Assn. of Securities Dealers, Inc.* v. *SEC*, 431 F. 3d 803, 806 (CADC 2005).

Adhering to that model, the statute here gives the Accounting Board the power to adopt rules and standards "relating to the preparation of audit reports"; to adjudicate disciplinary proceedings involving accounting firms that fail to follow these rules; to impose sanctions; and to engage in other related activities, such as conducting inspections of accounting firms registered as the law requires and investigations to monitor compliance with the rules and related legal obligations. See 15 U. S. C. §§7211–7216. . . .

[T]he Court is simply wrong when it says that "the Act nowhere gives the Commission effective power to start, stop, or alter" Board investigations. *Ante*, at 23–24. On the contrary, the Commission's control over the Board's investigatory and legal functions is virtually absolute. Moreover, the Commission has general supervisory powers over the Accounting Board itself: It controls the Board's budget, §§7219(b), (d)(1); it can assign to the Board any "duties or functions" that it "determines are necessary or appropriate," §7211(c)(5); it has full "oversight and enforcement authority over the Board," §7217(a), *including the authority to inspect the Board's activities whenever it believes it "appropriate" to do so,* §7217(d)(2) (emphasis added). And it can censure the Board or its members, as well as remove the members from office, if the members, for example, fail to enforce the Act, violate any provisions of the Act, or abuse the authority granted to them under the Act, §7217(d)(3). . . .

What is left? The Commission's inability to remove a Board member whose perfectly *reasonable* actions cause the Commission to overrule him with great frequency? What is the practical likelihood of that occurring, or, if it does, of the President's serious concern about such a matter? Everyone concedes that the President's control over the Commission is constitutionally sufficient. See *Humphrey's Executor*, 295 U. S. 602; *Wiener*, 357 U. S. 349. And if the President's control over the Commission is sufficient, and the Commission's control over the Board is virtually absolute, then, as a practical matter, the President's control over the Board should prove sufficient as well.

B

At the same time, Congress and the President had good reason for enacting the challenged "for cause" provision. First and foremost, the Board adjudicates cases. See 15 U. S. C. §7215. This Court has long recognized the appropriateness of using "for cause" provisions to protect the personal independence of those who even only sometimes engage in adjudicatory functions. *Humphrey's Executor*, *supra*, at 623–628; see also *Wiener*, *supra*, at 355–356; *Morrison*, 487 U. S., at 690–691, and n. 30; *McAllister* v. *United States*, 141 U. S. 174, 191–201 (1891) (Field, J., dissenting). Indeed, as early as 1789 James Madison stated that "there may be strong reasons why an" executive "officer" such as the Comptroller of the United States "should not hold his office at the pleasure of the Executive branch" if one of his "principal dut[ies]" "partakes strongly of the judicial character." The Court, however, all but ignores the Board's adjudicatory

functions when conducting its analysis. And when it finally does address that central function (in a footnote), it simply asserts that the Board *does not* "*perform* adjudicative … functions," an assertion that is inconsistent with the terms of the statute. . . .

Here, the justification for insulating the "technical experts" on the Board from fear of losing their jobs due to political influence is particularly strong. Congress deliberately sought to provide that kind of protection. See, *e.g.*, 148 Cong. Rec. 12036, 12115, 13352–13355. It did so for good reason. . . .

In sum, Congress and the President could reasonably have thought it prudent to insulate the adjudicative Board members from fear of purely politically based removal. Cf. *Civil Service Comm'n* v. *Letter Carriers*, 413 U. S. 548, 565 (1973) ("[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent"). And in a world in which we count on the Federal Government to regulate matters as complex as, say, nuclear-power production, the Court's assertion that we should simply learn to get by "without being" regulated "by experts" is, at best, unrealistic—at worst, dangerously so. *Ante*, at 18.

C

Where a "for cause" provision is so unlikely to restrict presidential power and so likely to further a legitimate institutional need, precedent strongly supports its constitutionality. First, in considering a related issue in *Nixon* v. *Administrator of General Services*, 433 U. S. 425 (1977), the Court made clear that when "determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Id.*, at 443. The Court said the same in *Morrison*, where it upheld a restriction on the President's removal power. 487 U. S., at 691 ("[T]he real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light"). Here, the removal restriction may somewhat diminish the *Commission's* ability to control the Board, but it will have little, if any, negative effect in respect to the President's ability to control the Board, let alone to coordinate the Executive Branch. See Part II–A, *supra*. Indeed, given *Morrison*, where the Court upheld a restriction that significantly interfered with the President's important historic power to control criminal prosecutions, a " 'purely executive' " function, 487 U. S., at 687–689, the constitutionality of the present restriction would seem to follow *a fortiori*.

Second, as previously pointed out, this Court has repeatedly upheld "for cause" provisions where they restrict the President's power to remove an officer with adjudicatory responsibilities. Compare *Humphrey's Executor*, 295 U. S., at 623–628; *Wiener*, 357 U. S., at 355; *Schor*, 478 U. S., at 854; *Morrison*, *supra*, at 691, n. 30. And we have also upheld such restrictions when they relate to officials with technical responsibilities that warrant a degree of special independence. *E.g.*, *Humphrey's Executor*, *supra*, at 624. The Accounting Board's functions involve both kinds of responsibility. And, accordingly, the Accounting Board's adjudicatory responsibilities, the technical nature of its job, the need to attract experts to that job, and the

importance of demonstrating the nonpolitical nature of the job to the public strongly justify a statute that assures that Board members need not fear for their jobs when competently carrying out their tasks, while still maintaining the Commission as the ultimate authority over Board policies and actions. See Part II–B, *supra.*

Third, consider how several cases fit together in a way that logically compels a holding of constitutionality here. In *Perkins*, 116 U. S., at 483, 484—which was reaffirmed in *Myers*, 272 U. S., at 127 and in *Morrison, supra*, at 689, n. 27—the Court upheld a removal restriction limiting the authority of the Secretary of the Navy to remove a "cadet-engineer," whom the Court explicitly defined as an "inferior officer." The Court said,

"We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments *it may limit and restrict the power of removal as it deems best for the public interest*. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed." *Perkins, supra*, at 485 (emphasis added; internal quotation marks omitted).

See also *Morrison, supra,* at 723–724 (Scalia, J., dissenting) (agreeing that the power to remove an "inferior officer" who is appointed by a department head can be restricted). Cf. *ante,* at 30–33 (holding that SEC Commissioners are "Heads of Departments"). . . .

Fourth, the Court has said that "[o]ur separation-of-powers jurisprudence generally focuses on the danger of one branch's *aggrandizing its power* at the expense of another branch." *Freytag, supra*, at 878 (emphasis added); accord, *Buckley, supra*, at 129; *Schor, supra*, at 856; *Morrison, supra*, at 686; cf. *Bowsher, supra*. Indeed, it has added that "the essence of the decision in *Myers,"* which is the only one of our cases to have struck down a "for cause" removal restriction, "was the judgment that the Constitution prevents Congress from *'draw[ing] to itself … the power to remove.' "* *Morrison, supra*, at 686 (quoting *Myers, supra*, at 161; emphasis added). Congress here has "drawn" no power to itself to remove the Board members. It has instead sought to *limit* its own power, by, for example, providing the Accounting Board with a revenue stream independent of the congressional appropriations process. See *supra,* at 19; see also Brief for Former SEC Chairmen 16. And this case thereby falls outside the ambit of the Court's most serious constitutional concern.

In sum, the Court's prior cases impose functional criteria that are readily met here. Once one goes beyond the Court's elementary arithmetical logic (*i.e.*, "one plus one is greater than one") our precedent virtually dictates a holding that the challenged "for cause" provision is constitutional.

D

We should ask one further question. Even if the "for cause" provision before us does not itself significantly interfere with the President's authority or aggrandize Congress' power, is it nonetheless necessary to adopt a bright-line rule forbidding the provision lest, through a series of such provisions, each itself upheld as reasonable, Congress might undercut the President's

central constitutional role? Cf. Strauss 625–626. The answer to this question is that no such need has been shown. Moreover, insofar as the Court seeks to create such a rule, it fails. And in failing it threatens a harm that is far more serious than any imaginable harm this "for cause" provision might bring about.

The Court fails to create a bright-line rule because of considerable uncertainty about the scope of its holding—an uncertainty that the Court's opinion both reflects and generates. The Court suggests, for example, that its rule may not apply where an inferior officer "perform[s] adjudicative … functions." Cf. *ante,* at 26, n. 10. But the Accounting Board performs adjudicative functions. *See supra,* at 17–18. What, then, are we to make of the Court's potential exception? And would such an exception apply to an administrative law judge who also has important administrative duties beyond pure adjudication? See, *e.g.*, 8 CFR §1003.9, 34 CFR §81.4 (2009). The Court elsewhere suggests that its rule may be limited to removal statutes that provide for "judicial review of a[n] effort to remove" an official for cause. But we have previously stated that *all* officers protected by a for-cause removal provision and later subject to termination are entitled to "notice and [a] hearing" in the "courts," as without such review "the appointing power" otherwise "could remove at pleasure or for such cause as [only] it deemed sufficient." *Reagan* v. *United States*, 182 U. S. 419, 425 (1901); *Shurtleff*, 189 U. S., at 314; cf. *Humphrey's Executor*, *supra* (entertaining civil suit challenging removal). But cf. *Bowsher*, *supra*, at 729. What weight, then, should be given to this hint of an exception?

The Court further seems to suggest that its holding may not apply to inferior officers who have a different relationship to their appointing agents than the relationship between the Commission and the Board. But the only characteristic of the "relationship" between the Commission and the Board that the Court apparently deems relevant is that the relationship includes two layers of for-cause removal. Why then would any different relationship that also includes two layers of for-cause removal survive where this one has not? In a word, what differences are relevant? If the Court means to state that its holding in fact applies only where Congress has "enacted an *unusually high standard*" of for-cause removal—and does not otherwise render two layers of " 'ordinary' " for-cause removal unconstitutional—I should welcome the statement. But much of the majority's opinion appears to avoid so narrow a holding in favor of a broad, basically mechanical rule—a rule that, as I have said, is divorced from the context of the case at hand. Compare Parts III–A, III–B, III–C, *ante*, with Parts II–A, II–B, II–C, *supra.* And such a mechanical rule cannot be cabined simply by saying that, *perhaps,* the rule does not apply to instances that, at least at first blush, seem highly similar. A judicial holding by its very nature is not "a restricted railroad ticket, good for" one "day and train only." *Smith* v. *Allwright*, 321 U. S. 649, 669 (1944) (Roberts, J., dissenting).

The Court begins to reveal the practical problems inherent in its double for-cause rule when it suggests that its rule may not apply to "the civil service." The "civil service" is defined by statute to include "all appointive positions in … the Government of the United States," excluding the military, but including *all* civil "officer[s]" up to and including those who are subject to Senate confirmation. 5 U. S. C. §§2101, 2102(a)(1)(B), 2104. The civil service thus includes many officers indistinguishable from the members of both the Commission and the Accounting Board. Indeed, as this Court recognized in *Myers,* the "competitive service"—the class within the broader civil service that enjoys the most robust career protection—"includes a *vast majority* of

all the civil officers" in the United States. 272 U. S., at 173 (emphasis added); 5 U. S. C. §2102(c).

But even if I assume that the majority categorically excludes the competitive service from the scope of its new rule, the exclusion would be insufficient. This is because the Court's "double for-cause" rule applies to appointees who are "inferior officer[s]." *Ante*, at 2. And who are they? Courts and scholars have struggled for more than a century to define the constitutional term "inferior officers," without much success. See 2 J. Story, Commentaries on the Constitution §1536, pp. 397–398 (3d ed. 1858) ("[T]here does not seem to have been any exact line drawn, who are and who are not to be deemed *inferior* officers, in the sense of the constitution"); *Edmond* v. *United States*, 520 U. S. 651, 661 (1997) ("Our cases have not set forth an exclusive criterion for [defining] inferior officers"); Memorandum from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, to the General Counsels of the Executive Branch: Officers of the United States Within the Meaning of the Appointments Clause, p. 3 (Apr. 16, 2007) (hereinafter OLC Memo), online at http://www.justice.gov/olc/2007/appointmentsclausev10.pdf ("[T]he Supreme Court has not articulated the precise scope and application of the [Inferior Officer] Clause's requirements"); Konecke, The Appointments Clause and Military Judges: Inferior Appointment to a Principal Office, 5 Seton Hall Const. L. J. 489, 492 (1995) (same); Burkoff, Appointment Konecke, The Appointments Clause and Military Judges: Inferior Appointment to a Principal Office, 5 Seton Hall Const. L. J. 489, 492 (1995) (same); Burkoff, Appointment and Removal Under the Federal Constitution: The Impact of Buckley v. Valeo, 22 Wayne L. Rev. 1335, 1347, 1364 (1976) (describing our early precedent as "circular" and our later law as "not particularly useful"). The Court does not clarify the concept. But without defining who is an inferior officer, to whom the majority's new rule applies, we cannot know the scope or the coherence of the legal rule that the Court creates. I understand the virtues of a common-law case-by-case approach. But here that kind of approach (when applied without more specificity than I can find in the Court's opinion) threatens serious harm.

The problem is not simply that the term "inferior officer" is indefinite but also that efforts to define it inevitably conclude that the term's sweep is unusually broad. Consider the Court's definitions: Inferior officers are, *inter alia*, (1) those charged with "the administration and enforcement of the public law," *Buckley*, 424 U. S., at 139; *ante*, at 2; (2) those granted "significant authority," 424 U. S., at 126; *ante*, at 25; (3) those with "responsibility for conducting civil litigation in the courts of the United States," 424 U. S., at 140; and (4) those "who can be said to hold an office," *United States* v. *Germaine*, 99 U. S. 508, 510 (1879), that has been created either by "regulations" or by "statute," *United States* v. *Mouat*, 124 U. S. 303, 307–308 (1888).

Consider the definitional conclusion that the Department of Justice more recently reached: An "inferior officer" is anyone who holds a "continuing" position and who is "invested by legal authority with a portion of the sovereign powers of the federal Government," including, *inter alia*, the power to *"arrest criminals," "seize persons or property,"* "issue regulations," "issue … authoritative legal opinions," *"conduc[t] civil litigation,"* "collec[t] revenue," represent "the United States to foreign nations," "command" military force, or *enter into "contracts"* on behalf "of the nation."

And consider the fact that those whom this Court has *held* to be "officers" include: (1) a district court clerk, *Hennen*, 13 Pet., at 258; (2) "thousands of clerks in the Departments of the Treasury, Interior and the othe[r]" departments, *Germaine*, *supra*, at 511, who are responsible for "the records, books, and papers appertaining to the office," *Hennen*, *supra*, at 259; (3) a clerk to "the assistant treasurer" stationed "at Boston," *United States* v. *Hartwell*, 6 Wall. 385, 392 (1868); (4 & 5) an "assistant-surgeon" and a "cadet-engineer" appointed by the Secretary of the Navy, *United States* v. *Moore*, 95 U. S. 760, 762 (1878); *Perkins*, 116 U. S., at 484; (6) election monitors, *Ex parte Siebold*, 100 U. S. 371, 397–399 (1880); (7) United States attorneys, *Myers*, *supra*, at 159; (8) federal marshals, *Sieblod*, *supra*, at 397; *Morrison*, 487 U. S., at 676; (9) military judges, *Weiss* v. *United States*, 510 U. S., 163, 170 (1994); (10) judges in Article I courts, *Freytag*, 501 U. S., at 880–881; and (11) the general counsel of the Department of Transportation, *Edmond* v. *United States*, 520 U. S. 651 (1997). Individual Members of the Court would add to the list the Federal Communication Commission's managing director, the Federal Trade Commission's "secretary," the general counsel of the Commodity Futures Trading Commission, and more generally, bureau chiefs, general counsels, and administrative law judges, see *Freytag*, *supra*, at 918–920 (SCALIA, J., concurring in part and concurring in judgment), as well as "ordinary commissioned military officers," *Weiss*, *supra*, at 182 (Souter, J., concurring).

Reading the criteria above as stringently as possible, I still see no way to avoid sweeping hundreds, perhaps thousands of high level government officials within the scope of the Court's holding, putting their job security and their administrative actions and decisions constitutionally at risk. To make even a conservative estimate, one would have to begin by listing federal departments, offices, bureaus and other agencies whose heads are by statute removable only "for cause." I have found 48 such agencies, which I have listed in Appendix A, *infra*. Then it would be necessary to identify the senior officials in those agencies (just below the top) who themselves are removable only "for cause." I have identified 573 such high-ranking officials, whom I have listed in Appendix B, *infra*. They include most of the leadership of the Nuclear Regulatory Commission (including that agency's executive director as well as the directors of its Office of Nuclear Reactor Regulation and Office of Enforcement), virtually all of the leadership of the Social Security Administration, the executive directors of the Federal Energy Regulatory Commission and the Federal Trade Commission, as well as the general counsels of the Chemical Safety Board, the Federal Mine Safety and Health Review Commission, and the National Mediation Board.

This list is a conservative estimate because it consists only of career appointees in the Senior Executive Service (SES), see 5 U. S. C. §§2101a, 3132(a)(2), a group of high-ranking officials distinct from the "competitive service," see §2101(a)(1)(C), who "serve in the key positions just below the top Presidential appointees," Office of Personnel Management, About the Senior Executive Service, online at http://www.opm.gov/ses/about_ses/index.asp; §2102(a)(1)(C), and who are, without exception, subject to "removal" only for cause. §§7542–7543; see also §2302(a)(2) (substantially limiting conditions under which "a career appointee in the Senior Executive Service" may be "transfer[red], or reassign[ed]"). . . . Is the SES exempt from today's rule or is it not? The Court, after listing reasons why the SES may be different, simply says that it will not "addres[s]" the matter. *Ante*, at 27. Perhaps it does not do so because it cannot do so without revealing the difficulty of distinguishing the SES from the Accounting Board and

thereby also revealing the inherent instability of the legal rule it creates. . . .

The majority asserts that its opinion will not affect the Government's ability to function while these many questions are litigated in the lower courts because the Court's holding concerns only "the conditions under which th[e]se officers might some day be removed." But this case was not brought by federal officials challenging their potential removal. It was brought by private individuals who were *subject to regulation* " '*here-and-now*' " and who "object to the" very "existence" of the regulators themselves. *Ante*, at 33, 8 (emphasis added). And those private individuals have prevailed. Thus, any person similarly regulated by a federal official who is potentially subject to the Court's amorphous new rule will be able to bring an "implied private right of action directly under the Constitution" "seeking … a declaratory judgment that" the official's actions are "unconstitutional and an injunction preventing the" official "from exercising [his] powers." Such a plaintiff need not even first exhaust his administrative remedies.

Nor is it clear that courts will always be able to cure such a constitutional defect merely by severing an offending removal provision. For a court's "ability to devise [such] a judicial remedy … often depends on how clearly" the "background constitutional rules at issue" have been "articulated"; severance will be unavailable "in a murky constitutional context," which is precisely the context that the Court's new rule creates. *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 329, 330 (2006). Moreover, "the touchstone" of the severability analysis "is legislative intent," *id.*, at 330, and Congress has repeatedly expressed its judgment "over the last century that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service," *Civil Service Comm'n*, 413 U. S., at 557; see also *Bush* v. *Lucas*, 462 U. S. 367, 380–388 (1983) (describing the history of "Congressional attention to the problem of politically-motivated removals"). And so it may well be that courts called upon to resolve the many questions the majority's opinion raises will not only apply the Court's new rule to its logical conclusion, but will also determine that the only available remedy to certain double for-cause problems is to invalidate entire agencies.

Thus, notwithstanding the majority's assertions to the contrary, the potential consequences of today's holding are worrying. The upshot, I believe, is a legal dilemma. To interpret the Court's decision as applicable only in a few circumstances will make the rule less harmful but arbitrary. To interpret the rule more broadly will make the rule more rational, but destructive. . . .

§ 2.05 LIMITS ON JUDICIAL POWER – THE JUSTICIABILITY DOCTRINES

[D] Standing to Sue

Page 258: [Add a new note (8)]:

(8) In *Hollingsworth v. Perry*, 570 U.S. __, 2013 WL 3196927, the Court declined to reach the merits in a high-profile same-sex marriage dispute from California. After the California Supreme Court held that limiting marriage to opposite-sex couples violated the California Constitution, state voters passed a ballot initiative known as Proposition 8, amending the State Constitution to define marriage as a union between a man and a woman**. S**ame-sex couples who wish to marry filed suit in federal court, challenging Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and naming as defendants California's Governor and other state and local officials responsible for enforcing California's marriage laws. The officials refused to defend the law, so the District Court allowed Hollingsworth and others — the initiative's official proponents — to intervene to defend it. After a bench trial, the court declared Proposition 8 unconstitutional and enjoined the public officials named as defendants from enforcing the law. Those officials elected not to appeal, but Hollingsworth did. The Ninth Circuit certified a question to the California Supreme Court: whether official proponents of a ballot initiative have authority to assert the State's interest in defending the constitutionality of the initiative when public officials refuse to do so. After the California Supreme Court answered in the affirmative, the Ninth Circuit concluded that Hollingsworth had standing under federal law to defend Proposition 8's constitutionality. On the merits, the court affirmed the District Court's order.

In a 5-4 decision, the majority opinion by Chief Justice Roberts found that Hollingsworth and other petitioners lack standing to sue because their interest is generalized, not particularized, and is too attenuated to assure the adverseness that the standing rules require. Although California law may support substitution of parties in suits seeking to adjudicated issues resolved in the initiative process, the California rules cannot substitute for the constitutional law of standing in federal courts.

Chapter 3
FEDERALISM LIMITS ON FEDERAL COURTS

§ 3.03 Eleventh Amendment

Page 314: [Add at end of Notes and Questions]:

(11) In *Sossamon v. Texas*, 131 S. Ct. 1651 (2011), the Court held that when states accept federal funds they do not waive their sovereign immunity for suits for damages under the federal program. The Religious Land Use and Institutionalized Persons Act of 2000 forbids government entities from imposing a substantial burden on the religious exercise of an institutionalized person unless the government demonstrates that the burden is in furtherance of a compelling government interest and is the least restrictive means of furthering that interest in any case where the burden is imposed in a program or activity that receives Federal financial assistance. The Act permitted aggrieved persons to assert a violation in a judicial proceeding and "obtain appropriate relief against a government." The Court found that the "appropriate relief" is not a sufficiently unequivocal expression of state consent to be sued.

Page 329: [Add at end of Note (6)]:

In *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012), the Court distinguished *Hibbs* and found that suits against a state employer for failing to grant unpaid leave for self-care for a serious medical condition as required by the Family and Medical Leave Act are barred by the Eleventh Amendment. Unlike *Hibbs*, where the plaintiffs challenged family care leave policies and the courts found evidence that states had family-leave policies that differentiated on the basis of sex, in *Coleman* a majority of the Court found no evidence that discrimination based on sex affected administration of the self-care provision. Without a record of discrimination in the states, Congress lacked the Section 5 authority to abrogate state sovereign immunity.

Chapter 4
FEDERALISM LIMITS ON THE ELECTED BRANCHES AND ON THE STATES

§4.02 SCOPE OF FEDERAL POWER

Page 362: [Add before Notes and Questions]:

UNITED STATES v. COMSTOCK
United States Supreme Court
__ U.S. __, 130 S. Ct. 1949, 176 L. Ed. 2d 878, (2010)

JUSTICE BREYER delivered the opinion of the Court.

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. We have previously examined similar statutes enacted under state law to determine whether they violate the Due Process Clause. See *Kansas v. Hendricks*, 521 U.S. 346, 356-358 (1997); *Kansas v. Crane*, 534 U.S. 407 (2002). But this case presents a different question. Here we ask whether the Federal Government has the authority under Article I of the Constitution to enact this federal civil-commitment program or whether its doing so falls beyond the reach of a government "of enumerated powers." *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819). We conclude that the Constitution grants Congress the authority to enact § 4248 as "necessary and proper for carrying into Execution" the powers "vested by" the "Constitution in the Government of the United States." Art. I, § 8, cl. 18.

I

The federal statute before us allows a district court to order the civil commitment of an individual who is currently "in the custody of the [Federal] Bureau of Prisons," § 4248, if that individual (1) has previously "engaged or attempted to engage in sexually violent conduct or child molestation," (2) currently "suffers from a serious mental illness, abnormality, or disorder," and (3) "as a result of" that mental illness, abnormality, or disorder is "sexually dangerous to others," in that "he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." §§ 4247(a)(5)-(6).

In order to detain such a person, the Government (acting through the Department of Justice) must certify to a federal district judge that the prisoner meets the conditions just described, *i.e.*, that he has engaged in sexually violent activity or child molestation in the past and that he suffers from a mental illness that makes him correspondingly dangerous to others. § 4248(a). When such a certification is filed, the statute automatically stays the individual's release from prison, *ibid.*, thereby giving the Government an opportunity to prove its claims at a hearing through psychiatric (or other) evidence, §§ 4247(b)-(c), 4248(b). The statute provides that the prisoner

"shall be represented by counsel" and shall have "an opportunity" at the hearing "to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine" the Government's witnesses. §§ 4247(d), 4248(c).

If the Government proves its claims by "clear and convincing evidence," the court will order the prisoner's continued commitment in "the custody of the Attorney General," who must "make all reasonable efforts to cause" the State where that person was tried, or the State where he is domiciled, to "assume responsibility for his custody, care, and treatment." § 4248(d); cf. *Sullivan v. Freeman*, 944 F.2d 334, 337 (C.A.7 1991). If either State is willing to assume that responsibility, the Attorney General "shall release" the individual "to the appropriate official" of that State. § 4248(d). But if, "notwithstanding such efforts, neither such State will assume such responsibility," then "the Attorney General shall place the person for treatment in a suitable [federal] facility." *Ibid.*; cf. § 4247(i)(A).

Confinement in the federal facility will last until either (1) the person's mental condition improves to the point where he is no longer dangerous (with or without appropriate ongoing treatment), in which case he will be released; or (2) a State assumes responsibility for his custody, care, and treatment, in which case he will be transferred to the custody of that State. §§ 4248(d)(1)-(2). The statute establishes a system for ongoing psychiatric and judicial review of the individual's case, including judicial hearings at the request of the confined person at six-month intervals. §§ 4247(e)(1)(B), (h).

In November and December 2006, the Government instituted proceedings in the Federal District Court for the Eastern District of North Carolina against the five respondents in this case. Three of the five had previously pleaded guilty in federal court to possession of child pornography, see 507 F.Supp.2d 522, 526, and n. 2 (2007); § 2252A(a), and the fourth had pleaded guilty to sexual abuse of a minor, see *United States v. Vigil*, No. 1:99CR00509-001 (D NM, Jan. 26, 2000); §§ 1153, 2243(a). With respect to each of them, the Government claimed that the respondent was about to be released from federal prison, that he had engaged in sexually violent conduct or child molestation in the past, and that he suffered from a mental illness that made him sexually dangerous to others. During that same time period, the Government instituted similar proceedings against the fifth respondent, who had been charged in federal court with aggravated sexual abuse of a minor, but was found mentally incompetent to stand trial. See *id.*, at 41-43; *United States v. Catron*, No. 04-778 (D Ariz., Mar. 27, 2006); § 4241(d).

Each of the five respondents moved to dismiss the civil-commitment proceeding on constitutional grounds. They claimed that the commitment proceeding is, in fact, criminal, not civil, in nature and consequently that it violates the Double Jeopardy Clause, the *Ex Post Facto* Clause, and the Sixth and Eighth Amendments. 507 F.Supp.2d, at 528. They claimed that the statute denies them substantive due process and equal protection of the laws. *Ibid.* They claimed that it violates their procedural due process rights by allowing a showing of sexual dangerousness to be made by clear and convincing evidence, instead of by proof beyond a reasonable doubt. *Ibid.* And, finally, they claimed that, in enacting the statute, Congress exceeded the powers granted to it by Art. I, § 8 of the Constitution, including those granted by the Commerce Clause and the Necessary and Proper Clause. 507 F.Supp.2d, at 528-529.

The District Court. . . granted their motion to dismiss. It agreed . . . that, in enacting the statute, Congress exceeded its Article I legislative powers, 507 F.Supp.2d, at 530-551. On appeal, the Court of Appeals for the Fourth Circuit upheld the dismissal on this latter, legislative-power ground. 551 F.3d 274, 278-284 (2009). . . .

The Government sought certiorari, and we granted its request, limited to the question of Congress' authority under Art. I, § 8 of the Constitution. . . .

II

The question presented is whether the Necessary and Proper Clause, Art. I, § 8, cl. 18, grants Congress authority sufficient to enact the statute before us. 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. Cf. *Hendricks*, 521 U.S. 346; *Addington v. Texas*, 441 U.S. 418 (1979). 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. Nearly 200 years ago, this Court stated that the Federal "[G]overnment is acknowledged by all to be one of enumerated powers," *McCulloch*, 4 Wheat., at 405, which means that "[e]very law enacted by Congress must be based on one or more of" those powers, *United States v. Morrison*, 529 U.S. 598, 607 (2000). But, at the same time, "a government, entrusted with such" powers "must also be entrusted with ample means for their execution." *McCulloch*, 4 Wheat., at 408. 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." *Id.*, at 413, 418; see also *id.*, at 421 ("[Congress can] legislate on that vast mass of incidental powers which must be involved in the constitution ..."). Chief Justice Marshall emphasized that the word "necessary" does not mean "absolutely necessary." *Id.*, at 413-415 (emphasis deleted) In language that has come to define the scope of the Necessary and Proper Clause, he 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*, at 421.

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. *Sabri v. United States*, 541 U.S. 600, 605 (2004) (using term "means-ends rationality" to describe the necessary relationship); *ibid.* (upholding Congress' "authority under the Necessary and Proper Clause" to enact a criminal statute in furtherance of the federal power granted by the Spending Clause); see *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (holding that

because “Congress had a rational basis” for concluding that a statute implements Commerce Clause power, the statute falls within the scope of congressional “authority to ‘make all Laws which shall be necessary and proper’ to ‘regulate Commerce ... among the several States' ” (ellipsis in original)); see also *United States v. Lopez*, 514 U.S. 549, 557 (1995); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276 (1981).

Of course, as Chief Justice Marshall stated, a federal statute, in addition to being authorized by Art. I, § 8, must also “not [be] prohibited” by the Constitution. *McCulloch*, *supra*, at 421. But as we have already stated, the present statute's validity under provisions of the Constitution other than the Necessary and Proper Clause is an issue that is not before us. Under the question presented, the relevant inquiry is simply “whether the means chosen are ‘reasonably adapted’ to the attainment of a legitimate end under the commerce power” or under other powers that the Constitution grants Congress the authority to implement. *Gonzales*, *supra*, at 37 (SCALIA, J., concurring in judgment) (quoting *United States v. Darby*, 312 U.S. 100 (1941)).

We have also recognized that the Constitution “addresse[s]” the “choice of means”

“primarily ... to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.” *Burroughs v. United States*, 290 U.S. 534, 547-548 (1934).

Thus, the Constitution, which nowhere speaks explicitly about the creation of federal crimes beyond those related to “counterfeiting,” “treason,” or “Piracies and Felonies committed on the high Seas” or “against the Law of Nations,” Art. I, § 8, cls. 6, 10; Art. III, § 3, nonetheless grants Congress broad authority to create such crimes. See *McCulloch*, 4 Wheat., at 416, 4 L.Ed. 579 (“All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress”). And Congress routinely exercises its authority to enact criminal laws in furtherance of, for example, its enumerated powers to regulate interstate and foreign commerce, to enforce civil rights, to spend funds for the general welfare, to establish federal courts, to establish post offices, to regulate bankruptcy, to regulate naturalization, and so forth. Art. I, § 8, cls. 1, 3, 4, 7, 9; Amdts. 13-15. See, *e.g.*, *Lottery Case*, *supra* (upholding criminal statute enacted in furtherance of the Commerce Clause); *Ex parte Yarbrough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884) (upholding Congress' authority to enact Rev. Stat. § 5508, currently 18 U.S.C. § 241 (criminalizing civil-rights violations) and Rev. Stat. § 5520, currently 42 U.S.C. § 1973j (criminalizing voting-rights violations) in furtherance of the Fourteenth and Fifteenth Amendments); *Sabri*, *supra*, (upholding criminal statute enacted in furtherance of the Spending Clause); *Jinks*, *supra*, at 462, n. 2, 123 S.Ct. 1667 (citing *McCulloch*, *supra*, at 417) (describing perjury and witness tampering as federal crimes enacted in furtherance of the power to constitute federal tribunals); see also 18 U.S.C. § 1691 *et seq.* (postal crimes); § 151 *et seq.* (bankruptcy crimes); 8 U.S.C. §§ 1324-1328 (immigration crimes). . . .

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" the enumerated powers "vested by" the "Constitution in the Government of the United States," Art. I, § 8, cl. 18-authority granted by the Necessary and Proper Clause.

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. We recognize that even a longstanding history of related federal action does not demonstrate a statute's constitutionality. A history of involvement, however, can nonetheless be "helpful in reviewing the substance of a congressional statutory scheme," *Gonzales*, 545 U.S., at 21, and, in particular, 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. . . .

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. Cf. *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982) ("In operating an institution such as [a prison system], there are occasions in which it is necessary for the State to restrain the movement of residents-for example, to protect them *as well as others* from violence" (emphasis added)). . . . 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," *Darby*, 312 U.S., at 121, to Congress' power to act as a responsible federal custodian. 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," § 4247(a)(6), would pose an especially high danger to the public if released. Cf. H.R.Rep. No. 109-218, at 22-23. And Congress could also have reasonably concluded (as detailed in the Judicial Conference's report) that a reasonable number of such individuals would likely *not* be detained by the States if released from federal custody, in part because the Federal Government itself severed their claim to "legal residence in any State" by incarcerating them in remote federal prisons. H.R.Rep. No. 1319, at 2. Here Congress' desire to address the specific challenges identified in the Reports cited above, taken together with its responsibilities as a federal custodian, supports the conclusion that § 4248 satisfies "review for means-end rationality," *i.e.*, that it satisfies the Constitution's insistence that a federal statute represent a rational means for implementing a constitutional grant of legislative authority. *Sabri*, 541 U.S., at 605.

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. *New York v. United States*, 505 U.S. 144, 155 (THOMAS, J., dissenting). 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." (Emphasis added.) 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 invade state sovereignty or otherwise improperly limit the scope of "powers that remain with the States." To the contrary, it requires *accommodation* of state interests: The Attorney General must inform the State in which the federal prisoner "is domiciled or was tried" that he is detaining someone with respect to whom those States may wish to assert their authority, and he must encourage those States to assume custody of the individual. § 4248(d). He must also immediately "release" that person "to the appropriate official of" either State "if such State will assume [such] responsibility." *Ibid.* And either State has the right, at any time, to assert its authority over the individual, which will prompt the individual's immediate transfer to State custody. § 4248(d)(1). Respondents contend that the States are nonetheless "powerless to *prevent* the detention of their citizens under § 4248, even if detention is contrary to the States' policy choices." But that is not the most natural reading of the statute, see §§ 4248(d)(1)-(e), and the Solicitor General acknowledges that "the Federal Government would have no appropriate role" with respect to an individual covered by the statute once "the transfer to State responsibility and State control has occurred." . . .

Fifth, the links between § 4248 and an enumerated Article I power are not too attenuated. Neither is the statutory provision too sweeping in its scope. Invoking the cautionary instruction that we may not "pile inference upon inference" in order to sustain congressional action under Article I, *Lopez*, 514 U.S., at 567, respondents argue that, when legislating pursuant to the Necessary and Proper Clause, Congress' authority can be no more than one step removed from a specifically enumerated power. But this argument is irreconcilable with our precedents. . . .

[I]n *Sabri* we observed that "Congress has authority under the Spending Clause to appropriate federal moneys" and that it therefore "has corresponding authority under the Necessary and Proper Clause to see to it that taxpayer dollars" are not "siphoned off" by "corrupt public officers." 541 U.S., at 605. We then further held that, in aid of that implied power to criminalize graft of "taxpayer dollars," Congress has the *additional* prophylactic power to criminalize bribes or kickbacks even when the stolen funds have not been "traceably skimmed from specific federal payments." *Ibid.* Similarly, in *United States v. Hall*, 98 U.S. 343 (1879), we held that the Necessary and Proper Clause grants Congress the power, in furtherance of Art. I, § 8, cls. 11-13, to award "pensions to the wounded and disabled" soldiers of the armed forces and their dependents, 98 U.S. at 351; and from that implied power we further inferred the "[i]mplied power" "to pass laws to ... punish" anyone who fraudulently appropriated such pensions, *id.*, at 346.

Indeed 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 even after their release. Of course, each of those powers, like the powers addressed in *Sabri*, *Hall*, and *McCulloch*, 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 enumerated power "that justifies a criminal defendant's arrest or conviction," in *all* cases because Congress relies on different enumerated powers (often, but not exclusively, its Commerce Clause power) to enact its various federal criminal statutes. But every such statute must itself be legitimately 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. Thus, we must reject respondents' 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, which the Founders denied the National Government and reposed in the States." *Morrison*, 529 U.S., at 618. As the Solicitor General repeatedly confirmed at oral argument, § 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. § 4248(a). . . .

The Framers demonstrated considerable foresight in drafting a Constitution capable of such resilience through time. As Chief Justice Marshall observed nearly 200 years ago, the Necessary and Proper Clause is part of "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." *McCulloch*, 4 Wheat., at 415, 4 L.Ed. 579 (emphasis deleted).

* * *

We take these five considerations 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 accommodation 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. The Constitution consequently authorizes Congress to enact the statute.

We do not reach or decide any claim that the statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution. Respondents are free to pursue those claims on remand, and any others they have preserved.

The judgment of the Court of Appeals for the Fourth Circuit with respect to Congress' power to enact this statute is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, concurring in the judgment. . . .

When the inquiry is whether a federal law has sufficient links to an enumerated power to be within the scope of federal authority, the analysis depends not on the number of links in the congressional-power chain but on the strength of the chain.

Concluding that a relation can be put into a verbal formulation that fits somewhere along a causal chain of federal powers is merely the beginning, not the end, of the constitutional inquiry. The inferences must be controlled by some limitations lest, as Thomas Jefferson warned, congressional powers become completely unbounded by linking one power to another *ad infinitum* in a veritable game of " 'this is the house that Jack built.' " Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800), 31 The Papers of Thomas Jefferson 547 (B. Oberg ed.2004). . . .

I

. . . 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. 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.

The opinion of the Court should not be interpreted to hold that the only, or even the principal, constraints on the exercise of congressional power are the Constitution's express prohibitions. The Court's discussion of the Tenth Amendment invites the inference that restrictions flowing from the federal system are of no import when defining the limits of the National Government's power, as it proceeds by first asking whether the power is within the National Government's reach, and if so it discards federalism concerns entirely.

These remarks explain why the Court ignores important limitations stemming from federalism principles. Those principles are essential to an understanding of the function and province of the States in our constitutional structure.

II

As stated at the outset, in this case Congress has acted within its powers to ensure that an abrupt end to the federal detention of prisoners does not endanger third parties. Federal prisoners often lack a single home State to take charge of them due to their lengthy prison stays, so it is

incumbent on the National Government to act. This obligation, parallel in some respects to duties defined in tort law, is not to put in motion a particular force (here an unstable and dangerous person) that endangers others. Having acted within its constitutional authority to detain the person, the National Government can acknowledge a duty to ensure that an abrupt end to the detention does not prejudice the States and their citizens. . . .

JUSTICE ALITO, concurring in the judgment [omitted]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins in all but Part III-A-1-b, dissenting. . . .

I

. . . The Constitution plainly sets forth the "few and defined" powers that Congress may exercise. Article I "vest[s]" in Congress "[a]ll legislative Powers herein granted," § 1, and carefully enumerates those powers in § 8. The final clause of § 8, the Necessary and Proper Clause, authorizes Congress "[t]o make 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 or Officer thereof." Art. I, § 8, cl. 18. As the Clause's placement at the end of § 8 indicates, the "foregoing Powers" are those granted to Congress in the preceding clauses of that section. The "other Powers" to which the Clause refers are those "vested" in Congress and the other branches by other specific provisions of the Constitution. . . .

McCulloch's summation is descriptive of the Clause itself, providing that federal legislation is a valid exercise of Congress' authority under the Clause if it satisfies a two-part test: First, the law must be directed toward a "legitimate" end, which *McCulloch* defines as one "within the scope of the [C]onstitution"-that is, the powers expressly delegated to the Federal Government by some provision in the Constitution. Second, there must be a necessary and proper fit between the "means" (the federal law) and the "end" (the enumerated power or powers) it is designed to serve. *Ibid.* *McCulloch* accords Congress a certain amount of discretion in assessing means-end fit under this second inquiry. The means Congress selects will be deemed "necessary" if they are "appropriate" and "plainly adapted" to the exercise of an enumerated power, and "proper" if they are not otherwise "prohibited" by the Constitution and not "[in]consistent" with its "letter and spirit." *Ibid.*

Critically, however, *McCulloch* underscores the linear relationship the Clause establishes between the two inquiries: Unless the end itself is "legitimate," the fit between means and end is irrelevant. In other words, no matter how "necessary" or "proper" an Act of Congress may be to its objective, Congress lacks authority to legislate if the objective is anything other than "carrying into Execution" one or more of the Federal Government's enumerated powers. Art. I, § 8, cl. 18. . . .

II

. . . No enumerated power in Article I, § 8, expressly delegates to Congress the power to enact a civil-commitment regime for sexually dangerous persons, nor does any other provision in the

Constitution vest Congress or the other branches of the Federal Government with such a power. Accordingly, § 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.

Section 4248 does not fall within any of those powers. The 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-the enumerated power this Court has interpreted most expansively can justify federal civil detention of sex offenders. Under the Court's precedents, Congress may not regulate noneconomic activity (such as sexual violence) based solely on the effect such activity may have, in individual cases or in the aggregate, on interstate commerce. *Morrison*, 529 U.S., at 617-618; *United States v. Lopez*, 514 U.S. 549, 563-567 (1995). That limitation forecloses any claim that § 4248 carries into execution Congress' Commerce Clause power, and the Government has never argued otherwise. . . .

III

The Court perfunctorily genuflects to *McCulloch* 's framework for assessing Congress' Necessary and Proper Clause authority, and to the principle of dual sovereignty it helps to maintain, then promptly abandons both in favor of a novel five-factor test supporting its conclusion that § 4248 is a " 'necessary and proper' " adjunct to a jumble of *unenumerated* "authorit [ies]." The Court's newly minted test cannot be reconciled with the Clause's plain text or with two centuries of our precedents interpreting it. It also raises more questions than it answers. Must each of the five considerations exist before the Court sustains future federal legislation as proper exercises of Congress' Necessary and Proper Clause authority? What if the facts of a given case support a finding of only four considerations? Or three? And if three or four will suffice, *which* three or four are imperative? At a minimum, 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, assuming some number less than five suffices. (Or, if not, why all five are required.) The Court provides no answers to these questions. . . .

Not long ago, this Court described the Necessary and Proper Clause as "the last, best hope of those who defend ultra vires congressional action." *Printz*, *supra*, at 923. Regrettably, today's opinion breathes new life into that Clause, and the Court's protestations to the contrary notwithstanding, comes perilously close to transforming the Necessary and Proper Clause into a basis for the federal police power that "we *always* have rejected," *Lopez*, 514 U.S., at 584 (THOMAS, J., concurring) In so doing, the Court endorses the precise abuse of power Article I is designed to prevent - the use of a limited grant of authority as a "pretext ... for the accomplishment of objects not entrusted to the government." *McCulloch, supra*, at 423.

I respectfully dissent.

Page 477: [Add a new section and renumber §4.06 as §4.07]:

§4.06 THE AFFORDABLE CARE ACT

NATIONAL FEDERATION OF INDEPENDENT BUSINESS v. SEBELIUS

United States Supreme Court
__ U.S. __, 2012 U.S. LEXIS 4876

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

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

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

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

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

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

The reach of the Federal Government's enumerated powers is broader still because the Constitution authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Art. I, § 8, cl. 18. We have long read this provision to give Congress great latitude in exercising its powers: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch,* 4 Wheat., at 421.

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

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

enforce the limits on federal power by striking down acts of Congress that transgress those limits. *Marbury v. Madison*.

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

I

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

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

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

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

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

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

The second provision of the Affordable Care Act directly challenged here is the Medicaid expansion. Enacted in 1965, Medicaid offers federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care. See 42 U.S.C. § 1396a(a)(10). In order to receive that funding, States must comply with federal criteria governing matters such as who 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. See § 1396a(a)(10)(A)(i)(VIII). The Act increases federal funding to cover the States' costs in expanding Medicaid coverage, although States will bear a portion of the costs on their own. § 1396d(y)(1). If a State does not comply with the Act's new coverage requirements, it may lose not only the federal funding for those requirements, but all of its federal Medicaid funds. See § 1396c.

Along with their challenge to the individual mandate, the state plaintiffs in the Eleventh Circuit argued that the Medicaid expansion exceeds Congress's constitutional powers. The Court of Appeals unanimously held that the Medicaid expansion is a valid exercise of Congress's power under the Spending Clause. And the court rejected the States' claim that the threatened loss of all federal Medicaid funding violates the Tenth Amendment by coercing them into complying with the Medicaid expansion.

We granted certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit with respect to both the individual mandate and the Medicaid expansion. Because no party supports the Eleventh Circuit's holding that the individual mandate can be completely severed

from the remainder of the Affordable Care Act, we appointed an *amicus curiae* to defend that aspect of the judgment below. And because there is a reasonable argument that the Anti–Injunction Act deprives us of jurisdiction to hear challenges to the individual mandate, but no party supports that proposition, we appointed an *amicus curiae* to advance it. . . .

II . . .

[The Court first held that the Anti-Injunction Act does not apply to this lawsuit challenging the Affordable Care Act.]

III

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

A

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

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

The guaranteed-issue and community-rating reforms do not, however, address the issue of healthy individuals who choose not to purchase insurance to cover potential health care needs. In fact, the reforms sharply exacerbate that problem, by providing an incentive for individuals to delay purchasing health insurance until they become sick, relying on the promise of guaranteed and affordable coverage. The reforms also threaten to impose massive new costs on insurers, who are required to accept unhealthy individuals but prohibited from charging them rates necessary to pay for their coverage. This will lead insurers to significantly increase premiums on

everyone.

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

1

The Government contends that the individual mandate is within Congress's power because the failure to purchase insurance "has a substantial and deleterious effect on interstate commerce" by creating the cost-shifting problem. The path of our Commerce Clause decisions has not always run smooth, see *United States v. Lopez*, 514 U.S. 549, 552–559 (1995), but it is now well established that Congress has broad authority under the Clause. We have recognized, for example, that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states," but extends to activities that "have a substantial effect on interstate commerce." *United States v. Darby*, 312 U.S. 100, 118–119 (1941). Congress's power, moreover, is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others. See *Wickard*.

Given its expansive scope, it is no surprise that Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time. But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product.[1] Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes "the most telling indication of [a] severe constitutional problem ... is the lack of historical precedent" for Congress's action. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. ——, —— (2010). At the very least, we should "pause to consider the implications of the Government's arguments" when confronted with such new conceptions of federal power. *Lopez, supra*, at 564.

The Constitution grants Congress the power to "*regulate* Commerce." Art. I, § 8, cl. 3 (emphasis added). The power to *regulate* commerce presupposes the existence of commercial activity to be regulated. If the power to "regulate" something included the power to create it, many of the provisions in the Constitution would be superfluous. For example, the Constitution gives Congress the power to "coin Money," in addition to the power to "regulate the Value thereof." *Id.*, cl. 5. And it gives Congress the power to "raise and support Armies" and to "provide and maintain a Navy," in addition to the power to "make Rules for the Government and Regulation

3. The examples of other congressional mandates cited by JUSTICE GINSBURG , *post*, at 35, n. 10 (opinion concurring in part, concurring in judgment in part, and dissenting in part), are not to the contrary. Each of those mandates—to report for jury duty, to register for the draft, to purchase firearms in anticipation of militia service, to exchange gold currency for paper currency, and to file a tax return—are based on constitutional provisions other than the Commerce Clause. See Art. I, § 8, cl. 9 (to "constitute Tribunals inferior to the supreme Court"); *id.*, cl. 12 (to "raise and support Armies"); *id.*, cl. 16 (to "provide for organizing, arming, and disciplining, the Militia"); *id.*, cl. 5 (to "coin Money"); *id.*, cl. 1 (to "lay and collect Taxes").

of the land and naval Forces." *Id.*, cls. 12–14. If the power to regulate the armed forces or the value of money included the power to bring the subject of the regulation into existence, the specific grant of such powers would have been unnecessary. The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated. See *Gibbons*, 9 Wheat., at 188, 6 L.Ed. 23 ("[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said").[2]

Our precedent also reflects this understanding. As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching "activity." It is nearly impossible to avoid the word when quoting them. See, *e.g.*, *Lopez*, *supra*, at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained"); *Perez*, 402 U.S., at 154 ("Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class"); *Wickard*, *supra*, at 125 ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) ("Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control").

The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and—under the Government's theory—empower Congress to make those decisions for him.

Applying the Government's logic to the familiar case of *Wickard v. Filburn* shows how far that logic would carry us from the notion of a government of limited powers. . . . *Wickard* has long been regarded as "perhaps the most far reaching example of Commerce Clause authority over

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[2] JUSTICE GINSBURG suggests that "at the time the Constitution was framed, to 'regulate' meant, among other things, to require action." *Post*, at 23 (citing *Seven–Sky v. Holder*, 661 F.3d 1, 16 (C.A.D.C.2011). But to reach this conclusion, the case cited by JUSTICE GINSBURG relied on a dictionary in which "[t]o order; to command" was the fifth-alternative definition of "to direct," which was itself the second-alternative definition of "to regulate." See *Seven–Sky*,*supra*, at 16 (citing S. Johnson, Dictionary of the English Language (4th ed. 1773) (reprinted 1978)). It is unlikely that the Framers had such an obscure meaning in mind when they used the word "regulate." Far more commonly, "[t]o regulate" meant "[t]o adjust by rule or method," which presupposes something to adjust. 2 Johnson, *supra*, at 1619; see also *Gibbons*, 9 Wheat., at 196, 6 L.Ed. 23 (defining the commerce power as the power "to prescribe the rule by which commerce is to be governed").

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

Indeed, the Government's logic would justify a mandatory purchase to solve almost any problem. To consider a different example in the health care market, many Americans do not eat a balanced diet. That group makes up a larger percentage of the total population than those without health insurance. The failure of that group to have a healthy diet increases health care costs, to a greater extent than the failure of the uninsured to purchase insurance. Those increased costs are borne in part by other Americans who must pay more, just as the uninsured shift costs to the insured. Congress addressed the insurance problem by ordering everyone to buy insurance. Under the Government's theory, Congress could address the diet problem by ordering everyone to buy vegetables.

People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.

That is not the country the Framers of our Constitution envisioned. . . . Accepting the Government's theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.

To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers, who were "practical statesmen," not metaphysical philosophers. . . . 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 . . . argues that because sickness and injury are unpredictable but unavoidable, "the uninsured as a class are active in the market for health care, which they regularly seek and obtain." The individual mandate "merely regulates how individuals finance and pay for that active participation—requiring that they do so through insurance, rather than through attempted self-insurance with the back-stop of shifting costs to others." *Ibid.*

The Government repeats the phrase "active in the market for health care" throughout its brief,

but that concept has no constitutional significance. . . . The phrase "active in the market" cannot obscure the fact that most of those regulated by the individual mandate are not currently engaged in any commercial activity involving health care, and that fact is fatal to the Government's effort to "regulate the uninsured as a class." *Id.*, at 42. Our precedents recognize Congress's power to regulate "class[es] of *activities*, " *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (emphasis added), not classes of *individuals*, apart from any activity in which they are engaged, see, *e.g.*, *Perez*, 402 U.S., at 153 ("Petitioner is clearly a member of the class which engages in 'extortionate credit transactions' . . .".

The individual mandate's regulation of the uninsured as a class is, in fact, particularly divorced from any link to existing commercial activity. The mandate primarily affects healthy, often young adults who are less likely to need significant health care and have other priorities for spending their money. It is precisely because these individuals, as an actuarial class, incur relatively low health care costs that the mandate helps counter the effect of forcing insurance companies to cover others who impose greater costs than their premiums are allowed to reflect. If the individual mandate is targeted at a class, it is a class whose commercial inactivity rather than activity is its defining feature.

. . . The Government regards it as sufficient to trigger Congress's authority that almost all those who are uninsured will, at some unknown point in the future, engage in a health care transaction. Asserting that "[t]here is no temporal limitation in the Commerce Clause," the Government argues that because "[e]veryone subject to this regulation is in or will be in the health care market," they can be "regulated in advance."

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

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

The Government argues that the individual mandate can be sustained as a sort of exception to this rule, because health insurance is a unique product. According to the Government, upholding the individual mandate would not justify mandatory purchases of items such as cars or broccoli because, as the Government puts it, "[h]ealth insurance is not purchased for its own sake like a

car or broccoli; it is a means of financing health-care consumption and covering universal risks." But cars and broccoli are no more purchased for their "own sake" than health insurance. They are purchased to cover the need for transportation and food.

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

2

The Government next contends that Congress has the power under the Necessary and Proper Clause to enact the individual mandate because the mandate is an "integral part of a comprehensive scheme of economic regulation"—the guaranteed-issue and community-rating insurance reforms. 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*, 4 Wheat., at 418, 4 L.Ed. 579. Although the Clause gives Congress authority to "legislate on that vast mass of incidental powers which must be involved in the constitution," it does not license the exercise of any "great substantive and independent power[s]" beyond those specifically enumerated. *Id.*, at 411, 421. Instead, the Clause is " 'merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant.' " *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960) (quoting VI Writings of James Madison 383 (G. Hunt ed.1906)).

As our jurisprudence under the Necessary and Proper Clause has developed, we have been very deferential to Congress's determination that a regulation is "necessary." We have thus upheld laws that are " 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.' " *Comstock*, 560 U.S., at —— (quoting *McCulloch, supra*, at 413, 418). But we have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution. Such laws, which are not "consist[ent] with the letter and spirit of the constitution," *McCulloch, supra*, at 421, are not "*proper* [means] for carrying into Execution" Congress's enumerated powers. Rather, they are, "in the words of The Federalist, 'merely acts of usurpation' which 'deserve to be treated as such.' " *Printz v. United States*, 521 U.S. 898, 924 (1997) (quoting The Federalist No. 33, at 204 (A.Hamilton)).

Applying these principles, the individual mandate cannot be sustained under the Necessary and

Proper Clause as an essential component of the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. . . .

The Government relies primarily on our decision in *Gonzales v. Raich*. In *Raich*, we considered "comprehensive legislation to regulate the interstate market" in marijuana. 545 U.S., at 22. Certain individuals sought an exemption from that regulation on the ground that they engaged in only intrastate possession and consumption. We denied any exemption, on the ground that marijuana is a fungible commodity, so that any marijuana could be readily diverted into the interstate market. Congress's attempt to regulate the interstate market for marijuana would therefore have been substantially undercut if it could not also regulate intrastate possession and consumption. *Id.*, at 19. Accordingly, we recognized that "Congress was acting well within its authority" under the Necessary and Proper Clause even though its "regulation ensnare[d] some purely intrastate activity." *Id.*, at 22; see also *Perez*, 402 U.S., at 154. *Raich* thus did not involve the exercise of any "great substantive and independent power," *McCulloch, supra*, at 411, of the sort at issue here. Instead, it concerned only the constitutionality of "individual *applications* of a concededly valid statutory scheme." *Raich, supra*, at 23. . . .

B

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

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

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

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. See § 5000A(b). That, according to the Government, means the mandate can be regarded as establishing a condition—not owning health insurance—that triggers a tax—the required payment to the IRS. Under that theory, the mandate is not a legal command to buy insurance. Rather, it makes going

without insurance just another thing the Government taxes, like buying gasoline or earning income. And if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress's constitutional power to tax.

The question is not whether that is the most natural interpretation of the mandate, but only whether it is a "fairly possible" one. *Crowell v. Benson*, 285 U.S. 22, 62 (1932). As we have explained, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895). The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution. Granting the Act the full measure of deference owed to federal statutes, it can be so read, for the reasons set forth below.

C

The exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects. The "[s]hared responsibility payment," as the statute entitles it, is paid into the Treasury by "taxpayer [s]" when they file their tax returns. 26 U.S.C. § 5000A(b). It does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code. § 5000A(e)(2). For taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status. §§ 5000A(b)(3), (c)(2), (c)(4). The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which—as we previously explained—must 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. *United States v. Kahriger*, 345 U.S. 22, 28, n. 4 (1953). Indeed, the payment is expected to raise about $4 billion per year by 2017. . . .

We have . . . held that exactions not labeled taxes nonetheless were authorized by Congress's power to tax. In the *License Tax Cases*, for example, we held that federal licenses to sell liquor and lottery tickets—for which the licensee had to pay a fee—could be sustained as exercises of the taxing power. 5 Wall., at 471, 18 L.Ed. 497. And in *New York v. United States* we upheld as a tax a "surcharge" on out-of-state nuclear waste shipments, a portion of which was paid to the Federal Treasury. 505 U.S., at 171. We thus ask whether the shared responsibility payment falls within Congress's taxing power, "[d]isregarding the designation of the exaction, and viewing its substance and application." *United States v. Constantine*, 296 U.S. 287, 294 (1935).

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. 259 U.S., at 36–37.

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—except that the Service is *not* allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution. See § 5000A(g)(2). The reasons the Court in *Drexel Furniture* held that what was called a "tax" there was a penalty support the conclusion that what is called a "penalty" here may be viewed as a tax.

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. . . .

In distinguishing penalties from taxes, this Court has explained that "if the concept of penalty means anything, it means punishment for an unlawful act or omission." *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996); see also *United States v. La Franca*, 282 U.S. 568, 572 (1931) ("[A] penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act"). While the individual mandate clearly aims to induce the purchase of health 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. The Government agrees with that reading, confirming that if someone chooses to pay rather than obtain health insurance, they have fully complied with the law. . . .

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

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. The Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity. But from its creation, the Constitution has made no such promise with respect to taxes.

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

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

We have already explained that the shared responsibility payment's practical characteristics pass muster as a tax under our narrowest interpretations of the taxing power. Because the tax at hand is within even those strict limits, we need not here decide the precise point at which an exaction becomes so punitive that the taxing power does not authorize it. It remains true, however, that the " 'power to tax is not the power to destroy while this Court sits.' " *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 364 (1949).

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

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

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

D

JUSTICE GINSBURG questions the necessity of rejecting the Government's commerce power argument, given that § 5000A can be upheld under the taxing power. But the statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it. It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question. And it is only because we have a duty to construe a statute to save it, if fairly possible, that § 5000A can be interpreted as a tax. Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction.

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

IV

A

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

There is no doubt that the Act dramatically increases state obligations under Medicaid. The current Medicaid program requires States to cover only certain discrete categories of needy individuals—pregnant women, children, needy families, the blind, the elderly, and the disabled. 42 U.S.C. § 1396a(a)(10). There is no mandatory coverage for most childless adults, and the States typically do not offer any such coverage. The States also enjoy considerable flexibility with respect to the coverage levels for parents of needy families. § 1396a(a)(10)(A)(ii). On average States cover only those unemployed parents who make less than 37 percent of the federal poverty level, and only those employed parents who make less than 63 percent of the poverty line.

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

[O]ur cases have recognized limits on Congress's power under the Spending Clause to secure state compliance with federal objectives. "We have repeatedly characterized . . . Spending Clause legislation as 'much in the nature of a *contract*.' " *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)). The legitimacy of Congress's exercise of the spending power "thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " *Pennhurst, supra*, at 17. Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system. That system "rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.' " *Bond [v. United States]*, 564 U.S., at —— (slip op., at 8) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)). For this reason, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York, supra*, at 162. Otherwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer.

That insight has led this Court to strike down federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes. See, *e.g.*, *Printz*; *New York*. It has also led us to scrutinize Spending Clause legislation to ensure that Congress is not using financial inducements to exert a "power akin to undue influence." *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937). Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when "pressure turns into compulsion," *ibid.*, 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*, 505 U.S., at 178. That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.

Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system. Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer. But when the State has no choice, the Federal Government can achieve its objectives without accountability, just as in *New York* and *Printz*. Indeed, this danger is heightened when Congress acts under the Spending Clause,

because Congress can use that power to implement federal policy it could not impose directly under its enumerated powers.

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

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

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

The States, however, argue that the Medicaid expansion is far from the typical case. They object that Congress has "crossed the line distinguishing encouragement from coercion," *New York, supra*, at 175, 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 affected by the Act.

Given the nature of the threat and the programs at issue here, we must agree. We have upheld Congress's authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the "general Welfare." Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly

viewed as a means of pressuring the States to accept policy changes.

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

We accordingly asked whether "the financial inducement offered by Congress" was "so coercive as to pass the point at which 'pressure turns into compulsion.' " *Id.*, at 211 (quoting *Steward Machine, supra*, at 590). By "financial inducement" the Court meant the threat of losing five percent of highway funds; no new money was offered to the States to raise their drinking ages. We found that the inducement was not impermissibly coercive, because Congress was offering only "relatively mild encouragement to the States." *Dole*, 483 U.S., at 211. 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. *Ibid.* In fact, the federal funds at stake constituted less than half of one percent of South Dakota's budget at the time. In consequence, "we conclude[d] that [the] encouragement to state action [was] a valid use of the spending power." *Dole*, 483 U.S., at 212. Whether to accept the drinking age change "remain[ed] the prerogative of the States not merely in theory but in fact." *Id.*, at 211–212.

In this case, the financial "inducement" Congress has chosen is much more than "relatively mild encouragement"—it is a gun to the head. Section 1396c of the Medicaid Act provides that if a State's Medicaid plan does not comply with the Act's requirements, the Secretary of Health and Human Services may declare that "further payments will not be made to the State." 42 U.S.C. § 1396c. A State that opts out of the Affordable Care Act's expansion in health care coverage thus stands to lose not merely "a relatively small percentage" of its existing Medicaid funding, but *all* of it. *Dole, supra*, at 211. Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs. See Nat. Assn. of State Budget Officers, Fiscal Year 2010 State Expenditure Report, p. 11, Table 5 (2011); 42 U.S.C. § 1396d(b). The Federal Government estimates that it will pay out approximately $3.3 trillion between 2010 and 2019 in order to cover the costs of *pre*-expansion Medicaid. In addition, the States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid. It is easy to see how the *Dole* Court could conclude that the threatened loss of less than half of one percent of South Dakota's budget left that State with a "prerogative" to reject Congress's desired policy, "not merely in theory but in fact." 483 U.S., at 211–212. 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.

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 it by threatening the funds for the existing Medicaid program. We cannot agree that existing Medicaid and the expansion dictated by the Affordable Care Act are all one program

simply because "Congress styled" them as such. 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." *Pennhurst*, 451 U.S., at 17. A State confronted with statutory language reserving the right to "alter" or "amend" the pertinent provisions of the Social Security Act might reasonably assume that Congress was entitled to make adjustments to the Medicaid program as it developed. . . .

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. . . . It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.

Indeed, the manner in which the expansion is structured indicates that while Congress may have styled the expansion a mere alteration of existing Medicaid, it recognized it was enlisting the States in a new health care program. . . .

B

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

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

This is not to say, as the joint dissent suggests, that we are "rewriting the Medicaid Expansion." Instead, we determine, first, that § 1396c is unconstitutional when applied to withdraw existing Medicaid funds from States that decline to comply with the expansion. We then follow Congress's explicit textual instruction to leave unaffected "the remainder of the chapter, and the

application of [the challenged] provision to other persons or circumstances." § 1303. When we invalidate an application of a statute because that application is unconstitutional, we are not "rewriting" the statute; we are merely enforcing the Constitution.

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

We are confident that Congress would have wanted to preserve the rest of the Act. . . .

* * *

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

It is so ordered.

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

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

I

. . . THE CHIEF JUSTICE's crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress' efforts to regulate the national economy in the interest of those who labor to sustain it. See, *e.g.*, *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 362, 368 (1935) (invalidating compulsory retirement and pension plan for employees of carriers subject to the Interstate Commerce Act; Court found law related essentially "to the social welfare of the worker, and therefore remote from any regulation of commerce as such"). It is a reading that should not have staying power. . . .

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

decade, it is anticipated, spending on health care will nearly double. *Ibid.* The health-care market's size is not its only distinctive feature. Unlike the market for almost any other product or service, the market for medical care is one in which all individuals inevitably participate. . . .

The large number of individuals without health insurance, Congress found, heavily burdens the national health-care market. See 42 U.S.C. § 18091(2). . . .

States cannot resolve the problem of the uninsured on their own. Like Social Security benefits, a universal health-care system, if adopted by an individual State, would be "bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose." *Helvering v. Davis*, 301 U.S. 619, 644 (1937). An influx of unhealthy individuals into a State with universal health care would result in increased spending on medical services. To cover the increased costs, a State would have to raise taxes, and private health-insurance companies would have to increase premiums. Higher taxes and increased insurance costs would, in turn, encourage businesses and healthy individuals to leave the State. . . .

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

* * *

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

II . . .

Until today, this Court's pragmatic approach to judging whether Congress validly exercised its commerce power was guided by two familiar principles. First, Congress has the power to regulate economic activities "that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). This capacious power extends even to local activities that, viewed in the aggregate, have a substantial impact on interstate commerce. See *ibid.* See also *Wickard*, 317 U.S., at 125.

Second, we owe a large measure of respect to Congress when it frames and enacts economic and social legislation. See *Raich*, 545 U.S., at 17. See also *Pension Benefit Guaranty Corporation v.*

R.A. Gray & Co., 467 U.S. 717, 729 (1984) ("[S]trong deference [is] accorded legislation in the field of national economic policy."); *Hodel v. Indiana*, 452 U.S. 314, 326 (1981) ("This [C]ourt will certainly not substitute its judgment for that of Congress unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent."). When appraising such legislation, we ask only (1) whether Congress had a "rational basis" for concluding that the regulated activity substantially affects interstate commerce, and (2) whether there is a "reasonable connection between the regulatory means selected and the asserted ends." *Id.*, at 323–324. See also *Raich*, 545 U.S., at 22; *Lopez*, 514 U.S., at 557; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 277 (1981); *Katzenbach v. McClung*, 379 U.S. 294, 303 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *United States v. Carolene Products Co.*, 304 U.S. 144, 152–153 (1938). In answering these questions, we presume the statute under review is constitutional and may strike it down only on a "plain showing" that Congress acted irrationally. *United States v. Morrison*, 529 U.S. 598, 607 (2000). . . .

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

Not only do those without insurance consume a large amount of health care each year; critically, as earlier explained, their inability to pay for a significant portion of that consumption drives up market prices, foists costs on other consumers, and reduces market efficiency and stability. Given these far-reaching effects on interstate commerce, the decision to forgo insurance is hardly inconsequential or equivalent to "doing nothing,"; it is, instead, an economic decision Congress has the authority to address under the Commerce Clause. See also *Wickard*, 317 U.S., at 128 ("It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and *practices affecting such prices*." (emphasis added)).

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

Congress also acted reasonably in requiring uninsured individuals, whether sick or healthy, either to obtain insurance or to pay the specified penalty. As earlier observed, because every person is at risk of needing care at any moment, all those who lack insurance, regardless of their current health status, adversely affect the price of health care and health insurance. See *supra*, at 6–7. Moreover, an insurance-purchase requirement limited to those in need of immediate care simply

could not work. Insurance companies would either charge these individuals prohibitively expensive premiums, or, if community-rating regulations were in place, close up shop. . . .

D

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

1

a

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

THE CHIEF JUSTICE does not dispute that all U.S. residents participate in the market for health services over the course of their lives. But, THE CHIEF JUSTICE insists, the uninsured cannot be considered active in the market for health care, because "[t]he proximity and degree of connection between the [uninsured today] and [their] subsequent commercial activity is too lacking."

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

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

Second, it is Congress' role, not the Court's, to delineate the boundaries of the market the Legislature seeks to regulate. . . .

Third, contrary to THE CHIEF JUSTICE's contention, our precedent does indeed support "[t]he proposition that Congress may dictate the conduct of an individual today because of prophesied future activity." [See] *Wickard*. . .

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

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

b

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

In concluding that the Commerce Clause does not permit Congress to regulate commercial "inactivity," and therefore does not allow Congress to adopt the practical solution it devised for the health-care problem, THE CHIEF JUSTICE views the Clause as a "technical legal conception," precisely what our case law tells us not to do. *Wickard*, 317 U.S., at 122. See also *supra*, at 14–16. This Court's former endeavors to impose categorical limits on the commerce power have not fared well. In several pre-New Deal cases, the Court attempted to cabin Congress' Commerce Clause authority by distinguishing "commerce" from activity once conceived to be noncommercial, notably, "production," "mining," and "manufacturing." See, *e.g.*, *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) ("Commerce succeeds to manufacture, and is not a part of it."); *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) ("Mining brings the subject matter of commerce into existence. Commerce disposes of it."). The Court also sought to distinguish activities having a "direct" effect on interstate commerce, and for that reason, subject to federal regulation, from those having only an "indirect" effect, and therefore not amenable to federal control. See, *e.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548 (1935) ("[T]he distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one.").

These line-drawing exercises were untenable, and the Court long ago abandoned them. "[Q]uestions of the power of Congress [under the Commerce Clause]," we held in *Wickard*, "are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce." 317 U.S., at 120. See also *Morrison*, 529 U.S., at 641–644 (Souter, J., dissenting) (recounting the Court's "nearly disastrous experiment"

with formalistic limits on Congress' commerce power). . . .

2

Underlying THE CHIEF JUSTICE's view that the Commerce Clause must be confined to the regulation of active participants in a commercial market is a fear that the commerce power would otherwise know no limits. The joint dissenters express a similar apprehension. This concern is unfounded.

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

Nor would the commerce power be unbridled, absent THE CHIEF JUSTICE's "activity" limitation. Congress would remain unable to regulate noneconomic conduct that has only an attenuated effect on interstate commerce and is traditionally left to state law. See *Lopez*, 514 U.S., at 567; *Morrison*, 529 U.S., at 617–619. . . .

As an example of the type of regulation he fears, THE CHIEF JUSTICE cites a Government mandate to purchase green vegetables. One could call this concern "the broccoli horrible." Congress, THE CHIEF JUSTICE posits, might adopt such a mandate, reasoning that an individual's failure to eat a healthy diet, like the failure to purchase health insurance, imposes costs on others.

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

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

III

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

THE CHIEF JUSTICE cites only two cases in which this Court concluded that a federal statute impermissibly transgressed the Constitution's boundary between state and federal authority:

Printz and *New York*. The statutes at issue in both cases, however, compelled *state officials* to act on the Federal Government's behalf.

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

Lacking case law support for his holding, THE CHIEF JUSTICE nevertheless declares the minimum coverage provision not "proper" because it is less "narrow in scope" than other laws this Court has upheld under the Necessary and Proper Clause. . . . Nor does THE CHIEF JUSTICE pause to explain *why* the power to direct either the purchase of health insurance or, alternatively, the payment of a penalty collectible as a tax is more far-reaching than other implied powers this Court has found meet under the Necessary and Proper Clause. These powers include the power to enact criminal laws, see, *e.g.*, *United States v. Fox*, 95 U.S. 670, 672 (1878); the power to imprison, including civil imprisonment, see, *e.g.*, *Comstock*, 560 U.S., at —— (slip op., at 1); and the power to create a national bank, see *McCulloch*, 4 Wheat., at 425. . . .

[T]he 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. Notably, the ACA serves the general welfare of the people of the United States while retaining a prominent role for the States. . . .

V

. . . The spending power conferred by the Constitution, the Court has never doubted, permits Congress to define the contours of programs financed with federal funds. See, *e.g.*, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). And to expand coverage, Congress could have recalled the existing legislation, and replaced it with a new law making Medicaid as embracive of the poor as Congress chose.

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

Medicaid, as amended by the ACA. . . is not two spending programs; it is a single program with a constant aim—to enable poor persons to receive basic health care when they need it. Given past expansions, plus express statutory warning that Congress may change the requirements

participating States must meet, there can be no tenable claim that the ACA fails for lack of notice. Moreover, States have no entitlement to receive any Medicaid funds; they enjoy only the opportunity to accept funds on Congress' terms. Future Congresses are not bound by their predecessors' dispositions; they have authority to spend federal revenue as they see fit. The Federal Government, therefore, is not, as THE CHIEF JUSTICE charges, threatening States with the loss of "existing" funds from one spending program in order to induce them to opt into another program. Congress is simply requiring States to do what States have long been required to do to receive Medicaid funding: comply with the conditions Congress prescribes for participation.

A majority of the Court, however, buys the argument that prospective withholding of funds formerly available exceeds Congress' spending power. Given that holding, I entirely agree with THE CHIEF JUSTICE as to the appropriate remedy. It is to bar the withholding found impermissible—not, as the joint dissenters would have it, to scrap the expansion altogether. The dissenters' view that the ACA must fall in its entirety is a radical departure from the Court's normal course. When a constitutional infirmity mars a statute, the Court ordinarily removes the infirmity. It undertakes a salvage operation; it does not demolish the legislation. . . .

[T]here 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. The conditions placed on federal grants to States must (a) promote the "general welfare," (b) "unambiguously" inform States what is demanded of them, (c) be germane "to the federal interest in particular national projects or programs," and (d) not "induce the States to engage in activities that would themselves be unconstitutional." *Id.*, at 207–208, 210.

The Court in *Dole* mentioned, but did not adopt, a further limitation, one hypothetically raised a half-century earlier: In "some circumstances," Congress might be prohibited from offering a "financial inducement . . . so coercive as to pass the point at which 'pressure turns into compulsion.' " *Id.*, at 211 (quoting *Steward Machine Co. v. Davis*). 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 case does not present the concerns that led the Court in *Dole* even to consider the prospect of coercion. In *Dole*, the condition—set 21 as the minimum drinking age—did not tell the States how to use funds Congress provided for highway construction. Further, in view of the Twenty–First Amendment, it was an open question whether Congress could directly impose a national minimum drinking age.

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

That is what makes this such a simple case, and the Court's decision so unsettling. Congress, aiming to assist the needy, has appropriated federal money to subsidize state health-insurance

programs that meet federal standards. The principal standard the ACA sets is that the state program cover adults earning no more than 133% of the federal poverty line. Enforcing that prescription ensures that federal funds will be spent on health care for the poor in furtherance of Congress' present perception of the general welfare.

C

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

Congress has broad authority to construct or adjust spending programs to meet its contemporary understanding of "the general Welfare." *Helvering v. Davis*. Courts owe a large measure of respect to Congress' characterization of the grant programs it establishes. See *Steward Machine,* 301 U.S., at 594. 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? . . .

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

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

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

At bottom, my colleagues' position is that the States' reliance on federal funds limits Congress' authority to alter its spending programs. This gets things backwards: Congress, not the States, is tasked with spending federal money in service of the general welfare. And each successive Congress is empowered to appropriate funds as it sees fit. . . .

[I]n view of THE CHIEF JUSTICE's disposition, I agree with him that the Medicaid Act's severability clause determines the appropriate remedy. . . .

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

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

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

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

As for the constitutional power to tax and spend for the general welfare: The Court has long since expanded that beyond (what Madison thought it meant) taxing and spending for those aspects of the general welfare that were within the Federal Government's enumerated powers, see *United States v. Butler*, 297 U.S. 1, 65–66 (1936). Thus, we now have sizable federal Departments devoted to subjects not mentioned among Congress' enumerated powers, and only marginally related to commerce: the Department of Education, the Department of Health and

Human Services, the Department of Housing and Urban Development. The principal practical obstacle that prevents Congress from using the tax-and-spend power to assume all the general-welfare responsibilities traditionally exercised by the States is the sheer impossibility of managing a Federal Government large enough to administer such a system. That obstacle can be overcome by granting funds to the States, allowing them to administer the program. That is fair and constitutional enough when the States freely agree to have their powers employed and their employees enlisted in the federal scheme. But it is a blatant violation of the constitutional structure when the States have no choice.

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

I

The Individual Mandate

. . . If this provision "regulates" anything, it is the *failure* to maintain minimum essential coverage. One might argue that it regulates that failure by requiring it to be accompanied by payment of a penalty. But that failure—that abstention from commerce—is not "Commerce." To be sure, *purchasing* insurance *is* "Commerce"; but one does not regulate commerce that does not exist by compelling its existence. . . .

Here . . . Congress has impressed into service third parties, healthy individuals who could be but are not customers of the relevant industry, to offset the undesirable consequences of the regulation. Congress' desire to force these individuals to purchase insurance is motivated by the fact that they are further removed from the market than unhealthy individuals with pre-existing conditions, because they are less likely to need extensive care in the near future. If Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power, or in Hamilton's words, "the hideous monster whose devouring jaws ... spare neither sex nor age, nor high nor low, nor sacred nor profane." The Federalist No. 33, p. 202 (C. Rossiter ed.1961).

At the outer edge of the commerce power, this Court has insisted on careful scrutiny of regulations that do not act directly on an interstate market or its participants. In *New York v. United States*, we held that Congress could not, in an effort to regulate the disposal of radioactive waste produced in several different industries, order the States to take title to that waste. *Id.*, at 174–177. In *Printz*, we held that Congress could not, in an effort to regulate the distribution of firearms in the interstate market, compel state law-enforcement officials to perform background checks. In *United States v. Lopez*, we held that Congress could not, as a means of fostering an educated interstate labor market through the protection of schools, ban the possession of a firearm within a school zone. And in *United States v. Morrison*, we held that Congress could not, in an effort to ensure the full participation of women in the interstate economy, subject private individuals and companies to suit for gender-motivated violent torts. The lesson of these cases is that the Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not *carte blanche* for doing whatever will help achieve the ends Congress seeks by the regulation of commerce. And the last two of these cases show that the scope of the Necessary and Proper

Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power. . . .

Raich is no precedent for what Congress has done here. That case's prohibition of growing (cf. *Wickard*), and of possession (cf. innumerable federal statutes) did not represent the expansion of the federal power to direct into a broad new field. The mandating of economic activity does, and since it is a field so limitless that it converts the Commerce Clause into a general authority to direct the economy, that mandating is not "consist[ent] with the letter and spirit of the constitution." *McCulloch v. Maryland*.

Moreover, *Raich* is far different from the Individual Mandate in another respect. The Court's opinion in *Raich* pointed out that the growing and possession prohibitions were the only practicable way of enabling the prohibition of interstate traffic in marijuana to be effectively enforced. Intrastate marijuana could no more be distinguished from interstate marijuana than, for example, endangered-species trophies obtained before the species was federally protected can be distinguished from trophies obtained afterwards—which made it necessary and proper to prohibit the sale of all such trophies.

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

It is true that, at the end of the day, it is inevitable that each American will affect commerce and become a part of it, even if not by choice. But if every person comes within the Commerce Clause power of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end.

Wickard v. Filburn has been regarded as the most expansive assertion of the commerce power in our history. A close second is *Perez v. United States*, 402 U.S. 146 (1971), which upheld a statute criminalizing the eminently local activity of loan-sharking. Both of those cases, however, involved commercial *activity*. To go beyond that, and to say that the failure to grow wheat or the refusal to make loans affects commerce, so that growing and lending can be federally compelled, is to extend federal power to virtually everything. All of us consume food, and when we do so the Federal Government can prescribe what its quality must be and even how much we must pay. But the mere fact that we all consume food and are thus, sooner or later, participants in the "market" for food, does not empower the Government to say when and what we will buy. That is essentially what this Act seeks to do with respect to the purchase of health care. It exceeds federal power. . . .

II

The Taxing Power . . .

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

statute as punishment for an unlawful act.' " *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996). In a few cases, this Court has held that a "tax" imposed upon private conduct was so onerous as to be in effect a penalty. But we have never held—*never*—that a penalty imposed for violation of the law was so trivial as to be in effect a tax. We have never held that *any* exaction imposed for violation of the law is an exercise of Congress' taxing power—even when the statute *calls* it a tax, much less when (as here) the statute repeatedly calls it a penalty. When an act "adopt[s] the criteria of wrongdoing" and then imposes a monetary penalty as the "principal consequence on those who transgress its standard," it creates a regulatory penalty, not a tax. *Child Labor Tax Case*, 259 U.S. 20, 38 (1922).

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

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

IV
The Medicaid Expansion . . .

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

Acceptance of the Federal Government's interpretation of the anticoercion rule would permit Congress to dictate policy in areas traditionally governed primarily at the state or local level. Suppose, for example, that Congress enacted legislation offering each State a grant equal to the State's entire annual expenditures for primary and secondary education. Suppose also that this funding came with conditions governing such things as school curriculum, the hiring and tenure of teachers, the drawing of school districts, the length and hours of the school day, the school calendar, a dress code for students, and rules for student discipline. *As a matter of law,* a State could turn down that offer, but if it did so, its residents would not only be required to pay the federal taxes needed to support this expensive new program, but they would also be forced to pay an equivalent amount in state taxes. And if the State gave in to the federal law, the State and its subdivisions would surrender their traditional authority in the field of education. . . .

E

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

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

F

Seven Members of the Court agree that the Medicaid Expansion, as enacted by Congress, is unconstitutional. Because the Medicaid Expansion is unconstitutional, the question of remedy arises. The most natural remedy would be to invalidate the Medicaid Expansion. However, the Government proposes—in two cursory sentences at the very end of its brief—preserving the Expansion. Under its proposal, States would receive the additional Medicaid funds if they expand eligibility, but States would keep their pre-existing Medicaid funds if they do not expand eligibility. We cannot accept the Government's suggestion.

The reality that States were given no real choice but to expand Medicaid was not an accident.

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

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

The Government cites a severability clause codified with Medicaid in Chapter 7 of the United States Code stating that if "any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby." 42 U.S.C. § 1303 (2006 ed.). But that clause tells us only that other provisions in Chapter 7 should not be invalidated if § 1396c, the authorization for the cut-off of all Medicaid funds, is unconstitutional. It does not tell us that § 1396c can be judicially revised, to say what it does not say. Such a judicial power would not be called the doctrine of severability but perhaps the doctrine of amendatory invalidation—similar to the amendatory veto that permits the Governors of some States to reduce the amounts appropriated in legislation. The proof that such a power does not exist is the fact that it would not preserve other congressional dispositions, but would leave it up to the Court what the "validated" legislation will contain. The Court today opts for permitting the cut-off of only incremental Medicaid funding, but it might just as well have permitted, say, the cut-off of funds that represent no more than *x* percent of the State's budget. The Court severs nothing, but simply revises § 1396c to read as the Court would desire.

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

V
Severability

The Affordable Care Act seeks to achieve "near-universal" health insurance coverage. § 18091(2)(D) (2006 ed., Supp. IV). The two pillars of the Act are the Individual Mandate and the expansion of coverage under Medicaid. In our view, both these central provisions of the Act—the Individual Mandate and Medicaid Expansion—are invalid. It follows, as some of the parties

urge, that all other provisions of the Act must fall as well. . . .

* * *

The Court today decides to save a statute Congress did not write. It rules that what the statute declares to be a requirement with a penalty is instead an option subject to a tax. And it changes the intentionally coercive sanction of a total cut-off of Medicaid funds to a supposedly noncoercive cut-off of only the incremental funds that the Act makes available.

The Court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching. It creates a debilitated, inoperable version of health-care regulation that Congress did not enact and the public does not expect. It makes enactment of sensible health-care regulation more difficult, since Congress cannot start afresh but must take as its point of departure a jumble of now senseless provisions, provisions that certain interests favored under the Court's new design will struggle to retain. And it leaves the public and the States to expend vast sums of money on requirements that may or may not survive the necessary congressional revision.

The Court's disposition, invented and atextual as it is, does not even have the merit of avoiding constitutional difficulties. It creates them. The holding that the Individual Mandate is a tax raises a difficult constitutional question (what is a direct tax?) that the Court resolves with inadequate deliberation. And the judgment on the Medicaid Expansion issue ushers in new federalism concerns and places an unaccustomed strain upon the Union. Those States that decline the Medicaid Expansion must subsidize, by the federal tax dollars taken from their citizens, vast grants to the States that accept the Medicaid Expansion. If that destabilizing political dynamic, so antagonistic to a harmonious Union, is to be introduced at all, it should be by Congress, not by the Judiciary.

The values that should have determined our course today are caution, minimalism, and the understanding that the Federal Government is one of limited powers. But the Court's ruling undermines those values at every turn. In the name of restraint, it overreaches. In the name of constitutional avoidance, it creates new constitutional questions. In the name of cooperative federalism, it undermines state sovereignty.

The Constitution, though it dates from the founding of the Republic, has powerful meaning and vital relevance to our own times. The constitutional protections that this case involves are protections of structure. Structural protections—notably, the restraints imposed by federalism and separation of powers—are less romantic and have less obvious a connection to personal freedom than the provisions of the Bill of Rights or the Civil War Amendments. Hence they tend to be undervalued or even forgotten by our citizens. It should be the responsibility of the Court to teach otherwise, to remind our people that the Framers considered structural protections of freedom the most important ones, for which reason they alone were embodied in the original Constitution and not left to later amendment. The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril. Today's decision should have vindicated, should have taught, this truth; instead, our judgment today has disregarded it.

For the reasons here stated, we would find the Act invalid in its entirety. We respectfully dissent.

JUSTICE THOMAS, dissenting. [omitted]

Chapter 6 EXCLUSION AND EQUAL PROTECTION

§ 6.03 RACIAL CLASSIFICATION

[D] Affirmative Action

Page 714: [Add a new note (4)]:

(4) The Supreme Court in *Fisher v. University of Texas,* 570 U.S., 2013 WL 3155220, did not decide, as many had expected, what the future affirmative action in American higher education would be. Instead, the Justices put off for a future day any definitive ruling on the rules of engagement for affirmative action. Justice Kennedy wrote the opinion, joined by Chief Justice Roberts, and Justices Scalia, Thomas, Breyer, Alito, and Sotomayor. Only Justice Ginsburg dissented. (Justice Kagan recused herself from the case, because she had participated in the litigation while serving as Solicitor General in the early years of the Obama Administration.) Justices Scalia and Thomas, while joining in the opinion of Justice Kennedy, wrote concurring opinions.

The *Fisher* case arose against the backdrop of the peculiar history of affirmative action in Texas. In 1996, in a case entitled *Hopwood v. Texas*, 78 F.3d 932, 955 (5th Cir. 1996), in which the United States Court of Appeals for the Fifth Circuit issued a ruling that led to the temporary end of affirmative action in Texas. In *Hopwood* the court struck down the University of Texas Law School's affirmative action program, holding that the pursuit of diversity in education was not a "compelling governmental interest" and that the use of race and ethnicity by the Law School violated the Fourteenth Amendment's Equal Protection Clause. *Hopwood* was interpreted by the Texas Attorney General as effectively banning all race-conscious admissions programs in all of the state's public universities and colleges, at all levels of higher education.

In 1997, responding to *Hopwood*, the Texas legislature enacted "The Top Ten Percent Law," mandating that any student finishing in the top ten-percent of his or her high school class be granted automatic admission to any Texas state university. The purpose of the law was to enhance the diversity at public universities in Texas. Although on its face the law was race-neutral—it simply imposed a mathematical threshold that guaranteed admission to the top 10% of all high school students—it worked to modestly enhance diversity, because so many Texas high schools were predominantly populated by students of only one race. The law of averages kicked in as an end-run around the law of the Fourteenth Amendment as *Hopwood* had declared it, because Texas had a goodly share of schools that were almost entirely African-American, or entirely Hispanic, or entirely Caucasian. Taking the top 10% from each school thus enhanced the diversity of the overall "10% pool."

This unusual system ended, however, when the ruling in *Hopwood* was in turn overruled in 2003 by the Supreme Court's decision in *Grutter v. Bolinger*, upholding as constitutionally permissible the University of Michigan Law School's aspiration to enroll a critical mass of minority students. *Grutter*, along with its companion case, *Gratz v. Bollinger*, formed a pair of Fourteenth Amendment bookends that for the last ten years had marked the boundaries of what was permissible and impermissible in affirmative action in admissions.

In *Fisher*, the plaintiff, Abigail Fisher, applied to the University of Texas at Austin in 2008, but was denied admission. She instead went to LSU. Fisher was in the top 12% of her high school class, and thus could not benefit from the Texas 10% regime, but was instead relegated to competition for the remaining seats in the freshman class admitted outside the 10% system. In the year she applied, approximately 81% of the class at UT was filled by the 10% system, leaving Fisher as one of the applicants for the remaining 19% of the class. Fisher alleged that she was denied admission because Texas used the sort of racial and ethnic preferences approved in the Michigan *Grutter* ruling to add additional diversity to the Texas student body in that remaining 19% of the class, claiming that her academic record was stronger than the records of minority students who were admitted over her. Texas disputed Fisher's assertion, stating that under the holistic approach to admissions it employed to fill the final portion of its class, Fisher could not prove she would have been admitted, even if Texas had not used race and ethnicity as plus factors to enhance diversity. Fisher in turn argued that whether or not she could prove that she would have been admitted to Texas but for her race, she still was entitled to participate in an admissions program that was not tainted by unconstitutional race discrimination. Since the 10% system *already* increased racial diversity at Texas, Fisher argued, Texas could not engage in piling on, seeking yet additional diversity in rounding out the profile of the student body. Since the 10% system demonstrated that enhanced diversity could be achieved in Texas through a formally race-neutral admissions system, Fisher argued, Texas had no constitutionally justifiable rationale for adding to that system an additional race-conscious program, which effectively penalized applicants such as Fisher solely because of the color of her skin.

Fisher did not launch a wholesale challenge to the prior *Grutter* ruling, but instead framed her case in a more measured manner, arguing that whether *Grutter* was right or wrong, it ought not apply when a state has demonstrated that a race-neutral alternative exists, such as the 10% system.

In response, Texas argued that the 10% system did not achieve *sufficient* diversity, either quantitatively or qualitatively, to vindicate its compelling interests in achieving a more diverse student body. Texas also argued that the admissions system it used was precisely what the Supreme Court had already approved in *Grutter*. If Abigail Fisher was not challenging the ruling in *Grutter*, Texas reasoned, and if Texas was simply following *Grutter*'s roadmap, then it had done nothing unconstitutional.

The majority opinion in *Fisher* from the Supreme Court did not resolve the issue. The seven-Justice majority opinion of Justice Kennedy interpreted the Fifth Circuit ruling in the case as failing to conscientiously apply the "strict scrutiny" test. Instead, as the majority saw it, the lower court had merely required that the University of Texas demonstrate that its decision to reintroduce race as a factor in admissions be made "in good faith." This "good faith" standard, the majority held, was inconsistent with the demands of *Bakke*, *Grutter*, and *Gratz*, and therefore the Supreme Court remanded the case back to the Fifth Circuit to apply the correct standard.

Abigail Fisher's lawyers, as previously noted, did not seek an outright overruling of the *Bakke* / *Grutter* / *Gratz* line of cases. Are there any hints to be gleaned from *Fisher* as to what the future of that line of precedent will be? Justice Kennedy's opinion described in *Fisher* included this critical yet cryptic sentence: "We take those cases as given for purposes of deciding this case." Note the careful wording: He did not say "we reaffirm those cases." He only said that the Court would "take" the cases "as given" "*for the purposes of deciding this case*," leaving open the possibility that the Court would *not* take those cases as given for the purposes of deciding a future case.

This is more. Justice Kennedy's opinion noted the mandate of *Grutter* that judges defer to the educational judgment of university educators regarding the benefits that flow from a diverse student body:

> According to *Grutter*, a university's "educational judgment that such diversity is essential to its educational mission is one to which we defer." *Grutter* concluded that the decision to pursue "the educational benefits that flow from student body diversity," that the University deems integral to its mission is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*.

Defenders of affirmative action may seek some solace in this passage. But the opinion of Justice Kennedy then goes on, in a critical section, to describe the issue on which universities should *not* receive deference—the decision that race-conscious affirmative action is *necessary* to achieve the goal of a diverse student body:

> The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference. *Grutter* made clear that it is for the courts, not for university administrators, to ensure that "[t]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." True, a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes. But, as the Court said in *Grutter*, it remains at all times the University's obligation

> to demonstrate, and the Judiciary's obligation to determine, that admissions processes "ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."
>
> Narrow tailoring also requires that the reviewing court verify that it is "necessary" for a university to use race to achieve the educational benefits of diversity.

In short, it will now remain open, in the remand of the case in *Fisher*, and in any future challenges to affirmative action brought anywhere else, for the opponents of affirmative action to argue that the means employed are not "holistic" within the framework of *Grutter*, or more critically, may not be *necessary*, when there are race-neutral alternatives, such as the ten-percent system, that will work just as well.

§ 6.06 THE DEFENSE OF MARRIAGE ACT (DOMA) AND SAME-SEX MARRIAGE

Page 766: [Insert new §6.06]:

UNITED STATES v. WINDSOR

United States Supreme Court

570 U.S. ___ (2013)

JUSTICE KENNEDY delivered the opinion of the Court.

Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007. Edith Windsor and Thea Spyer returned to their home in New York City. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the estate tax exemption for surviving spouses. She was barred from doing so, however, by a federal law, the Defense of Marriage Act, which excludes a same-sex partner from the definition of "spouse" as that term is used in federal statutes. Windsor paid the taxes but filed suit to challenge the constitutionality of this provision. The United States District Court and the Court of Appeals ruled that this portion of the statute is unconstitutional and ordered the United States to pay Windsor a refund. This Court granted certiorari and now affirms the judgment in Windsor's favor.

I

In 1996, as some States were beginning to consider the concept of same-sex marriage, see, *e.g., Baehr v. Lewin,* 74 Haw. 530, 852 P.2d 44 (1993), and before any State had acted to permit it, Congress enacted the Defense of Marriage Act (DOMA), 110 Stat. 2419. DOMA contains two operative sections: Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States. See 28 U.S.C. § 1738C.

Section 3 is at issue here. It amends the Dictionary Act in Title 1, § 7, of the United States Code to provide a federal definition of "marriage" and "spouse." Section 3 of DOMA provides as follows:

> "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7.

The definitional provision does not by its terms forbid States from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents in that status. The

enactment's comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms, however, does control over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law. See GAO, D. Shah, Defense of Marriage Act: Update to Prior Report 1 (GAO–04–353R, 2004).

Edith Windsor and Thea Spyer met in New York City in 1963 and began a long-term relationship. Windsor and Spyer registered as domestic partners when New York City gave that right to same-sex couples in 1993. Concerned about Spyer's health, the couple made the 2007 trip to Canada for their marriage, but they continued to reside in New York City. The State of New York deems their Ontario marriage to be a valid one. See 699 F.3d 169, 177–178 (C.A.2 2012).

Spyer died in February 2009, and left her entire estate to Windsor. Because DOMA denies federal recognition to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation "any interest in property which passes or has passed from the decedent to his surviving spouse." 26 U.S.C. § 2056(a). Windsor paid $363,053 in estate taxes and sought a refund. The Internal Revenue Service denied the refund, concluding that, under DOMA, Windsor was not a "surviving spouse." Windsor commenced this refund suit in the United States District Court for the Southern District of New York. She contended that DOMA violates the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment.

While the tax refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives, pursuant to 28 U.S.C. § 530D, that the Department of Justice would no longer defend the constitutionality of DOMA's § 3. Noting that "the Department has previously defended DOMA against ... challenges involving legally married same-sex couples," the Attorney General informed Congress that "the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny." *Id.*, at 191. The Department of Justice has submitted many § 530D letters over the years refusing to defend laws it deems unconstitutional, when, for instance, a federal court has rejected the Government's defense of a statute and has issued a judgment against it. This case is unusual, however, because the § 530D letter was not preceded by an adverse judgment. The letter instead reflected the Executive's own conclusion, relying on a definition still being debated and considered in the courts, that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.

Although "the President . . . instructed the Department not to defend the statute in *Windsor*," he also decided "that Section 3 will continue to be enforced by the Executive Branch" and that

the United States had an "interest in providing Congress a full and fair opportunity to participate in the litigation of those cases." *Id.*, at 191–193. The stated rationale for this dual-track procedure (determination of unconstitutionality coupled with ongoing enforcement) was to "recogniz[e] the judiciary as the final arbiter of the constitutional claims raised." *Id.*, at 192.

In response to the notice from the Attorney General, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend the constitutionality of § 3 of DOMA. The Department of Justice did not oppose limited intervention by BLAG. The District Court denied BLAG's motion to enter the suit as of right, on the rationale that the United States already was represented by the Department of Justice. The District Court, however, did grant intervention by BLAG as an interested party. See Fed. Rule Civ. Proc. 24(a)(2).

On the merits of the tax refund suit, the District Court ruled against the United States. It held that § 3 of DOMA is unconstitutional and ordered the Treasury to refund the tax with interest. Both the Justice Department and BLAG filed notices of appeal, and the Solicitor General filed a petition for certiorari before judgment. Before this Court acted on the petition, the Court of Appeals for the Second Circuit affirmed the District Court's judgment. It applied heightened scrutiny to classifications based on sexual orientation, as both the Department and Windsor had urged. The United States has not complied with the judgment. Windsor has not received her refund, and the Executive Branch continues to enforce § 3 of DOMA. . . .

II . . .

[The Court first held that it had jurisdiction to hear the appeal. Even though the Executive chose not to defend the constitutionality of § 3 in court, it denied Windor's refund and an order directing the Treasury to pay her money would constitute a real economic injury to the United States, satisfying Article III requirements. Because BLAG remains sharply adverse to Windsor in presenting the appeal, prudential grounds do not counsel refusing to rule on the merits.]

III . . .

Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community. And so New York recognized same-sex marriages performed elsewhere; and then it later amended its own marriage laws to permit same-sex marriage. New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons. After a statewide deliberative process that enabled its citizens to discuss and weigh

arguments for and against samesex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood. See Marriage Equality Act, 2011 N.Y. Laws 749 (codified at N.Y. Dom. Rel. Law Ann. §§ 10–a, 10–b, 13 (West 2013)).

Against this background of lawful same-sex marriage in some States, the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution. By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States. Yet it is further established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges. Just this Term the Court upheld the authority of the Congress to pre-empt state laws, allowing a former spouse to retain life insurance proceeds under a federal program that gave her priority, because of formal beneficiary designation rules, over the wife by a second marriage who survived the husband. *Hillman v. Maretta,* 569 U.S. —— (2013); see also *Ridgway v. Ridgway,* 454 U.S. 46 (1981); *Wissner v. Wissner,* 338 U.S. 655 (1950). This is one example of the general principle that when the Federal Government acts in the exercise of its own proper authority, it has a wide choice of the mechanisms and means to adopt. See *McCulloch v. Maryland,* 4 Wheat. 316, 421, 4 L.Ed. 579 (1819). Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue.

Other precedents involving congressional statutes which affect marriages and family status further illustrate this point. In addressing the interaction of state domestic relations and federal immigration law Congress determined that marriages "entered into for the purpose of procuring an alien's admission [to the United States] as an immigrant" will not qualify the noncitizen for that status, even if the noncitizen's marriage is valid and proper for state-law purposes. 8 U.S.C. § 1186a(b)(1) (2006 ed. and Supp. V). And in establishing income-based criteria for Social Security benefits, Congress decided that although state law would determine in general who qualifies as an applicant's spouse, common-law marriages also should be recognized, regardless of any particular State's view on these relationships. 42 U.S.C. § 1382c(d)(2).

Though these discrete examples establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy, DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations. And its operation is directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect. See *Goodridge v. Department of Public Health,* 440 Mass. 309, 798 N.E.2d 941 (2003); An Act Implementing the Guarantee of Equal Protection Under the Constitution of the State for Same Sex Couples, 2009 Conn. Pub. Acts no. 09–13; *Varnum v. Brien,* 763 N.W.2d 862 (Iowa 2009); Vt. Stat. Ann., Tit. 15, § 8 (2010); N.H.Rev.Stat.

Ann. § 457:1–a (West Supp.2012); Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 57 D.C.Reg. 27 (Dec. 18, 2009); N.Y. Dom. Rel. Law Ann. § 10–a (West Supp.2013); Wash. Rev.Code § 26.04.010 (2012); Citizen Initiative, SameSex Marriage, Question 1 (Me.2012) (results online at http: / / w w w.maine.gov/sos/cec/elec/2012/tab—ref–2012.html (all Internet sources as visited June 18, 2013, and available in Clerk of Court's case file)); Md. Fam. Law Code Ann. § 2–201 (Lexis 2012); An Act to Amend Title 13 of the Delaware Code Relating to Domestic Relations to Provide for Same–Gender Civil Marriage and to Convert Existing Civil Unions to Civil Marriages, 79 Del. Laws ch. 19 (2013); An act relating to marriage; providing for civil marriage between two persons; providing for exemptions and protections based on religious association, 2013 Minn. Laws ch. 74; An Act Relating to Domestic Relations—Persons Eligible to Marry, 2013 R. I. Laws ch. 4.

In order to assess the validity of that intervention it is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition. State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, see, *e.g., Loving v. Virginia*, 388 U.S. 1 (1967); but, subject to those guarantees, "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. See *Williams v. North Carolina*, 317 U.S. 287, 298 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders"). The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities." *Ibid*. "[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce ... [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Haddock v. Haddock*, 201 U.S. 562, 575 (1906); see also *In re Burrus*, 136 U.S. 586, 593–594 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States").

Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations. In *De Sylva v. Ballentine*, 351 U.S. 570 (1956), for example, the Court held that, "[t]o decide who is the widow or widower of a deceased author, or who are his executors or next of kin," under the Copyright Act "requires a reference to the law of the State which created those legal relationships" because "there is no federal law of domestic relations." *Id.*, at 580. In order to respect this principle, the federal courts, as a general rule, do not adjudicate issues of marital status even when there might

otherwise be a basis for federal jurisdiction. See *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992). Federal courts will not hear divorce and custody cases even if they arise in diversity because of "the virtually exclusive primacy ... of the States in the regulation of domestic relations." *Id.*, at 714 (Blackmun, J., concurring in judgment).

The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for "when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States." *Ohio ex rel. Popovici v. Agler,* 280 U.S. 379, 383–384 (1930). Marriage laws vary in some respects from State to State. For example, the required minimum age is 16 in Vermont, but only 13 in New Hampshire. Compare Vt. Stat. Ann., Tit. 18, § 5142 (2012), with N.H.Rev.Stat. Ann. § 457:4 (West Supp.2012). Likewise the permissible degree of consanguinity can vary (most States permit first cousins to marry, but a handful—such as Iowa and Washington, see Iowa Code § 595.19 (2009); Wash. Rev.Code § 26.04.020 (2012)—prohibit the practice). But these rules are in every event consistent within each State.

Against this background DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next. Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. " '[D]is-criminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.' " *Romer v. Evans,* 517 U.S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman,* 277 U.S. 32, 37–38 (1928)).

The Federal Government uses this state-defined class for the opposite purpose—to impose restrictions and disabilities. That result requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment. What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect.

In acting first to recognize and then to allow same-sex marriages, New York was responding

"to the initiative of those who [sought] a voice in shaping the destiny of their own times." *Bond v. United States,* 564 U.S. ——, —— (2011) (slip op., at 9). These actions were without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended. The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other.

The States' interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form "but one element in a personal bond that is more enduring." *Lawrence v. Texas,* 539 U.S. 558, 567 (2003). By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

IV

DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. See U.S. Const., Amdt. 5; *Bolling v. Sharpe,* 347 U.S. 497 (1954). The Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. *Department of Agriculture v. Moreno,* 413 U.S. 528, 534–535 (1973). In determining whether a law is motived by an improper animus or purpose, " '[d]iscriminations of an unusual character' " especially require careful consideration. *Supra,* at 19 (quoting *Romer, supra,* at 633). DOMA cannot survive under these principles. The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people. DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage.... H.R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage." H.R.Rep. No. 104–664, pp. 12–13 (1996). The House concluded that DOMA expresses "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo–Christian) morality." *Id.,* at 16 (footnote deleted). The stated purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." *Ibid.* Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.

The arguments put forward by BLAG are just as candid about the congressional purpose to influence or interfere with state sovereign choices about who may be married. As the title and dynamics of the bill indicate, its purpose is to discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married under those laws if they are enacted. The congressional goal was "to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws." *Massachusetts,* 682 F.3d, at 12–13. The Act's demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law. This raises a most serious question under the Constitution's Fifth Amendment.

DOMA's operation in practice confirms this purpose. When New York adopted a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a system-wide enactment with no identified connection to any particular area of federal law. DOMA writes inequality into the entire United States Code. The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits.

DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes

within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, 539 U.S. 558, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound. It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive. See 5 U.S.C. §§ 8901(5), 8905. It deprives them of the Bankruptcy Code's special protections for domestic-support obligations. See 11 U.S.C. §§ 101(14A), 507(a)(1)(A), 523(a)(5), 523(a)(15). It forces them to follow a complicated procedure to file their state and federal taxes jointly. Technical Bulletin TB–55, 2010 Vt. Tax LEXIS 6 (Oct. 7, 2010); Brief for Federalism Scholars as *Amici Curiae* 34. It prohibits them from being buried together in veterans' cemeteries. National Cemetery Administration Directive 3210/1, p. 37 (June 4, 2008).

For certain married couples, DOMA's unequal effects are even more serious. The federal penal code makes it a crime to "assaul[t], kidna[p], or murde[r] ... a member of the immediate family" of "a United States official, a United States judge, [or] a Federal law enforcement officer," 18 U.S.C. § 115(a)(1)(A), with the intent to influence or retaliate against that official, § 115(a)(1). Although a "spouse" qualifies as a member of the officer's "immediate family," § 115(c)(2), DOMA makes this protection inapplicable to same-sex spouses.

DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. See 26 U.S.C. § 106; Treas. Reg. § 1.106–1, 26 CFR § 1.106–1 (2012); IRS Private Letter Ruling 9850011 (Sept. 10, 1998). And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security. See Social Security Administration, Social Security Survivors Benefits 5 (2012) (benefits available to a surviving spouse caring for the couple's child), online at http://www.ssa.gov/pubs/EN–05–10084.pdf.

DOMA divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force. For instance, because it is expected that spouses will support each other as they pursue educational opportunities, federal law takes into consideration a spouse's income in calculating a student's federal financial aid eligibility. See 20 U.S.C. § 1087nn(b). Same-sex married couples are exempt from this requirement. The same is true with respect to federal ethics rules. Federal executive and agency officials are prohibited from "participat[ing] personally and substantially" in matters as to which they or their spouses have a financial interest. 18 U.S.C. § 208(a). A similar statute prohibits Senators, Senate employees, and their spouses from accepting high-value gifts from certain sources, see 2 U.S.C. § 31–2(a)(1), and another mandates detailed financial disclosures by numerous high-ranking officials and their spouses. See 5 U.S.C.App. §§ 102(a), (e). Under DOMA, however, these Government-integrity rules do not apply to same-sex spouses.

* * *

The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.

What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.

The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. See *Bolling*, 347 U.S., at 499–500; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217–218 (1995). While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the

marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages.

The judgment of the Court of Appeals for the Second Circuit is affirmed.

It is so ordered.

CHIEF JUSTICE ROBERTS, dissenting.

I agree with JUSTICE SCALIA that this Court lacks jurisdiction to review the decisions of the courts below. On the merits of the constitutional dispute the Court decides to decide, I also agree with JUSTICE SCALIA that Congress acted constitutionally in passing the Defense of Marriage Act (DOMA). Interests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world. *Post,* at 19–20 (dissenting opinion).

The majority sees a more sinister motive, pointing out that the Federal Government has generally (though not uniformly) deferred to state definitions of marriage in the past. That is true, of course, but none of those prior state-by-state variations had involved differences over something—as the majority puts it—"thought of by most people as essential to the very definition of [marriage] and to its role and function throughout the history of civilization." *Ante,* at 13. That the Federal Government treated this fundamental question differently than it treated variations over consanguinity or minimum age is hardly surprising—and hardly enough to support a conclusion that the "principal purpose," of the 342 Representatives and 85 Senators who voted for it, and the President who signed it, was a bare desire to harm. Nor do the snippets of legislative history and the banal title of the Act to which the majority points suffice to make such a showing. At least without some more convincing evidence that the Act's principal purpose was to codify malice, and that it furthered *no* legitimate government interests, I would not tar the political branches with the brush of bigotry.

But while I disagree with the result to which the majority's analysis leads it in this case, I think it more important to point out that its analysis leads no further. The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their "historic and essential authority to define the marital relation," may continue to utilize the traditional definition of marriage. . . .

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom THE CHIEF JUSTICE joins as to Part I, dissenting.

This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation. The Court's errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America. . . .

II . . .

[I]f this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality. That is the issue that divided the parties and the court below, compare Brief for Respondent Bipartisan Legal Advisory Group of U.S. House of Representatives (merits) 24–28(no), with Brief for Respondent Windsor (merits) 17–31 and Brief for United States (merits) 18–36(yes); and compare 699 F.3d 169, 180–185 (C.A.2 2012) (yes), with *id.*, at 208–211 (Straub, J., dissenting in part and concurring in part) (no). In accord with my previously expressed skepticism about the Court's "tiers of scrutiny" approach, I would review this classification only for its rationality. See *United States v. Virginia*, 518 U.S. 515, 567–570 (1996) (SCALIA, J., dissenting). As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like *Moreno*. But the Court certainly does not *apply* anything that resembles that deferential framework. See *Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (a classification " 'must be upheld ... if there is any reasonably conceivable state of facts' " that could justify it).

The majority opinion need not get into the strict-vs.-rational-basis scrutiny question, and need not justify its holding under either, because it says that DOMA is unconstitutional as "a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution," *ante*, at 25; that it violates "basic due process" principles, *ante*, at 20; and that it inflicts an "injury and indignity" of a kind that denies "an essential part of the liberty protected by the Fifth Amendment," *ante*, at 19. The majority never utters the dread words "substantive due process," perhaps sensing the disrepute into which that doctrine has fallen, but that is what those statements mean. Yet the opinion does not argue that same-sex marriage is "deeply rooted in this Nation's history and tradition," *Washington v. Glucksberg*, 521 U.S. 702, 720–721 (1997), a claim that would of course be quite absurd. So would the further suggestion (also necessary, under our substantive-due-process precedents) that a world in which DOMA exists is one bereft

of " 'ordered liberty.' " *Id.*, at 721 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

Some might conclude that this loaf could have used a while longer in the oven. But that would be wrong; it is already overcooked. The most expert care in preparation cannot redeem a bad recipe. The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a " 'bare ... desire to harm' " couples in same-sex marriages. *Ante,* at 20. It is this proposition with which I will therefore engage.

B

As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms. See *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (SCALIA, J., dissenting). I will not swell the U.S. Reports with restatements of that point. It is enough to say that the Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol.

However, even setting aside traditional moral disapproval of same-sex marriage (or indeed same-sex sex), there are many perfectly valid—indeed, downright boring—justifying rationales for this legislation. Their existence ought to be the end of this case. For they give the lie to the Court's conclusion that only those with hateful hearts could have voted "aye" on this Act. And more importantly, they serve to make the contents of the legislators' hearts quite irrelevant: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). Or at least it *was* a familiar principle. By holding to the contrary, the majority has declared open season on any law that (in the opinion of the law's opponents and any panel of like-minded federal judges) can be characterized as mean-spirited.

The majority concludes that the only motive for this Act was the "bare ... desire to harm a politically unpopular group." *Ante*, at 20. Bear in mind that the object of this condemnation is not the legislature of some once-Confederate Southern state (familiar objects of the Court's scorn, see, *e.g., Edwards v. Aguillard*, 482 U.S. 578 (1987)), but our respected coordinate branches, the Congress and Presidency of the United States. Laying such a charge against them should require the most extraordinary evidence, and I would have thought that every attempt would be made to indulge a more anodyne explanation for the statute. The majority does the opposite—affirmatively concealing from the reader the arguments that exist in justification. It makes only a passing mention of the "arguments put forward" by the Act's defenders, and does not even trouble to paraphrase or describe them. See *ante,* at 21. I imagine that this is because it is harder

to maintain the illusion of the Act's supporters as unhinged members of a wild-eyed lynch mob when one first describes their views as *they* see them.

To choose just one of these defenders' arguments, DOMA avoids difficult choice-of-law issues that will now arise absent a uniform federal definition of marriage. See, *e.g.*, Baude, Beyond DOMA: Choice of State Law in Federal Statutes, 64 Stan. L.Rev. 1371 (2012). Imagine a pair of women who marry in Albany and then move to Alabama, which does not "recognize as valid any marriage of parties of the same sex." Ala.Code § 30–1–19(e) (2011). When the couple files their next federal tax return, may it be a joint one? Which State's law controls, for federal-law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)? (Does the answer depend on whether they were just visiting in Albany?) Are these questions to be answered as a matter of federal common law, or perhaps by borrowing a State's choice-of-law rules? If so, *which* State's? And what about States where the status of an out-of-state same-sex marriage is an unsettled question under local law? See *Godfrey v. Spano*, 13 N.Y.3d 358, 892 N.Y.S.2d 272, 920 N.E.2d 328 (2009). DOMA avoided all of this uncertainty by specifying which marriages would be recognized for federal purposes. That is a classic purpose for a definitional provision. . . .

* * *

The penultimate sentence of the majority's opinion is a naked declaration that "[t]his opinion and its holding are confined" to those couples "joined in same-sex marriages made lawful by the State." *Ante*, at 26, 25, 892 N.Y.S.2d 272, 920 N.E.2d 328. I have heard such "bald, unreasoned disclaimer[s]" before. *Lawrence*, 539 U.S., at 604. When the Court declared a constitutional right to homosexual sodomy, we were assured that the case had nothing, nothing at all to do with "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.*, at 578. Now we are told that DOMA is invalid because it "demeans the couple, whose moral and sexual choices the Constitution protects," *ante*, at 23—with an accompanying citation of *Lawrence*. It takes real cheek for today's majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here—when what has preceded that assurance is a lecture on how superior the majority's moral judgment in favor of same-sex marriage is to the Congress's hateful moral judgment against it. I promise you this: The only thing that will "confine" the Court's holding is its sense of what it can get away with. . . .

By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition. Henceforth those challengers will lead with this Court's declaration that there is "no legitimate purpose" served by such a law, and will claim that the traditional definition has "the purpose and effect to disparage and to injure" the "personhood and dignity" of same-sex couples,

see *ante*, at 25, 26. The majority's limiting assurance will be meaningless in the face of language like that, as the majority well knows. That is why the language is there. The result will be a judicial distortion of our society's debate over marriage—a debate that can seem in need of our clumsy "help" only to a member of this institution.

As to that debate: Few public controversies touch an institution so central to the lives of so many, and few inspire such attendant passion by good people on all sides. Few public controversies will ever demonstrate so vividly the beauty of what our Framers gave us, a gift the Court pawns today to buy its stolen moment in the spotlight: a system of government that permits us to rule *ourselves*. Since DOMA's passage, citizens on all sides of the question have seen victories and they have seen defeats. There have been plebiscites, legislation, persuasion, and loud voices—in other words, democracy. Victories in one place for some, see North Carolina Const., Amdt. 1 (providing that "[m]arriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State") (approved by a popular vote, 61% to 39% on May 8, 2012), are offset by victories in other places for others, see Maryland Question 6 (establishing "that Maryland's civil marriage laws allow gay and lesbian couples to obtain a civil marriage license") (approved by a popular vote, 52% to 48%, on November 6, 2012). Even in a *single State*, the question has come out differently on different occasions. Compare Maine Question 1 (permitting "the State of Maine to issue marriage licenses to same-sex couples") (approved by a popular vote, 53% to 47%, on November 6, 2012) with Maine Question 1 (rejecting "the new law that lets same-sex couples marry") (approved by a popular vote, 53% to 47%, on November 3, 2009).

In the majority's telling, this story is black-and-white: Hate your neighbor or come along with us. The truth is more complicated. It is hard to admit that one's political opponents are not monsters, especially in a struggle like this one, and the challenge in the end proves more than today's Court can handle. Too bad. A reminder that disagreement over something so fundamental as marriage can still be politically legitimate would have been a fit task for what in earlier times was called the judicial temperament. We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide.

But that the majority will not do. Some will rejoice in today's decision, and some will despair at it; that is the nature of a controversy that matters so much to so many. But the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better. I dissent.

JUSTICE ALITO, with whom JUSTICE THOMAS joins as to Parts II and III, dissenting. [omitted]

Chapter 7 ECONOMIC AND SOCIAL RIGHTS

§ 7. 01 THE RISE, FALL, AND RESURRECTION OF ENTREPENEURIAL LIBERTY

[B] Takings

Page 810: [Insert a new note (8)]:

(8) In *Koontz v. St. John's River Water Management District*, 570 U. S., 2013 WL 3184628, the Supreme Court elaborated on the doctrine of unconstitutional conditions and the principles of *Nollan v. California Coastal Commission*, and *Dolan v. City of Tigard*. The case involved the application for a land use permit by Coy Koontz. The St. John's River Water District and Koontz engaged in a back-and-forth series of offers and counter-offers over the concessions the District wanted Koontz to make to enhance environmental interests in the area in exchange for approval of his application to build on his land. In the end, Koontz refused to give in to the District's demands, believing that they were excessive in relation to the environmental detriments of his proposed development. Koontz prevailed in Florida's lower courts, which applied *Nollan* and *Dolan* to hold that the conditions the District sought to extract from Koontz violated the principles of "nexus" and "rough proportionality" to the environmental impact of Koontz's proposed development. The Florida Supreme Court, however, reversed, distinguishing *Nollan* and *Dolan* on two grounds. First, the Florida Supreme Court thought it significant that, unlike *Nollan* or *Dolan*, the St. John's District did not approve Koontz's application on the condition that he accede to the District's demands, but rather denied his application because he refused to make concessions.. Second, the Florida Supreme Court drew a distinction between a demand for an interest in real property (what happened in *Nollan* and *Dolan*) and a demand for money. The United States Supreme Court, in a 5-4 decision written by Justice Alito, reversed. "The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so," the Court held. "We have often concluded that denials of governmental benefits were impermissible under the unconstitutional conditions doctrine." A contrary rule, the Court argued, would "enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval." Turning to the alternative holding of the Florida Supreme Court, that Koontz's claim failed because he was asked to spend money rather than give up an easement on his land, the Court noted that a "predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." The rub, however, was to distinguish between an unconstitutional "taking" and a constitutional "tax." Arguing that that "teasing out the difference between taxes and takings is more difficult in theory than in practice" the Court held that, while it was not necessary to articulate a precise formula as to when a monetary exaction becomes so

arbitrary that it may no longer be deemed the exertion of taxation but a confiscation of property, on the record before it there "was little trouble distinguishing the two." Finding that the Florida Supreme Court's opinion could not be reconciled with *Nollan* and *Dolan*, the Supreme Court reversed and remanded. Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, dissented. The dissenters did not take issue with the Court's resolution of the first issue—the Court was thus unanimous in its decision that the principles of *Nollan* and *Dolan* apply when the government refuses to grant a permit because an applicant will not make the concessions the government wants. The dissenters sharply disagreed with the majority's resolution of the second issue, however—its holding that *Nollan* and *Dolan* apply to cases in which the government conditions a permit not on the transfer of real property, but instead on the payment or expenditure of money. That holding, the dissenters argued, ran "roughshod" over the Court's prior decision in *Eastern Enterprises*. "The boundaries of the majority's new rule are uncertain," Justice Kagan argued, claiming that "it threatens to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny."

Chapter 8

RIGHTS OF CONSCIENCE AND EXPRESSION

§8.03 EXPRESSION IN THE PUBLIC ARENA

[C] Vulgar, Graphic, Offensive, and Hate Speech

Page 1108: [Add before Notes and Questions]:

UNITED STATES v. STEVENS
Supreme Court of the United States
__ U.S. __, 130 S. Ct. 1577, 176 L. Ed. 2d 435(2010)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Congress enacted 18 U.S.C. § 48 to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty. The statute does not address underlying acts harmful to animals, but only portrayals of such conduct. The question presented is whether the prohibition in the statute is consistent with the freedom of speech guaranteed by the First Amendment.

I

Section 48 establishes a criminal penalty of up to five years in prison for anyone who knowingly "creates, sells, or possesses a depiction of animal cruelty," if done "for commercial gain" in interstate or foreign commerce. § 48(a). A depiction of "animal cruelty" is defined as one "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if that conduct violates federal or state law where "the creation, sale, or possession takes place." § 48(c)(1). In what is referred to as the "exceptions clause," the law exempts from prohibition any depiction "that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." § 48(b).

This case, however, involves an application of § 48 to depictions of animal fighting. Dogfighting, for example, is unlawful in all 50 States and the District of Columbia, Respondent Robert J. Stevens ran a business, "Dogs of Velvet and Steel," and an associated Web site, through which he sold videos of pit bulls engaging in dogfights and attacking other animals. Among these videos were Japan Pit Fights and Pick-A-Winna: A Pit Bull Documentary, which include contemporary footage of dogfights in Japan (where such conduct is allegedly legal) as well as footage of American dogfights from the 1960's and 1970's. A third video, Catch Dogs and Country Living, depicts the use of pit bulls to hunt wild boar, as well as a "gruesome" scene

of a pit bull attacking a domestic farm pig. On the basis of these videos, Stevens was indicted on three counts of violating § 48.

Stevens moved to dismiss the indictment, arguing that § 48 is facially invalid under the First Amendment. The District Court denied the motion. It held that the depictions subject to § 48, like obscenity or child pornography, are categorically unprotected by the First Amendment. It went on to hold that § 48 is not substantially overbroad, because the exceptions clause sufficiently narrows the statute to constitutional applications. The jury convicted Stevens on all counts, and the District Court sentenced him to three concurrent sentences of 37 months' imprisonment, followed by three years of supervised release.

The en banc Third Circuit, over a three-judge dissent, declared § 48 facially unconstitutional and vacated Stevens's conviction. The Court of Appeals first held that § 48 regulates speech that is protected by the First Amendment. The Court declined to recognize a new category of unprotected speech for depictions of animal cruelty, and rejected the Government's analogy between animal cruelty depictions and child pornography.

The Court of Appeals then held that § 48 could not survive strict scrutiny as a content-based regulation of protected speech. It found that the statute lacked a compelling government interest and was neither narrowly tailored to preventing animal cruelty nor the least restrictive means of doing so. It therefore held § 48 facially invalid.

In an extended footnote, the Third Circuit noted that § 48 "might also be unconstitutionally overbroad," because it "potentially covers a great deal of constitutionally protected speech" and "sweeps [too] widely" to be limited only by prosecutorial discretion. But the Court of Appeals declined to rest its analysis on this ground.

We granted certiorari.

II

The Government's primary submission is that § 48 necessarily complies with the Constitution because the banned depictions of animal cruelty, as a class, are categorically unprotected by the First Amendment. We disagree.

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union,* 535 U.S. 564, 573 (2002). Section 48 explicitly regulates expression based on content: The statute restricts "visual [and] auditory depiction[s]," such as photographs, videos, or sound recordings, depending on whether they depict conduct in which a living animal is intentionally harmed. As such, § 48 is " 'presumptively invalid,' and the Government bears the burden to rebut that presumption." *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 817 (2000) (quoting *R.A.V. v. St. Paul,* 505 U.S. 377, 382 (1992).

. . . The Government argues that "depictions of animal cruelty" should be added to the list. It contends that depictions of "illegal acts of animal cruelty" that are "made, sold, or possessed for commercial gain" necessarily "lack expressive value," and may accordingly "be regulated as *unprotected* speech." The claim is not just that Congress may regulate depictions of animal cruelty subject to the First Amendment, but that these depictions are outside the reach of that Amendment altogether-that they fall into a " 'First Amendment Free Zone.' " *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987).

As the Government notes, the prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies. . . . But we are unaware of any similar tradition excluding *depictions* of animal cruelty from "the freedom of speech" codified in the First Amendment, and the Government points us to none.

The Government contends that "historical evidence" about the reach of the First Amendment is not "a necessary prerequisite for regulation today," and that categories of speech may be exempted from the First Amendment's protection without any long-settled tradition of subjecting that speech to regulation. Instead, the Government points to Congress's " 'legislative judgment that ... depictions of animals being intentionally tortured and killed [are] of such minimal redeeming value as to render [them] unworthy of First Amendment protection,' and asks the Court to uphold the ban on the same basis. The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs."

As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits, and declaring that those limits may be passed at pleasure." *Marbury v. Madison*, 1 Cranch 137, 178, (1803).

. . . In *New York v. Ferber*, 458 U.S. 747 (1982), we noted that within these categories of unprotected speech, "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required," because "the balance of competing interests is clearly struck," The Government derives its proposed test from these descriptions in our precedents.

But such descriptions are just that-descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor.

When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis. In *Ferber*, for example, we classified child pornography as such a category, 458 U.S., at 763. We noted that the State of New York had a compelling interest in protecting children from abuse . . . But our decision did not rest on this "balance of competing interests" alone. We made clear that *Ferber* presented a special case: The market for child pornography was "intrinsically related" to the underlying abuse, and was therefore "an integral part of the production of such materials, an activity illegal throughout the Nation." *Ferber* at 759, 761. . . .

Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that "depictions of animal cruelty" is among them. We need not foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them.

III

Because we decline to carve out from the First Amendment any novel exception for § 48, we review Stevens's First Amendment challenge under our existing doctrine.

A

. . . [W]e granted the Solicitor General's petition for certiorari to determine whether 18 U.S.C. 48 is facially invalid under the Free Speech Clause of the First Amendment.

To succeed in a typical facial attack, Stevens would have to establish "that no set of circumstances exists under which [§ 48] would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987), or that the statute lacks any "plainly legitimate sweep," *Washington v. Glucksberg*, 521 U.S. 702, 740, n. 7 (1997) (Stevens, J., concurring in judgments) . . .

In the First Amendment context, however, this Court recognizes "a second type of facial challenge," whereby a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6 (2008). Stevens argues that § 48 applies to common depictions of ordinary and lawful activities, and that these depictions constitute the vast majority of materials subject to the statute. The Government makes no effort to defend such a broad ban as constitutional. Instead, the Government's entire defense of § 48 rests on interpreting the statute as narrowly limited to specific types of "extreme" material. As the parties have presented the issue, therefore, the constitutionality of § 48 hinges on how broadly it is construed. It is to that question that we now turn.

B

. . . We read § 48 to create a criminal prohibition of alarming breadth. To begin with, the text of the statute's ban on a "depiction of animal cruelty" nowhere requires that the depicted conduct be cruel. That text applies to "any ... depiction" in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." § 48(c)(1). "[M]aimed, mutilated, [and] tortured" convey cruelty, but "wounded" or "killed" do not suggest any such limitation.

. . .While not requiring cruelty, § 48 does require that the depicted conduct be "illegal." But this requirement does not limit § 48 along the lines the Government suggests. There are myriad federal and state laws concerning the proper treatment of animals, but many of them are not designed to guard against animal cruelty. Protections of endangered species, for example, restrict even the humane "wound[ing] or kill[ing]" of "living animal[s]." § 48(c)(1). Livestock regulations are often designed to protect the health of human beings, and hunting and fishing rules (seasons, licensure, bag limits, weight requirements) can be designed to raise revenue, preserve animal populations, or prevent accidents. The text of § 48(c) draws no distinction based on the reason the intentional killing of an animal is made illegal, and includes, for example, the humane slaughter of a stolen cow.

What is more, the application of § 48 to depictions of illegal conduct extends to conduct that is illegal in only a single jurisdiction. Under subsection (c)(1), the depicted conduct need only be illegal in "the State in which the creation, sale, or possession takes place, regardless of whether the ... wounding ... or killing took place in [that] State." A depiction of entirely lawful conduct runs afoul of the ban if that depiction later finds its way into another State where the same conduct is unlawful. This provision greatly expands the scope of § 48, because although there may be "a broad societal consensus" against cruelty to animals there is substantial disagreement on what types of conduct are properly regarded as cruel. Both views about cruelty to animals and regulations having no connection to cruelty vary widely from place to place.

In the District of Columbia, for example, all hunting is unlawful. . . .Other jurisdictions permit or encourage hunting, and there is an enormous national market for hunting-related depictions in which a living animal is intentionally killed. Hunting periodicals have circulations in the hundreds of thousands or millions . . . [but] because the statute allows each jurisdiction to export its laws to the rest of the country, § 48(a) extends to *any* magazine or video depicting lawful hunting, so long as that depiction is sold within the Nation's Capital.

C

The only thing standing between defendants who sell such depictions and five years in federal prison-other than the mercy of a prosecutor-is the statute's exceptions clause. Subsection (b) exempts from prohibition "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." The Government argues that this clause substantially narrows the statute's reach: News reports about animal cruelty have "journalistic" value; pictures of bullfights in Spain have "historical" value; and instructional hunting videos have "educational" value.

The Government's attempt to narrow the statutory ban, however, requires an unrealistically

broad reading of the exceptions clause. As the Government reads the clause, any material with "redeeming societal value," [or] " 'at least some minimal value." But the text says "serious" value, and "serious" should be taken seriously. We decline the Government's invitation-advanced for the first time in this Court-to regard as "serious" anything that is not "scant."

Quite apart from the requirement of "serious" value in § 48(b), the excepted speech must also fall within one of the enumerated categories. Much speech does not. Most hunting videos, for example, are not obviously instructional in nature, except in the sense that all life is a lesson. According to Safari Club International and the Congressional Sportsmen's Foundation, many popular videos "have primarily entertainment value" and are designed to "entertai[n] the viewer, marke[t] hunting equipment, or increas[e] the hunting community."

In *Miller* we held that "serious" value shields depictions of sex from regulation as obscenity. . . . We did not, however, determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place. *Most* of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from government regulation.

Thus, the protection of the First Amendment presumptively extends to many forms of speech that do not qualify for the serious-value exception of § 48(b), but nonetheless fall within the broad reach of § 48(c).

D

Not to worry, the Government says [in its brief]: The Executive Branch construes § 48 to reach only "extreme" cruelty and it "neither has brought nor will bring a prosecution for anything less." The Government hits this theme hard, invoking its prosecutorial discretion several times.. But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.

This prosecution is itself evidence of the danger in putting faith in government representations of prosecutorial restraint. When this legislation was enacted, the Executive Branch announced that it would interpret § 48 as covering only depictions "of wanton cruelty to animals designed to appeal to a prurient interest in sex." See Statement by President William J. Clinton upon Signing H.R. 1887, 34 Weekly Comp. Pres. Doc. 2557 (Dec. 9, 1999). No one suggests that the videos in this case fit that description. The Government's assurance that it will apply § 48 far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading.

The judgment of the United States Court of Appeals for the Third Circuit is affirmed.

It is so ordered.

JUSTICE ALITO dissenting.

The Court strikes down in its entirety a valuable statute, 18 U.S.C. § 48, that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty-in particular, the creation and commercial exploitation of "crush videos," a form of depraved entertainment that has no social value. The Court's approach, which has the practical effect of legalizing the sale of such videos and is thus likely to spur a resumption of their production, is unwarranted. Respondent was convicted under § 48 for selling videos depicting dogfights. On appeal, he argued, among other things, that § 48 is unconstitutional as applied to the facts of this case, and he highlighted features of those videos that might distinguish them from other dogfight videos brought to our attention. Today's decision . . . strikes down § 48 using what has been aptly termed the "strong medicine" of the overbreadth doctrine, *United States v. Williams*, 553 U.S. 285, 293 (2008) a potion that generally should be administered only as "a last resort." *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32, 39 (1999).

II

The overbreadth doctrine "strike[s] a balance between competing social costs." *Williams* at 292. Specifically, the doctrine seeks to balance the "harmful effects" of "invalidating a law that in some of its applications is perfectly constitutional" against the possibility that "the threat of enforcement of an overbroad law [will] dete[r] people from engaging in constitutionally protected speech." *Wiliams* at 292. "In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams* at 292.

In determining whether a statute's overbreadth is substantial, we consider a statute's application to real-world conduct, not fanciful hypotheticals . . . Similarly, "there must be a *realistic danger* that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

III

In holding that § 48 violates the overbreadth rule, the Court declines to decide whether, as the Government maintains, § 48 is constitutional as applied to two broad categories of depictions that exist in the real world: crush videos and depictions of deadly animal fights. Instead, the Court tacitly assumes for the sake of argument that § 48 is valid as applied to these depictions, but the Court concludes that § 48 reaches too much protected speech to survive. The Court relies primarily on depictions of hunters killing or wounding game and depictions of animals being slaughtered for food. I address the Court's examples below.

A

I turn first to depictions of hunting. As the Court notes, photographs and videos of hunters shooting game are common. But hunting is legal in all 50 States, and § 48 applies only to a

depiction of conduct that is illegal in the jurisdiction in which the depiction is created, sold, or possessed. §§ 48(a), (c). Therefore, in all 50 States, the creation, sale, or possession for sale of the vast majority of hunting depictions indisputably falls outside § 48's reach.

Straining to find overbreadth, the Court suggests that § 48 prohibits the sale or possession in the District of Columbia of any depiction of hunting because the District-undoubtedly because of its urban character-does not permit hunting within its boundaries. The Court also suggests that, because some States prohibit a particular type of hunting (*e.g.*, hunting with a crossbow or "canned" hunting) or the hunting of a particular animal (*e.g.*, the "sharp-tailed grouse"), § 48 makes it illegal for persons in such States to sell or possess for sale a depiction of hunting that was perfectly legal in the State in which the hunting took place.

. . . I would hold that § 48 does not apply to depictions of hunting. First, because § 48 targets depictions of "animal cruelty," I would interpret that term to apply only to depictions involving acts of animal cruelty as defined by applicable state or federal law, not to depictions of acts that happen to be illegal for reasons having nothing to do with the prevention of animal cruelty. . . .Virtually all state laws prohibiting animal cruelty either expressly define the term "animal" to exclude wildlife or else specifically exempt lawful hunting activities, so the statutory prohibition set forth in § 48(a) may reasonably be interpreted not to reach most if not all hunting depictions.

For these reasons, I am convinced that § 48 has no application to depictions of hunting. But even if § 48 did impermissibly reach the sale or possession of depictions of hunting in a few unusual situations (for example, the sale in Oregon of a depiction of hunting with a crossbow in Virginia or the sale in Washington State of the hunting of a sharp-tailed grouse in Idaho, see *ante*, at ----), those isolated applications would hardly show that § 48 bans a substantial amount of protected speech.

B

[Section omitted. Justice Alito uses a similar analysis for images of animal slaughtering as he used in part A.]

1

As the Court of Appeals recognized, "the primary conduct that Congress sought to address through its passage [of § 48] was the creation, sale, or possession of 'crush videos.' " A sample crush video, which has been lodged with the Clerk, records the following event:

"[A] kitten, secured to the ground, watches and shrieks in pain as a woman thrusts her high-heeled shoe into its body, slams her heel into the kitten's eye socket and mouth loudly fracturing its skull, and stomps repeatedly on the animal's head. The kitten hemorrhages blood, screams blindly in pain, and is ultimately left dead in a moist pile of blood-soaked hair and bone."

It is undisputed that the *conduct* depicted in crush videos may constitutionally be prohibited. All 50 States and the District of Columbia have enacted statutes prohibiting animal cruelty. . . These videos, which "often appeal to persons with a very specific sexual fetish," *id.*, at 2, were

made in secret, generally without a live audience, and "the faces of the women inflicting the torture in the material often were not shown, nor could the location of the place where the cruelty was being inflicted or the date of the activity be ascertained from the depiction." *Id.*, at 3. Thus, law enforcement authorities often were not able to identify the parties responsible for the torture.

. . . In light of the practical problems thwarting the prosecution of the creators of crush videos under state animal cruelty laws, Congress concluded that the only effective way of stopping the underlying criminal conduct was to prohibit the commercial exploitation of the videos of that conduct. And Congress' strategy appears to have been vindicated. We are told that "[b]y 2007, sponsors of § 48 declared the crush video industry dead. Even overseas Websites shut down in the wake of § 48.

2

The First Amendment protects freedom of speech, but it most certainly does not protect violent criminal conduct, even if engaged in for expressive purposes. Crush videos present a highly unusual free speech issue because they are so closely linked with violent criminal conduct. The videos record the commission of violent criminal acts, and it appears that these crimes are committed for the sole purpose of creating the videos. In addition, as noted above, Congress was presented with compelling evidence that the only way of preventing these crimes was to target the sale of the videos. Under these circumstances, I cannot believe that the First Amendment commands Congress to step aside and allow the underlying crimes to continue.

The most relevant of our prior decisions is *Ferber*, 458 U.S. 747, which concerned child pornography. The Court there held that child pornography is not protected speech, and I believe that *Ferber* 's reasoning dictates a similar conclusion here.

In *Ferber*, an important factor-I would say the most important factor-was that child pornography involves the commission of a crime that inflicts severe personal injury to the "children who are made to engage in sexual conduct for commercial purposes.' " *Id.*, at 753, The *Ferber* Court repeatedly described the production of child pornography as child "abuse," "molestation," or "exploitation."

. . . Second, *Ferber* emphasized the fact that these underlying crimes could not be effectively combated without targeting the distribution of child pornography. As the Court put it, "the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." *Ferber* at 759.

. . . Third, the *Ferber* Court noted that the value of child pornography "is exceedingly modest, if not *de minimis,"* and that any such value was "overwhelmingly outweigh[ed]" by "the evil to be restricted." *Id.*, at 762-763.

All three of these characteristics are shared by § 48, as applied to crush videos. First, the conduct depicted in crush videos is criminal in every State and the District of Columbia. Thus, any crush video made in this country records the actual commission of a criminal act that inflicts severe physical injury and excruciating pain and ultimately results in death. Those who record

the underlying criminal acts are likely to be criminally culpable, either as aiders and abettors or conspirators. And in the tight and secretive market for these videos, some who sell the videos or possess them with the intent to make a profit may be similarly culpable. . . . To the extent that § 48 reaches such persons, it surely does not violate the First Amendment.

Second, the criminal acts shown in crush videos cannot be prevented without targeting the conduct prohibited by § 48-the creation, sale, and possession for sale of depictions of animal torture with the intention of realizing a commercial profit. The evidence presented to Congress posed a stark choice: Either ban the commercial exploitation of crush videos or tolerate a continuation of the criminal acts that they record. Faced with this evidence, Congress reasonably chose to target the lucrative crush video market.

Finally, the harm caused by the underlying crimes vastly outweighs any minimal value that the depictions might conceivably be thought to possess. Section 48 reaches only the actual recording of acts of animal torture; the statute does not apply to verbal descriptions or to simulations. And, unlike the child pornography statute in *Ferber* or its federal counterpart, § 48(b) provides an exception for depictions having any "serious religious, political, scientific, educational, journalistic, historical, or artistic value."

It must be acknowledged that § 48 differs from a child pornography law in an important respect: preventing the abuse of children is certainly much more important than preventing the torture of the animals used in crush videos. . . . But while protecting children is unquestionably *more* important than protecting animals, the Government also has a compelling interest in preventing the torture depicted in crush videos.

The animals used in crush videos are living creatures that experience excruciating pain. Our society has long banned such cruelty, which is illegal throughout the country. In *Ferber*, the Court noted that "virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combating 'child pornography,' " and the Court declined to "second-guess [that] legislative judgment." *Ferber* at 758. Here, likewise, the Court of Appeals erred in second-guessing the legislative judgment about the importance of preventing cruelty to animals.

. . .In short, *Ferber* is the case that sheds the most light on the constitutionality of Congress' effort to halt the production of crush videos. Applying the principles set forth in *Ferber*, I would hold that crush videos are not protected by the First Amendment.

B

Application of the *Ferber* framework also supports the constitutionality of § 48 as applied to depictions of brutal animal fights. (For convenience, I will focus on videos of dogfights, which appear to be the most common type of animal fight videos.)

First, such depictions, like crush videos, record the actual commission of a crime involving deadly violence. Dogfights are illegal in every State and the District of Columbia . . . and under federal law . . .

Second, Congress had an ample basis for concluding that the crimes depicted in these videos cannot be effectively controlled without targeting the videos. . . .

. . .Third, depictions of dogfights that fall within § 48's reach have by definition no appreciable social value. As noted, § 48(b) exempts depictions having any appreciable social value, and thus the mere inclusion of a depiction of a live fight in a larger work that aims at communicating an idea or a message with a modicum of social value would not run afoul of the statute.

Finally, the harm caused by the underlying criminal acts greatly outweighs any trifling value that the depictions might be thought to possess.

. . . For these dogs, unlike the animals killed in crush videos, the suffering lasts for years rather than minutes. As with crush videos, moreover, the statutory ban on commerce in dogfighting videos is also supported by compelling governmental interests in effectively enforcing the Nation's criminal laws and preventing criminals from profiting from their illegal activities.

In sum, § 48 may validly be applied to at least two broad real-world categories of expression covered by the statute: crush videos and dogfighting videos. Thus, the statute has a substantial core of constitutionally permissible applications. Moreover, for the reasons set forth above, the record does not show that § 48, properly interpreted, bans a substantial amount of protected speech in absolute terms. *A fortiori*, respondent has not met his burden of demonstrating that any impermissible applications of the statute are "substantial" in relation to its "plainly legitimate sweep." Accordingly, I would reject respondent's claim that § 48 is facially unconstitutional under the overbreadth doctrine.

* * *

For these reasons, I respectfully dissent.

Page 1110: [Add after Note (5]):

(6) In *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011), the Supreme Court relied on its 2010 opinion in *United States v. Stevens* to strike down a California law restricting access to violent video games by minors. The California law at issue, Cal. Civ.Code Ann. §§ 1746–1746.5, prohibited the sale or rental of "violent video games" to minors, and required their packaging to be labeled "18." The Act covered games "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," that is "patently offensive to prevailing standards in the community as to what is suitable for minors," and that "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." Violation of the Act was punishable by a civil fine of up to $1,000.

In a majority opinion written by Justice Scalia, and joined by Justices Kennedy, Ginsburg, Sotomayer, and Kagan, the Court held that the California law violated the First Amendment. The Court began its analysis by affirming what the state of California had conceded, that video games qualified for First Amendment protection. Video games, the Court observed, were like books, plays, and movies, in that they communicate ideas through familiar literary devices and features distinctive to their medium. Free speech principles, the Court held, do not vary with new and different media. California's law, the Court held, violated one of the most basic principles of free speech law, that government lacks the power to restrict expression because of its message, ideas, subject matter, or content. California tried to convince the Court to treat violent expression targeting minors, particularly violent expression communicated through video games, as a new special category of expression that should be deemed exempt from First Amendment protection, akin to obscenity, incitement, and fighting words. California was thus attempting to make the same sort of argument that the United States government asserted, but failed to win, in the *Stevens* case, where it sought to convince the Court to carve out a special exempt category of expression for depictions of violent animal cruelty. California's effort also failed. The Court reiterated its holding in *Stevens*, that a legislature cannot create new categories of unprotected speech simply by weighing the value of a particular category against its social costs and then punishing it if it fails the test.

The Court noted that the United States has no tradition of specially restricting children's access to depictions of violence. The Court also found unpersuasive California's argument that "interactive" video games present special problems, in that the player participates in the violent action on screen and determines its outcome. Having set up this analytic framework, the Court held that the California law should be subject to strict scrutiny, as content-based restriction of protected speech. The California law could not pass this test. The Court rejected the psychological studies cited by California, which purported to show a connection between exposure to violent video games and harmful effects on children. Those studies, the Court held, did not prove that exposure of violence to minors in video games caused minors to act aggressively. Whatever demonstrated effects the studies revealed, the Court held, were both small and indistinguishable from effects produced by other media. Given that California had declined to restrict those other media, such as Saturday morning cartoons, the Court held, California's special targeted of video-game regulation was "wildly under inclusive." California's attack on video games alone, the Court observed, raised serious doubts about whether what was really afoot was the disfavoring particular speakers or viewpoints. The Court also rebuffed the

claim that the California law was justified as a means of providing assistance to parents who wished to restrict their children's access to violent videos. The Court was persuaded that the voluntary rating system used by the video-game industry had largely already accomplished that goal. Moreover, the Court argued, the California law was greatly over inclusive as a remedy for assisting parents, because not all of the children who are prohibited from purchasing violent video games have parents who disapprove of their doing so. Finding that the law could not withstand strict scrutiny, the Court struck it down.

Justice Alito, joined by Chief Justice Roberts, filed an opinion concurring in the judgment. Justice Alito disagreed with the majority's position on the merits, holding open the possibility that he and the Chief Justice might approve a more narrowly drawn restriction on violent video games. Justice Alito instead argued that the California law was too imprecise to provide the fair warning required by due process.

Justice Thomas and Justice Breyer each dissented. Justice Thomas, following one of his familiar themes, argued that the First Amendment contains no right to speak to minors without first going through their parents or guardians. Justice Breyer found California's general arguments persuasive, and argued that the case was not about censorship, but "education." The First Amendment, he argued, does not prevent a state from coming to the aid of parents in making decisions for their children about their access to expression that a legislature had determined, with the aid of social science data, to be harmful to children.

(7) In *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the Supreme Court dealt with the highly charged and notorious protests of the Westboro Baptist Church. The Westboro Church was founded by Fred Phelps in Topeka, Kansas in 1955. The congregation believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military. For more than two decades, the Church has used the picketing of military funerals as a tactic for propagating its message. As the *Snyder* litigation reached the Supreme Court, the Church had picketed nearly 600 funerals. The *Snyder* case arose from a civil lawsuit brought by the family of Marine Lance Corporal Matthew Snyder, who was killed in Iraq in the line of duty. Phelps and the Westboro Church, following their standard tactics, set out to use Synder's funeral for one its protests. The funeral was set for a Catholic church in Westminster, Maryland, the Snyders' hometown. The time and location were printed in local newspapers. Phelps became aware of Matthew Snyder's funeral and decided to travel to Maryland with six other Westboro Baptist parishioners (two of his daughters and four of his grandchildren) to picket. On the day of the memorial service, Phelps and six of his fellow Church members picketed on public land adjacent to public streets near the Maryland State House, the United States Naval Academy, and Matthew Snyder's funeral. They carried signs with messages such as: "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You." The Westboro Church had, in advance, notified local law enforcement authorities of their protest plans. They complied with police instructions in staging their protests. The actual picketing took place within a 10-by 25-foot plot of public land adjacent to a public street, behind a temporary fence. This was a location approximately 1,000 feet from the church at which the funeral service was conducted. The protest lasted about 30 minutes. The funeral procession passed within 200 to 300 feet of the picket location. Albert

> Snyder, the father of Corporal Snyder, stated that he could see the tops of the picket signs, but not read their content. No protestors entered the church property or went to the cemetery. There was no use of profanity, and there was no violence associated with the event.

Several weeks following the funeral, a member of the Westboro Church who had been one of the picketers at the Synder funeral posted on the Internet, on the Westboro web site, an attack on the Snyder family. The message was laced with religious denunciations of the Snyders, interspersed among lengthy Bible quotations. When Albert Snyder discovered the posting, which came to be known in the litigation by the nickname the "epic," his distress and sense of offense were understandably intensified. The epic played a role in the lower court litigation in the civil suit, but essentially dropped out of the case at the Supreme Court level. The Court marginalized the importance of the epic by relegating all mention of it to a footnote, stating that Snyder had not included any mention of the epic in his Petition for Certiorari, and had not devoted anything other than one paragraph of attention to it in his opening briefing before the Supreme Court. In a cryptic reference, the Court said simply that in light of these facts "and the fact that an Internet posting may raise distinct issues in this context, we decline to consider the epic in deciding this case."

Albert Snyder brought a diversity suit in federal court based on Maryland state tort claims, including defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. The Westboro Church was granted summary judgment on the defamation and publicity given to private life claims, but the trial judge allowed the remaining three claims to proceed to a jury trial. At that trial Snyder described the intensity of his emotional injury, testifying that was unable to separate the thought of his dead son from his thoughts of Westboro's picketing, and that he often becomes tearful, angry, and physically ill when he thinks about it. Snyder's personal testimony was in turn buttressed by expert witnesses, who explained that Snyder's emotional anguish had resulted in severe depression and had exacerbated Snyder's pre-existing health conditions. At the trial the jury found for Snyder on his claims for intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims. The jury awarded Snyder $2.9 million in compensatory damages and $8 million in punitive damages. The trial judge sustained the $2.9 million compensatory damages award, but reduced the punitive damages award to $2.1 million The United States Court of Appeals for the Fourth Circuit reversed, holding that the Church's expression was protected by the First Amendment.

The Supreme Court, in an opinion by Chief Justice Roberts, ruled 8-1 that the speech of the Westboro Church was insulated from liability by the First Amendment. Only Justice Alito dissented. The Court began its analysis by invoking the long line of Supreme Court cases holding that the First Amendment operates as a limiting force on state tort law claims involving freedom of expression, cases such as *Hustler Magazine, Inc. v. Falwell*. The key inquiry in this line of precedent, the Court held, was whether the speech falls within the class of expression deemed to be a matter of public concern. The public concern inquiry focuses on whether the expression may be fairly considered as relating to "any matter of political, social, or other concern to the community," or "is a subject of general interest and of value and concern to the public." Expression is not disqualified from being categorized as a matter of public concern merely because it is deemed inappropriate or controversial character. To determine whether speech is of public or private concern, the Court explain, it must independently examine the "content, form, and context," of the speech "as revealed by the whole record." The "content" of

Westboro's signs, the Court held, plainly related to public, rather than private, matters. The placards highlighted issues of public import -- the political and moral conduct of the United States and its citizens, the fate of the Nation, homosexuality in the military, and scandals involving the Catholic clergy. Westboro conveyed its views on those issues in a manner designed to reach as broad a public audience as possible.

The Court held that even if a few of the signs were viewed as containing messages related to a particular individual, that would not alter the dominant theme of Westboro's public message. But what of the "context" of the speech, a military funeral? The Court was unwilling to hold that the mere fact that the Westboro Church chose to use Matthew Snyder's funeral as the launching pad for its expression did not transform the Church's speech from public to private. While it was true that the Church was in a sense exploiting the occasion of the funeral to heighten the attention paid to its message, and this may have been particularly hurtful to Snyder, this did not diminish the First Amendment protection that the Church's speech would otherwise enjoy. The Court conceded that the Church's speech could be subjected to reasonable time, place, or manner restrictions. It also noted that Maryland currently has a law restricting funeral picketing, but that law was not in effect at the time of the events. The Court said that in this posture it would not opine on whether the restrictions in the Maryland law would be upheld as "reasonable time, place, or manner" regulations.

Against this backdrop, the Court reversed all the tort liability awards. The emotional distress claim, the Court held, could not stand, because the jury was permitted to award liability merely on the finding that the picketing was "outrageous." Following its prior decision in *Hustler*, the Court held that this was too subjective and unpredictable a standard to satisfy First Amendment principles. Such as standard posed too great a danger that the jury would punish Westboro for its views on matters of public concern. Nor, the Court held, could Snyder recover for the tort of intrusion upon seclusion. Snyder argued that he was a member of a captive audience at his son's funeral, and that the actions of the Church thus constituted an intrusion on his private space, because he could not leave his own son's funeral. The Court found this unpersuasive, noting that Westboro Church members stayed well away from the memorial service, that Snyder could see no more than the tops of the picketers' signs, and that there was no indication that the picketing interfered with the funeral service itself. Once the two substantive tort claims were deemed to be inconsistent with the First Amendment, it followed that the conspiracy claim based upon them would also fail. The Court summarized its decision by noting that Westboro had been engaged in expressing its views on matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. The Church did not, in any literal sense, disrupt Mathew Snyder's funeral. The Church's strategic decision to picket Snyder's funeral did not alter the nature of its speech. Chief Justice Roberts' opinion concluded: "Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and -- as it did here -- inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course-to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case."

Justice Alito wrote an impassioned dissent in *Snyder*. His opening statement framed his argument: "Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case. Petitioner Albert Snyder is not a public figure. He is simply a parent whose son, Marine Lance Corporal Matthew Snyder, was killed in Iraq. Mr. Snyder wanted what is surely the right of any parent who experiences such an incalculable

loss: to bury his son in peace. But respondents, members of the Westboro Baptist Church, deprived him of that elementary right. They first issued a press release and thus turned Matthew's funeral into a tumultuous media event. They then appeared at the church, approached as closely as they could without trespassing, and launched a malevolent verbal attack on Matthew and his family at a time of acute emotional vulnerability. As a result, Albert Snyder suffered severe and lasting emotional injury."

(8) In *Holder v. Humanitarian Law Project*, the Supreme Court, 130 S. Ct. 2705 (2010), in a 6-3 ruling written by Chief Justice John Roberts, upheld a federal statute, 18 U.S.C. § 2339B(a)(1), prohibiting the provision of "material support or resources" to certain foreign organizations that engage in terrorist activity. Congress grounded the law in its finding that the specified organizations "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 301(a)(7), 110 Stat. 1247, note following 18 U.S.C. § 2339B (Findings and Purpose). The term "material support" was defined in the law:

> [T]he term 'material support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials."

18 U.S.C. § 2339A(b)(1); see also 18 U.S.C. § 2339B(g)(4).

The Secretary of State is vested with the authority to designate an entity a "foreign terrorist organization." 8 U.S.C. §§ 1189(a)(1), (d)(4). In 1997, the Secretary of State designated 30 groups as foreign terrorist organizations, including the two groups at issue in *Holder v. Humanitarian Law Project*, the Kurdistan Workers' Party (also known as the Partiya Karkeran Kurdistan, or PKK), founded in 1974 with the aim of establishing an independent Kurdish state in southeastern Turkey and the Liberation Tigers of Tamil Eelam (LTTE), founded in 1976 for the purpose of creating an independent Tamil state in Sri Lanka. The plaintiffs in the case sought to provide support to these groups, including training them on how to use humanitarian and international law to peacefully resolve disputes, and teaching them how to petition various representative bodies, such as the United Nations, for relief.

Subjecting the statute to strict-scrutiny review, the Court upheld the law. The Court began with the broad proposition, which was not contested in the case, that "combating terrorism is an urgent objective of the highest order." The key to the Court's decision was its judgment that the issue of whether "foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism is an empirical question." Congress, the Court observed, had made a specific finding on the issue, determining that "[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution to such an organization* facilitates that conduct." The Court concluded that this finding was justified, describing the PKK and LTTE as "deadly groups," and noting that the PKK's insurgency had claimed more than 22,000 lives, and that LTTE had engaged in extensive suicide bombings and political assassinations, including killings of the Sri Lankan President, Security

Minister, and Deputy Defense Minister. The Court held that "money is fungible," and that terrorist organizations do not maintain "firewalls" that prevent contributions aimed at lawful activity from being diverted to terrorist actions. In response to the objection of Justice Breyer in dissent (joined by Justice Ginsburg and Justice Sotomayor) that there was no natural stopping point to this reasoning, the Court stated that "Congress has settled on just such a natural stopping place: The statute reaches only material support coordinated with or under the direction of a designated foreign terrorist organization. Independent advocacy that might be viewed as promoting the group's legitimacy is not covered." The Court also rejected the dissent's argument that the government should be required to produce hard proof - with "detail," "specific facts," and "specific evidence" that plaintiffs' proposed activities would support terrorist attacks. In the field of national security and international affairs, the Court held, the government "is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions." Citing the unique separation of powers elements implicated in national security matters, the Court held that "Congress and the Executive are uniquely positioned to make principled distinctions between activities that will further terrorist conduct and undermine United States foreign policy, and those that will not."

Page 1188: [Add before §8.04 as a new section §8.03[I]]:

§ 8.03 [I] Corporate Speech

CITIZENS UNITED v. FEDERAL ELECTION COMMISSION
Supreme Court of the United States
__ U.S. __, 130 S. Ct. 876, 175 L.Ed.2d 753 (2010)

JUSTICE KENNEDY delivered the opinion of the Court.

Federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an "electioneering communication" or for speech expressly advocating the election or defeat of a candidate. 2 U.S.C. § 441b. Limits on electioneering communications were upheld in *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003). The holding of *McConnell* rested to a large extent on an earlier case, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). *Austin* had held that political speech may be banned based on the speaker's corporate identity.

In this case we are asked to reconsider *Austin* and, in effect, *McConnell*. It has been noted that " *Austin* was a significant departure from ancient First Amendment principles," *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 490 (2007). *(WRTL)* (SCALIA, J., concurring in part and concurring in judgment). We agree with that conclusion and hold that *stare decisis* does not compel the continued acceptance of *Austin*. The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether. We turn to the case now before us.

I

A

Citizens United is a nonprofit corporation. It brought this action in the United States District Court for the District of Columbia. A three-judge court later convened to hear the cause. The resulting judgment gives rise to this appeal.

Citizens United has an annual budget of about $12 million. Most of its funds are from donations by individuals; but, in addition, it accepts a small portion of its funds from for-profit corporations.

In January 2008, Citizens United released a film entitled *Hillary: The Movie*. We refer to the film as *Hillary*. It is a 90-minute documentary about then-Senator Hillary Clinton, who was a candidate in the Democratic Party's 2008 Presidential primary elections. *Hillary* mentions Senator Clinton by name and depicts interviews with political commentators and other persons, most of them quite critical of Senator Clinton. *Hillary* was released in theaters and on DVD, but Citizens United wanted to increase distribution by making it available through video-on-demand.

Video-on-demand allows digital cable subscribers to select programming from various menus, including movies, television shows, sports, news, and music. The viewer can watch the program at any time and can elect to rewind or pause the program. In December 2007, a cable company offered, for a payment of $1.2 million, to make *Hillary* available on a video-on-demand channel called "Elections '08." App. 255a-257a. Some video-on-demand services require viewers to pay a small fee to view a selected program, but here the proposal was to make *Hillary* available to viewers free of charge.

To implement the proposal, Citizens United was prepared to pay for the video-on-demand; and to promote the film, it produced two 10-second ads and one 30-second ad for *Hillary*. Each ad includes a short (and, in our view, pejorative) statement about Senator Clinton, followed by the name of the movie and the movie's Website address. *Id.*, at 26a-27a. Citizens United desired to promote the video-on-demand offering by running advertisements on broadcast and cable television.

B

Before the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibited-and still does prohibit-corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections. BCRA § 203 amended § 441b to prohibit any "electioneering communication" as well. 2 U.S.C. § 441b(b)(2) (2006 ed.). An electioneering communication is defined as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary or 60 days of a general election. § 434(f)(3)(A). The Federal Election Commission's (FEC) regulations further define an electioneering communication as a communication that is "publicly distributed." 11 CFR § 100.29(a)(2) (2009). "In the case of a candidate for nomination for President ... *publicly distributed* means" that the communication "[c]an be received by 50,000 or more persons in a State where a primary election ... is being held within 30 days." § 100.29(b)(3)(ii). Corporations and unions are barred from using their general treasury funds for express advocacy or electioneering communications. They

may establish, however, a "separate segregated fund" (known as a political action committee, or PAC) for these purposes. 2 U.S.C. § 441b(b)(2). The moneys received by the segregated fund are limited to donations from stockholders and employees of the corporation or, in the case of unions, members of the union. *Ibid.*

C

Citizens United wanted to make *Hillary* available through video-on-demand within 30 days of the 2008 primary elections. It feared, however, that both the film and the ads would be covered by § 441b's ban on corporate-funded independent expenditures, thus subjecting the corporation to civil and criminal penalties under § 437g. In December 2007, Citizens United sought declaratory and injunctive relief against the FEC. It argued that (1) § 441b is unconstitutional as applied to *Hillary;* and (2) BCRA's disclaimer and disclosure requirements, BCRA §§ 201 and 311, are unconstitutional as applied to *Hillary* and to the three ads for the movie.

The District Court denied Citizens United's motion for a preliminary injunction, 530 F.Supp.2d 274 (D.D.C.2008) *(per curiam),* and then granted the FEC's motion for summary judgment, . . . The court held that § 441b was facially constitutional under *McConnell,* and that § 441b was constitutional as applied to *Hillary* because it was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." The court also rejected Citizens United's challenge to BCRA's disclaimer and disclosure requirements. It noted that "the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment."

II

Before considering whether *Austin* should be overruled, we first address whether Citizens United's claim that § 441b cannot be applied to *Hillary* may be resolved on other, narrower grounds.

A

Citizens United contends that § 441b does not cover *Hillary,* as a matter of statutory interpretation, because the film does not qualify as an "electioneering communication." § 441b(b)(2). . . . Under the definition of electioneering communication, the video-on-demand showing of *Hillary* on cable television would have been a "cable ... communication" that "refer[red] to a clearly identified candidate for Federal office" and that was made within 30 days of a primary election. 2 U.S.C. § 434(f)(3)(A)(i). Citizens United, however, argues that *Hillary* was not "publicly distributed," because a single video-on-demand transmission is sent only to a requesting cable converter box and each separate transmission, in most instances, will be seen by just one household-not 50,000 or more persons. 11 CFR § 100.29(a)(2); see § 100.29(b)(3)(ii).

This argument ignores the regulation's instruction on how to determine whether a cable transmission "[c]an be received by 50,000 or more persons." § 100.29(b)(3)(ii). The regulation provides that the number of people who can receive a cable transmission is determined by the

number of cable subscribers in the relevant area. §§ 100.29(b)(7)(i)(G), (ii). Here, Citizens United wanted to use a cable video-on-demand system that had 34.5 million subscribers nationwide.. Thus, *Hillary* could have been received by 50,000 persons or more.

. . . Section 441b covers *Hillary*.

B

Citizens United next argues that § 441b may not be applied to *Hillary* under the approach taken in *WRTL*. *McConnell* decided that § 441b(b)(2)'s definition of an "electioneering communication" was facially constitutional insofar as it restricted speech that was "the functional equivalent of express advocacy" for or against a specific candidate. 540 U.S., at 206, 124 S.Ct. 619. *WRTL* then found an unconstitutional application of § 441b where the speech was not "express advocacy or its functional equivalent." 551 U.S., at 481, 127 S.Ct. 2652. . . . [T]he functional-equivalent test is objective: "a court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.*, at 469-470, 127 S.Ct. 2652.

Under this test, *Hillary* is equivalent to express advocacy. The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President. In light of historical footage, interviews with persons critical of her, and voiceover narration, the film would be understood by most viewers as an extended criticism of Senator Clinton's character and her fitness for the office of the Presidency. . . .

Citizens United argues that *Hillary* is just "a documentary film that examines certain historical events." Brief for Appellant 35. We disagree. The movie's consistent emphasis is on the relevance of these events to Senator Clinton's candidacy for President. . .

As the District Court found, there is no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton. Under the standard stated in *McConnell* and further elaborated in *WRTL*, the film qualifies as the functional equivalent of express advocacy.

C

Citizens United further contends that § 441b should be invalidated as applied to movies shown through video-on-demand, arguing that this delivery system has a lower risk of distorting the political process than do television ads.

Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker. . . .

D

Citizens United also asks us to carve out an exception to § 441b's expenditure ban for nonprofit corporate political speech funded overwhelmingly by individuals. As an alternative to reconsidering *Austin*, the Government also seems to prefer this approach. This line of analysis, however, would be unavailing.

. . .We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned, especially if we are convinced that, in the end, this corporation has a constitutional right to speak on this subject.

E

As the foregoing analysis confirms, the Court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment. . . . Here, the lack of a valid basis for an alternative ruling requires full consideration of the continuing effect of the speech suppression upheld in *Austin*. . . .

III

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." . . .

The law before us is an outright ban, backed by criminal sanctions. Section 441b makes it a felony for all corporations-including nonprofit advocacy corporations-either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election. Thus, the following acts would all be felonies under § 441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech. These prohibitions are classic examples of censorship.

Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. A PAC is a separate association from the corporation. So the PAC exemption from § 441b's expenditure ban, § 441b(b)(2), does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak-and it does not-the option to form PACs does not alleviate the First Amendment problems with § 441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days.

And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur . . .

PACs have to comply with these regulations just to speak. This might explain why fewer than 2,000 of the millions of corporations in this country have PACs. PACs, furthermore, must exist before they can speak. Given the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign.

Section 441b's prohibition on corporate independent expenditures is thus a ban on speech. As a "restriction on the amount of money a person or group can spend on political communication during a campaign," that statute "necessarily reduces the quantity of expression by restricting the

number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley v. Valeo,* 424 U.S. 1 (1976) *(per curiam).* Were the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process. (Government could repress speech by "attacking all levels of the production and dissemination of ideas," for "effective public communication requires the speaker to make use of the services of others"). If § 441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence entities whose voices the Government deems to be suspect.

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment " 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy,* 401 U.S. 265 (1971)).

For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest.". . . .We shall employ it here.

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. . . . As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

The Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions. [Justice Kennedy points to exceptions in schools, prisons, and the military].

We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion.

A

1

The Court has recognized that First Amendment protection extends to corporations. This protection has been extended by explicit holdings to the context of political speech

At least since the latter part of the 19th century, the laws of some States and of the United States imposed a ban on corporate direct contributions to candidates. Yet not until 1947 did Congress first prohibit independent expenditures by corporations and labor unions in § 304 of the Labor Management Relations Act 1947.

For almost three decades thereafter, the Court did not reach the question whether restrictions on corporate and union expenditures are constitutional. . . .

2

In *Buckley*, the Court addressed various challenges to the Federal Election Campaign Act of 1971 (FECA) as amended in 1974.

Before addressing the constitutionality of § 608(e)'s independent expenditure ban, *Buckley* first upheld § 608(b), FECA's limits on direct contributions to candidates. The *Buckley* Court recognized a "sufficiently important" governmental interest in "the prevention of corruption and the appearance of corruption."

The *Buckley* Court explained that the potential for *quid pro quo* corruption distinguished direct contributions to candidates from independent expenditures. The Court emphasized that "the independent expenditure ceiling ... fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process. *Buckley* invalidated § 608(e)'s restrictions on independent expenditures, with only one Justice dissenting.

Less than two years after *Buckley*, *Bellotti* reaffirmed the First Amendment principle that the Government cannot restrict political speech based on the speaker's corporate identity. *Bellotti* could not have been clearer when it struck down a state-law prohibition on corporate independent expenditures related to referenda issues:

"We thus find no support in the First ... Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property.... [That proposition] amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication.

* * *

"In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."

It is important to note that the reasoning and holding of *Bellotti* did not rest on the existence of a viewpoint-discriminatory statute. It rested on the principle that the Government lacks the power to ban corporations from speaking.

Bellotti did not address the constitutionality of the State's ban on corporate independent expenditures to support candidates. In our view, however, that restriction would have been unconstitutional under *Bellotti* 's central principle: that the First Amendment does not allow

political speech restrictions based on a speaker's corporate identity. See *ibid.*

3

. . . *Austin* "uph[eld] a direct restriction on the independent expenditure of funds for political speech for the first time in [this Court's] history." There, the Michigan Chamber of Commerce sought to use general treasury funds to run a newspaper ad supporting a specific candidate. Michigan law, however, prohibited corporate independent expenditures that supported or opposed any candidate for state office. A violation of the law was punishable as a felony. The Court sustained the speech prohibition.

To bypass *Buckley* and *Bellotti*, the *Austin* Court identified a new governmental interest in limiting political speech: an antidistortion interest. *Austin* found a compelling governmental interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."

B

The Court is thus confronted with conflicting lines of precedent: a pre- *Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post- *Austin* line that permits them. No case before *Austin* had held that Congress could prohibit independent expenditures for political speech based on the speaker's corporate identity.

1

As for *Austin*'s antidistortion rationale . . . [it] cannot support § 441b.

If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form. The Government contends that *Austin* permits it to ban corporate expenditures for almost all forms of communication stemming from a corporation If *Austin* were correct, the Government could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books. The Government responds "that the FEC has never applied this statute to a book," and if it did, "there would be quite [a] good as-applied challenge." This troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure.

Political speech is "indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Bellotti*, 435 U.S., at 777. . . . This protection for speech is inconsistent with *Austin* 's antidistortion rationale. *Austin* sought to defend the antidistortion rationale as a means to prevent corporations from obtaining " 'an unfair advantage in the political marketplace' " by using " 'resources amassed in the economic marketplace.' . . . First Amendment's protections do not depend on the speaker's "financial ability to engage in public discussion."

The Court reaffirmed these conclusions when it invalidated the BCRA provision that increased

the cap on contributions to one candidate if the opponent made certain expenditures from personal funds.

Austin's antidistortion rationale would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations. . . . Media corporations are now exempt from § 441b's ban on corporate expenditures. See 2 U.S.C. §§ 431(9)(B)(i), 434(f)(3)(B)(i). Yet media corporations accumulate wealth with the help of the corporate form, the largest media corporations have "immense aggregations of wealth," and the views expressed by media corporations often "have little or no correlation to the public's support" for those views. Thus, under the Government's reasoning, wealthy media corporations could have their voices diminished to put them on par with other media entities. There is no precedent for permitting this under the First Amendment.

The law's exception for media corporations is, on its own terms, all but an admission of the invalidity of the antidistortion rationale. And the exemption results in a further, separate reason for finding this law invalid: Again by its own terms, the law exempts some corporations but covers others, even though both have the need or the motive to communicate their views. The exemption applies to media corporations owned or controlled by corporations that have diverse and substantial investments and participate in endeavors other than news. So even assuming the most doubtful proposition that a news organization has a right to speak when others do not, the exemption would allow a conglomerate that owns both a media business and an unrelated business to influence or control the media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. This differential treatment cannot be squared with the First Amendment.

The censorship we now confront is vast in its reach. . . . By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. Factions will necessarily form in our Republic, but the remedy of "destroying the liberty" of some factions is "worse than the disease." The Federalist No. 10. Factions should be checked by permitting them all to speak and by entrusting the people to judge what is true and what is false.

The nonprofit corporations, from presenting both facts and opinions to the public. This makes *Austin*'s antidistortion rationale all the more an aberration. . . .

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.

2

What we have said also shows the invalidity of other arguments made by the Government. For the most part relinquishing the antidistortion rationale, the Government falls back on the argument that corporate political speech can be banned in order to prevent corruption or its

appearance. In *Buckley,* the Court found this interest "sufficiently important" to allow limits on contributions but did not extend that reasoning to expenditure limits.

. . . The *Buckley* Court, nevertheless, sustained limits on direct contributions in order to ensure against the reality or appearance of corruption. That case did not extend this rationale to independent expenditures, and the Court does not do so here.

. . . Limits on independent expenditures, such as § 441b, have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption. The anticorruption interest is not sufficient to displace the speech here in question. Indeed, 26 States do not restrict independent expenditures by for-profit corporations. The Government does not claim that these expenditures have corrupted the political process in those States.

When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.

The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. . . .

. . . When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption.

3

The Government contends further that corporate independent expenditures can be limited because of its interest in protecting dissenting shareholders from being compelled to fund corporate political speech. This asserted interest, like *Austin*'s antidistortion rationale, would allow the Government to ban the political speech even of media corporations. . . . Under the Government's view, that potential disagreement could give the Government the authority to restrict the media corporation's political speech. The First Amendment does not allow that power. There is, furthermore, little evidence of abuse that cannot be corrected by shareholders "through the procedures of corporate democracy."

Those reasons are sufficient to reject this shareholder-protection interest; and, moreover, the statute is both underinclusive and overinclusive. As to the first, if Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in only certain media within 30 or 60 days before an election. A dissenting shareholder's interests would be implicated by speech in any media at any time. As to the second, the statute is overinclusive because it

covers all corporations, including nonprofit corporations and for-profit corporations with only single shareholders. As to other corporations, the remedy is not to restrict speech but to consider and explore other regulatory mechanisms. The regulatory mechanism here, based on speech, contravenes the First Amendment.

4

We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process. . . .

C

Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error. . .

. . . [I]t must be concluded that *Austin* was not well reasoned. The Government defends *Austin*, relying almost entirely on "the quid pro quo interest, the corruption interest or the shareholder interest," and not *Austin*'s expressed antidistortion rationale. . . .

Austin is undermined by experience since its announcement. Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws. Our Nation's speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights. Speakers have become adept at presenting citizens with sound bites, talking points, and scripted messages that dominate the 24-hour news cycle. Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.

Rapid changes in technology-and the creative dynamic inherent in the concept of free expression-counsel against upholding a law that restricts political speech in certain media or by certain speakers. . . .

Due consideration leads to this conclusion: *Austin*, 494 U.S. 652, should be and now is overruled. We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.

D

Austin is overruled, so it provides no basis for allowing the Government to limit corporate independent expenditures.

Given our conclusion we are further required to overrule the part of *McConnell* that upheld BCRA § 203's extension of § 441b's restrictions on corporate independent expenditures. The *McConnell* Court relied on the antidistortion interest recognized in *Austin* to uphold a greater restriction on speech than the restriction upheld in *Austin*, and we have found this interest unconvincing and insufficient. This part of *McConnell* is now overruled.

IV

A

Citizens United next challenges BCRA's disclaimer and disclosure provisions as applied to *Hillary* and the three advertisements for the movie. Under BCRA § 311, televised electioneering communications funded by anyone other than a candidate must include a disclaimer that " '_____ is responsible for the content of this advertising.' " 2 U.S.C. § 441d(d)(2). The required statement must be made in a "clearly spoken manner," and displayed on the screen in a "clearly readable manner" for at least four seconds. It must state that the communication "is not authorized by any candidate or candidate's committee"; it must also display the name and address (or Web site address) of the person or group that funded the advertisement. § 441d(a)(3). Under BCRA § 201, any person who spends more than $10,000 on electioneering communications within a calendar year must file a disclosure statement with the FEC. 2 U.S.C. § 434(f)(1). That statement must identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors. § 434(f)(2).

Disclaimer and disclosure requirements may burden the ability to speak, but they "impose no ceiling on campaign-related activities," *Buckley* at 64 and "do not prevent anyone from speaking," *McConnell* at 201. . The Court has subjected these requirements to "exacting scrutiny," which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest. *Buckley* at 64, 66; see *McConnell* at 231-232

In *Buckley*, the Court explained that disclosure could be justified based on a governmental interest in "provid[ing] the electorate with information" about the sources of election-related spending.

Although both provisions were facially upheld, the Court acknowledged that as-applied challenges would be available if a group could show a " 'reasonable probability' " that disclosure of its contributors' names " 'will subject them to threats, harassment, or reprisals from either Government officials or private parties.' "

For the reasons stated below, we find the statute valid as applied to the ads for the movie and to the movie itself.

B

Citizens United sought to broadcast one 30-second and two 10-second ads to promote *Hillary*. Under FEC regulations, a communication that "[p]roposes a commercial transaction" was not subject to 2 U.S.C. § 441b's restrictions on corporate or union funding of electioneering communications. 11 CFR § 114.15(b)(3)(ii). The regulations, however, do not exempt those communications from the disclaimer and disclosure requirements in BCRA §§ 201 and 311. See 72 Fed.Reg. 72901 (2007).

Citizens United argues that the disclaimer requirements in § 311 are unconstitutional as applied to its ads. It contends that the governmental interest in providing information to the electorate

does not justify requiring disclaimers for any commercial advertisements, including the ones at issue here. We disagree.

. . .The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech.

Citizens United also disputes that an informational interest justifies the application of § 201 to its ads, which only attempt to persuade viewers to see the film. Even if it disclosed the funding sources for the ads, Citizens United says, the information would not help viewers make informed choices in the political marketplace.

Last, Citizens United argues that disclosure requirements can chill donations to an organization by exposing donors to retaliation. . . .

. . . The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

C

For the same reasons we uphold the application of BCRA §§ 201 and 311 to the ads, we affirm their application to *Hillary*. We find no constitutional impediment to the application of BCRA's disclaimer and disclosure requirements to a movie broadcast via video-on-demand. And there has been no showing that, as applied in this case, these requirements would impose a chill on speech or expression.

V

Modern day movies, television comedies, or skits on Youtube.com might portray public officials or public policies in unflattering ways. Yet if a covered transmission during the blackout period creates the background for candidate endorsement or opposition, a felony occurs solely because a corporation, other than an exempt media corporation, has made the "purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value" in order to engage in political speech. 2 U.S.C. § 431(9)(A)(i). Speech would be suppressed in the realm where its necessity is most evident: in the public dialogue preceding a real election. Governments are often hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime. Yet this is the statute's purpose and design.

Some members of the public might consider *Hillary* to be insightful and instructive; some might find it to be neither high art nor a fair discussion on how to set the Nation's course; still others simply might suspend judgment on these points but decide to think more about issues and candidates. Those choices and assessments, however, are not for the Government to make. "The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it." *McConnell* at 341.

The judgment of the District Court is reversed with respect to the constitutionality of 2 U.S.C. § 441b's restrictions on corporate independent expenditures. The judgment is affirmed with respect to BCRA's disclaimer and disclosure requirements. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO joins, concurring.

The Court properly rejects that theory, and I join its opinion in full. The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer. I write separately to address the important principles of judicial restraint and *stare decisis* implicated in this case.

[Remainder of the ROBERTS' concurring opinion omitted.]

JUSTICE SCALIA with whom Justice ALITO joins, and with whom JUSTICE THOMAS joins in part, concurring. [JUSTICE THOMAS does not join Part IV of the Court's opinion.]

I join the opinion of the Court.

I write separately to address Justice Steven's [opinion]. . . .This section of the dissent purports to show that today's decision is not supported by the original understanding of the First Amendment. The dissent attempts this demonstration, however, in splendid isolation from the text of the First Amendment. It never shows why "the freedom of speech" that was the right of Englishmen did not include the freedom to speak in association with other individuals, including association in the corporate form. To be sure, in 1791 (as now) corporations could pursue only the objectives set forth in their charters; but the dissent provides no evidence that their speech in the pursuit of those objectives could be censored.

Instead of taking this straightforward approach to determining the Amendment's meaning, the dissent embarks on a detailed exploration of the Framers' views about the "role of corporations in society." The Framers didn't like corporations, the dissent concludes, and therefore it follows (as night the day) that corporations had no rights of free speech. Of course the Framers' personal affection or disaffection for corporations is relevant only insofar as it can be thought to be reflected in the understood meaning of the text they enacted-not, as the dissent suggests, as a freestanding substitute for that text. But the dissent's distortion of proper analysis is even worse than that. Though faced with a constitutional text that makes no distinction between types of speakers, the dissent feels no necessity to provide even an isolated statement from the founding era to the effect that corporations are *not* covered, but places the burden on petitioners to bring forward statements showing that they *are* ("there is not a scintilla of evidence to support the notion that anyone believed [the First Amendment] would preclude regulatory distinctions based on the corporate form,").

Despite the corporation-hating quotations the dissent has dredged up, it is far from clear that by the end of the 18th century corporations were despised. If so, how came there to be so many of them? The dissent's statement that there were few business corporations during the eighteenth century-"only a few hundred during all of the 18th century"-is misleading. There were

approximately 335 charters issued to business corporations in the United States by the end of the 18th century, Moreover, what seems like a small number by today's standards surely does not indicate the relative importance of corporations when the Nation was considerably smaller. As I have previously noted, "[b]y the end of the eighteenth century the corporation was a familiar figure in American economic life."

Even if we thought it proper to apply the dissent's approach of excluding from First Amendment coverage what the Founders disliked, and even if we agreed that the Founders disliked founding-era corporations; modern corporations might not qualify for exclusion. Most of the Founders' resentment towards corporations was directed at the state-granted monopoly privileges that individually chartered corporations enjoyed.[FN3] Modern corporations do not have such privileges, and would probably have been favored by most of our enterprising Founders-excluding, perhaps, Thomas Jefferson and others favoring perpetuation of an agrarian society. Moreover, if the Founders' specific intent with respect to corporations is what matters, why does the dissent ignore the Founders' views about other legal entities that have more in common with modern business corporations than the founding-era corporations? At the time of the founding, religious, educational, and literary corporations were incorporated under general incorporation statutes, much as business corporations are today.

The lack of a textual exception for speech by corporations cannot be explained on the ground that such organizations did not exist or did not speak. To the contrary, colleges, towns and cities, religious institutions, and guilds had long been organized as corporations at common law and under the King's charter. . .

The dissent says that when the Framers "constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind." That is no doubt true. All the provisions of the Bill of Rights set forth the rights of individual men and women-not, for example, of trees or polar bears. But the individual person's right to speak includes the right to speak *in association with other individual persons*. Surely the dissent does not believe that speech by the Republican Party or the Democratic Party can be censored because it is not the speech of "an individual American." It is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf. The association of individuals in a business corporation is no different-or at least it cannot be denied the right to speak on the simplistic ground that it is not "an individual American."

But to return to, and summarize, my principal point, which is the conformity of today's opinion with the original meaning of the First Amendment. The Amendment is written in terms of "speech," not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals-and the dissent offers no evidence about the original meaning of the text to support any such exclusion. We are therefore simply left with the question whether the speech at issue in this case is "speech" covered by the First Amendment. No one says otherwise. A documentary film critical of a potential Presidential candidate is core political speech, and its nature as such does not change simply because it was funded by a corporation. Nor does the character of that funding produce any reduction whatever in the "inherent worth of the speech" and "its capacity for informing the public," Indeed, to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather

than condemn the addition of this speech to the public debate.

JUSTICE STEVENS, with whom JUSTICE BREYER, and Justice SOTOMAYOR join, concurring in part and dissenting in part.

The real issue in this case concerns how, not if, the appellant may finance its electioneering. Citizens United is a wealthy nonprofit corporation that runs a political action committee (PAC) with millions of dollars in assets. Under the Bipartisan Campaign Reform Act of 2002 (BCRA), it could have used those assets to televise and promote *Hillary: The Movie* wherever and whenever it wanted to. It also could have spent unrestricted sums to broadcast *Hillary* at any time other than the 30 days before the last primary election. Neither Citizens United's nor any other corporation's speech has been "banned." All that the parties dispute is whether Citizens United had a right to use the funds in its general treasury to pay for broadcasts during the 30-day period. The notion that the First Amendment dictates an affirmative answer to that question is, in my judgment, profoundly misguided. Even more misguided is the notion that the Court must rewrite the law relating to campaign expenditures by *for-profit* corporations and unions to decide this case.

The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its "identity" as a corporation. While that glittering generality has rhetorical appeal, it is not a correct statement of the law. Nor does it tell us when a corporation may engage in electioneering that some of its shareholders oppose. It does not even resolve the specific question whether Citizens United may be required to finance some of its messages with the money in its PAC. The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case.

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.

The majority's approach to corporate electioneering marks a dramatic break from our past. Congress has placed special limitations on campaign spending by corporations ever since the passage of the Tillman Act in 1907, ch. 420, 34 Stat. 864. We have unanimously concluded that this "reflects a permissible assessment of the dangers posed by those entities to the electoral process," *FEC v. National Right to Work Comm.*, 459 U.S. 197, 209 (1982) *(NRWC),* and have accepted the "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation," *id.*, at 209-210. The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990).

Relying largely on individual dissenting opinions, the majority blazes through our precedents, overruling or disavowing a body of case law. . .

In his landmark concurrence in *Ashwander v. TVA*, 297 U.S. 288, 346 (1936), Justice Brandeis stressed the importance of adhering to rules the Court has "developed ... for its own governance" when deciding constitutional questions. Because departures from those rules always enhance the risk of error, I shall review the background of this case in some detail before explaining why the Court's analysis rests on a faulty understanding of *Austin* and *McConnell* and of our campaign finance jurisprudence more generally.[FN1] I regret the length of what follows, but the importance and novelty of the Court's opinion require a full response. Although I concur in the Court's decision to sustain BCRA's disclosure provisions and join Part IV of its opinion, I emphatically dissent from its principal holding.

I

The Court's ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution. . . .

II

The final principle of judicial process that the majority violates is the most transparent: *stare decisis*. I am not an absolutist when it comes to *stare decisis*, in the campaign finance area or in any other. No one is. But if this principle is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine. "[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 864 (1992). No such justification exists in this case, and to the contrary there are powerful prudential reasons to keep faith with our precedents.

The Court's central argument for why *stare decisis* ought to be trumped is that it does not like *Austin*. The opinion "was not well reasoned," our colleagues assert, and it conflicts with First Amendment principles.. This, of course, is the Court's merits argument, the many defects in which we will soon consider. I am perfectly willing to concede that if one of our precedents were dead wrong in its reasoning or irreconcilable with the rest of our doctrine, there would be a compelling basis for revisiting it. But neither is true of *Austin*, . . . and restating a merits argument with additional vigor does not give it extra weight in the *stare decisis* calculus.

Perhaps in recognition of this point, the Court supplements its merits case with a smattering of assertions. The Court proclaims that " *Austin* is undermined by experience since its announcement." This is a curious claim to make in a case that lacks a developed record. The majority has no empirical evidence with which to substantiate the claim; we just have its *ipse dixit* that the real world has not been kind to *Austin*. Nor does the majority bother to specify in what sense *Austin* has been "undermined." Instead it treats the reader to a string of non sequiturs: "Our Nation's speech dynamic is changing,". . . s]peakers have become adept at presenting citizens with sound bites, talking points, and scripted messages," *ibid.;* "[c]orporations ... do not

have monolithic views," *ibid.* How any of these ruminations weakens the force of *stare decisis*, escapes my comprehension.

The majority also contends that the Government's hesitation to rely on *Austin*'s antidistortion rationale "diminishe[s]" "the principle of adhering to that precedent." Why it diminishes the value of *stare decisis* is left unexplained. We have never thought fit to overrule a precedent because a litigant has taken any particular tack. Nor should we. Our decisions can often be defended on multiple grounds, and a litigant may have strategic or case-specific reasons for emphasizing only a subset of them. Members of the public, moreover, often rely on our bottom-line holdings far more than our precise legal arguments; surely this is true for the legislatures that have been regulating corporate electioneering since *Austin*. The task of evaluating the continued viability of precedents falls to this Court, not to the parties.

. . .In the end, the Court's rejection of *Austin* and *McConnell* comes down to nothing more than its disagreement with their results. Virtually every one of its arguments was made and rejected in those cases, and the majority opinion is essentially an amalgamation of resuscitated dissents. The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court. Today's ruling thus strikes at the vitals of *stare decisis*, "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion" that "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

III

The novelty of the Court's procedural dereliction and its approach to *stare decisis* is matched by the novelty of its ruling on the merits. The ruling rests on several premises. First, the Court claims that *Austin* and *McConnell* have "banned" corporate speech. Second, it claims that the First Amendment precludes regulatory distinctions based on speaker identity, including the speaker's identity as a corporation. Third, it claims that *Austin* and *McConnell* were radical outliers in our First Amendment tradition and our campaign finance jurisprudence. Each of these claims is wrong.

The So-Called "Ban"

Pervading the Court's analysis is the ominous image of a "categorical ba[n]" on corporate speech. Indeed, the majority invokes the specter of a "ban" on nearly every page of its opinion. This characterization is highly misleading, and needs to be corrected.

In fact it already has been. Our cases have repeatedly pointed out that, "[c]ontrary to the [majority's] critical assumptions," the statutes upheld in *Austin* and *McConnell* do "not impose an *absolute* ban on all forms of corporate political spending." . . .For starters, both statutes provide exemptions for PACs, separate segregated funds established by a corporation for political purposes. . . .

Under BCRA, any corporation's "stockholders and their families and its executive or administrative personnel and their families" can pool their resources to finance electioneering communications. 2 U.S.C. § 441b(b)(4)(A)(i). A significant and growing number of corporations avail themselves of this option; [FN29] during the most recent election cycle, corporate and union

PACs raised nearly a billion dollars.

Administering a PAC entails some administrative burden, but so does complying with the disclaimer, disclosure, and reporting requirements that the Court today upholds and no one has suggested that the burden is severe for a sophisticated for-profit corporation. To the extent the majority is worried about this issue, it is important to keep in mind that we have no record to show how substantial the burden really is, just the majority's own unsupported factfinding. Like all other natural persons, every shareholder of every corporation remains entirely free under *Austin* and *McConnell* to do however much electioneering she pleases outside of the corporate form. The owners of a "mom & pop" store can simply place ads in their own names, rather than the store's. If ideologically aligned individuals wish to make unlimited expenditures through the corporate form, they may utilize an *MCFL* organization that has policies in place to avoid becoming a conduit for business or union interests. See *MCFL*, 479 U.S., at 263-264.

Identity-Based Distinctions

The second pillar of the Court's opinion is its assertion that "the Government cannot restrict political speech based on the speaker's ... identity." . . .Like its paeans to unfettered discourse, the Court's denunciation of identity-based distinctions may have rhetorical appeal but it obscures reality.

"Our jurisprudence over the past 216 years has rejected an absolutist interpretation" of the First Amendment. *WRTL*, 551 U.S., at 482. The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech, or of the press." Apart perhaps from measures designed to protect the press, that text might seem to permit no distinctions of any kind. Yet in a variety of contexts, we have held that speech can be regulated differentially on account of the speaker's identity, when identity is understood in categorical or institutional terms. The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees. When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems. . . .

. . .In short, the Court dramatically overstates its critique of identity-based distinctions, without ever explaining why corporate identity demands the same treatment as individual identity. Only the most wooden approach to the First Amendment could justify the unprecedented line it seeks to draw.

Our First Amendment Tradition

A third fulcrum of the Court's opinion is the idea that *Austin* and *McConnell* are radical outliers, "aberration[s]," in our First Amendment tradition. The Court has it exactly backwards. It is today's holding that is the radical departure from what had been settled First Amendment law. To see why, it is useful to take a long view.

1. *Original Understandings*

Let us start from the beginning. The Court invokes "ancient First Amendment principles," and

original understandings to defend today's ruling, yet it makes only a perfunctory attempt to ground its analysis in the principles or understandings of those who drafted and ratified the Amendment. Perhaps this is because there is not a scintilla of evidence to support the notion that anyone believed it would preclude regulatory distinctions based on the corporate form. To the extent that the Framers' views are discernible and relevant to the disposition of this case, they would appear to cut strongly against the majority's position.

This is not only because the Framers and their contemporaries conceived of speech more narrowly than we now think of it, see Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 22 (1971), but also because they held very different views about the nature of the First Amendment right and the role of corporations in society. Those few corporations that existed at the founding were authorized by grant of a special legislative charter. Corporate sponsors would petition the legislature, and the legislature, if amenable, would issue a charter that specified the corporation's powers and purposes and "authoritatively fixed the scope and content of corporate organization," including "the internal structure of the corporation." J. Hurst, The Legitimacy of the Business Corporation in the Law of the United States 1780-1970, pp. 15-16 (1970) (reprint 2004). Corporations were created, supervised, and conceptualized as quasi-public entities, "designed to serve a social function for the state." Handlin & Handlin, Origin of the American Business Corporation, 5 J. Econ. Hist. 1, 22 (1945). It was "assumed that [they] were legally privileged organizations that had to be closely scrutinized by the legislature because their purposes had to be made consistent with public welfare." R. Seavoy, Origins of the American Business Corporation, 1784-1855, p. 5 (1982).

. . .The Framers thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare. Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind. While individuals might join together to exercise their speech rights, business corporations, at least, were plainly not seen as facilitating such associational or expressive ends. Even "the notion that business corporations could invoke the First Amendment would probably have been quite a novelty," given that "at the time, the legitimacy of every corporate activity was thought to rest entirely in a concession of the sovereign." Shelledy, Autonomy, Debate, and Corporate Speech, 18 Hastings Const. L.Q. 541, 578 (1991); cf. *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 636, 4 L.Ed. 629 (1819) (Marshall, C.J.) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it"). . . . In light of these background practices and understandings, it seems to me implausible that the Framers believed "the freedom of speech" would extend equally to all corporate speakers, much less that it would preclude legislatures from taking limited measures to guard against corporate capture of elections.

The Court observes that the Framers drew on diverse intellectual sources, communicated through newspapers, and aimed to provide greater freedom of speech than had existed in England. From these (accurate) observations, the Court concludes that "[t]he First Amendment was certainly not understood to condone the suppression of political speech in society's most salient media." This conclusion is far from certain, given that many historians believe the Framers were focused on prior restraints on publication and did not understand the First Amendment to "prevent the

subsequent punishment of such [publications] as may be deemed contrary to the public welfare." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 714 (1931). Yet, even if the majority's conclusion were correct, it would tell us only that the First Amendment was understood to protect political speech *in* certain media. It would tell us little about whether the Amendment was understood to protect general treasury electioneering expenditures *by* corporations, *and to what extent*.

Justice Scalia criticizes the foregoing discussion for failing to adduce statements from the founding era showing that corporations were understood to be excluded from the First Amendment's free speech guarantee. Of course, Justice Scalia adduces no statements to suggest the contrary proposition, or even to suggest that the contrary proposition better reflects the kind of right that the drafters and ratifiers of the Free Speech Clause thought they were enshrining. Although Justice Scalia makes a perfectly sensible argument that an individual's right to speak entails a right to speak with others for a common cause, the does not explain why those two rights must be precisely identical, or why that principle applies to electioneering by corporations that serve no "common cause." Nothing in his account dislodges my basic point that members of the founding generation held a cautious view of corporate power and a narrow view of corporate rights (not that they "despised" corporations), and that they conceptualized speech in individualistic terms. If no prominent Framer bothered to articulate that corporate speech would have lesser status than individual speech, that may well be because the contrary proposition-if not also the very notion of "corporate speech"-was inconceivable.

Justice Scalia also emphasizes the unqualified nature of the First Amendment text. Yet he would seemingly read out the Free Press Clause: How else could he claim that my purported views on newspapers must track my views on corporations generally? Like virtually all modern lawyers, Justice Scalia presumably believes that the First Amendment restricts the Executive, even though its language refers to Congress alone. In any event, the text only leads us back to the questions who or what is guaranteed "the freedom of speech," and, just as critically, what that freedom consists of and under what circumstances it may be limited. Justice Scalia appears to believe that because corporations are created and utilized by individuals, it follows (as night the day) that their electioneering must be equally protected by the First Amendment and equally immunized from expenditure limits. That conclusion certainly does not follow as a logical matter, and Justice Scalia fails to explain why the original public meaning leads it to follow as a matter of interpretation.

The truth is we cannot be certain how a law such as BCRA § 203 meshes with the original meaning of the First Amendment. I have given several reasons why I believe the Constitution would have been understood then, and ought to be understood now, to permit reasonable restrictions on corporate electioneering, and I will give many more reasons in the pages to come. The Court enlists the Framers in its defense without seriously grappling with their understandings of corporations or the free speech right, or with the republican principles that underlay those understandings.

In fairness, our campaign finance jurisprudence has never attended very closely to the views of the Framers, see *Randall v. Sorrell*, 548 U.S. 230, 280 (2006) (Stevens, J., dissenting), whose political universe differed profoundly from that of today. We have long since held that corporations are covered by the First Amendment, and many legal scholars have long since rejected the concession theory of the corporation. But "historical context is usually relevant," *ibid.*, and in light of the Court's effort to cast itself as guardian of ancient values, it pays to

remember that nothing in our constitutional history dictates today's outcome. To the contrary, this history helps illuminate just how extraordinarily dissonant the decision is.

2. *Legislative and Judicial Interpretation*

A century of more recent history puts to rest any notion that today's ruling is faithful to our First Amendment tradition. At the federal level, the express distinction between corporate and individual political spending on elections stretches back to 1907, when Congress passed the Tillman Act, ch. 420, 34 Stat. 864, banning all corporate contributions to candidates. The Senate Report on the legislation observed that "[t]he evils of the use of [corporate] money in connection with political elections are so generally recognized that the committee deems it unnecessary to make any ***953** argument in favor of the general purpose of this measure. It is in the interest of good government and calculated to promote purity in the selection of public officials." S.Rep. No. 3056, 59th Cong., 1st Sess., 2 (1906). President Roosevelt, in his 1905 annual message to Congress, declared:

" 'All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes; and, moreover, a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts.' " *United States v. Automobile Workers,* 352 U.S. 567, 572, 77 S.Ct. 529, 1 L.Ed.2d 563 (1957) (quoting 40 Cong. Rec. 96).

Over the years, the limitations on corporate political spending have been modified in a number of ways, as Congress responded to changes in the American economy and political practices that threatened to displace the commonweal. Justice Souter recently traced these developments at length. The Taft-Hartley Act of 1947 is of special significance for this case. In that Act passed more than 60 years ago, Congress extended the prohibition on corporate support of candidates to cover not only direct contributions, but independent expenditures as well. Labor Management Relations Act, 1947, § 304, 61 Stat. 159. The bar on contributions "was being so narrowly construed" that corporations were easily able to defeat the purposes of the Act by supporting candidates through other means.

Our colleagues emphasize that in two cases from the middle of the 20th century, several Justices wrote separately to criticize the expenditure restriction as applied to unions, even though the Court declined to pass on its constitutionality. Two features of these cases are of far greater relevance. First, those Justices were writing separately; which is to say, their position failed to command a majority. Prior to today, this was a fact we found significant in evaluating precedents. Second, each case in this line expressed support for the principle that corporate and union political speech financed with PAC funds, collected voluntarily from the organization's stockholders or members, receives greater protection than speech financed with general treasury funds.

By the time Congress passed FECA in 1971, the bar on corporate contributions and expenditures had become such an accepted part of federal campaign finance regulation that when a large number of plaintiffs, including several nonprofit corporations, challenged virtually every

aspect of the Act in *Buckley*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, no one even bothered to argue that the bar as such was unconstitutional. *Buckley* famously (or infamously) distinguished direct contributions from independent expenditures, but its silence on corporations only reinforced the understanding that corporate expenditures could be treated differently from individual expenditures. "Since our decision in *Buckley*, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law." *McConnell*, 540 U.S., at 203.

Thus, it was unremarkable, in a 1982 case holding that Congress could bar nonprofit corporations from soliciting nonmembers for PAC funds, that then-Justice Rehnquist wrote for a unanimous Court that Congress' "careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations ... warrants considerable deference," and "reflects a permissible assessment of the dangers posed by those entities to the electoral process." . . .

The corporate/individual distinction was not questioned by the Court's disposition, in 1986, of a challenge to the expenditure restriction as applied to a distinctive type of nonprofit corporation. In *MCFL*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539, we stated again "that 'the special characteristics of the corporate structure require particularly careful regulation,' " *id.*, at 256.

Four years later, in *Austin*, 494 U.S. 652, we considered whether corporations falling outside the *MCFL* exception could be barred from using general treasury funds to make independent expenditures in support of, or in opposition to, candidates. We held they could be. Once again recognizing the importance of "the integrity of the marketplace of political ideas" in candidate elections. . .

In the 20 years since *Austin*, we have reaffirmed its holding and rationale a number of times, see, *e.g.*, *Beaumont*, 539 U.S., at 153-156, 123 S.Ct. 2200, most importantly in *McConnell*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491, where we upheld the provision challenged here, § 203 of BCRA.

When we asked in *McConnell* "whether a compelling governmental interest justifie[d]" § 203, we found the question "easily answered": "We have repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.' " 540 U.S., at 205 (quoting *Austin*, 494 U.S., at 660, 110 S.Ct. 1391).

3. *Buckley and Bellotti*

Against this extensive background of congressional regulation of corporate campaign spending, and our repeated affirmation of this regulation as constitutionally sound, the majority dismisses *Austin* as "a significant departure from ancient First Amendment principles. . . .[I]n the Court's view, *Buckley* and *Bellotti* decisively rejected the possibility of distinguishing corporations from natural persons in the 1970's; it just so happens that in every single case in which the Court has reviewed campaign finance legislation in the decades since, the majority failed to grasp this truth. The Federal Congress and dozens of state legislatures, we now know, have been similarly

deluded.

The majority emphasizes *Buckley* 's statement that " '[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.' " But this elegant phrase cannot bear the weight that our colleagues have placed on it. For one thing, the Constitution does, in fact, permit numerous "restrictions on the speech of some in order to prevent a few from drowning out the many": for example, restrictions on ballot access and on legislators' floor time. *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 402 (2000) (Breyer, J., concurring). . . .

The case on which the majority places even greater weight than *Buckley,* however, is *Bellotti,* 435 U.S. 765, claiming it "could not have been clearer" that *Bellotti*'s holding forbade distinctions between corporate and individual expenditures like the one at issue here. The Court's reliance is odd. The only thing about *Bellotti* that could not be clearer is that it declined to adopt the majority's position. *Bellotti* ruled, in an explicit limitation on the scope of its holding, that "our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office." 435 U.S., at 788, n. 26, 98 S.Ct. 1407; see also *id.,* at 787-788, 98 S.Ct. 1407 (acknowledging that the interests in preserving public confidence in Government and protecting dissenting shareholders may be "weighty ... in the context of partisan candidate elections"). *Bellotti,* in other words, did not touch the question presented in *Austin* and *McConnell,* and the opinion squarely disavowed the proposition for which the majority cites it.

The majority attempts to explain away the distinction *Bellotti* drew-between general corporate speech and campaign speech intended to promote or prevent the election of specific candidates for office as inconsistent with the rest of the opinion and with *Buckley*. Yet the basis for this distinction is perfectly coherent: The anticorruption interests that animate regulations of corporate participation in candidate elections, the "importance" of which "has never been doubted," 435 U.S., at 788, n. 26, 98 S.Ct. 1407, do not apply equally to regulations of corporate participation in referenda. A referendum cannot owe a political debt to a corporation, seek to curry favor with a corporation, or fear the corporation's retaliation. . . .The majority likewise overlooks the fact that, over the past 30 years, our cases have repeatedly recognized the candidate/issue distinction. The Court's critique of *Bellotti*'s puts it in the strange position of trying to elevate *Bellotti* to canonical status, while simultaneously disparaging a critical piece of its analysis as unsupported and irreconcilable with *Buckley*. *Bellotti,* apparently, is both the font of all wisdom and internally incoherent.

The *Bellotti* Court confronted a dramatically different factual situation from the one that confronts us in this case: a state statute that barred business corporations' expenditures on some referenda but not others. . . .

Bellotti thus involved a *viewpoint-discriminatory* statute, created to effect a particular policy outcome. Even Justice Rehnquist, in dissent, had to acknowledge that "a very persuasive argument could be made that the [Massachusetts Legislature], desiring to impose a personal income tax but more than once defeated in that desire by the combination of the Commonwealth's referendum provision and corporate expenditures in opposition to such a tax, simply decided to muzzle corporations on this sort of issue so that it could succeed in its desire." *Id.,* at 827, n. 6. To make matters worse, the law at issue did not make any allowance for

corporations to spend money through PACs. This really was a complete ban on a specific, preidentified subject.

The majority grasps a quotational straw from *Bellotti*, that speech does not fall entirely outside the protection of the First Amendment merely because it comes from a corporation. Of course not, but no one suggests the contrary and neither *Austin* nor *McConnell* held otherwise. They held that even though the expenditures at issue were subject to First Amendment scrutiny, the restrictions on those expenditures were justified by a compelling state interest. We acknowledged in *Bellotti* that numerous "interests of the highest importance" can justify campaign finance regulation. But we found no evidence that these interests were served by the Massachusetts law. We left open the possibility that our decision might have been different if there had been "record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests." *Ibid.*

Austin and *McConnell*, then, sit perfectly well with *Bellotti*. Indeed, all six Members of the *Austin* majority had been on the Court at the time of *Bellotti*, and none so much as hinted in *Austin* that they saw any tension between the decisions. The difference between the cases is not that *Austin* and *McConnell* rejected First Amendment protection for corporations whereas *Bellotti* accepted it. The difference is that the statute at issue in *Bellotti* smacked of viewpoint discrimination, targeted one class of corporations, and provided no PAC option; and the State has a greater interest in regulating independent corporate expenditures on candidate elections than on referenda, because in a functioning democracy the public must have faith that its representatives owe their positions to the people, not to the corporations with the deepest pockets.

* * *

In sum, over the course of the past century Congress has demonstrated a recurrent need to regulate corporate participation in candidate elections to " '[p]reserv[e] the integrity of the electoral process, preven[t] corruption, ... sustai[n] the active, alert responsibility of the individual citizen,' " protect the expressive interests of shareholders, and " '[p]reserv [e] ... the individual citizen's confidence in government.' " *McConnell*, 540 U.S., at 206-207, n. 88 (quoting *Bellotti*, 435 U.S., at 788-789). . . .Time and again, we have recognized these realities in approving measures that Congress and the States have taken. None of the cases the majority cites is to the contrary. The only thing new about *Austin* was the dissent, with its stunning failure to appreciate the legitimacy of interests recognized in the name of democratic integrity since the days of the Progressives.

IV

Having explained why this is not an appropriate case in which to revisit *Austin* and *McConnell* and why these decisions sit perfectly well with "First Amendment principles," I come at last to the interests that are at stake. The majority recognizes that *Austin* and *McConnell* may be defended on anticorruption, antidistortion, and shareholder protection rationales. It badly errs both in explaining the nature of these rationales, which overlap and complement each other, and in applying them to the case at hand.

The Anticorruption Interest

Undergirding the majority's approach to the merits is the claim that the only "sufficiently important governmental interest in preventing corruption or the appearance of corruption" is one that is "limited to *quid pro quo* corruption.". This is the same "crabbed view of corruption" that was espoused by Justice Kennedy in *McConnell* and squarely rejected by the Court in that case. 540 U.S., at 152. While it is true that we have not always spoken about corruption in a clear or consistent voice, the approach taken by the majority cannot be right, in my judgment. It disregards our constitutional history and the fundamental demands of a democratic society.

On numerous occasions we have recognized Congress' legitimate interest in preventing the money that is spent on elections from exerting an " 'undue influence on an officeholder's judgment' " and from creating " 'the appearance of such influence,' " beyond the sphere of *quid pro quo* relationships. Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf. Corruption operates along a spectrum, and the majority's apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics. It certainly does not accord with the record Congress developed in passing BCRA, a record that stands as a remarkable testament to the energy and ingenuity with which corporations, unions, lobbyists, and politicians may go about scratching each other's backs-and which amply supported Congress' determination to target a limited set of especially destructive practices.

. . .Many of the relationships of dependency [between politicians and sponsors of electioneering may] have a *quid pro quo* basis, but other arrangements were more subtle. Her analysis shows the great difficulty in delimiting the precise scope of the *quid pro quo* category, as well as the adverse consequences that *all* such arrangements may have. There are threats of corruption that are far more destructive to a democratic society than the odd bribe. Yet the majority's understanding of corruption would leave lawmakers impotent to address all but the most discrete abuses.

Our "undue influence" cases have allowed the American people to cast a wider net through legislative experiments designed to ensure, to some minimal extent, "that officeholders will decide issues ... on the merits or the desires of their constituencies," and not "according to the wishes of those who have made large financial contributions"-or expenditures-"valued by the officeholder." *McConnell,* 540 U.S., at 153. . . . At stake in the legislative efforts to address this threat is therefore not only the legitimacy and quality of Government but also the public's faith therein, not only "the capacity of this democracy to represent its constituents [but also] the confidence of its citizens in their capacity to govern themselves," *WRTL,* 551 U.S., at 507 (Souter, J., dissenting). . .

Quid Pro Quo *Corruption*

There is no need to take my side in the debate over the scope of the anticorruption interest to see that the Court's merits holding is wrong. Even under the majority's "crabbed view of corruption," *McConnell,* 540 U.S., at 152, 124 S.Ct. 619, the Government should not lose this case.

"The importance of the governmental interest in preventing [corruption through the creation of political debts] has never been doubted." *Bellotti,* 435 U.S., at 788, n. 26, 98 S.Ct. 1407. Even in

the cases that have construed the anticorruption interest most narrowly, we have never suggested that such *quid pro quo* debts must take the form of outright vote buying or bribes, which have long been distinct crimes. Rather, they encompass the myriad ways in which outside parties may induce an officeholder to confer a legislative benefit in direct response to, or anticipation of, some outlay of money the parties have made or will make on behalf of the officeholder. See *McConnell,* 540 U.S., at 143. . .

The *Austin* Court did not rest its holding on *quid pro quo* corruption, as it found the broader corruption implicated by the antidistortion and shareholder protection rationales a sufficient basis for Michigan's restriction on corporate electioneering. 494 U.S., at 658-660, 110 S.Ct. 1391. Concurring in that opinion, I took the position that "the danger of either the fact, or the appearance, of *quid pro quo* relationships [also] provides an adequate justification for state regulation" of these independent expenditures. *Id.,* at 678, 110 S.Ct. 1391. I did not see this position as inconsistent with *Buckley* 's analysis of individual expenditures. Corporations, as a class, tend to be more attuned to the complexities of the legislative process and more directly affected by tax and appropriations measures that receive little public scrutiny; they also have vastly more money with which to try to buy access and votes. . . . The unparalleled resources, professional lobbyists, and single-minded focus they bring to this effort, I believed, make *quid pro quo* corruption and its appearance inherently more likely when they (or their conduits or trade groups) spend unrestricted sums on elections.

It is with regret rather than satisfaction that I can now say that time has borne out my concerns. The legislative and judicial proceedings relating to BCRA generated a substantial body of evidence suggesting that, as corporations grew more and more adept at crafting "issue ads" to help or harm a particular candidate, these nominally independent expenditures began to corrupt the political process in a very direct sense. The sponsors of these ads were routinely granted special access after the campaign was over; "candidates and officials knew who their friends were," *McConnell,* 540 U.S., at 129. Many corporate independent expenditures, it seemed, had become essentially interchangeable with direct contributions in their capacity to generate *quid pro quo* arrangements. In an age in which money and television ads are the coin of the campaign realm, it is hardly surprising that corporations deployed these ads to curry favor with, and to gain influence over, public officials.

The majority appears to think it decisive that the BCRA record does not contain "direct examples of votes being exchanged for ... expenditures." It would have been quite remarkable if Congress had created a record detailing such behavior by its own Members. Proving that a specific vote was exchanged for a specific expenditure has always been next to impossible: Elected officials have diverse motivations, and no one will acknowledge that he sold a vote. . .

When the *McConnell* Court affirmed the judgment of the District Court regarding § 203, we did not rest our holding on a narrow notion of *quid pro quo* corruption. Instead we relied on the governmental interest in combating the unique forms of corruption threatened by corporations, as recognized in *Austin*'s antidistortion and shareholder protection rationales, 540 U.S., at 205 (citing *Austin,* 494 U.S., at 660, as well as the interest in preventing circumvention of contribution limits, 540 U.S., at 128-129, Had we felt constrained by the view of today's Court that *quid pro quo* corruption and its appearance are the only interests that count in this field, we of course would have looked closely at that issue. And. . .it is a very real possibility that we would have found one or both of those interests satisfied and § 203 appropriately tailored to

them.

The majority's rejection of the *Buckley* anticorruption rationale on the ground that independent corporate expenditures "do not give rise to [*quid pro quo*] corruption or the appearance of corruption," is thus unfair as well as unreasonable.

Deference and Incumbent Self-Protection

Rather than show any deference to a coordinate branch of Government, the majority thus rejects the anticorruption rationale without serious analysis. Today's opinion provides no clear rationale for being so dismissive of Congress, but the prior individual opinions on which it relies have offered one: the incentives of the legislators who passed BCRA. Section 203, our colleagues have suggested, may be little more than "an incumbency protection plan," *McConnell*, 540 U.S., at 306 (Kennedy, J., concurring in judgment in part and dissenting in part).

In my view, we should instead start by acknowledging that "Congress surely has both wisdom and experience in these matters that is far superior to ours." *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (Stevens, J., dissenting). whiff of self-interest, is to deprive them of the ability to regulate electioneering. . . .

This is not to say that deference would be appropriate if there were a solid basis for believing that a legislative action was motivated by the desire to protect incumbents or that it will degrade the competitiveness of the electoral process. . .

We have no record evidence from which to conclude that BCRA § 203, or any of the dozens of state laws that the Court today calls into question, reflects or fosters such invidious discrimination. . . .

. . . [W]e do not have a solid theoretical basis for condemning § 203 as a front for incumbent self-protection, and it seems equally if not more plausible that restrictions on corporate electioneering will be self-denying. Nor do we have a good empirical case for skepticism, as the Court's failure to cite any empirical research attests. Nor does the legislative history give reason for concern. . . .

Austin and Corporate Expenditures

Just as the majority gives short shrift to the general societal interests at stake in campaign finance regulation, it also overlooks the distinctive considerations raised by the regulation of *corporate* expenditures. The majority fails to appreciate that *Austin*'s antidistortion rationale is itself an anticorruption rationale, tied to the special concerns raised by corporations. Understood properly, "antidistortion" is simply a variant on the classic governmental interest in protecting against improper influences on officeholders that debilitate the democratic process. It is manifestly not just an " 'equalizing' " ideal in disguise.

1. *Antidistortion*

The fact that corporations are different from human beings might seem to need no elaboration, except that the majority opinion almost completely elides it. *Austin* set forth some of the basic differences. Unlike natural persons, corporations have "limited liability" for their owners and

managers, “perpetual life,” separation of ownership and control, “and favorable treatment of the accumulation and distribution of assets ... that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments.” Unlike voters in U.S. elections, corporations may be foreign controlled. Unlike other interest groups, business corporations have been “effectively delegated responsibility for ensuring society's economic welfare”; they inescapably structure the life of every citizen. “ ‘[T]he resources in the treasury of a business corporation,’ ” furthermore, “ ‘are not an indication of popular support for the corporation's political ideas.’ ”. . .

It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their “personhood” often serves as a useful legal fiction. But they are not themselves members of “We the People” by whom and for whom our Constitution was established.

These basic points help explain why corporate electioneering is not only more likely to impair compelling governmental interests, but also why restrictions on that electioneering are less likely to encroach upon First Amendment freedoms. One fundamental concern of the First Amendment is to “protec[t] the individual's interest in self-expression.” *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 530 (1980). A regulation such as BCRA § 203 may affect the way in which individuals disseminate certain messages through the corporate form, but it does not prevent anyone from speaking in his or her own voice. “Within the realm of [campaign spending] generally,” corporate spending is “furthest from the core of political expression.” *Beaumont*, 539 U.S., at 161, n. 8.

It is an interesting question “who” is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate. Presumably it is not the customers or employees, who typically have no say in such matters. It cannot realistically be said to be the shareholders, who tend to be far removed from the day-to-day decisions of the firm and whose political preferences may be opaque to management. Perhaps the officers or directors of the corporation have the best claim to be the ones speaking, except their fiduciary duties generally prohibit them from using corporate funds for personal ends. Some individuals associated with the corporation must make the decision to place the ad, but the idea that these individuals are thereby fostering their self-expression or cultivating their critical faculties is fanciful. It is entirely possible that the corporation's electoral message will *conflict* with their personal convictions. Take away the ability to use general treasury funds for some of those ads, and no one's autonomy, dignity, or political equality has been impinged upon in the least.

Corporate expenditures are distinguishable from individual expenditures in this respect. I have taken the view that a legislature may place reasonable restrictions on individuals' electioneering expenditures in the service of the governmental interests explained above, and in recognition of the fact that such restrictions are not direct restraints on speech but rather on its financing. But those restrictions concededly present a tougher case, because the primary conduct of actual, flesh-and-blood persons is involved. Some of those individuals might feel that they need to spend large sums of money on behalf of a particular candidate to vindicate the intensity of their electoral preferences. This is obviously not the situation with business corporations, as their routine practice of giving “substantial sums to *both* major national parties” makes pellucidly clear. *McConnell*, 540 U.S., at 148.. “[C]orporate participation” in elections, any business executive will tell you, “is more transactional than ideological.”

. . . In short, regulations such as § 203 and the statute upheld in *Austin* impose only a limited burden on First Amendment freedoms not only because they target a narrow subset of expenditures and leave untouched the broader "public dialogue," but also because they leave untouched the speech of natural persons. . . .

Austin recognized that there are substantial reasons why a legislature might conclude that unregulated general treasury expenditures will give corporations "unfai[r] influence" in the electoral process, 494 U.S., at 660 and distort public debate in ways that undermine rather than advance the interests of listeners. The legal structure of corporations allows them to amass and deploy financial resources on a scale few natural persons can match. The structure of a business corporation, furthermore, draws a line between the corporation's economic interests and the political preferences of the individuals associated with the corporation; the corporation must engage the electoral process with the aim "to enhance the profitability of the company, no matter how persuasive the arguments for a broader or conflicting set of priorities." . . . In a state election such as the one at issue in *Austin,* the interests of nonresident corporations may be fundamentally adverse to the interests of local voters. Consequently, when corporations grab up the prime broadcasting slots on the eve of an election, they can flood the market with advocacy that bears "little or no correlation" to the ideas of natural persons or to any broader notion of the public good, 494 U.S., at 660 The opinions of real people may be marginalized. "The expenditure restrictions of [2 U.S.C.] § 441b are thus meant to ensure that competition among actors in the political arena is truly competition among ideas." *MCFL,* 479 U.S.at 259.

In addition to this immediate drowning out of noncorporate voices, there may be deleterious effects that follow soon thereafter. Corporate "domination" of electioneering, *Austin,* 494 U.S., at 659, can generate the impression that corporations dominate our democracy. When citizens turn on their televisions and radios before an election and hear only corporate electioneering, they may lose faith in their capacity, as citizens, to influence public policy. A Government captured by corporate interests, they may come to believe, will be neither responsive to their needs nor willing to give their views a fair hearing. The predictable result is cynicism and disenchantment: an increased perception that large spenders " 'call the tune' " and a reduced " 'willingness of voters to take part in democratic governance.' " *McConnell,* 540 U.S., at 144 (quoting *Shrink Missouri,* 528 U.S., at 390). To the extent that corporations are allowed to exert undue influence in electoral races, the speech of the eventual winners of those races may also be chilled. Politicians who fear that a certain corporation can make or break their reelection chances may be cowed into silence about that corporation. On a variety of levels, unregulated corporate electioneering might diminish the ability of citizens to "hold officials accountable to the people," and disserve the goal of a public debate that is "uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). At the least, I stress again, a legislature is entitled to credit these concerns and to take tailored measures in response.

The majority's unwillingness to distinguish between corporations and humans similarly blinds it to the possibility that corporations' "war chests" and their special "advantages" in the legal realm, *Austin,* 494 U.S., at 659, may translate into special advantages in the market for legislation. When large numbers of citizens have a common stake in a measure that is under consideration, it may be very difficult for them to coordinate resources on behalf of their position. The corporate form, by contrast, "provides a simple way to channel rents to only those who have paid their dues, as it were. If you do not own stock, you do not benefit from the larger

dividends or appreciation in the stock price caused by the passage of private interest legislation." Sitkoff, Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters, 69 U. Chi. L.Rev. 1103, 1113 (2002). Corporations, that is, are uniquely equipped to seek laws that favor their owners, not simply because they have a lot of money but because of their legal and organizational structure. Remove all restrictions on their electioneering, and the door may be opened to a type of rent seeking that is "far more destructive" than what noncorporations are capable of. *Ibid.* It is for reasons such as these that our campaign finance jurisprudence has long appreciated that "the 'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process.' " *NRWC*, 459 U.S., at 210 (quoting *California Medical Assn.*, 453 U.S., at 201).

The Court's facile depiction of corporate electioneering assumes away all of these complexities. Our colleagues ridicule the idea of regulating expenditures based on "nothing more" than a fear that corporations have a special "ability to persuade," as if corporations were our society's ablest debaters and viewpoint-neutral laws such as § 203 were created to suppress their best arguments. In their haste to knock down yet another straw man, our colleagues simply ignore the fundamental concerns of the *Austin* Court and the legislatures that have passed laws like § 203: to safeguard the integrity, competitiveness, and democratic responsiveness of the electoral process. . . .

. . .Our colleagues have raised some interesting and difficult questions about Congress' authority to regulate electioneering by the press, and about how to define what constitutes the press. *But that is not the case before us.* Section 203 does not apply to media corporations, and even if it did, Citizens United is not a media corporation. There would be absolutely no reason to consider the issue of media corporations if the majority did not, first, transform Citizens United's as-applied challenge into a facial challenge and, second, invent the theory that legislatures must eschew all "identity"-based distinctions and treat a local nonprofit news outlet exactly the same as General Motors. . . .

The Court's blinkered and aphoristic approach to the First Amendment may well promote corporate power at the cost of the individual and collective self-expression the Amendment was meant to serve. It will undoubtedly cripple the ability of ordinary citizens, Congress, and the States to adopt even limited measures to protect against corporate domination of the electoral process. Americans may be forgiven if they do not feel the Court has advanced the cause of self-government today.

2. *Shareholder Protection*

There is yet another way in which laws such as § 203 can serve First Amendment values. Interwoven with *Austin*'s concern to protect the integrity of the electoral process is a concern to protect the rights of shareholders from a kind of coerced speech: electioneering expenditures that do not "reflec [t] [their] support." 494 U.S., at 660-661, When corporations use general treasury funds to praise or attack a particular candidate for office, it is the shareholders, as the residual claimants, who are effectively footing the bill. Those shareholders who disagree with the corporation's electoral message may find their financial investments being used to undermine their political convictions.

The PAC mechanism, by contrast, helps assure that those who pay for an electioneering

communication actually support its content and that managers do not use general treasuries to advance personal agendas. *Ibid.* It " 'allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members.' " *McConnell,* 540 U.S., at 204 (quoting *Beaumont,* 539 U.S., at 163). A rule that privileges the use of PACs thus does more than facilitate the political speech of like-minded shareholders; it also curbs the rent seeking behavior of executives and respects the views of dissenters. *Austin*'s acceptance of restrictions on general treasury spending "simply allows people who have invested in the business corporation for purely economic reasons"-the vast majority of investors, one assumes-"to avoid being taken advantage of, without sacrificing their economic objectives." Winkler, Beyond *Bellotti,* 32 Loyola (LA) L.Rev. 133, 201 (1998).

The concern to protect dissenting shareholders and union members has a long history in campaign finance reform. It provided a central motivation for the Tillman Act in 1907 and subsequent legislation.

The Court dismisses this interest on the ground that abuses of shareholder money can be corrected "through the procedures of corporate democracy," and, it seems, through Internet-based disclosures. I fail to understand how this addresses the concerns of dissenting union members, who will also be affected by today's ruling, and I fail to understand why the Court is so confident in these mechanisms. By "corporate democracy," presumably the Court means the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty. In practice, however, many corporate lawyers will tell you that "these rights are so limited as to be almost nonexistent," given the internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule. . . . Most American households that own stock do so through intermediaries such as mutual funds and pension plans, which makes it more difficult both to monitor and to alter particular holdings.

If and when shareholders learn that a corporation has been spending general treasury money on objectionable electioneering, they can divest. Even assuming that they reliably learn as much, however, this solution is only partial. The injury to the shareholders' expressive rights has already occurred; they might have preferred to keep that corporation's stock in their portfolio for any number of economic reasons; and they may incur a capital gains tax or other penalty from selling their shares, changing their pension plan, or the like. The shareholder protection rationale has been criticized as underinclusive, in that corporations also spend money on lobbying and charitable contributions in ways that any particular shareholder might disapprove.

Recognizing the limits of the shareholder protection rationale, the *Austin* Court did not hold it out as an adequate and independent ground for sustaining the statute in question. Rather, the Court applied it to reinforce the antidistortion rationale, in two main ways. First, the problem of dissenting shareholders shows that even if electioneering expenditures can advance the political views of some members of a corporation, they will often compromise the views of others. Second, it provides an additional reason, beyond the distinctive legal attributes of the corporate form, for doubting that these "expenditures reflect actual public support for the political ideas espoused." The shareholder protection rationale, in other words, bolsters the conclusion that restrictions on corporate electioneering can serve both speakers' and listeners' interests, as well as

the anticorruption interest. And it supplies yet another reason why corporate expenditures merit less protection than individual expenditures.

V

Today's decision is backwards in many senses. It elevates the majority's agenda over the litigants' submissions, facial attacks over as-applied claims, broad constitutional theories over narrow statutory grounds, individual dissenting opinions over precedential holdings, assertion over tradition, absolutism over empiricism, rhetoric over reality. Our colleagues have arrived at the conclusion that *Austin* must be overruled and that § 203 is facially unconstitutional only after mischaracterizing both the reach and rationale of those authorities, and after bypassing or ignoring rules of judicial restraint used to cabin the Court's lawmaking power. Their conclusion that the societal interest in avoiding corruption and the appearance of corruption does not provide an adequate justification for regulating corporate expenditures on candidate elections relies on an incorrect description of that interest, along with a failure to acknowledge the relevance of established facts and the considered judgments of state and federal legislatures over many decades.

In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules. The majority's rejection of this principle "elevate[s] corporations to a level of deference which has not been seen at least since the days when substantive due process was regularly used to invalidate regulatory legislation thought to unfairly impinge upon established economic interests." *Bellotti*, 435 U.S., at 817, n. 13 (White, J., dissenting). At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.

I would affirm the judgment of the District Court.

JUSTICE THOMAS, concurring in part and dissenting in part.

I join all but Part IV of the Court's opinion.

Political speech is entitled to robust protection under the First Amendment. Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA) has never been reconcilable with that protection. By striking down § 203, the Court takes an important first step toward restoring full constitutional protection to speech that is "indispensable to the effective and intelligent use of the processes of popular government." *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003).

Congress may not abridge the "right to anonymous speech" based on the " 'simple interest in providing voters with additional relevant information." In continuing to hold otherwise, the Court misapprehends the import of "recent events" that some *amici* describe "in which donors to certain causes were blacklisted, threatened, or otherwise targeted for retaliation." The Court

properly recognizes these events as "cause for concern," *ibid.*, but fails to acknowledge their constitutional significance. In my view, *amici*'s submissions show why the Court's insistence on upholding §§ 201 and 311 will ultimately prove as misguided (and ill fated) as was its prior approval of § 203. . . .

. . .I cannot endorse a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters as the price for engaging in "core political speech, the 'primary object of First Amendment protection.' *McConnell*, 540 U.S., at 264. Accordingly, I respectfully dissent from the Court's judgment upholding BCRA §§ 201 and 311.

§8.04 CONSCIENCE AND EXPRESSION IN SPECIAL SETTINGS

[B] Universities

Page 1288: [Add before Problem J]:

NOTES AND QUESTIONS

In *Christian Legal Society Chapter of the University of California, Hastings v. Martinez*, 130 S. Ct. 2971 (2010), the Supreme Court dealt with a challenge brought by the Christian Legal Society to a policy of the Hastings Law School, a state university law school in San Francisco that is part of the University of California system. The policy, which the Supreme Court described as an "all-comers" policy, imposed an open membership rule on all officially recognized student groups, a rule that required the student group to accept all comers as voting members even if those individuals disagree with the mission of the group.

The Hastings chapter of the Christian Legal Society, a national organization, required its members to sign a "Statement of Faith" and to live their lives according to certain tenets, including the principle that sexual activity should not occur outside of marriage between a man and a woman. Consistent with this belief, the Society would not accept gay and lesbian members, placing it in conflict with the non-discrimination policy that Hastings mandated for all of its registered student organizations. The Christian Legal Society sought a waiver from Hastings, arguing that to force it to accept gay and lesbian members violated its First Amendment rights of freedom of speech and freedom of association, relying on decisions such as *Boy Scouts of America v. Dale.*

By a 5-4 vote, in a decision written by Justice Ruth Bader Ginsburg, the Supreme Court rejected the Christian Legal Society's claim, holding that the Hastings Law School could require adherence to its all-comers non-discrimination policy as a condition of official recognition as a registered student organization. Justice Ginsburg's opinion for the Court held that the First Amendment rights of the Christian Legal Society had to be measured in light of the special deference that courts pay to public universities in making judgments germane to the educational process, judgments that are not limited to the classroom, but that extend to extracurricular

activities as well. Exclusion, Justice Ginsburg reasoned, has two sides. "Hastings, caught in the crossfire between a group's desire to exclude and students' demand for equal access, may reasonably draw a line in the sand permitting *all* organizations to express what they wish but *no* group to discriminate in membership." The Court observed that just as Hastings would not allow its professors to teach only classes to those students who adhere to certain beliefs, it could reach the educational judgment that it should not grant official status to student groups who engage in similar discrimination. Moreover, the Court reasoned, it would be difficult for Hastings to police student groups to determine which forms of discrimination were truly belief-based, and which were mere cover for discrimination.

The Court held that the Hastings Law School was entitled to reach the judgment that an all-comers policy would advance the valid educational goals of encouraging tolerance, conflict-resolution skills, and a readiness to find common ground. Finally, the Court reasoned, the non-discrimination policy followed by the Hastings Law School was consistent with the broader non-discrimination policies of the state of California. Hastings, the Court reasoned, could make the judgment that it would not subsidize discrimination that ran contrary to the state's declared public policies. The Court in *Christian Legal Society* made much of the fact that the Hastings policy did not force the Society to accept gay and lesbian members. It merely conditioned status as a registered student organization on such acceptance. The Christian Legal Society could still exist, and could even gain access to school facilities, and the use of chalkboards and bulletin boards to advertise Society events. All that the Hastings rule did was prevent the Society from receiving the other benefits that came with recognition as an official registered student organization, such as eligibility for funding assistance through the funds generated by required student fees, use of the Law School's name and logo, participation in a student organization fair, access to the Law School's official student services newsletter, and use of the Law School's e-mail service with an official Hastings organizational e-mail address.

As the Court saw the matter, the Christian Legal Society could remain true to its principles if it chose, and reject these fringe benefits of official recognition, but still function within the Law School as an unofficial student organization, or it could accept the benefits and agree to adhere to the Hastings policy. Indeed, the Court appeared to concede that the First Amendment rights of the Christian Legal Society would have been violated if the government had forced the society to accept gay and lesbian members against its will, through an outright criminal prohibition. The Court noted, however, that "[i]n diverse contexts, our decisions have distinguished between policies that require action and those that withhold benefits." A less restrictive First Amendment standard applied, to the Hastings registered student organization, program, the Court reasoned, because through it Hasting was "dangling the carrot of subsidy, not wielding the stick of prohibition."

AGENCY FOR INTERNATIONAL DEVELOPMENT v. ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC.

United States Supreme Court

570 U.S.__ (2013)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act), 117 Stat. 711, as amended, 22 U.S.C. § 7601 et seq., outlined a comprehensive strategy to combat the spread of HIV/AIDS around the world. As part of that strategy, Congress authorized the appropriation of billions of dollars to fund efforts by nongovernmental organizations to assist in the fight. The Act imposes two related conditions on that funding: First, no funds made available by the Act "may be used to promote or advocate the legalization or practice of prostitution or sex trafficking." § 7631(e). And second, no funds may be used by an organization "that does not have a policy explicitly opposing prostitution and sex trafficking." § 7631(f). This case concerns the second of these conditions, referred to as the Policy Requirement. The question is whether that funding condition violates a recipient's First Amendment rights.

I

Congress passed the Leadership Act in 2003 after finding that HIV/AIDS had "assumed pandemic proportions, spreading from the most severely affected regions, sub-Saharan Africa and the Caribbean, to all corners of the world, and leaving an unprecedented path of death and devastation." 22 U.S.C. § 7601(1). According to congressional findings, more than 65 million people had been infected by HIV and more than 25 million had lost their lives, making HIV/AIDS the fourth highest cause of death worldwide. In sub-Saharan Africa alone, AIDS had claimed the lives of more than 19 million individuals and was projected to kill a full quarter of the population of that area over the next decade. The disease not only directly endangered those infected, but also increased the potential for social and political instability and economic devastation, posing a security issue for the entire international community. § 7601(2)–(10). . . .

The United States has enlisted the assistance of nongovernmental organizations to help achieve the many goals of the program. . . . Since 2003, Congress has authorized the appropriation of billions of dollars for funding these organizations' fight against HIV/AIDS around the world. § 2151b–2(c); § 7671.

Those funds, however, come with two conditions: First, no funds made available to carry out the Leadership Act "may be used to promote or advocate the legalization or practice of prostitution or sex trafficking." § 7631(e). Second, no funds made available may "provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except ... to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency." § 7631(f). It is this second condition—the Policy Requirement—that is at issue here. . . .

II

Respondents are a group of domestic organizations engaged in combating HIV/AIDS overseas. In addition to substantial private funding, they receive billions annually in financial assistance from the United States, including under the Leadership Act. Their work includes programs aimed at limiting injection drug use in Uzbekistan, Tajikistan, and Kyrgyzstan, preventing mother-to-child HIV transmission in Kenya, and promoting safer sex practices in India. Respondents fear that adopting a policy explicitly opposing prostitution may alienate certain host governments, and may diminish the effectiveness of some of their programs by making it more difficult to work with prostitutes in the fight against HIV/AIDS. They are also concerned that the Policy Requirement may require them to censor their privately funded discussions in publications, at conferences, and in other forums about how best to prevent the spread of HIV/AIDS among prostitutes. . . .

III

The Policy Requirement mandates that recipients of Leadership Act funds explicitly agree with the Government's policy to oppose prostitution and sex trafficking. It is, however, a basic First Amendment principle that "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* . . . "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting System, Inc. v. FCC* . . . Were it enacted as a direct regulation of speech, the Policy Requirement would plainly violate the First Amendment. The question is whether the Government may nonetheless impose that requirement as a condition on the receipt of federal funds.

A

The Spending Clause of the Federal Constitution grants Congress the power "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, cl. 1. The Clause provides Congress broad discretion to tax and spend for the "general Welfare," including by funding particular state or private programs or activities. That power includes the authority to impose

limits on the use of such funds to ensure they are used in the manner Congress intends. *Rust v. Sullivan*. . . .

As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights. *United States v. American Library Assn., Inc.*, 539 U.S. 194, 212, (2003) (plurality opinion) (rejecting a claim by public libraries that conditioning funds for Internet access on the libraries' installing filtering software violated their First Amendment rights, explaining that "[t]o the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance"); *Regan v. Taxation With Representation of Wash.*, (dismissing "the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State" (internal quotation marks omitted)).

At the same time, however, we have held that the Government " 'may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit.'" *Forum for Academic and Institutional* Rights. . . . The dissent thinks that can only be true when the condition is not relevant to the objectives of the program (although it has its doubts about that), or when the condition is actually coercive, in the sense of an offer that cannot be refused. (opinion of SCALIA, J.). Our precedents, however, are not so limited. In the present context, 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. The line is hardly clear, in part because the definition of a particular program can always be manipulated to subsume the challenged condition. We have held, however, that "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Legal Services Corporation v. Velazquez*.

A comparison of two cases helps illustrate the distinction: In *Regan v. Taxation With Representation of Washington*, the Court upheld a requirement that nonprofit organizations seeking tax-exempt status under 26 U.S.C. § 501(c)(3) not engage in substantial efforts to influence legislation. The tax-exempt status, we explained, "ha[d] much the same effect as a cash grant to the organization." And by limiting § 501(c)(3) status to organizations that did not attempt to influence legislation, Congress had merely "chose[n] not to subsidize lobbying.". In rejecting the nonprofit's First Amendment claim, the Court highlighted—in the text of its opinion, the fact that the condition did not prohibit that organization from lobbying Congress altogether. By returning to a "dual structure" it had used in the past—separately incorporating as a § 501(c)(3) organization and § 501(c)(4) organization—the nonprofit could continue to claim § 501(c)(3) status for its nonlobbying activities, while attempting to influence legislation in its § 501(c)(4) capacity with separate funds. Maintaining such a structure, the Court noted, was not "unduly burdensome." The condition thus did not deny the organization a government benefit "on account of its intention to lobby."

In *FCC v. League of Women Voters of California*, by contrast, the Court struck down a condition on federal financial assistance to noncommercial broadcast television and radio stations that prohibited all editorializing, including with private funds. Even a station receiving only one percent of its overall budget from the Federal Government, the Court explained, was "barred absolutely from all editorializing." Unlike the situation in *Regan*, the law provided no way for a station to limit its use of federal funds to noneditorializing activities, while using private funds "to make known its views on matters of public importance." The prohibition thus went beyond ensuring that federal funds not be used to subsidize "public broadcasting station editorials," and instead leveraged the federal funding to regulate the stations' speech outside the scope of the program.

Our decision in *Rust v. Sullivan* elaborated on the approach reflected in *Regan* and *League of Women Voters*. In Rust, we considered Title X of the Public Health Service Act, a Spending Clause program that issued grants to nonprofit health-care organizations "to assist in the establishment and operation of voluntary family planning projects [to] offer a broad range of acceptable and effective family planning methods and services." The organizations received funds from a variety of sources other than the Federal Government for a variety of purposes. The Act, however, prohibited the Title X federal funds from being "used in programs where abortion is a method of family planning." To enforce this provision, HHS regulations barred Title X projects from advocating abortion as a method of family planning, and required grantees to ensure that their Title X projects were " 'physically and financially separate' " from their other projects that engaged in the prohibited activities. A group of Title X funding recipients brought suit, claiming the regulations imposed an unconstitutional condition on their First Amendment rights. We rejected their claim.

We explained that Congress can, without offending the Constitution, selectively fund certain programs to address an issue of public concern, without funding alternative ways of addressing the same problem. In Title X, Congress had defined the federal program to encourage only particular family planning methods. The challenged regulations were simply "designed to ensure that the limits of the federal program are observed," and "that public funds [are] spent for the purposes for which they were authorized."

In making this determination, the Court stressed that "Title X expressly distinguishes between a Title X grantee and a Title X project." The regulations governed only the scope of the grantee's Title X projects, leaving it "unfettered in its other activities." Ibid. "The Title X grantee can continue to ... engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds." Ibid. Because the regulations did not "prohibit[ ] the recipient from engaging in the protected conduct outside the scope of the federally funded program," they did not run afoul of the First Amendment.

B

As noted, the distinction drawn in these cases—between conditions that define the federal program and those that reach outside it—is not always self-evident. As Justice Cardozo put it in a related context, "Definition more precise must abide the wisdom of the future." *Steward Machine Co. v. Davis*, 301 U.S. 548, 591 (1937). Here, however, we are confident that the Policy Requirement falls on the unconstitutional side of the line.

To begin, it is important to recall that the Leadership Act has two conditions relevant here. The first—unchallenged in this litigation—prohibits Leadership Act funds from being used "to promote or advocate the legalization or practice of prostitution or sex trafficking." 22 U.S.C. § 7631(e). The Government concedes that § 7631(e) by itself ensures that federal funds will not be used for the prohibited purposes.

The Policy Requirement therefore must be doing something more—and it is. The dissent views the Requirement as simply a selection criterion by which the Government identifies organizations "who believe in its ideas to carry them to fruition." As an initial matter, whatever purpose the Policy Requirement serves in selecting funding recipients, its effects go beyond selection. The Policy Requirement is an ongoing condition on recipients' speech and activities, a ground for terminating a grant after selection is complete. In any event, as the Government acknowledges, it is not simply seeking organizations that oppose prostitution. Reply Brief 5. Rather, it explains, "Congress has expressed its purpose 'to eradicate' prostitution and sex trafficking, 22 U.S.C. § 7601(23), and it wants recipients to adopt a similar stance." Brief for Petitioners 32 (emphasis added). This case is not about the Government's ability to enlist the assistance of those with whom it already agrees. It is about compelling a grant recipient to adopt a particular belief as a condition of funding.

By demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition by its very nature affects "protected conduct outside the scope of the federally funded program." A recipient cannot avow the belief dictated by the Policy Requirement when spending Leadership Act funds, and then turn around and assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime. By requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient. *Ibid.* ("our 'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program").

The Government contends that the affiliate guidelines, established while this litigation was pending, save the program. Under those guidelines, funding recipients are permitted to work with affiliated organizations that do not abide by the condition, as long as the recipients retain "objective integrity and independence" from the unfettered affiliates. 45 CFR § 89.3. The Government suggests the guidelines alleviate any unconstitutional burden on the respondents' First Amendment rights by allowing them to either: (1) accept Leadership Act funding and

comply with Policy Requirement, but establish affiliates to communicate contrary views on prostitution; or (2) decline funding themselves (thus remaining free to express their own views or remain neutral), while creating affiliates whose sole purpose is to receive and administer Leadership Act funds, thereby "cabin[ing] the effects" of the Policy Requirement within the scope of the federal program.

Neither approach is sufficient. When we have noted the importance of affiliates in this context, it has been because they allow an organization bound by a funding condition to exercise its First Amendment rights outside the scope of the federal program. Affiliates cannot serve that purpose when the condition is that a funding recipient espouse a specific belief as its own. If the affiliate is distinct from the recipient, the arrangement does not afford a means for the recipient to express its beliefs. If the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy. The guidelines themselves make that clear. See 45 CFR § 89.3 (allowing funding recipients to work with affiliates whose conduct is "inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking."

The Government suggests that the Policy Requirement is necessary because, without it, the grant of federal funds could free a recipient's private funds "to be used to promote prostitution or sex trafficking." That argument assumes that federal funding will simply supplant private funding, rather than pay for new programs or expand existing ones. The Government offers no support for that assumption as a general matter, or any reason to believe it is true here. And if the Government's argument were correct, *League of Women Voters* would have come out differently, and much of the reasoning of *Regan* and *Rust* would have been beside the point.

The Government cites but one case to support that argument, *Holder v. Humanitarian Law Project*. That case concerned the quite different context of a ban on providing material support to terrorist organizations, where the record indicated that support for those organizations' nonviolent operations was funneled to support their violent activities

Pressing its argument further, the Government contends that "if organizations awarded federal funds to implement Leadership Act programs could at the same time promote or affirmatively condone prostitution or sex trafficking, whether using public or private funds, it would undermine the government's program and confuse its message opposing prostitution and sex trafficking." But the Policy Requirement goes beyond preventing recipients from using private funds in a way that would undermine the federal program. It requires them to pledge allegiance to the Government's policy of eradicating prostitution. As to that, we cannot improve upon what Justice Jackson wrote for the Court 70 years ago: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*.

The Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program. In so doing, it violates the First Amendment and cannot be sustained. The judgment of the Court of Appeals is affirmed.

It is so ordered.

KAGAN, J., took no part in the consideration or decision of this case.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

The Leadership Act provides that "any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking" may not receive funds appropriated under the Act. 22 U.S.C. § 7631(f). This Policy Requirement is nothing more than a means of selecting suitable agents to implement the Government's chosen strategy to eradicate HIV/AIDS. That is perfectly permissible under the Constitution.

The First Amendment does not mandate a viewpoint-neutral government. Government must choose between rival ideas and adopt some as its own: competition over cartels, solar energy over coal, weapon development over disarmament, and so forth. Moreover, the government may enlist the assistance of those who believe in its ideas to carry them to fruition; and it need not enlist for that purpose those who oppose or do not support the ideas. That seems to me a matter of the most common common sense. For example: One of the purposes of America's foreign-aid programs is the fostering of good will towards this country. If the organization Hamas—reputed to have an efficient system for delivering welfare—were excluded from a program for the distribution of U.S. food assistance, no one could reasonably object. And that would remain true if Hamas were an organization of United States citizens entitled to the protection of the Constitution. So long as the unfunded organization remains free to engage in its activities (including anti-American propaganda) "without federal assistance," *United States v. American Library Assn., Inc.*, (plurality), refusing to make use of its assistance for an enterprise to which it is opposed does not abridge its speech. And the same is true when the rejected organization is not affirmatively opposed to, but merely unsupportive of, the object of the federal program, which appears to be the case here. (Respondents do not promote prostitution, but neither do they wish to oppose it.) A federal program to encourage healthy eating habits need not be administered by the American Gourmet Society, which has nothing against healthy food but does not insist upon it.

The argument is that this commonsense principle will enable the government to discriminate against, and injure, points of view to which it is opposed. Of course the Constitution

does not prohibit government spending that discriminates against, and injures, points of view to which the government is opposed; every government program which takes a position on a controversial issue does that. Anti-smoking programs injure cigar aficionados, programs encouraging sexual abstinence injure free-love advocates, etc. The constitutional prohibition at issue here is not a prohibition against discriminating against or injuring opposing points of view, but the First Amendment's prohibition against the coercing of speech. I am frankly dubious that a condition for eligibility to participate in a minor federal program such as this one runs afoul of that prohibition even when the condition is irrelevant to the goals of the program. Not every disadvantage is a coercion.

But that is not the issue before us here. Here the views that the Government demands an applicant forswear—or that the Government insists an applicant favor—are relevant to the program in question. The program is valid only if the Government is entitled to disfavor the opposing view (here, advocacy of or toleration of prostitution). And if the program can disfavor it, so can the selection of those who are to administer the program. There is no risk that this principle will enable the Government to discriminate arbitrarily against positions it disfavors. It would not, for example, permit the Government to exclude from bidding on defense contracts anyone who refuses to abjure prostitution. But here a central part of the Government's HIV/AIDS strategy is the suppression of prostitution, by which HIV is transmitted. It is entirely reasonable to admit to participation in the program only those who believe in that goal.

According to the Court, however, this transgresses a constitutional line between conditions that operate inside a spending program and those that control speech outside of it. I am at a loss to explain what this central pillar of the Court's opinion—this distinction that the Court itself admits is "hardly clear" and "not always self-evident," has to do with the First Amendment. The distinction was alluded to, to be sure, in *Rust v. Sullivan*, but not as (what the Court now makes it) an invariable requirement for First Amendment validity. That the pro-abortion speech prohibition was limited to "inside the program" speech was relevant in *Rust* because the program itself was not an anti-abortion program. The Government remained neutral on that controversial issue, but did not wish abortion to be promoted within its family-planning-services program. The statutory objective could not be impaired, in other words, by "outside the program" pro-abortion speech. The purpose of the limitation was to prevent Government funding from providing the means of pro-abortion propaganda, which the Government did not wish (and had no constitutional obligation) to provide. The situation here is vastly different. Elimination of prostitution is an objective of the HIV/AIDS program, and any promotion of prostitution—whether made inside or outside the program— does harm the program.

Of course the most obvious manner in which the admission to a program of an ideological opponent can frustrate the purpose of the program is by freeing up the opponent's funds for use in its ideological opposition. To use the Hamas example again: Subsidizing that organization's provision of social services enables the money that it would otherwise use for that purpose to be used, instead, for anti-American propaganda. Perhaps that problem does not exist

in this case since the respondents do not affirmatively promote prostitution. But the Court's analysis categorically rejects that justification for ideological requirements in all cases, demanding "record indica[tion]" that "federal funding will simply supplant private funding, rather than pay for new programs." Ante, at ——. This seems to me quite naive. Money is fungible. The economic reality is that when NGOs can conduct their AIDS work on the Government's dime, they can expend greater resources on policies that undercut the Leadership Act. The Government need not establish by record evidence that this will happen. To make it a valid consideration in determining participation in federal programs, it suffices that this is a real and obvious risk.

None of the cases the Court cites for its holding provide support. . . .

The Court makes a head-fake at the unconstitutional conditions doctrine, but that doctrine is of no help. There is no case of ours in which a condition that is relevant to a statute's valid purpose and that is not in itself unconstitutional (e.g., a religious-affiliation condition that violates the Establishment Clause) has been held to violate the doctrine. Moreover, as I suggested earlier, the contention that the condition here "coerces" respondents' speech is on its face implausible. . . .

The majority cannot credibly say that this speech condition is coercive, so it does not. It pussyfoots around the lack of coercion by invalidating the Leadership Act for "requiring recipients to profess a specific belief" and " demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern." But like King Cnut's commanding of the tides, here the Government's "requiring" and "demanding" have no coercive effect. In the end, and in the circumstances of this case, "compell[ing] as a condition of federal funding the affirmation of a belief," is no compulsion at all. It is the reasonable price of admission to a limited government-spending program that each organization remains free to accept or reject. . . .

3

Ideological-commitment requirements such as the one here are quite rare; but making the choice between competing applicants on relevant ideological grounds is undoubtedly quite common. . . . As far as the Constitution is concerned, it is quite impossible to distinguish between the two. If the government cannot demand a relevant ideological commitment as a condition of application, neither can it distinguish between applicants on a relevant ideological ground. And that is the real evil of today's opinion. One can expect, in the future, frequent challenges to the denial of government funding for relevant ideological reasons.

The Court's opinion contains stirring quotations from cases like *West Virginia State Bd. of Ed. v. Barnette*, and *Turner Broadcasting System, Inc. v. FCC.* They serve only to distract attention from the elephant in the room: that the Government is not forcing anyone to say anything. What Congress has done here—requiring an ideological commitment relevant to the Government task at hand—is approved by the Constitution itself. Americans need not support

the Constitution; they may be Communists or anarchists. But “[t]he Senators and Representatives ..., and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support [the] Constitution.” U.S. Const., Art. VI, cl. 3. The Framers saw the wisdom of imposing affirmative ideological commitments prerequisite to assisting in the government's work. And so should we.