

# Splintered

to

Federal Folly

The Secret behind ObamaCare, Federal  
Jurisdiction, and the Death of Liberty

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Dedicated to  
Luis Batista and Orlando Carter

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Note: All bold text within any citation is added emphasis by the author.

splinter – the purposeful reduction and distortion of logic and truth; the rejection of balance in an argument with the intent to reach a contrived and conclusion.



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## History as Teacher

In 1819, the United States Supreme Court wrote,

No political dreamer was ever wild enough to think of breaking down the lines which separate the states and compounding them into one common mass. McCulloch v. Maryland

For those who are discerning, the foregoing quote may create an avalanche of thoughts and questions which are not easily reconciled for one simple fact. The 1819 Supreme Court, separated from the ratification of the Federal Constitution by only twenty-seven years, could never have imagined that the united States of America would be so vastly different two hundred years later. The 1819 Court must have concluded the prized independence of the several States, the liberty of its citizens, and the limits of the Federal Government were and would always be.

Yet, whether admitted or not, Americans identify more readily with the Federal Government than to the separate and distinct States of the Union. Americans default to federal citizenship rather than defer to State citizenship. When the current political landscape is contrasted with that of the early 1800s, most Americans today would not relinquish their federal status for the once coveted and superior State citizenship. Clearly, the Supreme Court in 1819 never envisioned the wholesale dismantling of the philosophical, mental, emotional, and practical significance of the several States and the sovereign people.

The 1819 Court more than hints of the impossibility of a federal leviathan ruling and dictating as it does today. The Court's words "No political dreamer" set the tone. The word "No" is absolute and "dreamer" is used as a warning to those politicians who would propose thoughts foreign to the American Republic. In the early 1800s, federal politicians were more apt to toe the line of limited government in deference to the power and significance of the "free and independent States".<sup>1</sup> Justices and politicians knew the limits of federal authority. Rare was the occurrence for the Federal Government to be involved with State citizens. The Government did not control sovereign State citizens.

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<sup>1</sup> The Declaration of Independence, 1776

The distinct separation between the Federal Government and the States and State citizens is underscored by the Court's descriptive words "ever wild enough". The Court's wisdom more than suggests governing officials would never be unbridled with the exercise of federal powers much less excessive power. Akin to a broken bronco, with the Constitution as a harness, the Federal Government could not bolt from its constraints. The Court was assured of this impossibility with the absolute "ever".

There is no doubt that the 1819 Court was confident no political dreamer would ever be so wild as "to think." But think of what? The answer is "[B]reaking down the lines which separate the states." The Court knew breaking down lines meant more than State boundary lines. The lines were State powers the Federal Government could not cross—limited powers which served as its demarcation. State powers may not exist without lines that bind the Federal Government.

The Supreme Court's admonishment is clear and only its conclusion remains unexplained. The conclusion, "compounding them into one common mass" is defining. The Court, in stark, stern, and equally measured language states what is beyond dispute. The several States may not be one. The several States may not be beaten, broken, melded, or made—compounded—into one common mass. That the several States were autonomous in 1819 was incontestable. The justices merely asserted what was axiomatic. The independence of the States was certain and the Federal Government could not use its powers to compromise that independence.

The query the Court posed is "Who would ever be so wild as to think they could defeat the barriers which separate what may never be joined?" In light of the 2018 political and judicial climate this question deserves to be asked and answered. However, a response should not be offered before another query is weighed. Have the lines between the States been so broken that the States and its citizens are now one common mass?

America has been transformed over two centuries and not for the better. Countless political and judicial permutations and machinations of ideas have unduly affected a once fiercely independent people and their States. This admission is rather problematic in a culture that is all too relative with respect to its public, political, and judicial discourse. Federal and State politicians, if only for convenience, would boldly, although reluctantly, suggest the lines which separate the several States are as in the past. Even jurists would readily embrace this conclusion to satisfy a particular question of law in need of resolution and no more.

The people, however, those most likely to accept a sobering truth without the counsel of aggrandizing politicians and dicta spouting judges, know the Federal Government is nearly omnipotent and the States are relatively inconsequential. The people sense their depleted power. They may not know why, but they will sheepishly admit to being bridled by federal mandates and that the States are hamstrung with ubiquitous federal entitlements and associated conditions.

The 1819 Court, if apprised of the current condition of “American Republic,” would state,

No American would ever be so blind to think the lines, which once separated the States and ensured liberty, have not been broken by federal and state political and judicial dreamers who compounded the States and people into one common mass.

To undergird this conclusion, there must be a means of measurement. How does one measure the independence of the States and its citizens in 1819 and 2018? How does one measure the limits or excesses of constitutional federal governance then and now?

A benchmark would distinguish a shift of either a philosophy or practice from the early 1800s and that of the present. Notwithstanding the elements of time and events, or the pointed and purposeful acts undertaken because of both, with an established benchmark, deviations would be apparent. Regardless of the catalyst or motivation, and without characterizing the means, a shift from State independence to greater federal control would reflect a move to oneness. This oneness—the creation of a common mass—ensures the defeat of independence and liberty. This is particularly true when the Federal Government traverses over States barriers to control State citizens.

What, then, is the benchmark? Since [Splintered to Federal Folly](#) addresses the demise of the liberty of the American people and the 1819 Supreme Court speaks to an unthinkable federal common mass, the benchmark must be that people became Federal citizens more so than State citizens. In 1819, Americans were not and could not be easily or readily mandated by the Federal Government. This is no longer the case. Americans are mandated by the Federal Government to do one thing or another. Regrettably, since most Americans do not realize a distinction between these two classes of citizenship, they won’t recognize the benchmark or understand how and why this shift occurred.

The federal initiative infamously known as ObamaCare is emblematic of the shift from independence to interdependence (some might call it co-dependence) between the States and State citizens and the Federal Government. According to the 2012 Supreme Court, ObamaCare decision, which stipulates that the Federal Government may directly influence the inactivity of a private citizen, is *constitutional*. Only the benchmark that people became Federal citizens more so than State citizens would offer adequate context for such unimagined federal power, power that would never have been asserted much less enforced in the early 1800s. While this benchmark serves the purpose of measuring the weakness of the American Republic in the 21<sup>st</sup> century compared to the 19<sup>th</sup> century, it is important to know how and why the shift occurred.

If politicians and judges are reluctant to admit to this obvious benchmark, they would not agree as to how and why the benchmark was borne and manifested. This is the main reason for Splintered to Federal Folly. Admitting to a defining alteration of America's past, an alteration which ensures the end of liberty and the demise of the American Republic, is more troublesome when the how and why are revealed. Given man's innate need and desire for homeostasis and the power of cognitive dissonance, most people would not accept what is an inarguable and consequential change in America. And they most certainly would not accept a secret, or at least an unstated, motive for the change. They would deny the secret and motive. The reason is simple. Denial affords politicians and judges a reason to dismiss the benchmark, its manifestation, and, ultimately, reason to deny the secret. Splintered to Federal Folly reveals the benchmark and secret.

ObamaCare is proof that the secret is credible. If and when Americans understand how and why it was possible for ObamaCare to become federal law, they will know America is one common mass. They may accept the benchmark and the reasons for its manifestation over the last two centuries. If they understand the benchmark, the secret, and the corresponding insignificance of the once powerful States, the loss of their coveted liberty will be apparent.

What is the secret? It is disclosed within this book. The secret, as elusive as any, is provided during an in depth analysis of ObamaCare and the American history that made this law possible. In fact, that ObamaCare survived to become a federal law, an unthinkable proposition in 1819 and as impossible as it should have been in 2012, is because of the secret.

By now, you may be wondering why citizenship in 2018 is any different than two centuries ago. You may be puzzled as to how citizenship

correlates to ObamaCare. If you weigh such queries, you are less concerned about your comfort than freedom and you are not likely affected by cognitive dissonance. You are more likely to reject what you know for what you know not. If so, you may embrace why America is now one common mass and no longer a free country. Federal initiatives like ObamaCare are a mere reflection of this tragic reality.

## Generally and Specifically

George Friedman, author of Flash Points, chronicles the history of Europe. With the past as a benchmark, Friedman projects the possible future for Europeans and the world. He uses generalizations to explain the decisions and actions of leaders, organizations, and countries over the centuries. While not unique, his use of generalities is impressive. Friedman's broad discussion of causes of conflict and war parallels how people relate with history and life in the present.

People communicate broadly with thematic overtones. For example, family and friends may express generally that Bob and Susie love each other. With specifics, we learn Bob makes Susie fresh coffee every day and Susie darns his socks. Such details underscore the love they share and others sense. When Friedman speaks of a country's quest for security and prosperity, he relates generally that a leader and a people act to secure those results. He then provides specifics as to how those goals are achieved, whether by armed invasion or diplomatic agreement for access to seaports. Specifics underscore general representations.

If specifics are not available is a general overview supported? Are we certain Bob and Susie are committed if we do not know of their particular acts? Do we know a country needs security and greater prosperity until we see overt or covert acts which achieve these ends? Russia's quest for regional dominance, generally, is not validated until Russia invades the Ukraine, specifically.

The use of generalities absent specifics is a slippery slope<sup>2</sup> to confusion, misunderstanding, and, quite often, relativism, which reinforces the notion that those who do not understand history are condemned to repeat it. If generalizations are misused, if only for the absence of specifics, especially if generalities are not challenged into the near or distant future and people lack historical context, life becomes problematic. If an American does not know specifically that Congress cannot control a man's intrastate inactivity, he will accept a general representation that he must be active in the marketplace by congressional mandate or be penalized by an unconstitutional tax.

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<sup>2</sup> "Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom." *Tempting of America*, page 169, Simon & Schuster, New York, 1990

President Barack Hussein Obama accomplished this incredible result with the infamous Patient Protection Affordable Care Act, known as ObamaCare. This signature initiative requires an American who is inactive in the health insurance marketplace to be active or suffer a penalty by tax assessment. This begs a defining question. How does the Federal Government acquire control of the entire health care industry and the American population at large? What specifics justify such comprehensive federal legislation and the formidable exercise of federal authority? Does the passage and enforcement of ObamaCare indicate that the States and citizens are now one common mass?

If Obama provided particulars to substantiate such federal power, we could square his *facts* with an historical backdrop that would either support or repudiate his position. If unable to reconcile his *facts*, we would conclude Obama's specifics were unfounded and his generalization a farce. If we determined his facts were true, the ignorance of those who rejected his position would be apparent.

Is it possible that Congress lacks the authority to control the health care industry or mandate *individual* compliance with ObamaCare? With specifics, Americans may realize the United States Government is not the powerful juggernaut purported and its actions are unconstitutional. Did the Supreme Court approve ObamaCare by misapplying a generality? A false generalization would further American ignorance and entrap citizens into deeper federal control. With this abuse of power, life becomes relative to the time power is abused. Whether in 1795, 1854, or 1905, is it conceivable that ObamaCare would have been enacted?

If people lack specifics of limited constitutional power and historical facts which demonstrate constrained government authority, they accept the premise they are within federal jurisdiction and liable to ObamaCare. It is that simple. Otherwise people would reject the notion of federal control over the health care industry and the imposition of the ObamaCare tax known as the Individual Mandate upon all Americans.

If Americans understood the specifics of Obama's socialist crusade or the prescribed panaceas of any President or Congress, they would not gratuitously accept personal liability under any number of federal laws. Yet, ignorance and fear motivate people to act contrary to their best interests. Without historical context, Americans become beholden to laws which would and should not affect them. Sadly, most are controlled by a Government which originally lacked this power, while those who are informed assert that the Government lacks such power even now.

When a Government exercises comprehensive and unjustified power by overt or subtle force, it controls land, assets, and people. The actions of conquering armies are no different than the current practices of the Federal Government. If a man is unable to secure a job without a social security number and unable to secure a passport and exercise his natural right to travel for the same reason, or if he is unable to contract for his own medical care even though he is outside of federal authority, the Federal Government achieves near absolute authority. Americans are defeated in the “land of the free” by an aggrandizing Government.

Where did such authority originate? Is it justified? If not, what is the solution? The answers to these questions rest within the specifics of proper lawful authority and rejection of unmerited generalizations that such power exists. To this end, we must question if and how the United States Government acquired jurisdiction to enforce ObamaCare.

In order to ensure the Federal Government adheres to constitutional parameters and States remain separate, we must understand how and why the three branches of government defeat liberty. If we objectively compare general and specific examples of jurisprudence and the governing ethos during the history of our Republic, we gain contrast and learn of causes for shifts of power that belie constitutional dignity. Such analysis instructs as to why Americans are liable to the ObamaCare Individual Mandate and, consequently, less free.



## Chiefly Speaking

Chief Justice of the United States Supreme Court, John Roberts stated the following in his majority opinion on ObamaCare.

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.

Words are important. People use words deliberately when they communicate. The intent is clear when one screams “Fire!” Those who hear the message understand. When the founders of America wrote their list of grievances to the English Crown the intent was unequivocally expressed. Words serve a purpose. Words are conveyed to achieve a desired end. When words are used to create and further a lie, the result is no different, except the lie is often undetected. If people lack the specifics to debunk deception, they accept the general representation that the lie is credible. Is this what occurred with ObamaCare?

As a practical matter, words are the parameters of power. When words and meanings are blurred beyond comprehension, not only is the recipient confused, he may conclude the one who communicated the message is either misinformed or he misappropriated power. Moreover, if a governing body interprets and approves the words of another body, even if the words are incongruent with just cause and power, misinterpretation and misapplication are possible.

The Supreme Court is comprised of nine justices who, one would think, intend to use legal terms and the common language with exactness. Absent exactness or when justices do not agree to the meanings of particular words, we must ask why. Is there an ulterior motive beyond seeking and determining what is just and true? For example, if the Supreme Court issues an opinion inconsistent with past constitutional doctrine, does the Court intend to induce a new precedent congruent with an ideology that satisfies a prevailing sentiment or crisis-du-jour? Or, with a clear understanding of congressional intent, does the Court ignore the full impact of a law? Supreme Court decisions that are incongruent with the past are not likely to be corrected in the short or long term. As such, any deviation forebodes increased and entrenched government influence.

In light of Roberts' "fairly possible motive," did he misconstrue and misapply words in order to "save" ObamaCare? If so, his majority opinion takes on a life of its own and becomes what previous courts and generations of Americans never expected. Such is the dilemma with ObamaCare and the Court's opinion.

With the example of past Courts, Presidents, and Congresses, Roberts and the majority moved the benchmarks of word usage to a new extreme in order to justify the expansion of federal power. The impact is indisputable. When Congress attempts to aggrandize further in ten or one hundred years, the Supreme Court, having failed to hold Congress accountable in 2012, will have aided and abetted this unfortunate end. Sadly, Roberts has done no differently than past and present political and judicial dreamers who defeated lines of power to achieve the untenable.

Significant public backlash to tenuous new laws is an indication of structural or doctrinal flaws. Notably, as many as twenty-five States filed suit against the Federal Government over ObamaCare. This is a no small number. Citizens and State governments were unnerved. With such dissatisfaction, there can be no doubt people had a problem with the intent of the law and the use of the words employed.

Should the Court have reconciled congressional and presidential word usage and meaning to mitigate the cause of the public angst? When the Court does the opposite, when it preserves a law with apparent disregard for public discontent, are words misused deliberately? The distortion of words perverts truth and power. The perversion of truth and power is the core of public dissent. Congress and the Court should have been humbled by the outcry and weighed the people's belief that the Constitution, composed of words, was misconstrued for the purposes of ObamaCare.

Since ObamaCare mandates the Individual Mandate—a forced penalty/tax payable to the IRS if one does not buy health insurance—the law is rightly viewed by liberty-minded Americans as an injustice and untruth. One need only consider the school yard bully. The bully may declare the playground as his alone and require everyone use it for a monthly fee. Those who refuse to use the playground are assessed a penalty. To make matters worse, the school principal approves the scheme.

An understanding of law or logic is not needed to understand this scenario is unjust and most certainly not true. The bully does not own the playground. He has no authority to mandate use of the grounds for a fee or assess a penalty. The bully and the principal do not have any

jurisdiction to compel others to do something against their rights and desire.

Congress, the bully which enacted ObamaCare, used words for an end offensive to the people and the Constitution. The Supreme Court is the principal that sanctioned this abuse of power. The Court interpreted the words “tax” and “penalty” in a manner that failed to hold the Government accountable to constitutional constraints. Roberts had a narrow objective, “to construe a statute to save it, if fairly possible, that §5000A can be interpreted as a tax.”

The Court either ignored or morphed legislative words and meanings into what cannot be. The Court sanctioned asserted congressional authority to accomplish what could never have been. With Roberts’ emphasis on a “duty” to “construe” in order to “save” ObamaCare, the Court exceeded its own individual mandate to enforce the Constitution. When justices do not scrutinize language, rather, when they construe language to justify a law based upon an extremely narrow and flawed interpretation, the court furthers federal oversight in the present and into the future. Liberty is eroded. This is what the Roberts’ Court achieved.

Rather than burden the Court with the priority to save the law, why not ensure Congress neither plowed nor strayed into constitutional conundrums which vex the people and imperil their present and posterity? The often misguided 535 members of Congress, with a legion of lawyers at their disposal, who often keep Congress misguided, are generally less cautious than justices. That the Court exerted its wits to justify the likes of ObamaCare rather than prune or lop congressional overreach defies a judicious exercise of its deliberative efforts.

If the Federal Government is limited in scope by the Constitution, how is the Court able to endorse the Individual Mandate? One answer is that it cannot. Yet, the Government uses sweeping generalities to justify its actions under seemingly broad constitutional statements known as the General Welfare Clause, the Necessary and Proper Clause, and the Commerce Clause, and particularly as applied to the Taxation Clause.

These clauses are often construed to grant the Government authority that is otherwise non-existent. Yet, upon thorough examination by discerning legal and constitutional minds, these general clauses are accepted for their narrow relevance. More specifically, the intent of these clauses, checked by enumerated and limited powers under Article 1, Section 8 of the Constitution, bind the Government and prohibit what is unconstitutional.

Supreme Court Justice Joseph Story, one of the ablest legal minds in American history, illustrated the proper reading of the General Welfare Clause. He defined words effectively for their specific use and channeled the authority of the Federal Government to just and constitutional ends.

904. Before proceeding to consider the nature and extent of the power conferred by this clause, and the reasons, on which it was founded, it seems necessary to settle the grammatical construction of the clause, and to ascertain its true reading. Do the words, "to lay and collect taxes, duties, imposts and excises," constitute a distinct, substantial power; and the words, "to pay debts and provide for the common defense, and general welfare of the United States", constitute another distinct and substantial power? Or are the latter words connected with the former, so as to constitute a qualification upon them? This has been a topic of political controversy; and has garnished abundant materials for popular declamation and alarm. If the former be the true interpretation, then it is obvious, that under color of the generality of the words to "provide for the common defense and general welfare," the government of United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers; if the latter be the true construction, then the power of taxation only is given by the clause, and it is limited to objects of national character, "for the common defense and the general welfare."

905. The former opinion has been maintained by some minds of great ingenuity, and liberality of views. The latter has been the generally received sense of the nation, and seems supported by reasoning at once solid and impregnable. The reading, therefore, which will be maintained in these commentaries, is that, which makes the latter words a qualification of the former; and this will be best illustrated by supplying the words, which are necessarily to be understood in this interpretation. They will then stand thus: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, in order to pay the debts, and to provide the common defense and general welfare of the United States;" that is, for the purpose of paying the public debts, and providing for the common defense and general welfare of the United States. In this sense, **Congress has not an unlimited power of taxation; but it is limited to specific objects, - the payment of the public debts, and providing**

**for the common defense and general welfare. A tax, therefore, laid by Congress for neither of the objects, would be unconstitutional, as an excess of its legislative authority.** In what manner this is to be ascertained, or decided, will be considered hereafter. At present, the interpretation of the words only is before us; and the reasoning, by which that already suggested has been vindicated, will now be reviewed. 1833 Commentaries on the Constitution

Story's analysis leaves little doubt that Roberts' majority opinion is not without error. Roberts exceeded his authority and that of the Supreme Court. He was hell bent, if fairly possible, to interpret the Individual Mandate as a tax to save the law when he had every reason to soundly defeat it as a tax. With Story's understanding of the General Welfare and Tax Clauses, one may easily conclude ObamaCare is unconstitutional. Many a private citizen reached this conclusion without the need for the Court's splintered legal analysis.

The people's reaction to both ObamaCare and Roberts' decision was warranted. Their frustration was not some flippant and baseless response, but merited contempt for a federal attack on liberty. Many believe the Government committed another extra-constitutional foray which confirms their deepest misgivings and distrust. According to Story's steady judgment, the executive, legislative, and judicial branches failed to dignify another affront to freedom. Why and how could Roberts have been so diametrically opposed to Story's discipline and allegiance to the Constitution?

Did Roberts apply an elusive interpretation of ObamaCare however strained to generally and specifically validate his legal analysis? When Congress legislates and the Supreme Court approves legislation is there the possibility that Americans are incorrectly presumed to be within federal jurisdiction? If so, the Supreme Court need only interpret legislation as applicable to what the Government already controls to save a law. This leads to a defining question. Is the public fury over ObamaCare unwarranted if Americans are within federal control? Asked differently, were Americans already unwittingly ensnared within a federal jurisdictional trap which subjected them to ObamaCare? Under such a scenario, Roberts would be justified and Story would be less relevant.

We need only consider the Social Security scheme to appreciate this possibility. Contrary to popular belief, Americans are not required to obtain a Social Security Number. But most Americans are unaware of the law and they believe a Social Security Number (SSN) is mandatory. The

repercussions are catastrophic. With the acceptance of an SSN, Americans are liable for both the social security tax and the federal income tax. The Federal Government has jurisdiction over social security participants and identifies them as *federal persons, individuals, and taxpayers*. Given the importance of words, once jurisdiction is acquired, the Government may enact legislation that is not unthinkable. Stated rather pointedly, federal legislation becomes ever more binding when Americans enter federal control.

By way of contrast, there was a period in American history when the National Government admitted, specifically, to the limitations of federal legislation. The Government even disclosed jurisdiction. The first income tax was assessed upon a certain class and only that class, a class that was federal in scope. The Government validated its limited jurisdiction in 1862 and identified those subject to excise as employees.

*And be it further enacted, that on and after the first day of August, 1862 there shall be levied, collected and paid on all salaries of **officers, or payments to persons in the civil, military, naval, other employments or service of the United States, including Senators and representatives and delegates in Congress...***

The income tax did not affect Americans within the several States, for they were without federal control. The Federal Government had no authority—jurisdiction—to assess and collect this tax from private citizens. The Government only controls what it creates or possesses. The Government creates employment and statuses and possesses power to tax those who benefit from positions as *federal persons, individuals, or taxpayers*.

In 1939, the Government passed the Public Salary Tax Act and expanded the definition of those in the employ of the United States to include “*Employees of the United States the District of Columbia or any agency or instrumentality thereof whether elected or appointed*”. Consider the definition of “Gross Income” under Section 22a:

*Gross Income Defined. Section 213. That for the purposes of this title, (except as otherwise provided in section 233), the term “gross income”(A) includes gains, profits, and income derived from salaries, wages, and compensation for personal service (including in the case of the President of the United States, the judges of the Supreme Court and lower inferior courts of the United States, and all other*

***officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof or the District of Columbia, the compensation received as such.***

Note how the Government became more artful with its use of language and purposely blurred who was liable. Alaska and Hawaii were within the jurisdiction of the United States Government, as each was a territory and not yet admitted as a State of the Union.

The Public Salary Tax Act of 1939 qualified the definition of “Gross Income” as follows:

*Public Salary Tax Act of 1939, Title 1 - Section 22 (a) of the Internal Revenue Code relating to the definition of “gross income” is amended after the words “**compensation for personal service**” the following: including personal service as an official or employee of a State or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing.*

Note the more generalized language of “compensation for personal service.” Words are often used generally with the intent to deceive for a specific end. Contrast the last definition with the succinctness of the 1862 enactment. The general use of *State* implies a greater reach than should be attributed. The definition of *State* is the territories and possessions of the United States. If we weigh the definition of “trade or business,” which according to 26 USC 7701(a)(26) is “*The term ‘trade or business’ includes the performance of the function of a public office,*” the income tax is assessed against the intended class of persons—federal employees—and is congruent with the 1862 law.

Congress may only tax those within its jurisdiction. The Government creates positions of employment. As the employer it may tax those who voluntarily accept federal employment.

The right to receive income or earnings is a right belonging to every person and realization of income is therefore not a privilege that can be taxed. Taxation Key, West 933

The legislature cannot name something to be a taxable privilege unless it is first a **privilege**. Taxation Key, West 53

There can be little doubt the Government could not tax any and all earnings in 1862. The people of the several States were outside federal jurisdiction and this specific taxing power. The Government could tax those who were liable and no more. Confirmation that the Internal Revenue Code applied to federal “individuals” and “employees” is provided by the Department of the Treasury, Division of Tax Research:

For 1936, taxable income returns filed represented only 3.9% of the population...

The largest portion of consumer incomes in the United States is not subject to income taxation. Likewise, only a small portion of the population of the United States is covered by the Income Tax. (“Collection at Source of **Individual** Normal Income Tax (1941))

Not all Americans were or are liable to file a federal income tax return. Those who are not employees of the United States Government are not within the taxable class. They are not within a class able to be taxed. The reason is simple. One’s labor and earnings are his property. One’s earnings are not the result of a *privilege* granted by the Government. The Government has no power to tax those who are without its jurisdiction. Congress knew and knows of this constitutional limitation.

We need only consider an IRS levy of a man’s earnings. Under current practices, the IRS mails an excerpt from the tax code to the man’s employer or bank as justification for a levy. Deceitfully, the IRS sends paragraph (b) and purposely excludes paragraph (a).

(b) Seizure and sale of property.

The term “levy” as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (e), a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property (whether real or personal, tangible or intangible.) *26 USC, Subtitle F Procedure and Administration, Chapter 64 Collection, Subchapter D Seizure of property for collection of taxes, Part II Levy, Section 6331 Levy and distraint.*

The text appears unambiguous and applicable to any and all Americans, which is exactly the intent. However, upon examination of paragraph (a),



the limitations of the levy authority become evident. Once we understand the terms, we may challenge the meaning and intent and, thus, rightly question if a levy applies to *every person* or *individual*.

(a) Authority of Secretary.

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and right to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. **Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States or the District of Columbia, or any agency or instrumentality of the United States or District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. *Id.***

Compare this language with the Income Tax Act of 1862 and the definitions for *trade and business* and *employee* within the tax code.

26 USC 3401 – Definitions.

(c) For purposes of this chapter, the term “**employee**” **includes an officer, employee, or elected official of the United States, a State or any political subdivision thereof, or instrumentality of any one or more of the foregoing.** The term “employee” also includes an officer of a corporation.

We have a rather transparent admission; not *every person*<sup>3</sup> is subject to levy. For, not *every person* is subject to the federal income tax. If every person were liable for the tax, the language would state so and the authority to levy would establish this constitutional latitude.

The language *includes only officers, employees, or elected officials of the United States or the District of Columbia*, those *within the jurisdiction of the United States Government*. Americans who do not have a federal status or SSN are excluded. The Government rightly concludes that those

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<sup>3</sup> “Every person who shall monopolize”, etc. will be taken as a matter of course to such legislation, not all that the legislator may be able to catch. (quoting *American Banana Co., v United Fruit Co* 1909)

who become *employees* by and through the application for a tax identification number (SSN), which cements the *relation of employment or acceptance of a federal office*, and their submission of federal tax forms, to include the filing of a 1040 U. S. *Individual Income Tax Form*, are subject to the federal income tax and, therefore, subject to levy.

How do most Americans become *liable* for a tax when previously they were not? One answer cannot be denied. The Federal Government manipulates words, definitions, and language to create the presumption of jurisdiction and liability. When Americans do not know the law, they unwittingly enter federal jurisdiction. That Americans blindly waltz into federal jurisdiction is the crux of the Federal Government's increase in power and assault on liberty. This brings us back to Obamacare.

Federal legislation, such as ObamaCare, expands federal jurisdiction at the cost of liberty. This manifestation is best explained by analyzing Justice Ginsburg's ObamaCare dissent concerning the Commerce Clause. Ginsburg exposes the secret of federal jurisdiction. The following analysis is from an upcoming chapter.

*Ginsburg argues, "since 1937" Congress has had "large authority to set the course in the Nation's economic and social welfare realm" and "regulations of commerce that do not infringe some constitutional prohibition" are legitimate. However, Ginsburg fails to define "constitutional prohibition." Her failure is reflective of a justice's license to express, however artfully, a broad position, without nailing down the specific merits of the case. Such ploys forbid, by design, revelation of the whole truth.*

*Ginsburg does not acknowledge the historical backdrop of congressional power under the Commerce Clause prior to 1937. She cannot possibly think that this backdrop suffered from want of fixed constitutional prohibitions, at least more rigid than after 1937 and most certainly in 2012. Prior to 1937, Americans had greater awareness that the Constitution specifically constituted what the Federal Government may or may not do. These limits necessitate that the context of federal power rests upon jurisdiction, whether presumed by the Government or unwittingly assented to by private citizens. For example, under Article 1, Section 8, the United States Government may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers... vested by this Constitution in the Government of the United States..." , while under the Second Amendment the words are "shall not be*

*infringed.” The Government may make laws necessary concerning health care, but to what extent? To the abridgment of what shall not be infringed, be it the right to contract or the right to be left alone?*

*The Constitution prohibits the Government from imposing where it may not and conveys plenary power where permitted. Federal control over a territory or possession is much different than its influence over any of the 50 States. This fact cannot be overstated. If Ginsburg or any justice offered complete transparency, Americans would have full disclosure of the extent of federal jurisdiction over whom, what, and where, rather than presumptions in defiance of constitutional mandates that apply to the Government alone. The legislative and executive branches had no greater constitutional control in 1937 than 1854 and the Supreme Court did not have greater latitude to interpret then and it does not presently. The Constitution did not become malleable over time. The Constitution currently constitutes limited government and it always has.*

*Actual federal jurisdiction or its mere presumption is the Government’s best kept secret. That the Federal Government may legally interpret and act without full disclosure further cloaks the secret. Where does this leave uninformed Americans with respect to ObamaCare and the Individual Mandate? Americans presume the law applies to them. They perceive the Government as credible. They presume the Court’s judgment as credible. The law stands uncontested. The secret is preserved.*

*Ginsburg did not explain that those who accepted social security in 1937 and thereafter are under the Government’s control for purposes of federal classification and taxation. Congressional powers were not increased. Congress always had the power to tax federal citizens—those within its jurisdiction. Citizens who rejected the federal scheme of social security, those outside of federal oversight, were unaffected. This is complete constitutional jurisdictional context the Government prefers to hide.*

You now know the secret. Knowing the secret poses a challenge. You must read the balance of Splintered to Federal Folly with the subtext of ObamaCare that the Government already has the jurisdiction to do what the law accomplishes. This means the Government may do what many believed was impossible.

Now, would you prefer to read an explanation of the viability of ObamaCare knowing that you are liable because of actual or presumed federal jurisdiction or would you prefer to read with the belief that you are outside of the Government's control? The former option makes ObamaCare somewhat palatable and justifiable while the latter fosters outrage. While the answer may be irrelevant in the end, you will proceed with this book knowing that the Government either presumes or has jurisdiction over Americans as justification for the ObamaCare Individual Mandate.

Actual or presumed federal jurisdiction and constitutional prohibitions are components which must be appreciated in order to gain a balanced perspective of any federal law, particularly legislation as offensive as ObamaCare. Failure to appreciate jurisdiction is to miss the greatest lesson about the Individual Mandate and the errant application of federal power.

Are Americans within and under federal control for any and all reasons crafted by the President, Congress, and the Supreme Court? Do the three branches distort words and their meanings in order to save or justify any federal law when jurisdiction is lacking over a particular class? Affirmative answers to these queries confirm that the Constitution no longer constitutes limited federal power, liberty is a relic of the past, and the States and State citizens are compounded into one common mass.

If it is difficult to accept that the Government has jurisdiction over all Americans as federal *persons, individuals, and taxpayers*, who are deemed liable for the Individual Mandate because they subscribed to the benefit of social security, ask a simple query. How does the Federal Government acquire authority over the people within the Union of 50 States for any particular cause? Other than a prescribed constitutional power, it does not—unless the people cede to federal jurisdiction willingly.

Congress must have had the jurisdictional nexus required to enact ObamaCare and the Court must have acknowledged such jurisdiction to enforce the Individual Mandate. The fact that neither Congress nor the Court disclosed this fact not only continued but increased public disbelief and outrage. Public outrage over ObamaCare exists because the people knew something was terribly wrong; they just could not explain the reasons.

Americans do not understand the rules of the game. This is no small revelation. If people do not know Congress may do what many believe it cannot, they are oblivious to the authority behind any federal initiative.

Consequently, both the ignorant and contented and the informed and apathetic do not pose a challenge to expanding federal authority. Moreover, the blind but incensed are clueless to do so. Without awareness and the requisite motivation, excessive federal oversight will persist unabated as much as it is uncontested.

Had the Court revealed the reason the Federal Government has jurisdiction to legislate and enforce and, subsequently, why Americans are accountable to the Individual Mandate as federal taxpayers, the people would have, at a minimum, a sound basis for Roberts' majority opinion. Because the Court did not, the people do not. Not knowing is problematic when one does not know that he does not know. Equally problematic is when one does not know that what he thinks he knows is true is actually wrong. Either scenario creates more confusion in the absence of knowing and greater disbelief from the unexpected. Americans are either confused about ObamaCare or surprised that it prevailed. Each reaction may be attributed to the Government's secret.

The discussion about Ginsburg and the relevance of federal jurisdiction reveals the rules of the game. Lifting the veil about federal jurisdiction offers context for Congress' intent and the Court's rationale for deeming ObamaCare constitutional. Although many agree with the dissenting opinion that ObamaCare is unconstitutional, if the premise that the Federal Government has jurisdiction is correct, the Court's interpretation is correct as well. Otherwise, public confusion and disbelief remain.

Irresolution and a public outcry perpetuates what is divisive and destructive and leaves a supposedly free people imprisoned behind bars of ignorance and doubt. Imagine not knowing of actual federal jurisdiction much less presumed authority, all the while clamoring for rights which do not or no longer apply. Should Americans be surprised with federal encroachment that is acquired without detection and with crippling results?

Most world governments grant rights to its citizens. Americans acknowledge their rights as God-given. What would be the ideal means for the Government to marginalize divinely bestowed rights? Employ the Government's secret that resulted in ObamaCare. If actual or presumed federal jurisdiction persists and expands, natural rights are sidelined by federal privileges and corresponding oversight. The emphasis shifts from providentially-ordained rights to privileges created and enforced by the United States Government. Governance of a people under the guise of federal privileges renders coveted rights as irrelevant and burdens

Americans with expectations and subjugation on par with those under foreign governments.

If Americans are inclined to disbelieve that the Government will marginalize natural rights, they fail to appreciate how the rights of life, liberty, property, association, contract, privacy, religious beliefs, and to be left alone are sorely affected by federal laws like ObamaCare. Most don't know that the acceptance of the federal social security benefit alters how Americans are classified by the Government. To deny a distinction between a jurisdiction under natural rights and that of federal privileges is akin to rejecting the distinction of being in air to that of water.

Is it conceivable for the Government to increase its control to the exclusion of natural rights? Americans have the fundamental right to travel. The Federal Government has the responsibility to approve passport requests, which, by code and regulation, are issued upon proof of identity and declaration of allegiance to the United States of America. The requirements and process are straight forward and have always been. The right to travel has been a coveted natural right since America's founding.

Hypothetically, if the Government issued a federal mandate requiring an SSN in order to secure a passport, what happens to the natural right? The right is defeated. Alternatively, one must enter the federal jurisdiction by applying for and accepting an SSN in order to get a passport. Is this an impossible outcome? Would the Federal Government be so bold? Prior to 2012, ObamaCare was equally impossible with unalienable and natural rights.

The discussion about Ginsburg and the infamous year of 1937, a milestone of expanded federal jurisdiction, provides context for the Supreme Court's ObamaCare decision. Without agreeing to Roberts' majority opinion, one may understand how Congress and the Court justified ObamaCare. Undoubtedly, one's perspective of the Federal Government, natural rights, and liberty is profoundly altered.

Does this more complete context of federal jurisdiction and ObamaCare pose a challenge? Imagine reading the ObamaCare decision without knowledge of the Government's secret. Context is everything and only poses a challenge if one willfully disbelieves that the Federal Government has comprehensive jurisdiction by presumption alone. Candidly, one's refusal to accept what is factual and asserted by the Government is a personal issue. The truth is no less in the face of abject denial.

From this point forward one has no excuse but to accept the premise that the Roberts' majority embraces federal *taxpayers* as the class

liable for the *Individual* Mandate. The Court interprets the ObamaCare penalty as a tax and acknowledges the Government's authority to assess and collect this tax from federal citizens and—by presumption—the Government may collect the tax from those not liable.

## The Full Story

Americans come under federal control with and by their acceptance of the federal social security scheme. As a result, they became and are liable for the ObamaCare Individual Mandate. This liability is proved with an examination of the words employed by the Supreme Court and Congress. However, by way of contrast, consider Justice Story's analysis and explanation of the general welfare clause.

Story said it is "*necessary to settle the grammatical construction of the clause, and to ascertain its true reading.*" He sought to establish how sentences were built in order to understand congressional intent. By doing so, Story and the Court could comprehend the limits of constitutional authority and the Court's prescribed role. He dignified his effort by asking:

*Do the words, "to lay and collect taxes, duties, imposts and excises," constitute a distinct, substantial power; and the words, "to pay debts and provide for the common defense, and general welfare of the United States", constitute another distinct and substantial power? Or are the latter words connected with the former, so as to constitute a qualification upon them?*

Story recognized, "*This has been a topic of political controversy; and has garnished abundant materials for popular declamation and alarm.*" He did not ignore the obligation to constrain the Federal Government. Story stated, regarding his first question,

*If the former be the true interpretation, then it is obvious, that under color of the generality of the words to "provide for the common defense and general welfare," the government of United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers;"*

He purposely noted a "*generality of the words*" leads to "*unlimited powers*" and the source of any public alarm. He then offered,



*... if the latter be the true construction, then the power of taxation only is given by the clause, and it is limited to objects of national character, 'for the common defense and the general welfare.'*

Story applied a fluid logic consistent with the grammatical construction and the words employed.

The contrast between Story and Roberts and the exercise of their judicial temperament is remarkable. Story did not, as Roberts endeavors, seek to save a law or an interpretation, *if fairly possible*, that could not pass constitutional scrutiny and would increase federal power. Although Story was interpreting language within the Constitution, while Roberts weighed a law against the Constitution, the result is no different. Is the sanctity and integrity of this revered document preserved under either jurist? If not, why?

Story concluded that the second interpretation “... *has been the generally received sense of the nation, and seems supported by reasoning at once solid and impregnable.*” He did not hesitate to acknowledge the corollary between the “sense of the nation” and the clause which satisfied his incumbent responsibility to dignify both. He stated,

*...the latter words [are] a qualification of the former and interpreted as “The Congress shall have power to lay and collect taxes, duties, imposts and excises, in order to pay the debts, and to provide the common defense and general welfare of the United States;” that is, **for the purpose of paying the public debts, and providing for the common defense and general welfare of the United States.***

Story’s deliberative process netted a just and true end that Roberts would have been wise to observe and apply.

*In this sense, Congress has not an unlimited power of taxation; but it is limited to specific objects, - the payment of the public debts, and providing for the common defense and general welfare. A tax, therefore, laid by Congress for neither of the objects, would be unconstitutional, as an excess of its legislative authority.*

The proper application of words was important to Justice Story. Is this application less so for Chief Justice Roberts? After all, words, which define the parameters of power, are why Americans are under federal control and liable to the ObamaCare Individual Mandate.

Legal terms are used by design. Congress uses terms with the express intent to achieve a specific end. For example, Congress may define the legal term “vehicle” as “a means of locomotion with four legs and a mane and neighs.” This definition would serve a definitive purpose within a particular code section.

The legal term “United States” has different meanings within the United States Code and the Code of Federal Regulations. The “United States” may mean “Washington D. C., Guam, and Puerto Rico” in one section and “Washington D. C. and the 50 States of the Union” in another. It is essential to know how a term is defined to understand its application.

If only because the Supreme Court took for granted that those liable for the Individual Mandate are federal citizens, Roberts may not have given credence to the analysis of terms and their meanings in ObamaCare and the Constitution. The Court presumed Congress had jurisdiction over those *individuals* culpable for the penalty which it interpreted as a tax. Who are these *individuals*? Since Roberts interprets the *Individual* Mandate penalty as a tax and Congress identifies the IRS as the agency to receive the tax payments, we must look to the federal tax code.

26 USC—Internal Revenue Code

Subtitle F—Procedure and Administration Chapter 79—Definitions

(a)(1) **Person.** The term *person* shall be construed to mean and include an **individual**, a trust, estate, partnership, association, company or corporation.

Note the term *person* shall be *construed*. Why isn't the term defined to *mean* rather than to *be construed*? Why define *person* in the first place? A person is a person, right? Yet, *person* is not defined as it is in the vernacular. Legalese and the listings for *person* are creations of Government within federal authority. The list within the definition includes the term *individual*. What is unique about an *individual*? Is an individual one who elects to have a federal status within the domain of the United States Government?

ObamaCare enforces the *Individual* Mandate. The 1040 tax form is labeled “U. S. *Individual* Income Tax Form.” We may conclude “U. S.” stands for the “*United States*,” which must be limited to Washington D. C. This fact is validated with the definition of “*Individual*” under the tax code.

26 CFR—Internal Revenue

Part 1—Income Taxes

Nonresident aliens and foreign corporations

1.1441-1 Requirement for the deduction and withholding of tax on payments to foreign persons

(3) **Individual**—

(i) ***Alien Individual***. The term alien individual means an individual who is not a citizen or national of the United States. See 1.1-1(c)

(ii) ***Nonresident alien individual***. The term **nonresident alien individual means a person** described in 7701(b)(1)(B) [26 USCS 7701(b)(1)(B)], **an alien individual who is a resident of a foreign country** under the residence article of a foreign country of an income tax treaty and 301.7701(b)-7(A)(1) of this chapter, or an alien individual who is a resident of Puerto Rico, Guam, the Commonwealth of Northern Mariana Islands, the U. S. Virgin Islands, or American Samoa as determined under 301.7701(b)-1(d) of this chapter. **An alien who has made an election under 6013(g) or (h) [26 USCS 6013(g) or (h)] to be treated as a resident alien individual for purposes of withholding under Chapter 3 of the Code and regulations thereunder.**

Section 1.1441-1 underscores beyond doubt that an *individual* is either an alien or a nonresident alien who made an election to be treated as a *resident alien individual*. Note the use of the term “resident.”

Consider the phrase “*election made under 26 USC 6013.*” The Government regards one who is *foreign* (nonresident) to the *United States* as a *resident alien individual*. This must be for federal income tax purposes. Do not forget that an *individual* is a *person* as defined in the tax code, 26 USC 7701(a)(1). What is the definition of *United States*? An *individual* is a *resident* within the *possessions* of the *United States*, especially when the nonresident alien requests to enter the *United States* for and with this status.

26 USC Internal Revenue Code

Subtitle F Procedure and Administration

Chapter 79 Definitions

7701 Definitions

(b) Definition of resident alien and nonresident alien

(1) In general. For purposes of this title (other than subtitle B) [26 USC 2001 et seq.]—

(A) **Resident Alien.** An alien individual shall be treated as a resident of the United States with respect to any calendar year if (and only if) such individual meets the requirement of clause (i), (ii), or (iii)  
(i) Lawfully admitted for permanent residence...  
(ii) Substantial presence test...  
(iii) First year election...

(B) *Nonresident alien.* An individual is a nonresident alien if such individual is neither a citizen of the United States nor a resident of the United States (within the meaning of subparagraph (A)).

The terms *resident aliens* and *nonresident aliens* define *individual*. Why are *resident aliens* and *nonresident aliens* referred to as *individuals* and not simply as *resident aliens* and *nonresident aliens*? Are they *aliens* or *individuals* depending upon certain circumstances? Are *resident aliens* and *nonresident aliens* classified as *individuals* for purposes of *employment and taxation*?

Consider that *individual*, a federal designation and creation within the definition of “*person*” (26 USC 7701(a)(1)) is the only possibility to define or include a human being. This fact obscures that *individuals* are only resident aliens and nonresident aliens. Is one deemed resident or nonresident without being an alien or individual? Does *individual* imply or mean a government position, title, or employment? Is this legal term and definition written and applied ambiguously to accomplish a specific objective? Why include the term *individual* in the definition of *person*?

By presumption, the term *individual*, although defined as a *resident alien* and *nonresident alien*, creates the impression that more than those affected are individuals—as in all Americans. Are citizens of the 50 States *residents* of the *United States*? It would appear they cannot be. Are they *nonresidents*? Citizens of the 50 States do not conduct their business by saying, “*I am a nonresident alien individual.*” Furthermore, they do not consider themselves *residents* within the *State of the District of Columbia*—the seat of the United States Government. Most do not even know of this distinction. Does the United States Government consider citizens of the 50 States as *nonresident aliens* and *nonresident alien individuals*? When and why would the Government do so?

For the purpose of applying the tax code, even if by implication alone, the Government must dignify those without its jurisdiction for enforcement of the federal income tax, as well as specify those within its orbit. For those not beholden to the federal income tax (not all are liable

for this indirect excise), would the Government describe them with a legal title? Are Americans nonresident to the federal United States? Within the tax code the Government states when those who are not liable for the federal income tax become liable, when *nonresident aliens* elect to be *resident aliens* under 26 USC 6013(g). Is this when the Government treats nonresidents as *nonresident aliens* or *nonresident alien individuals* and *U. S. residents*—those who become *persons* and *taxpayers* known as *United States* citizens?

26 CFR Internal Revenue

Subchapter A—Income Taxes

Part I—Income Taxes

Pension, Profit-sharing, stock bonus plans

1.409A-1 Definitions and covered plans.

(j) **Nonresident alien**—(l) Except as provided in paragraph (j)(2) of this section, the term **nonresident alien means an individual who is (i) A nonresident alien within the meaning of section 7701(b)(1) [26 USCS 7701(b)(B)] or (ii) A dual resident taxpayer within the meaning of 301.7701 9 (b)-7(A)(1) of this chapter with respect to any taxable year in which such individual is treated as a nonresident alien for purposes of computing the individual’s U. S. income tax liability.**

The definition of nonresident alien is consistent with what we have learned. Note, however, an *individual* is a *nonresident alien* within the meaning of 26 USC 7701(b)(1) and a dual resident taxpayer within regulation 301.7701 9 (b)-7(A)(1). A *nonresident alien* would become an *individual* and subject to the tax code. Otherwise, would the nonresident alien remain a nonresident alien and not a *nonresident alien individual*? With certainty, the *United States* has jurisdiction which *includes* certain classes subject to the federal income tax. The definition of *person* as defined in 26 USC 7701 represents those classes. Those who are without these classes are not obligated to file a federal *U. S. Individual* Income Tax Return.

Caution is required at this juncture. Those outside of federal authority would include *nonresident alien fiduciaries* even if they were unaware that they fell under this label.

Part I—Income Taxes

**Nonresident alien individuals**

1.871-2 Determining residence of alien individuals

(a) General. The term “**nonresident alien individual**” means an **individual of the United States**. The term **includes a nonresident alien fiduciary**. For such purpose, the term fiduciary shall have the meaning assigned to it by section 7701(a)(6) [26 USCS 7701(a) 6]] and the regulations in part 301 of this chapter (Regulation on Procedure and Administration).

Consider the “meaning assigned” by section 26 USC 7701(a)(6) to the term “fiduciary.”

*The term “fiduciary” means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any **person**.*

The Government defines those who represent nonresident alien individuals the same as nonresident alien individuals. Behold the power of legalese! This is a distinction of immense importance. A *person*—a legal entity with a tax identification number and liability for a tax—is represented by one who acts on behalf of a nonresident alien individual. Is a private citizen a *fiduciary* even though he is unaware he serves in this role? Is a private citizen named “John Willard Smith” a fiduciary because he knowingly or unknowingly represents the federal *person* JOHN WILLARD SMITH with SSN: 123-45-6789? Answer this query in light of the definition of *residence*.

26 CFR—Internal Revenue

Part 1—Income Taxes

**Nonresident alien individuals**

1.871-2 Determining residence of **alien individuals**

(b) Residence defined. **An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax.** Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a

transient; but, if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

The meaning of *residence* offers a comparison between *transitory* and the *definite intention to stay* (permanently) in the *United States*. Those who intend to stay are classified as *residents*. Are citizens of the 50 States *residents*? Native Americans do not arrive in the United States of America with the intention of leaving. They are born within the 50 States. Are Americans *domiciled* within the 50 States? Are they transitory with respect to the *United States Government*? Does this definition confirm the federal income tax as *foreign* in nature? Under the Constitution, the Federal Government may tax foreign *persons (individuals)* who enter the *United States*.

If Americans are foreign to the *United States* and they enter the *United States* by election to be treated as resident aliens or accept a federal privilege (social security, employment, or public office), are they *residents* within the *United States* and, subsequently, *United States citizens* within the jurisdiction of the Federal Government for the application of the tax code?

26 USC—Internal Revenue Code

Subchapter A—Income Taxes

Chapter 1 Normal Taxes and Surtaxes

Subchapter N—Tax based on income from sources within or without the United States Part 1—Determination of Sources of Income 865

Source Rules for personal property sales

(g)(1)(a) **United States resident**. The term “**United States resident**” means

(i) any **individual** who

(1) is a **United States citizen or a resident alien** and does not have a tax home (as defined in section 911(d)(3) [26 USCS 911(D)(3)] in a foreign country or (II) is a **nonresident alien** and has a tax home (as

so defined) in the United States and (ii) any corporation, trust, or estate which is a United States person (as defined in section 7701(a)(30) [26 USCS 7701(a)(30)

**(b) Nonresident**—The term “*nonresident*” means any person other than a United States resident.

Each definition thus far, akin to an encoded DNA sequence, is connected to others. Yet, the tax code has limited application. Just as the code may not be applied in foreign countries, it may not be applied to a great extent within the United States of America. After weighing the definitions of *individual* and *residence*, compare *U. S. resident* and *nonresident*. The connectedness of these two terms is transparent. Would it be a surprise to learn that a *U. S. resident* is an *individual* who is a *U. S. citizen* or a *nonresident alien* or *resident alien* without a *tax home*? If so, how does the nonresident acquire the U. S. as a tax home and become a *nonresident alien* and *U. S. resident*? Obviously the tax code is consistent with an *individual* as a government creation and designation with a foreign status.

How is the term *United States* defined within the tax code? Who is a *citizen of the United States* or a *United States citizen*? Are citizens of the 50 States, who make an election to accept the federal benefits of social security, employment, or public office within the *United States*, *individuals* and *persons* who are *residents* with *residence* in the same *United States* for purposes of the federal income tax? Are these citizens treated as if they are *U. S. resident alien individuals* when they were once *nonresident*, but became *nonresident aliens* and *individuals* to satisfy federal jurisdiction?

Within the section titled *Identifying Numbers*, note how social security numbers are recognized. These numbers belong to *U. S. citizens* or *resident alien individuals*. We must identify who is a *U. S. citizen* for this section. The title does not apply to all Americans. We know those who enter the jurisdiction of the *United States* Government by election for a federal status or benefit would be identified with federal titles. The income tax would be due and payable by *U. S. citizens*, *persons*, and *individuals*—*taxpayers*—exactly those acknowledged by Roberts as liable for the *Individual Mandate*.

26 CFR—Internal Revenue  
301.6109-1 Identifying Numbers



(g) Special rules for taxpayers identifying numbers issued to foreign persons

(1) General Rule—

(i) **Social security number.** A social security number is **generally identified** in the records and database of the Internal Revenue Service as a number belonging to a **U.S. citizen or resident alien individual.** A person may establish a different status for the number by providing proof of **foreign** status with the Internal Revenue Service under such procedures as the Internal Revenue Service may specify. **Upon accepting an individual as a nonresident alien individual,** the Internal Revenue Service will assign this status to the **individual's** social security number

(ii) Employer identification number. An employer identification number is generally identified in the records and database of the Internal Revenue Service as a number belonging to a **U.S. person.**

Finally, we learn that records in the IRS database may be altered to designate the status of *foreign* for those who choose to alter their *resident alien individual* status. Is this change of status accomplished by the *revocation of an election* by a nonresident alien, an election which made him an *individual* and imposed the status as a *U. S. resident alien* and, consequently, one who is a *United States citizen, person, individual, and taxpayer* for purposes of the tax code? The answer may rest, in part, within the text in 26 USC 6013(g) and (h).

(g) ELECTION TO TREAT NONRESIDENT ALIEN INDIVIDUAL AS RESIDENT OF THE UNITED STATES (1) IN GENERAL. A nonresident alien individual with respect to whom this subsection is in effect for the taxable year shall be treated as a **resident of the United States** -

(4) TERMINATION OF ELECTION. An election under this subsection shall terminate at the earliest of the following times:

(A) Revocation by taxpayers

If either taxpayer revokes the election, as of the first taxable year for which the last day prescribed by law for filing the return of tax under chapter 1 has not yet occurred.

(h) JOINT RETURN, ETC., FOR YEAR IN WHICH NONRESIDENT ALIEN BECOMES RESIDENT OF UNITED STATES

(1) IN GENERAL. If-

(A) any individual is a nonresident alien individual at the beginning of any taxable year but is a resident of the United States at the close of such taxable year,

The following regulation from 20 CFR, “Employees’ Benefits,” which defines individual as a living natural person, confirms an individual is a federal status with a liability for the *Individual* Mandate.

20 CFR—Employees’ Benefits

401.25 Terms defined.

When used in connection with the rules governing program information, individual means a living natural person; this does not include corporations, partnerships, and unincorporated business or professional groups of two or more persons.

*Employees’ Benefits* is a federal regulation for Social Security and Employment Benefits, which limits *individuals* to *persons* who are natural and alive. No other entities (persons) may benefit. These employees must be within the jurisdiction of the federal *United States*.

Who are these “employees”? As a federal title, are *employees* those who subscribe for the federal benefit of social security? Are these *persons* considered *employees* of the *United States*? Should we conclude that if an *individual* accepts the federal benefit of social security the *United States* may tax their income by indirect excise? Are citizens of the 50 States, who accept the federal benefit of social security *persons* within the *States* of the *United States* and *resident aliens* and, therefore, *individuals*, even if they unwittingly become *fiduciaries*?

The arduous exercise of defining the term *individual* is necessary to understand how Americans become liable for the ObamaCare *Individual* Mandate. Since Roberts diminishes the importance of defining terms, if only because he presumes their broad federal application, we must appreciate how Americans enter federal oversight. The chain link effect of defining a *person*, who is an *individual* and is either a *resident* or *nonresident* alien who elected to be treated as a *resident alien* because of his acceptance of the federal benefit of social security, grants the federal *United States* Government jurisdiction. This simple truth is confirmed by a simple statement in 1 USC 1, Section 8.

*Despite Dictionary Act’s General rule (1 USC 1), artificial entity such as association is not “person” for purposes of 28 USC 1915; only*

*natural persons may qualify for treatment in forma pauperis, since the sole reason for amendments changing “citizen” to person was to extend benefits to aliens... Case Notations, Section 8, 1 USC 1*

This statement reflects how one word is changed by the *United States* Government to accommodate the inclusion of a separate *class* of people, to the exclusion of entities that are not *persons or individuals* within other sections of law. Compare the foregoing with the following regulation under Title 26.

301.6109-1 Identifying numbers.

(d) Obtaining a taxpayer identifying number

(1) Social Security number

**Individuals who are eligible for or do not wish to participate in the benefits of the social security program shall nevertheless obtain a social security number** if they are required to furnish such number pursuant to paragraph (b) of this section.

All Americans are not required to participate in the federal social security scheme or file an income tax form. What is the status of those who do not? How is it possible for the Government to presume all are within federal authority? How is it possible that those without the federal domain are presumed liable to the *Individual* Mandate? As opposed are wrestling with whether or not one falls under one label or another, which would involve direct engagement of the tax statute and regulations that would otherwise have no bearing upon one’s life if he is without the federal jurisdiction, could he simply declare that he is a *non person and nonresident to the United States*? This would establish that he is not within the federal jurisdiction as crafted under the tax code for *individuals*.

For a greater perspective, consider how the Government defines *individual* throughout the some of the remaining titles of the United States Code.

5 USC—Government Organization and Employees

552a Records maintained on individuals

(a) Definitions

(2) the term **“individual”** means a citizen of the United States or an alien lawfully admitted for permanent residence.

We have a definition which states an *individual* is a citizen of the United States. Notice the title, *Records maintained on individuals*. Upon whom would the Government maintain records? In prior definitions, *individual* was defined as a national (alien) or any entity.

25 USC—Indians

2201 Definitions

(8) “**person**” or “**individual**” means a natural person.

Note that an *individual* is a *natural person*.

We know 25 USC deals with Indians, a legitimate concern of the Federal Government. Are the terms *person* and *individual* designations of Government? Why not use the term “Native American” or “indigenous people”? Legal language tends to generalize, as if by design. After all, does not the *United States* Government want the broadest application possible?

29 USC—Labor

1301 Definitions

(v) “**individual**” means a living human being.

An individual is not only a human being, but a living one. A dead human being is not within this definition. Who is the living human to whom this code applies? Is he within the *United States*?

38 USC—Veterans’ Benefits

3687

(3) In this section, the term “*individual*” means

(A) an eligible veteran who is entitled to monthly educational assistance allowance payable under 30159(e) of this title, or

(B) an eligible person who is entitled to monthly educational assistance allowances payable under section 3532 (a) of this title, as the code may be.

43 USC—Public Lands

390bb. Definitions

(4) The term “*individual*” means any natural person, including his or her spouse, and including other dependents thereof within the meaning of the Internal Revenue Code of 1954.

We have another sweeping application where *individual* is any “natural person.” This definition refers to the meaning of the Internal Revenue Code. Why?

1 CFR—General Provisions

455.2 Definitions For the purposes of these procedures:

(a) The term *individual* means a citizen of the United States or an alien lawfully admitted for permanent residence.

2 CFR—Grants and Agreements

182.655 Individual

*Individual* means a natural person.

6 CFR—Homeland Security

13.2 Definitions

(1) *Individual* means a natural person.

10 CFR—Energy

20.1003

*Individual* means any human being.

727.2

“*Individual*” means an employee of DOE or a DOE contractor, or any other person who has been granted access to a DOE computer.

12 CFR—Banks and Banking

2619.2 Definitions

(c) *Individual* means a natural person who is either a citizen of the United States or an alien lawfully admitted for permanent residence.

13 CFR—Business Credit and Assistance

102.20

(3) *Individual* means a citizen of the United States or an alien lawfully admitted for permanent residence. The term shall not encompass entrepreneurial enterprises (e.g., sole proprietors, partnerships, corporations, or other forms of business entities).

14 CFR - Aeronautics and Space

### 1212.101 Definitions

(a) The term *individual* means a living person who is either a citizen of the United States or an alien lawfully admitted for permanent residence.

### 1260.38

*Individual* means a Proposer/Recipient that has no more than one employee including the Proposer/Recipient.

### 15 CFR—Commerce and Foreign Trade

#### 760.3

(2) For purposes of this section, a United States *individual* means a person who is a resident or national of the United States...

The term *United States individual* is limited to “resident” or “national.” Note that both terms are limited to aliens in prior definitions that are foreign in nature.

Is liability for the *Individual* Mandate the continuation of a federal jurisdictional trap? Congress may have enacted ObamaCare with the absolute general presumption that all Americans are liable to purchase health insurance or pay the penalty. If Americans are *individuals* and *taxpayers* this would be proper and true. These federal classifications are necessary for the President and Congress to prevail over an unsuspecting populace. Chief Justice Roberts acknowledges as much in his majority opinion. Those with an SSN are beholden to the IRS for the Individual Mandate penalty deemed a tax. Roberts, who may find ObamaCare objectionable, saves the law by interpreting a tax for those who cannot be anything other than liable—*taxpayers* under federal control—and, undeniably, *individuals*.

Americans entered a federal jurisdictional trap that is Washington D. C.—the seat of the Federal Government. They entered the jurisdiction of the *United States* with and through past legislation riddled with words and interpretations used dubiously to capture the entire population and place all Americans into one common mass. While the angst over ObamaCare is well founded, as this legislative act defies a coveted understanding of liberty, the harsher reality is that most don’t know anything about jurisdiction and, as a result, they are beholden to ObamaCare out of ignorance, apathy, and fear.

Roberts embraced the generalization that all Americans are liable as federal persons for the Individual Mandate without the need to specify

that some may be without the federal nexus. Roberts shunned a professional obligation to provide complete disclosure. Such judicial sleight of hand is not honorable in the least; for, it denigrates and denies the rights others. Roberts' rationale is in keeping with Justice Ginsburg's reference to the idea that

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.

The Supreme Court disregards the right of one American while it regards the Government's grasp for greater power that applies to others. The Court grants a judicial pass to legislative hubris under the pretext that

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.”

Although ObamaCare and the Court's opinion are written and applied generally, the term “individual” is defined narrowly. Roberts does not view his “narrowest interpretations of the taxing power” as taxing until the point of destruction under ObamaCare. He is willfully blind. To interpret the penalty as a tax and not a direct tax destroys liberty. The fact that Roberts makes his interpretation relative to “while [his] court sits” does not absolve him of error.

His declaration, “while [his] court sits,” is judicial mockery. Roberts jockeys for position upon a legal tack in which freedom is losing horse as much as it is a fleeting commodity. In *McCulloch v Maryland* (1819), Chief Justice Marshall remarked, “An unlimited power to tax involves, necessarily, a power to destroy.” It was not until 1928 when Justice Holmes, in *Panhandle Oil Co. v. Mississippi ex rel. Knox*, added the words “while this court sits.”

Conveniently, language becomes relative and meanings become malleable. Roberts' conscience is somehow assuaged with his claim that the Individual Mandate penalty, interpreted as an indirect tax, does not

destroy during his watch. Is it any wonder the Supreme Court will not and refuses to define liberty? The Federal Government expands its power when liberty is and remains a relative term.

Ironically, and quite curiously, Roberts refers to dated Supreme Court decisions in the context of “we.” As if channeling and invoking supernatural and timeless collaborative efforts, he effortlessly accepts the discernment of justices from over two centuries ago. In his ObamaCare majority opinion, one which he would expect the Court two hundred years hence to embrace in the obligatory sense of “we,” Roberts asserts,

**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).

Would Marshall or Holmes have applied Roberts’ Individual Mandate logic and conclusion to their respective Courts or would they have deferred to their political climes replete with a healthy fear of the power and limits of the federal government? Would they have expected Roberts to abide by their established “we” according to their constitutional analysis? Would Marshall and Holmes now conclude that Roberts’ tortured and forced opinion—his alone—is the antithesis of their liberty or liberty in as embraced by Americans generally then? Would they determine that Roberts’ Individual Mandate penalty, which is deemed a tax, destroys? Marshall and former justices would not likely accept Roberts’ efforts in the context of “we” as easily as Roberts embraces past Supreme Court decisions. Significantly, this would be true regarding the question of jurisdiction as well.



## Pierce the Obvious

Is there is a point in American history when the Federal Government categorically rejected the notion of providing social welfare to Americans, even for a sub class of disadvantaged? In the year 1854, a bill known as *Land-Grant Bill for Indigent Insane Persons* passed the U. S. Senate and House of Representatives. However, President Franklin Pierce vetoed the bill. Pierce argued that welfare for the indigent insane was a matter for the States. He enforced the inherent constraints of the Constitution. He knew the Government could not provide such care.

President Pierce spurned the notion of general federal social welfare with specifics that prohibited this use and abuse of federal power. His legal and political posture ensured the proper role of constitutional governance, which confirms that he would not have affirmed Obama's socialist policies in the sense of "we." Pierce would have cautioned against such federal folly as the destruction of freedom.

After reading Pierce's letter, it should be apparent that Obama and most modern presidents lack the scholarly depth and subsequent moral grounding to abide by and enforce the constraints of the Constitution. For obvious political and selfish reasons, most modern presidents are either incapable or unwilling to bind the Federal Government to its limited role and proper sphere for the well-being of the Republic, the people, and liberty.

*WASHINGTON May 3, 1854*

*To the Senate of the United States:*

The bill entitled "An act making a grant of public lands to the several States for the benefit of indigent insane persons," which was presented to me on the 27th ultimo, has been maturely considered, and is returned to the Senate, the House in which it originated, with a statement of the objections which have required me to withhold from it my approval.

In the performance of this duty, prescribed by the Constitution, I have been compelled to resist the deep sympathies of my own heart in favor of the humane purpose sought to be accomplished

and to overcome the reluctance with which I dissent from the conclusions of the two Houses of Congress, and present my own opinions in opposition to the action of a coordinate branch of the Government which possesses so fully my confidence and respect.

If in presenting my objections to this bill I should say more than strictly belongs to the measure or is required for the discharge of my official obligation, let it be attributed to a sincere desire to justify my act before those whose good opinion I so highly value and to that earnestness which springs from my deliberate conviction that a strict adherence to the terms and purposes of the federal compact offers the best, if not the only, security for the preservation of our blessed inheritance of representative liberty.

The bill provides in substance:

First. That 10,000,000 acres of land be granted to the several States, to be apportioned among them in the compound ratio of the geographical area and representation of said States in the House of Representatives.

Second. That wherever there are public lands in a State subject to sale at the regular price of private entry, the proportion of said 10,000,000 acres falling to such State shall be selected from such lands within it, and that to the States in which there are no such public lands land scrip shall be issued to the amount of their distributive shares, respectively, said scrip not to be entered by said States, but to be sold by them and subject to entry by their assignees: *Provided*, That none of it shall be sold at less than \$1 per acre, under penalty of forfeiture of the same to the United States.

Third. That the expenses of the management and superintendence of said lands and of the moneys received therefrom shall be paid by the States to which they may belong out of the treasury of said States.

Fourth. That the gross proceeds of the sales of such lands or land scrip so granted shall be invested by the several States in safe stocks, to constitute a perpetual fund, the principal of which shall remain forever undiminished, and the interest to be appropriated to the maintenance of the indigent insane within the several States.

Fifth. That annual returns of lands or scrip sold shall be made by the States to the Secretary of the Interior, and the whole grant be subject to certain conditions and limitations prescribed in the bill, to be assented to by legislative acts of said States.

This bill therefore proposes that the Federal Government shall make provision to the amount of the value of 10,000,000 acres of land for an eleemosynary object within the several States, to be administered by the political authority of the same; and it presents at the threshold the question whether any such act on the part of the Federal Government is warranted and sanctioned by the Constitution, the provisions and principles of which are to be protected and sustained as a first and paramount duty.

It can not be questioned that if Congress has power to make provision for the indigent insane without the limits of this District it has the same power to provide for the indigent who are not insane, and thus to transfer to the Federal Government the charge of all the poor in all the States. It has the same power to provide hospitals and other local establishments for the care and cure of every species of human infirmity, and thus to assume all that duty of either public philanthropy, or public necessity to the dependent, the orphan, the sick, or the needy which is now discharged by the States themselves or by corporate institutions or private endowments existing under the legislation of the States. The whole field of public beneficence is thrown open to the care and culture of the Federal Government. Generous impulses no longer encounter the limitations and control of our imperious fundamental law; for however worthy may be the present object in itself, it is only one of a class. It is not exclusively worthy of benevolent regard. Whatever considerations dictate sympathy for this particular object apply in like manner, if not in the same degree, to idiocy, to physical disease, to extreme destitution. If Congress may and ought to provide for any one of these objects, it may and ought to provide for them all. And if it be done in this case, what answer shall be given when Congress shall be called upon, as it doubtless will be, to pursue a similar course of legislation in the others? It will obviously be vain to reply that the object is worthy, but that the application has taken a wrong direction. The power will have been deliberately assumed, the general obligation will by this act have been acknowledged, and the question of means and expediency will alone be left for consideration. The decision upon the principle in any one case determines it for the whole class. The question presented, therefore, clearly is upon the constitutionality and propriety of the Federal Government assuming to enter into a novel and vast field of legislation, namely, that of providing for the care and support of all

those among the people of the United States who by any form of calamity become fit objects of public philanthropy.

I readily and, I trust, feelingly acknowledge the duty incumbent on us all as men and citizens, and as among the highest and holiest of our duties, to provide for those who, in the mysterious order of Providence, are subject to want and to disease of body or mind; but I can not find any authority in the Constitution for making the Federal Government the great almoner of public charity throughout the United States. To do so would, in my judgment, be contrary to the letter and spirit of the Constitution and subversive of the whole theory upon which the Union of these States is founded. And if it were admissible to contemplate the exercise of this power for any object whatever, I can not avoid the belief that it would in the end be prejudicial rather than beneficial in the noble offices of charity to have the charge of them transferred from the States to the Federal Government. Are we not too prone to forget that the Federal Union is the creature of the States, not they of the Federal Union? We were the inhabitants of colonies distinct in local government one from the other before the Revolution. By that Revolution the colonies each became an independent State. They achieved that independence and secured its recognition by the agency of a consulting body, which, from being an assembly of the ministers of distinct sovereignties instructed to agree to no form of government which did not leave the domestic concerns of each State to itself, was appropriately denominated a Congress. When having tried the experiment of the Confederation, they resolved to change that for the present Federal Union, and thus to confer on the Federal Government more ample authority, they scrupulously measured such of the functions of their cherished sovereignty as they chose to delegate to the General Government. With this aim and to this end the fathers of the Republic framed the Constitution, in and by which the independent and sovereign States united themselves for certain specified objects and purposes, and for those only, leaving all powers not therein set forth as conferred on one or another of the three great departments--the legislative, the executive, and the judicial--indubitably with the States. And when the people of the several States had in their State conventions, and thus alone, given effect and force to the Constitution, not content that any doubt should in future arise as to the scope and character of this act, they ingrafted thereon the explicit declaration that "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." Can it be controverted that the great mass of the business of Government--that involved in the social relations, the internal arrangements of the body politic, the mental and moral culture of men, the development of local resources of wealth, the punishment of crimes in general, the preservation of order, the relief of the needy or otherwise unfortunate members of society--did in practice remain with the States; that none of these objects of local concern are by the Constitution expressly or impliedly prohibited to the States, and that none of them are by any express language of the Constitution transferred to the United States? Can it be claimed that any of these functions of local administration and legislation are vested in the Federal Government by any implication? I have never found anything in the Constitution which is susceptible of such a construction. No one of the enumerated powers touches the subject or has even a remote analogy to it. The powers conferred upon the United States have reference to federal relations, or to the means of accomplishing or executing things of federal relation. So also of the same character are the powers taken away from the States by enumeration. In either case the powers granted and the powers restricted were so granted or so restricted only where it was requisite for the maintenance of peace and harmony between the States or for the purpose of protecting their common interests and defending their common sovereignty against aggression from abroad or insurrection at home.

I shall not discuss at length the question of power sometimes claimed for the General Government under the clause of the eighth section of the Constitution, which gives Congress the power "to lay and collect taxes, duties, imposts, and excises, to pay debts and provide for the common defense and general welfare of the United States," because if it has not already been settled upon sound reason and authority it never will be. I take the received and just construction of that article, as if written to lay and collect taxes, duties, imposts, and excises *in order* to pay the debts and *in order* to provide for the common defense and general welfare. It is not a substantive general power to provide for the welfare of the United States, but is a limitation on the grant of power to raise money by taxes, duties, and imposts. If it were otherwise, all the rest of the Constitution, consisting of carefully enumerated and cautiously

guarded grants of specific powers, would have been useless, if not delusive. It would be impossible in that view to escape from the conclusion that these were inserted only to mislead for the present, and, instead of enlightening and defining the pathway of the future, to involve its action in the mazes of doubtful construction. Such a conclusion the character of the men who framed that sacred instrument will never permit us to form. Indeed, to suppose it susceptible of any other construction would be to consign all the rights of the States and of the people of the States to the mere discretion of Congress, and thus to clothe the Federal Government with authority to control the sovereign States, by which they would have been dwarfed into provinces or departments and all sovereignty vested in an absolute consolidated central power, against which the spirit of liberty has so often and in so many countries struggled in vain. In my judgment you can not by tributes to humanity make any adequate compensation for the wrong you would inflict by removing the sources of power and political action from those who are to be thereby affected. If the time shall ever arrive when, for an object appealing, however strongly, to our sympathies, the dignity of the States shall bow to the dictation of Congress by conforming their legislation thereto, when the power and majesty and honor of those who created shall become subordinate to the thing of their creation, I but feebly utter my apprehensions when I express my firm conviction that we shall see "the beginning of the end."

Fortunately, we are not left in doubt as to the purpose of the Constitution any more than as to its express language, for although the history of its formation, as recorded in the Madison Papers, shows that the Federal Government in its present form emerged from the conflict of opposing influences which have continued to divide statesmen from that day to this, yet the rule of clearly defined powers and of strict construction presided over the actual conclusion and subsequent adoption of the Constitution. President Madison, in the *Federalist*, says:

The powers delegated by the proposed Constitution are few and defined. Those which are to remain in the State governments are numerous and indefinite. ... Its (the General Government's) jurisdiction extends to certain enumerated

objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.

In the same spirit President Jefferson invokes "the support of the State governments in all their rights as the most competent administrations for our domestic concerns and the surest bulwarks against anti-republican tendencies;" and President Jackson said that our true strength and wisdom are not promoted by invasions of the rights and powers of the several States, but that, on the contrary, they consist "not in binding the States more closely to the center, but in leaving each more unobstructed in its proper orbit."

The framers of the Constitution, in refusing to confer on the Federal Government any jurisdiction over these purely local objects, in my judgment manifested a wise forecast and broad comprehension of the true interests of these objects themselves. It is clear that public charities within the States can be efficiently administered only by their authority. The bill before me concedes this, for it does not commit the funds it provides to the administration of any other authority.

I can not but repeat what I have before expressed, that if the several States, many of which have already laid the foundation of munificent establishments of local beneficence, and nearly all of which are proceeding to establish them, shall be led to suppose, as, should this bill become a law, they will be, that Congress is to make provision for such objects, the fountains of charity will be dried up at home, and the several States, instead of bestowing their own means on the social wants of their own people, may themselves, through the strong temptation which appeals to states as to individuals, become humble suppliants for the bounty of the Federal Government, reversing their true relations to this Union.

Having stated my views of the limitation of the powers conferred by the eighth section of the first article of the Constitution, I deem it proper to call attention to the third section of the fourth article and to the provisions of the sixth article bearing directly upon the question under consideration, which, instead of aiding the claim to power exercised in this case, tend, it is believed, strongly to illustrate and explain positions which, even without such support, I can not regard as questionable. The third section of the fourth article of the Constitution is in the following terms:

The Congress shall have power to *dispose* of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

The sixth article is as follows, to wit, that—

All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation.

For a correct understanding of the terms used in the third section of the fourth article, above quoted, reference should be had to the history of the times in which the Constitution was formed and adopted. It was decided upon in convention on the 17th September, 1787, and by it Congress was empowered "to dispose of," etc., "the territory or other property belonging to the United States." The only territory then belonging to the United States was that then recently ceded by the several States, to wit: By New York in 1781, by Virginia in 1784, by Massachusetts in 1785, and by South Carolina in August, 1787, only the month before the formation of the Constitution. The cession from Virginia contained the following provision:

That all the lands within the territory so ceded to the United States, and not reserved for or appropriated to any of the before-mentioned purposes or disposed of in bounties to the officers and soldiers of the American Army, shall be considered a common fund for the use and benefit of such of the United States as have become or shall become members of the Confederation or Federal Alliance of the said States, Virginia included, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and *bona fide disposed* of for that purpose and for no other use or purpose whatsoever.

Here the object for which these lands are to be disposed of is clearly set forth, and the power to dispose of them granted by the third section of the fourth article of the Constitution clearly



contemplates such disposition only. If such be the fact, and in my mind there can be no doubt of it, then you have again not only no implication in favor of the contemplated grant, but the strongest authority against it. Furthermore, this bill is in violation of the faith of the Government pledged in the act of January 28, 1847. The nineteenth section of that act declares:

That for the payment of the stock which may be created under the provisions of this act the sales of the public lands are hereby pledged; and it is hereby made the duty of the Secretary of the Treasury to use and apply all moneys which may be received into the Treasury for the sales of the public lands after the 1st day of January, 1848, first, to pay the interest on all stocks issued by virtue of this act, and, secondly, to use the balance of said receipts, after paying the interest aforesaid, in the purchase of said stocks at their market value, etc.

The debts then contracted have not been liquidated, and the language of this section and the obligations of the United States under it are too plain to need comment.

I have been unable to discover any distinction on constitutional grounds or grounds of expediency between an appropriation of \$10,000,000 directly from the money in the Treasury for the object contemplated and the appropriation of lands presented for my sanction, and yet I can not doubt that if the bill proposed \$10,000,000 from the Treasury of the United States for the support of the indigent insane in the several States that the constitutional question involved in the act would have attracted forcibly the attention of Congress.

I respectfully submit that in a constitutional point of view it is wholly immaterial whether the appropriation be in money or in land.

The public domain is the common property of the Union just as much as the surplus proceeds of that and of duties on imports remaining unexpended in the Treasury. As such it has been pledged, is now pledged, and may need to be so pledged again for public indebtedness.

As property it is distinguished from actual money chiefly in this respect, that its profitable management sometimes requires that portions of it be appropriated to local objects in the States wherein

it may happen to lie, as would be done by any prudent proprietor to enhance the sale value of his private domain. All such grants of land are in fact a disposal of it for value received, but they afford no precedent or constitutional reason for giving away the public lands. Still less do they give sanction to appropriations for objects which have not been intrusted to the Federal Government, and therefore belong exclusively to the States.

To assume that the public lands are applicable to ordinary State objects, whether of public structures, police, charity, or expenses of State administration, would be to disregard to the amount of the value of the public lands all the limitations of the Constitution and confound to that extent all distinctions between the rights and powers of the States and those of the United States; for if the public lands may be applied to the support of the poor, whether sane or insane, if the disposal of them and their proceeds be not subject to the ordinary limitations of the Constitution, then Congress possesses unqualified power to provide for expenditures in the States by means of the public lands, even to the degree of defraying the salaries of governors, judges, and all other expenses of the government and internal administration within the several States.

The conclusion from the general survey of the whole subject is to my mind irresistible, and closes the question both of right and of expediency so far as regards the principle of the appropriation proposed in this bill. Would not the admission of such power in Congress to dispose of the public domain work the practical abrogation of some of the most important provisions of the Constitution?

If the systematic reservation of a definite portion of the public lands (the sixteenth sections) in the States for the purposes of education and occasional grants for similar purposes be cited as contradicting these conclusions, the answer as it appears to me is obvious and satisfactory. Such reservations and grants, besides being a part of the conditions on which the proprietary right of the United States is maintained, along with the eminent domain of a particular State, and by which the public land remains free from taxation in the State in which it lies as long as it remains the property of the United States, are the acts of a mere landowner disposing of a small share of his property in a way to augment the value of the residue and in this mode to encourage the early occupation of it by the industrious and intelligent pioneer.

The great example of apparent donation of lands to the States likely to be relied upon as sustaining the principles of this bill is the relinquishment of swamp lands to the States in which they are situated, but this also, like other grants already referred to, was based expressly upon grounds clearly distinguishable in principle from any which can be assumed for the bill herewith returned, viz, upon the interest and duty of the proprietor. They were charged, and not without reason, to be a nuisance to the inhabitants of the surrounding country. The measure was predicated not only upon the ground of the disease inflicted upon the people of the States, which the United States could not justify as a just and honest proprietor, but also upon an express limitation of the application of the proceeds in the first instance to purposes of levees and drains, thus protecting the health of the inhabitants and at the same time enhancing the value of the remaining lands belonging to the General Government.

It is not to be denied that Congress, while administering the public lands as a proprietor within the principle distinctly announced in my annual message, may sometimes have failed to distinguish accurately between objects which are and which are not within its constitutional powers.

After the most careful examination I find but two examples in the acts of Congress which furnish any precedent for the present bill, and those examples will, in my opinion, serve rather as a warning than as an inducement to tread in the same path.

The first is the act of March 3, 1819, granting a township of land to the Connecticut asylum for the education of the deaf and dumb; the second, that of April 5, 1826, making a similar grant of land to the Kentucky asylum for teaching the deaf and dumb--the first more than thirty years after the adoption of the Constitution and the second more than a quarter of a century ago. These acts were unimportant as to the amount appropriated, and so far as I can ascertain were passed on two grounds: First, that the object was a charitable one, and, secondly, that it was national. To say that it was a charitable object is only to say that it was an object of expenditure proper for the competent authority; but it no more tended to show that it was a proper object of expenditure by the United States than is any other purely local object appealing to the best sympathies of the human heart in any of the States. And the suggestion that a school for the mental culture of the deaf and dumb in Connecticut

or Kentucky is a national object only shows how loosely this expression has been used when the purpose was to procure appropriations by Congress. It is not perceived how a school of this character is otherwise national than is any establishment of religious or moral instruction. All the pursuits of industry, everything which promotes the material or intellectual well-being of the race, every ear of corn or boll of cotton which grows, is national in the same sense, for each one of these things goes to swell the aggregate of national prosperity and happiness of the United States; but it confounds all meaning of language to say that these things are "national," as equivalent to "Federal," so as to come within any of the classes of appropriation for which Congress is authorized by the Constitution to legislate.

It is a marked point of the history of the Constitution that when it was proposed to empower Congress to establish a university the proposition was confined to the District intended for the future seat of Government of the United States, and that even that proposed clause was omitted in consideration of the exclusive powers conferred on Congress to legislate for that District. Could a more decisive indication of the true construction and the spirit of the Constitution in regard to all matters of this nature have been given? It proves that such objects were considered by the Convention as appertaining to local legislation only; that they were not comprehended, either expressly or by implication, in the grant of general power to Congress, and that consequently they remained with the several States.

The general result at which I have arrived is the necessary consequence of those views of the relative rights, powers, and duties of the States and of the Federal Government which I have long entertained and often expressed and in reference to which my convictions do but increase in force with time and experience.

I have thus discharged the unwelcome duty of respectfully stating my objections to this bill, with which I cheerfully submit the whole subject to the wisdom of Congress.

FRANKLIN PIERCE.

Pierce was unequivocal. The Federal Government has neither the authority nor responsibility to provide for the social welfare of certain classes of people within the several States, just as the government lacks

this power for the American people generally. Pierce appropriately cited the absence of jurisdiction as the impetus for his veto.

## Jurisdiction

What does “jurisdiction” mean? One of many legal dictionaries defines jurisdiction as “the power, right, or authority to interpret, apply and declare the law (as by rendering a decision).”<sup>4</sup>

The Patient Protection and Affordable Care Act (ObamaCare) was enacted under Title 42 United States Code, The Public Health and Welfare, subpart ii, sections 300gg-11 through 300-19a, and implemented under Title 45 Code of Federal Regulations, Public Welfare. The Individual Mandate is imposed under the tax code, Title 26 U.S.C. §5000A. Does this law have jurisdiction over all Americans? If so, how?

Notwithstanding the terms reviewed earlier, a quandary exists. Why is there a disparate perspective of the role of the government in 1854 and 2012? Is it plausible that President Pierce could have exercised the same authority as Obama? Is the answer that, driven by the changing and prevailing sentiments of the time, legal thought morphed until the Federal Government and Supreme Court rendered a different outcome? Or, are word wizards, ideological political dreamers, and equally biased jurists to blame? Either the Constitution is substantially consistent from age to age or interpretations of this document at any given point in time are the dominant influence.

With disregard for a constitutional posture equal to President Pierce in 1854, in 2012 the United States Government exercised jurisdiction over social welfare and the population at large. Seemingly, the Constitution became irrelevant. How? There are two reasons: presumption by the Federal Government and the people and, secondly, Americans voluntarily consented to federal jurisdiction for benefits and status.

The Federal Government either presumes or has authority over the 50 States and State citizens. The people, having accepted federal oversight, presume this authority as credible. People rarely question or challenge federal presumption by rebuttal. Although the people and some States filed suit to prevent the Government from exceeding its authority with the passage of ObamaCare, the presumption of federal jurisdiction is a reality. All legal challenges were defeated. Presumption of federal authority was heightened by and with the Supreme Court’s blessing.

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<sup>4</sup> <http://dictionary.findlaw.com/definition/jurisdiction.html>

The presumption of federal control under ObamaCare is further cemented because Americans voluntarily chose to subject themselves to federal legislation and enter the federal domain. While this may be difficult to accept, even after the exhaustive evaluation of definitions, consider the meaning of *United States*.

The *United States* does not necessarily mean the several or 50 States of the Union. Depending upon the application of any given statute, *United States* means that which is under federal control, like Washington D. C., Guam, Puerto Rico, national forests, federal land, and persons. This is no different with ObamaCare. The people are either within or presumed to be within the *United States*.

Pierce appropriately asked, “Are we not too prone to forget that the Federal Union is the creature of the States, not they of the Federal Union?” He offered,

... a strict adherence to the terms and purposes of the federal compact offers the best, if not the only, security for the preservation of our blessed inheritance of representative liberty.

If Americans ceded their personal jurisdiction to the Federal Government for whatever reason, the *United States* would expect all *individuals* to comply with all federal legislation. This posture would defeat Pierce’s reference to constitutional language that

The Congress shall have power to *dispose* of and make all needful rules and regulations respecting the territory or other property **belonging to the United States**; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States **or of any particular State**.

If sovereign citizens within the sovereign States become subject to federal jurisdiction by whatever means, are they accountable as federal citizens of the United States? Pierce admonished against this notion.

... instead of bestowing their own means on the social wants of their own people, may themselves, through the strong temptation which appeals to states as to individuals, become humble supplicants for the bounty of the Federal Government, **reversing their true relations to this Union**.

Pierce's words were prescient for a people who would, out of greed, ignorance, want, or fear, lose a healthy respect for limited parameters of lawful government and the bounty of their liberty no matter how desperate their circumstances.

The Great Depression was a period of desperation. Many were in survival mode. Americans availed themselves to and entered federal jurisdiction when they accepted federal benefits. The Supreme Court validated this fact in 1937 with its *Charles C. Steward Machine v Davis* decision. In an opinion by Justice Cardozo, the Court determined the constitutional legitimacy of federal social welfare benefits and corresponding federal jurisdiction.

Quite extraordinarily, the court used the legal term *parens patriae*, which means "parent of his or her country."<sup>5</sup> The definition of *parens patriae* continues with, "The power of the state to act as **guardian for those who are unable to care for themselves...**" Cardozo said,

'parens patriae' has many reasons-fiscal and economic as well as social and moral-for planning to mitigate disasters that bring these burdens in their train.

There reason for the Court's deliberate use of *parens patriae* is apparent. According to the Federal Government, those who subscribed to social benefits were unable to care for themselves. Applicants entered federal jurisdiction and became individuals and citizens of the *United States*. The court must have intended that the term "citizens of the United States" not be confused with citizens of the united States of America or citizens of the several States. Rather, under the guise of *parens patriae*, the court knew recipients of federal benefits entered the jurisdiction of the United States Government (Washington D. C.) and were, thereafter, accountable as federal citizens and persons—citizens of the *United States*. As persons within federal control, the people became liable for the social security tax and the federal income tax. They were subject to the tax code as federal taxpayers and individuals.

Federal benefits like social security were a major shift in legal thought and practice in the 1930s, especially when compared to 1854. With the use of generalizations, the justices made sweeping determinations that would have been unacceptable in the past. It would have been unthinkable for the Federal Government to provide social

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<sup>5</sup> [https://www.law.cornell.edu/wex/parens\\_patriae](https://www.law.cornell.edu/wex/parens_patriae)



security and tax the earnings of Americans within the several States under President Pierce.

Americans knew the United States Government could tax by indirect and direct means. Direct taxation was limited to apportionment among the States, whereby the States determined how to assess and collect the tax. To be clear, just because the Federal Government imposed a direct tax did not mean it taxed or could tax each State citizen directly. The Constitution prohibited this possibility. Americans knew any indirect tax was voluntary. An indirect tax would not be paid unless one chose to engage in the activity or purchase a product subject to excise.

However, Cardozo justified federal power as never before with wording that created the general impression that the Federal Government always had the power to tax a man's earnings. Cardozo even tendered specifics, as unreasonable as they are, to justify this newfound and untenable position.

1. We are told that the relation of employment is one so essential to the pursuit of happiness that it may not be burdened with a tax. Appeal is made to history. From the precedents of colonial days we are supplied with illustrations of excises common in the colonies. They are said to have been bound up with the enjoyment of particular commodities. Appeal is also made to principle or the analysis of concepts. An excise, we are told, imports a tax upon a privilege; employment, it is said, is a right, not a privilege, from which it follows that employment is not subject to an excise. Neither the one appeal nor the other leads to the desired goal.

As to the argument from history: Doubtless there were many excises in colonial days and later that were associated, more or less intimately, with the enjoyment or the use of property. This would not prove, even if no others were then known, that the forms then accepted were not subject to enlargement. Cf. *Pensacola Telephone Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 9; *In re Debs*, 158 U. S. 564, 591; *South Carolina v. United States*, 199 U. S. 437, 448, 449. But in truth other excises were known, and known since early times. Thus in 1695 (6 & 7 Wm. III, c. 6), Parliament passed an act which granted "to His Majesty certain Rates and Duties upon Marriage, Births and Burials", all for the purpose of "carrying on the War against France with Vigour." See *Opinion of the Justices*, 196 Mass. 602, 609. No commodity was affected there. The industry of counsel has supplied us with an apter illustration where the tax was

not different in substance from the one now challenged as invalid. In 1777, before our Constitutional Convention, **Parliament laid upon employers an annual "duty" of 21 shillings for "every male Servant" employed in stated forms of work.** (3) Revenue Act of 1777, 17 George III, c. 39 (4) The point is made as a distinction that a tax upon the use of male servants was thought of as a tax upon a luxury. *Davis v. Boston & Maine R. R. Co.*, supra. It did not touch employments in husbandry or business. This is to throw over the argument that historically an excise is a tax upon the enjoyment of commodities. But the attempted distinction, whatever may be thought of its validity, is inapplicable to a statute of Virginia passed in 1780. **There a tax of three pounds, six shillings and eight pence was to be paid for every male tithable above the age of twenty-one years (with stated exceptions), and a like tax for "every white servant whatsoever, except apprentices under the age of twenty one years."** 10 Hening's Statutes of Virginia, p. 244. **Our colonial forbears knew more about ways of taxing than some of their descendants seem to be willing to concede.** (5) The historical prop failing, the prop or fancied prop of principle remains. We learn that employment for lawful gain is a "natural" or "inherent" or "inalienable" right, and not a "privilege" at all. But natural rights, so called, are as much subject to taxation as rights of less importance. (6) An excise is not limited to vocations or activities that may be prohibited altogether. It is not limited to those that are the outcome of a franchise. It extends to vocations or activities pursued as of common right. What the individual does in the operation of a business is amenable to taxation just as much as what he owns, at all events if the classification is not tyrannical or arbitrary. **"Business is as legitimate an object of the taxing powers as property."** *City of Newton v. Atchison*, 31 Kan. 151, 154 (per Brewer, J.). Indeed, ownership itself, as we had occasion to point out the other day, is only a bundle of rights and privileges invested with a single name. *Henneford v. Silas Mason Co., Inc.*, March 29, 1937, - U. S. -. "A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively." *Ibid.* **Employment is a business relation, if not itself a business.** It is a relation without which business could seldom be carried on effectively. The power to tax the activities and relations that constitute a calling considered as a unit is the power to tax any of them. The whole includes the parts. *Nashville C. & St. L. By. Co. v. Wallace*, 288 U. S. 249, 267, 268.

The subject matter of taxation open to the power of the Congress is as comprehensive as that open to the power of the states, though the method of apportionment may at times be different. "The Congress shall have power to lay and collect taxes, duties, imposts and excises". Art. 1, Sect. 8. If the tax is a direct one, it shall be apportioned according to the census or enumeration. If it is a duty, impost, or excise, it shall be uniform throughout the United States. Together these classes include every form of tax appropriate to sovereignty. Cf. *Burnet v. Brooks*, 288 U. S. 378, 403, 405; *Brushaber v. Union Pacific R.. R.. Co.*, 240 U. S. 1, 12.

Whether the tax is to be classified as an "excise" is in truth not of critical importance. If not that, it is an "impost" (*Pollock v. Farmers' Loan and Trust Co.*, 158 U. S. 601, 622, 625; *Pacific Insurance Co. v. Soule*, 7 Wall. 433, 445), or a "duty" (*Veazie Bank v. Fenno*, 8 Wall. 533, 546, 547; *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429, 570; *Knowlton v. Moore*, 178 U. S. 41, 46). A capitation or other "direct" tax it certainly is not. "Although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts and excises,' such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of powers." *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429, 557. There is no departure from that thought in later cases, but rather a new emphasis of it. Thus, in *Thomas v. United States*, 192 U. S. 363, 370, it was said of the words "duties, imposts and excises" that "they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like." At times **taxpayers** have contended that the Congress is without power to lay an excise on the enjoyment of a privilege created by state law. The contention has been put aside as baseless. Congress may tax the transmission of property by inheritance or will, though the states and not Congress have created the privilege of succession. *Knowlton v. Moore*, *supra*, p. 58. Congress may tax the enjoyment of a corporate franchise, though a state and not Congress has brought the franchise into being. *Flint v. Stone Tracy Co.*, 220 U. S. 108, 155. The statute books of the states are strewn with illustrations of taxes laid on occupations pursued of

common right. **(7)** We find no basis for a holding that the power in that regard which belongs by accepted practice to the legislatures of the states, has been denied by the Constitution to the Congress of the nation.

What do Cardozo's findings reveal? From America's founding until 1937, a period largely respectful of enduring and inarguably constitutional limits, a change in legal thought unduly affected America and its future. Is it reasonable to conclude that, had the Great Depression never occurred, America would be as mindful of the virtues of limited governance today and, in all probability, prohibited the enactment of ObamaCare?

The economic and social turmoil of the 1930s substantiates Pierce's grave reservation and admonishment that Americans may become "humble suppliants for the bounty of the Federal Government, reversing their true relations to this Union." Regrettably, repercussions from the 1930s were and are much worse for the granting of federal financial assistance during and after an economically troubled time, temporary as it was. The Steward Machine decision was an essential element to ensnaring Americans into seemingly permanent federal jurisdiction. Their relationship to the United States Government was forever altered. Even now Americans do not realize the significance of their uninformed decisions.

Obviously the role of the Federal Government in 1819 and 1854 was much different than in 1937 and 2012. Pierce, whose letter was referenced in Steward Machine by Justice McReynolds in his dissenting opinion, offered specifics in 1854 as to why social welfare was not within federal power. Yet, Justice Cardozo provided his specifics in 1937 that contradicted Pierce. Betwixt the two, who was correct? One set of specifics must be more credible than the other. When we refer to presumption and voluntary acceptance as the two key reasons the Government has jurisdiction to enact and enforce social security and ObamaCare, we may determine whether Pierce or Cardozo was and is congruent with the Constitution.

Pierce concluded that the Federal Government did not have jurisdiction to enact and fund social welfare laws. He based his conclusion upon long standing constitutional limits. Almost a century lapsed before Cardozo determined the Government always had the ability to excise earnings from employment for social welfare purposes. What most do not realize is that when Americans accept the federal benefit of social security, a voluntary choice, they are viewed as federal citizens subject to

excise on their earnings. As such, according to Cardozo, the United States Government expects to tax federal *persons, individuals, and United States citizens* within the jurisdiction of Washington, D. C., the seat of the United States Government. Ironically, one could argue that both Pierce and Cardozo dignify the Constitution equally, regardless of Cardozo's dubious means.

Most Americans presume participation in the federal social security scheme is mandatory. The following letter belies this falsehood. The perception of compelled involvement was shaped drastically by Cardozo and his ilk. During and shortly after the Depression, Americans entered the federal enclave unaware, desperate, and fear laden. They became liable for an excise tax which, by its nature, is a tax upon a voluntary choice to engage in an excisable activity—the acceptance of federal social benefits. By extension, as federal citizens, they became liable for the Individual Mandate in 2012.



## SOCIAL SECURITY

TEH2A  
OX1355

November 12, 2003

██████████  
Number 109  
8370 West Cheyenne Avenue  
Las Vegas, Nevada 89129

Dear ██████████:

This is in response to your letter about the law requiring an individual to obtain a Social Security number (SSN).

The Social Security Act does not require a person to have a Social Security number to live and work in the United States, nor does it require a Social Security number simply for the purpose of having one. However, if someone works without a Social Security number, we cannot properly credit the earnings for the work performed, and the worker may lose any potential entitlement to Social Security benefits.

Other laws require people to have and use Social Security numbers for specific purposes. For example, the Internal Revenue Code (26 U.S.C. 6109 (a)) and applicable regulations (26 CFR 301.6109-1(d)) require a person to get and use a Social Security number on tax documents and to furnish the number to any other person or institution (such as an employer or a bank) that is required to provide the Internal Revenue Service (IRS) information about payments to that person. There are penalties for failure to do so. The IRS also requires employers to report Social Security numbers with employees' earnings. In addition, people filing tax returns for taxable years after December 31, 1994, generally must include the Social Security number of each dependent.

The Privacy Act regulates the use of Social Security numbers by government agencies. They may require a Social Security number only if a law or regulation either orders or authorizes them to do so. Agencies are required to disclose the authorizing law or regulation. If the request has no legal basis, the person may refuse to provide the number and still receive the agency's services. However, the law does not apply to private sector organizations. Such an organization can refuse its services to anyone who does not provide the number on request.

If you have further questions, you may contact the Las Vegas office at 5460 West Sahara Avenue, Las Vegas, Nevada 89146 (telephone 702-248-8717) or call our toll-free number, 1-800-772-1213. Our representatives there will be glad to help you. For general information about the Social Security program, you can access *Social Security Online*, our Web site on the Internet, at <<http://www.socialsecurity.gov>>.

We hope you find this information helpful.

Sincerely,

Annie White

Annie White

Consider the following outlines:

In 1776

Power is sourced with and delegated from

The People to

The several States

Which ratified the Constitution (1788) and created

The limited United States Government.

In 1854, President Pierce:

Determined the United States Government lacked constitutional authority to grant social welfare, citing jurisdiction within the States.

In 1854, power was still sourced with the people—the sovereigns—who delegated power to the States. The States delegated limited power to the Federal Government under the Constitution. The federal United States Government was constituted. As the executive of the United States Government, President Pierce ensured that federal authority would not impart social welfare, a responsibility of the States. Pierce vetoed a bill from Congress and prevented an unconstitutional enactment. The Supreme Court was not involved.

In 1776

Power is sourced with and delegated from

The People to

The several States

Which ratified the Constitution (1788) and created

The United States Government

In 1937

President Roosevelt: Advanced federal social benefits

Congress: Enacted federal social programs

The Supreme Court: Found social programs constitutional

In 1937, power was sourced with the people—the sovereigns—who delegated power to the States. The States delegated limited power to the Federal Government under the Constitution. The federal United States Government was constituted. As the executive of the United States Government, President Roosevelt, along with Congress, blurred the lines of federal authority with the enactment of sundry social schemes, like social security. The Supreme Court determined these programs were constitutional. Without fully informed consent, citizens within the several States accepted the federal benefit of social security and, consequently, became federal citizens, individuals, and taxpayers.



In 1776

Power is sourced with and delegated from

The People to

The several States

Which ratified the Constitution (1788) and created

The limited United States Government

In 2012,

President Obama: Advanced federal social medicine

Congress: Enacted social medicine

The Supreme Court: Found ObamaCare constitutional

In 2012, power was still sourced with the people—the sovereigns—who delegated power to the States. The States delegated limited power to the Federal Government under the Constitution. The federal United States Government was still constituted. As the executive of the United States Government, President Obama advanced ObamaCare as federal law with the support of Congress and the approval of the Supreme Court.

Are Americans subject to the Federal Government and liable for ObamaCare simply because they are *taxpayers*? In light of federal terms and definitions under the tax code and the Supreme Court ObamaCare decision written by Chief Justice Roberts, the answer must be a certainty. The Court determined ObamaCare was constitutionally “permissible under Congress’s taxing authority.” Since taxpayers are liable, the Federal Government has jurisdiction.

Citizens within the several States who never received SSNs are not and cannot be within federal jurisdiction for the social security tax, the federal income tax, or ObamaCare. If one neither participates in social security nor files a tax return, how is he ever liable within the taxing authority and jurisdiction of the United States Government? There must be a nexus by which the Federal Government acquires jurisdiction over private citizens; otherwise, we must conclude the Government presumes jurisdiction generally over all Americans until the presumption is rebutted.

Consider this final outline:

In 1776

Power is sourced with and delegated from

The People to

The several States

Which ratified the Constitution (1788)

Creating the limited United States Government

In 1854, Congress passed legislation for federal social welfare. President Pierce vetoed social welfare as unconstitutional and cited such welfare as the responsibility of the States. The Supreme Court was not involved.

**In 1854, Americans were not within, nor were they presumed to be within federal jurisdiction**

In 1937, Roosevelt advanced federal social programs, which Congress enacted and the Supreme Court deemed constitutional.

**In 1937, recipients of federal social security became federal persons.**

In 2012, President Obama advanced federal social medicine, which Congress enacted, and the Supreme Court deemed constitutional.

**In 2012, all federal persons became liable for ObamaCare.**

With the 1937 Steward Machine decision, Americans who subscribed to the benefit of social security came within federal jurisdiction as taxpayers. In 2012, those taxpayers were automatically liable for ObamaCare. Private citizens who do not subscribe to the benefit of social security are not taxed for this privilege of social medicine. If there must be a label, they are *non persons* and *non taxpayers, non individuals, who are nonresident* to the *United States* federal authority and are not liable for the ObamaCare *Individual* Mandate tax.

## Clarity and Consensus

In his role as Chief Justice, Roberts expressed his objective to “... deliver one clear and focused opinion of the court.” As reported by Geoffrey R. Stone, Roberts

lauded the importance of judicial ‘consensus,’ arguing that cases should be decided ‘on narrow grounds’ and that differences of opinion among the Justices generally should be expressed secretly in the Court’s private conferences, rather than in published dissenting or concurring opinions.<sup>6</sup>

With this posture, Roberts would have foreclosed upon McReynold’s dissenting opinion in *Steward Machine*. In fact, Roberts would have preferred McReynolds not offer Pierce’s letter as refutation for the social leanings of an activist Supreme Court. Should anyone be surprised that Roberts and four other justices determined the *constitutional* basis of ObamaCare by narrowly defining those liable—federal taxpayers? This is a vital point. Federal taxpayers become taxpayers by voluntarily subscribing for federal benefits and receiving that federal distinction and status. They become liable to the Individual Mandate. Roberts’ “narrow grounds” reasoning hides this fact.

If this is a difficult concept to understand, consider a hypothetical scenario. If the President of the United States or any of his officials came to an American’s home with a number of requests, would that private citizen be liable to comply? Out of ignorance some may be inclined to respond in the affirmative; yet, the answer is negative. Unless enforcing a criminal law with due process, performing the census, or any other valid constitutional power, the federal government is without authority to enforce its demands or expectations.

If the President or federal agents asked for \$5.00 or required you to paint your house the color blue, one would and should close the door. If an agent of the United States required one to apply for and receive a social security number for a newborn, he would and should close the door. If an agent demanded a change to a healthier diet, one would and should close the door. That federal official is without jurisdiction. The

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<sup>6</sup> [https://www.huffingtonpost.com/geoffrey-r-stone/chief-justice-roberts-and\\_b\\_40277.html](https://www.huffingtonpost.com/geoffrey-r-stone/chief-justice-roberts-and_b_40277.html)

United States Government has no jurisdiction unless constitutionally warranted.

When Americans accepted social welfare in the 1930s, they were no longer without the domain of the federal taxing authority for specific indirect federal taxes. Consequently, if an agent of the United States wrote to or visited federal taxpayers about the excise of their earnings, they would be obligated to respond. This is the narrow scope Roberts was and is seeking when reaching a consensus among fellow justices.

Morphed legal reasoning and unchallenged generalizations over the centuries precipitated the presumption that the Federal Government is omnipotent. Once upon a time, Americans knew the Government could not tax those who were without the federal domain. Now people presume the Federal Government has absolute authority to do so and more. However, people do not realize the parameters of federal power had to be presumptively enlarged, whether by the executive, legislative, or judicial branch, or all three.

Americans may not be liable for any number of federal dictates. For example, Americans accept the general idea that everyone is required to get an SSN and pay social security and federal income taxes. They do not ask for the specifics which definitively establish this federal jurisdiction and liability. They do not know enough to ask. The general representation of culpability is sufficient to misinform Americans into compliance.

Social security and federal income taxes are *indirect excises*; they are, therefore, inherently voluntary. If an American living within one of the 50 States does not wish to pay an excise, he need only avoid the taxable activity or service. If he does not want to pay the excise tax on beer, he does not buy beer. If he does not want to pay the excise tax on cigars, he avoids cigars. If he does not want to pay the social security excise tax, he does not subscribe to this federal privilege.

If liberty exists, and if the Federal Government is limited in power and scope, Americans within the 50 States must have the right to be left alone. They must be free from federal intrusion and encumbrances. Supreme Court Justice Brandeis stated, "One of the most cherished of all rights is the right to be left alone." Americans within the several States may not be unduly affected by the Federal Government unless they seek something from it. Short of violating a criminal law or accepting federal employment, the United States Government would have little cause to intrude upon Americans.

Officials who directly or indirectly influence society establish and further the presumption that Americans are generally beholden to all

levels of government. A people presumed to be obligated to government destroys the notion of liberty. Contrast this thought with the premise that Americans are not beholden to Government unless they violate another man's life, liberty, or property. This philosophy ensures liberty.

Failure to define liberty ensures its destruction. Justice Cardozo wrote The Nature of the Judicial Process<sup>7</sup>. He comments on the concept of liberty and his words are disconcerting, to say the least.

I speak first of the constitution, and in particular of the great immunities with which it surrounds the individual. No one shall be deprived of liberty without due process of law. Here is a concept of greatest generality. Yet it is put before the courts en bloc. **Liberty is not defined. Its limits are not mapped and charted. How shall they be known? Does liberty mean the same thing for successive generations? May restraints that are arbitrary yesterday be useful and rational and therefore lawful today? May constraints that are arbitrary today become useful and rational and therefore lawful tomorrow? I have no doubt that the answer to these questions must be yes.** There were times in our judicial history when the answer might have been no. **Liberty was conceived of at first as something static and absolute.** The Declaration of Independence had enshrined it. The political philosophy of Rousseau and of Locke and later of Herbert Spencer and the Manchester school of economics had dignified and rationalized it. Laissez faire was not only a counsel of caution which statesmen would do well to heed. It was a categorical imperative which statesmen, as well as judges, must obey. The "nineteenth century theory" was "one of the eternal conceptions involved in the idea of justice and containing potentially an exact rule for every case to be reached by an absolute process of logical deduction." **The century had not closed, however, before a new political philosophy became reflected in the work of statesmen and ultimately of the courts.** (p. 46-47)

Cardozo then states,

Property, like liberty, though immune under the Constitution from destruction, is not immune from regulation essential for the

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<sup>7</sup> [http://www.constitution.org/cmt/cardozo/jud\\_proc.htm](http://www.constitution.org/cmt/cardozo/jud_proc.htm)

common good. What that regulation shall be, every generation must work out for itself. (p. 53)

This sentiment leads to a defining position. Cardozo says,

The courts, then, are free in making the limits of the individual's immunities to shape their judgments in accordance with reason and justice. (p. 54)

However, Cardozo does not believe a judge should rely upon his own "reason and justice," but "what I reasonably believe some other man of normal intellect and conscience might reasonably look upon as right."

Is Cardozo's judicial posture sound? What is normal? Are the justices who strongly dissented in *Steward Machine* normal? Is the man who cherishes a strict constructionist interpretation of the Constitution concerning property normal? Is the man who aspires for self-sufficiency with natural God-given rights the measure of normal? Those who would respond affirmatively to the last two questions would not readily embrace what is *right* according to Cardozo's progressive normal.

The year 1937 is noteworthy in American history. This infamous time, marked the passing of constitutional governance, philosophy, history, custom, and social justice whereby one provided for himself and extended charity to his fellow man without the dictates of the Federal Government, brought the shackles of *parens patriae* and an ultra-aggressive ideological Supreme Court. The principle of property was no longer the cornerstone of man's existence—his very being. The greatest use of property was no longer anchored in private application. Prior to 1937, the bounty of a man's life was not measured by his security, but his ability to live in freedom. The Constitution was the means to ensure the legislative, executive, and judicial branches could not and would not adversely alter what was not within its jurisdiction.

Cardozo "evolved" and was malleable with the times. The principles which forged America were secondary to his interpretation and measure of "normal intellect and conscience." Cardozo's view of the future, not the tried and true credentials of America's glorious past, led to his notion of "social justice." His "living law" was an antidote which failed. His *Steward Machine* opinion crippled the spirit of perseverance and resulted in a state of dependency, which paved the path to the eventual enactment of *ObamaCare*.



Just as grave, Cardozo contributed to a belief that the people are “one common mass. He countered the wisdom of past justices who exercised restraint for a free people who once cherished independence. President Pierce, if he were alive to witness the meanderings of the Federal Government and Supreme Court into numerous social welfare policies, would agree that Americans have *generally* “become humble suppliants to the bounty of the Federal Government.” His *specifics* would be easily enumerated.

## The Three Factions

There are three factions to the ObamaCare Supreme Court decision. Two factions comprise the majority and dissent opinions and the third is a dissent regarding aspects of the majority and the main dissent. Faction 1 consists of JUSTICES ROBERTS, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, the majority opinion. Faction 2 is represented by JUSTICES SCALIA, KENNEDY, THOMAS, and ALITO, the dissenting opinion. Faction 3 is comprised of JUSTICES GINSBURG, in a partial dissent joined by SOTOMAYOR for one aspect and BREYER and KAGAN for other aspects.

Our review of these factions concerns primarily with interpretations of the Individual Mandate as a tax. We begin with a review of Faction 2 as most congruent with President Pierce's enforcement of organic constitutional law and his veto of social welfare in 1854. Faction 3 does not address the Individual Mandate as a tax; it agrees completely with the majority opinion. However, we will examine Ginsburg's broader justification of ObamaCare under the Commerce Clause. As will become evident, her reasoning supports the purpose of Splintered to Federal Folly. Finally, since Faction 1 shoulders the burden of justifying the Individual Mandate as a tax, this opinion is reviewed last.

Each faction uses generalizations and specifics either effectively or in a manner that undermines objectivity for a prejudicial end. Any prejudicial end is cause for public outrage. Both the end and the outrage serve as litmus tests for unsound political and judicial deliberation. What consists of sound deliberation? For our purpose, the answer is Justice Story's practicum into grammatical construction, word application, and meanings of clauses—the fundamentals of constitutional legal analysis. Whether any faction shares Story's acute awareness of "*political controversy; and ... popular declamation and alarm*" is determined by its willingness to adhere to these fundamentals.

With an understanding that the Supreme Court provides judicial oversight of federal questions with the intent to comply with the Constitution, when justices differ as to interpretation, the majority consensus prevails and establishes precedent. Precedent is law; precedent is power. Precedent may be relied upon by future Supreme Courts to establish even broader precedent to justify greater expansion of unwarranted federal power.

Each of the three factions offers different arguments that narrowly or broadly apply core constitutional constraints and precedent to a challenged federal statute. While one could argue that both narrow or broad applications end in folly, such folly only comes with a lack of discipline. When the Court demonstrates a relative application of law in any time period, Court decisions are problematic for Americans then and into the future. Without respect for public sentiment and fundamental legal analysis, federal folly follows.

The advent of federal folly underscores the implications wrought from unmerited generalizations and specifics. The interpretations of either are the means and ends to increased federal power. Let's revert to President Pierce's letter. He firmly believed the Government could not provide social welfare for a sub class of Americans. He anchored his argument with the time-honored principle that the Federal Government was prohibited from affecting what it could not by constitutional limits. With the 1930s we find a progressive executive in President Roosevelt who not only sought legislation that far exceeded prior federal control, he had the backing of an ideologically congruent Supreme Court.

With a leap to the year 2012 and ObamaCare, federal influence expanded to the extreme with a corresponding decline of respect and enforcement of limited organic law. The point cannot be any clearer and the consequences any more dire. Without benchmarks for "constitutional prohibitions," liberty, which the Supreme Court is not willing to define, erodes over time. The erosion of liberty should compel any concerned citizen to question the state of America now and in another two hundred years. Given the past and present, the outlook is ominous.

Justice Thomas shares this ominous outlook in a separate ObamaCare dissent about the Commerce Clause. Thomas, with Scalia, Kennedy, Alito, and Roberts, a majority, highlights a general belief that

the very notion of a "substantial effects" test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases.

Thomas specifically cites

... the Court's continued use of that test "has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits.

Not surprisingly, Thomas applied this specific to the Government's efforts in ObamaCare. He acknowledged the

Government's unprecedented claim in this suit that it may regulate not only economic activity but also *inactivity* that substantially affects interstate commerce...

Thomas addresses the obvious. The Government weighs "inactivity" as economic activity. If this is not an example of morphed legal thought into the relative which precipitates the problematic nothing else can be.

Justice Thomas' dissent, which is not a part of the three factions, follows.

JUSTICE THOMAS, dissenting.

I dissent for the reasons stated in our joint opinion, but I write separately to say a word about the Commerce Clause. The joint dissent and THE CHIEF JUSTICE correctly apply our precedents to conclude that the Individual Mandate is beyond the power granted to Congress under the Commerce Clause and the Necessary and Proper Clause. Under those precedents, Congress may regulate "economic activity [that] substantially affects interstate commerce." *United States v. Lopez*, 514 U. S. 549, 560 (1995). I adhere to my view that "the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases." *United States v. Morrison*, 529 U. S. 598, 627 (2000) (THOMAS, J., concurring); see also *Lopez, supra*, at 584–602 (THOMAS, J., concurring); *Gonzales v. Raich*, 545 U. S. 1, 67–69 (2005) (THOMAS, J., dissenting). As I have explained, the Court's continued use of that test "has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits." *Morrison, supra*, at 627. The Government's unprecedented claim in this suit that it may regulate not only economic activity but also *inactivity* that substantially affects interstate commerce is a case in point.

## Faction 2

Faction 2, the dissent by Scalia, Kennedy, Thomas, and Alito, which is most aligned with President Pierce's 1854 letter, establishes a number of important points.

- The Court creates what Congress did not enact.
- A requirement becomes an option and a penalty becomes a tax.
- The public does not expect the law. (25 states filed suit)
- The Act and the Court's decision create constitutional challenges.
- The Individual Mandate is a direct tax.
- Federalism expands when the limits of power are ignored.

Our reading of Faction 2 begins with the end of the dissent. These justices offer a succinct summation as to why ObamaCare is misguided and contrary to the interests of liberty.

The conclusion of the Faction 2 dissent:

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. ...

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.

The following is a portion of the dissent from Faction 2:

Congress has set out to remedy the problem that the best healthcare is beyond the reach of many Americans who cannot afford it. It can assuredly do that, by exercising the powers accorded

to it under the Constitution. The question in this case, however, is whether the complex structures and provisions of the Patient Protection and Affordable Care Act (Affordable Care Act or ACA) go beyond those powers. We conclude that they do.

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

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

That clear principle carries the day here. The striking case of *Wickard v. Filburn*, 317 U. S. 111 (1942), 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 non-consenting States all Medicaid funding. These parts of the Act are central to its design and operation, and all the Act's other provisions would not have been enacted without them. In our view it must follow that the entire statute is inoperative.

I

### **The Individual Mandate**

Article I, §8, of the Constitution gives Congress the power to “regulate Commerce . . . among the several States.” The Individual Mandate in the Act commands that every “applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage.” 26 U. S. C. §5000A(a) (2006 ed., Supp. IV). If this provision “regulates”



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

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

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

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

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

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

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

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

This is not a dilemma unique to regulation of the health-insurance industry. Government regulation typically imposes costs on the regulated industry—especially regulation that prohibits economic behavior in which most market participants are already engaging, such as “piecing out” the market by selling the product to different classes of people at different prices (in the present context, providing much lower insurance rates to young and healthy buyers). And many industries so regulated face the reality that, without an artificial increase in demand, they cannot continue on. When Congress is regulating these industries directly, it enjoys the broad power to enact ““all appropriate legislation”” to ““protec[t]”” and ““advanc[e]”” commerce, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 36–37 (1937) (quoting *The Daniel Ball*, 10 Wall. 557, 564 (1871)). Thus, Congress might protect the imperiled industry by prohibiting low-cost competition, or by according it preferential tax treatment, or even by granting it a direct subsidy. Here, however, Congress has impressed into service third parties, healthy individuals who could be but are not customers of the relevant industry, to offset the undesirable consequences of the regulation. 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*, 505 U. S. 144 (1992), we held that Congress could not, in an effort to regulate the disposal of radioactive waste produced in several different industries, order the States to take title to that waste. *Id.*, at 174–177. In *Printz v. United States*, 521 U. S. 898 (1997), we held that Congress could not, in an effort to regulate the distribution of firearms in the interstate market, compel state law-enforcement officials to perform background checks. *Id.*, at 933–935. In *United States v. Lopez*, 514 U. S. 549 (1995), we held that Congress could not, as a means of fostering an educated interstate labor market through the protection of schools, ban the possession of a firearm within a school zone. *Id.*, at 559–563. And in *United States v. Morrison*, 529 U. S. 598 (2000), we held that Congress could not, in an effort to ensure the full participation of women in the interstate economy, subject private individuals and companies to suit for gender-motivated violent torts. *Id.*, at 609–619. The lesson of these cases is that the Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not *carte blanche* for doing whatever will help achieve the ends Congress seeks by the regulation of commerce. And the last two of these cases show that the scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power.

The case upon which the Government principally relies to sustain the Individual Mandate under the Necessary and Proper Clause is *Gonzales v. Raich*, 545 U. S. 1 (2005). That case held that Congress could, in an effort to restrain the interstate market in marijuana, ban the local cultivation and possession of that drug. *Id.*, at 15–22. *Raich* is no precedent for what Congress has done here. That case’s prohibition of growing (cf. *Wickard*, 317 U. S. 111), 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*, 4 Wheat. 316, 421 (1819).

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

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

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

B

The Government's second theory in support of the Individual Mandate is that §5000A is valid because it is actually a "regulat[ion of] activities having a substantial relation to interstate commerce, . . . . *i.e.*, . . . activities that substantially affect interstate commerce." *Id.*, at 558–559. See also *Shreveport Rate Cases*, *supra*. This argument takes a few different forms, but the basic idea is that §5000A regulates "the way in which individuals finance their participation in the health-care market." Petitioners' Minimum Coverage Brief 33 (emphasis added). That is, the provision directs the manner in which individuals purchase health care services and related goods (directing that they be purchased through insurance) and is therefore a straightforward exercise of the commerce power. The primary problem with this argument is that §5000A does not apply only to persons who purchase all, or most, or even any, of the health care services or goods that the mandated insurance covers. Indeed, the main objection many have to the Mandate is that they have no intention of purchasing most or even any of such goods or services and thus no need to buy insurance for those purchases. The Government responds that the health-care market involves "essentially universal participation," *id.*, at 35. The principal difficulty with this response is that it is, in the only relevant sense, not true. It is true enough that everyone consumes "health care," if the term is taken to include the purchase of a bottle of aspirin. But the health care "market" that is the object of the Individual Mandate not only includes but principally consists of goods and services that the young people primarily affected by the Mandate *do not purchase*. They are quite simply not participants in that market, and cannot be made so (and thereby subjected to regulation) by the simple device of defining participants to include all those who will, later in their lifetime, probably purchase the goods or services covered by the mandated insurance.<sup>2</sup> Such a definition of market participants is unprecedented, and were it to be a premise for the exercise of national power, it would have no principled limits.

In a variation on this attempted exercise of federal power, the Government points out that Congress in this Act has purported to regulate "economic and financial decision[s] to forego [*sic*] health insurance coverage and [to] attempt to self-insure," 42 U. S. C. §18091(2)(A), since those decisions have "a substantial and deleterious effect on interstate commerce," Petitioners' Minimum

Coverage Brief 34. But as the discussion above makes clear, the decision to forgo participation in an interstate market is not itself commercial activity (or indeed any activity at all) within Congress' power to regulate. It is true that, at the end of the day, it is inevitable that each American will affect commerce and become a part of it, even if not by choice. But if every person comes within the Commerce Clause power of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end.

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

## C

A few respectful responses to JUSTICE GINSBURG's dissent on the issue of the Mandate are in order. That dissent duly recites the test of Commerce Clause power that our opinions have applied, but disregards the premise the test contains. It is true enough that Congress needs only a "'rational basis' for concluding that the *regulated activity* substantially affects interstate commerce," *ante*, at 15 (emphasis added). But it must be *activity* affecting commerce that is regulated, and not merely the failure to engage in commerce. And one is not now purchasing the health care covered by the insurance mandate simply because one is likely to be purchasing it in the future. Our test's premise of regulated activity is not invented out of whole cloth, but rests upon the Constitution's requirement that it be commerce which is regulated. If all inactivity affecting

commerce is commerce, commerce is everything. Ultimately the dissent is driven to saying that there is really no difference between action and inaction, *ante*, at 26, a proposition that has never recommended itself, neither to the law nor to common sense. To say, for example, that the inaction here consists of activity in “the self-insurance market,” *ibid.*, seems to us wordplay. By parity of reasoning the failure to buy a car can be called participation in the non-private-car-transportation market. Commerce becomes everything.

The dissent claims that we “fai[l] to explain why the individual mandate threatens our constitutional order.” *Ante*, at 35. But we have done so. It threatens that order because it gives such an expansive meaning to the Commerce Clause that *all* private conduct (including failure to act) becomes subject to federal control, effectively destroying the Constitution’s division of governmental powers. Thus the dissent, on the theories proposed for the validity of the Mandate, would alter the accepted constitutional relation between the individual and the National Government. The dissent protests that the Necessary and Proper Clause has been held to include “the power to enact criminal laws, . . . the power to imprison, . . . and the power to create a national bank,” *ante*, at 34–35. Is not the power to compel purchase of health insurance much lesser? No, not if (unlike those other dispositions) its application rests upon a theory that everything is within federal control simply because it exists.

The dissent’s exposition of the wonderful things the Federal Government has achieved through exercise of its assigned powers, such as “the provision of old-age and survivors’ benefits” in the Social Security Act, *ante*, at 2, is quite beside the point. The issue here is whether the federal government can impose the Individual Mandate through the Commerce Clause. And the relevant history is not that Congress has achieved wide and wonderful results through the proper exercise of its assigned powers in the past, but that it has never before used the Commerce Clause to compel entry into commerce.<sup>3</sup> The dissent treats the Constitution as though it is an enumeration of those problems that the Federal Government can address—among which, it finds, is “the Nation’s course in the economic and social welfare realm,” *ibid.*, and more specifically “the problem of the uninsured,” *ante*, at 7. The Constitution is not that. It enumerates not federally soluble problems, but federally



available powers. The Federal Government can address whatever problems it wants but can bring to their solution only those powers that the Constitution confers, among which is the power to regulate commerce. None of our cases say anything else. Article I contains no whatever-it-takes-to-solve-a-national-problem power.

The dissent dismisses the conclusion that the power to compel entry into the health-insurance market would include the power to compel entry into the new-car or broccoli markets. The latter purchasers, it says, “will be obliged to pay at the counter before receiving the vehicle or nourishment,” whereas those refusing to purchase health-insurance will ultimately get treated anyway, at others’ expense. *Ante*, at 21. “[T]he unique attributes of the health-care market . . . give rise to a significant free-riding problem that does not occur in other markets.” *Ante*, at 28. And “a vegetable-purchase mandate” (or a car-purchase mandate) is not “likely to have a substantial effect on the health-care costs” borne by other Americans. *Ante*, at 29. Those differences make a very good argument by the dissent’s own lights, since they show that the failure to purchase health insurance, unlike the failure to purchase cars or broccoli, creates a national, social-welfare problem that is (in the dissent’s view) included among the unenumerated “problems” that the Constitution authorizes the Federal Government to solve. But those differences do not show that the failure to enter the health-insurance market, unlike the failure to buy cars and broccoli, is an *activity* that Congress can “regulate.” (Of course one day the failure of some of the public to purchase American cars may endanger the existence of domestic automobile manufacturers; or the failure of some to eat broccoli may be found to deprive them of a newly discovered cancer-fighting chemical which only that food contains, producing health-care costs that are a burden on the rest of us—in which case, under the theory of JUSTICE GINSBURG’s dissent, moving against those inactivities will also come within the Federal Government’s unenumerated problem-solving powers.)

## II

### The Taxing Power

As far as §5000A is concerned, we would stop there. Congress has attempted to regulate beyond the scope of its Commerce Clause authority,<sup>4</sup> and §5000A is therefore invalid. The Government

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

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

Our cases establish a clear line between a tax and a penalty: “[A] tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act.” *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U. S. 213, 224 (1996) (quoting *United States v. La Franca*, 282 U. S. 568, 572 (1931)). In a few cases, this Court has held that a “tax” imposed upon private conduct was so onerous as to be in effect a penalty. But we have never held—*never*—that a penalty imposed for violation of the law was so trivial as to be in effect a tax. We have never held that *any* exaction imposed for violation of the law is an exercise of Congress’ taxing power—even when the statute *calls* it a tax, much less when (as here) the statute repeatedly calls it a penalty. When an act “adopt[s] the criteria of wrongdoing” 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 minimum-coverage provision is found in 26 U. S. C. §5000A, entitled “*Requirement to maintain minimum essential coverage.*” It commands that every “applicable individual *shall* . . . ensure that the individual . . . is covered under minimum essential coverage.” *Ibid.* (emphasis added). And the immediately following provision states that, “[i]f . . . an applicable individual . . . fails to meet the *requirement* of subsection (a) . . . there is hereby imposed . . . a *penalty.*” §5000A(b) (emphasis added). And several of Congress’ legislative “findings” with regard to §5000A confirm that it sets forth a legal requirement and constitutes the assertion of regulatory power, not mere taxing power. See 42 U. S. C. §18091(2)(A) (“The requirement regulates activity . . .”); §18091(2)(C) (“The requirement . . . will add millions of new consumers to the health insurance market . . .”); §18091(2)(D) (“The requirement achieves near-universal coverage”); §18091(2)(H) (“The requirement is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market”); §18091(3) (“[T]he Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation”).

The Government and those who support its view on the tax point rely on *New York v. United States*, 505 U. S. 144, 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).

We never have classified as a tax an exaction imposed for violation of the law, and so too, we never have classified as a tax an exaction described in the legislation itself as a penalty. To be sure, we have sometimes treated as a tax a statutory exaction (imposed for something other than a violation of law) which bore an agnostic label that does not entail the significant constitutional consequences of a penalty—such as “license” (*License Tax Cases*, 5 Wall. 462 (1867)) or “surcharge” (*New York v. United States, supra.*). But we have never—*never*—treated as a tax an exaction which

faces up to the critical difference between a tax and a penalty, and explicitly denominates the exaction a “penalty.” Eighteen times in §5000A itself and elsewhere throughout the Act, Congress called the exaction in §5000A(b) a “penalty.”

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

In the face of all these indications of a regulatory requirement accompanied by a penalty, the Solicitor General assures us that “neither the Treasury Department nor the Department of Health and Human Services interprets Section 5000A as imposing a legal obligation,” Petitioners’ Minimum Coverage Brief 61, and that “[i]f [those subject to the Act] pay the tax penalty, they’re in compliance with the law,” Tr. of Oral Arg. 50 (Mar. 26, 2012). These self-serving litigating positions are entitled to no weight. What counts is what the statute says, and that is entirely clear. It is worth noting, moreover, that these assurances contradict the Government’s position in related litigation. Shortly before the Affordable Care Act was passed, the Commonwealth of Virginia enacted Va. Code Ann. §38.2–3430.1:1 (Lexis Supp. 2011), which states, “No resident of [the] Commonwealth . . . shall be required to obtain or maintain a

policy of individual insurance coverage except as required by a court or the Department of Social Services . . . .” In opposing Virginia’s assertion of standing to challenge §5000A based on this statute, the Government said that “if the minimum coverage provision is unconstitutional, the [Virginia] statute is unnecessary, and if the minimum coverage provision is upheld, the state statute is void under the Supremacy Clause.” Brief for Appellant in No. 11–1057 etc. (CA4), p. 29. But it would be void under the Supremacy Clause only if it was contradicted by a federal “require[ment] to obtain or maintain a policy of individual insurance coverage.”

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

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

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

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

For all these reasons, to say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it. Judicial tax-writing is particularly troubling. Taxes have never been popular, see, e.g., Stamp Act of 1765, and in part for that reason,

the Constitution requires tax increases to originate in the House of Representatives. See Art. I, §7, cl. 1. That is to say, they must originate in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next election, which is never more than two years off. The Federalist No. 58 “defend[ed] the decision to give the origination power to the House on the ground that the Chamber that is more accountable to the people should have the primary role in raising revenue.” *United States v. Munoz-Flores*, 495 U. S. 385, 395 (1990). We have no doubt that Congress knew precisely what it was doing when it rejected an earlier version of this legislation that imposed a tax instead of a requirement-with-penalty. See Affordable Health Care for America Act, H. R. 3962, 111th Cong., 1st Sess., §501 (2009); America’s Healthy Future Act of 2009, S. 1796, 111th Cong., 1st Sess., §1301. Imposing a tax through judicial legislation inverts the constitutional scheme, and places the power to tax in the branch of government least accountable to the citizenry.

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

<sup>1</sup> The most authoritative legal dictionaries of the founding era lack any definition for “regulate” or “regulation,” suggesting that the term bears its ordinary meaning



(rather than some specialized legal meaning) in the constitutional text. See R. Burn, *A New Law Dictionary* 281(1792); G. Jacob, *A New Law Dictionary* (10th ed. 1782); 2 T. Cunningham, *A New and Complete Law Dictionary* (2d ed. 1771).

2 JUSTICE GINSBURG is therefore right to note that Congress is “not mandating the purchase of a discrete, unwanted product.” Ante, at 22 (opinion concurring in part, concurring in judgment in part, and dissenting in part). Instead, it is mandating the purchase of an unwanted suite of products—e.g., physician office visits, emergency room visits, hospital room and board, physical therapy, durable medical equipment, mental health care, and substance abuse detoxification. See *Selected Medical Benefits: A Report from the Dept. of Labor to the Dept. of Health & Human Services* (April 15, 2011) (reporting that over two-thirds of private industry health plans cover these goods and services), online at <http://www.bls.gov/ncs/ebs/sp/selmedbensreport.pdf> (all Internet materials as visited June 26, 2012, and available in Clerk of Court’s case file).

3 In its effort to show the contrary, JUSTICE GINSBURG’S dissent comes up with nothing more than two condemnation cases, which it says demonstrate “Congress’ authority under the commerce power to compel an ‘inactive’ landholder to submit to an unwanted sale.” Ante, at 24. Wrong on both scores. As its name suggests, the condemnation power does not “compel” anyone to do anything. It acts in rem, against the property that is condemned, and is effective with or without a transfer of title from the former owner. More important, the power to condemn for public use is a separate sovereign power, explicitly acknowledged in the Fifth Amendment, which provides that “private property [shall not] be taken for public use, without just compensation.” Thus, the power to condemn tends to refute rather than support the power to compel purchase of unwanted goods at a prescribed price: The latter is rather like the power to condemn cash for public use. If it existed, why would it not (like the condemnation power) be accompanied by a requirement of fair compensation for the portion of the exacted price that exceeds the goods’ fair market value (here, the difference between what the free market would charge for a health-insurance policy on a young, healthy person with no pre-existing conditions, and the government-exacted community-rated premium)?

4 No one seriously contends that any of Congress’ other enumerated powers gives it the authority to enact §5000A as a regulation. 5 Of course it can be both for statutory purposes, since Congress can define “tax” and “penalty” in its enactments any way it wishes. That is why *United States v. Sotelo*, 436 U. S. 268 (1978), does not disprove our statement. That case held that a “penalty” for willful failure to pay one’s taxes was included among the “taxes” made non-dischargeable under the Bankruptcy Code. 436 U. S., at 273–275. Whether the “penalty” was a “tax” within the meaning of the Bankruptcy Code had absolutely no bearing on whether it escaped the constitutional limitations on penalties.

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Whether the “penalty” was a “tax” within the meaning of the Bankruptcy Code had absolutely no bearing on whether it escaped the constitutional limitations on penalties.

## Analysis – Faction 2

Beginning with Faction 2’s conclusion, the dissenting justices admonish in a manner that parallels the intention and force of President Pierce. They exhort the Court to remind the American people that the proper enforcement of “structural protections” inherent in our constitutional government is essential to liberty. This generalization is supported with the dissent’s observation that the Court burdens when and where it should not. The Court invents beyond legislative intent and overreaches to the demise of structural constitutional assurances.

At the core of congressional jurisdiction is its authority to pass appropriate legislation that involves a tax. For the Court to determine that a tax is a tax when it may not be so is to rewrite the legislation. For example, as cited by the dissent, if the Court questions whether a tax is direct in nature, one must challenge the wisdom of Congress. Taxation is fundamental to the “structural protections” of the Constitution and liberty. If Congress and the Court are able to justify a tax as an indirect excise when it is not, structural protections are compromised. When a direct tax is permitted under the guise that it is an indirect excise, the Court rationalizes federal folly and subverts liberty.

Federal folly gains strength when the terms used to create legislation are perverted beyond what is fundamental to “structural protections.” Here is a ripe example. The ObamaCare Act provides for a “requirement” that is actually an “option” and assesses a “penalty” that is a “tax” when the requirement or option is not chosen. With such confusion, the Federal Government identifies the failure to purchase health insurance—inactivity—as an “activity” within commerce. With such distortion ObamaCare and the majority opinion expand federalism as did Social Security Act and Steward Machine in 1937.

With the dissent’s focus on the limits of the Constitution and the need to educate the people, we have a general calling to the pillars of American constitutional governance. The Founding Fathers, President Pierce, Justice McReynolds, and select current statesmen and justices, those who acknowledge a specific baseline for limited government, acknowledge that slight deviations at one point in time result in seismic shifts later. These massive changes are almost as unalterable as they are destructive.

President Pierce was closer to the ratification of the Constitution and more in keeping with its meaning than Roosevelt in 1930. Justice McReynolds' use of Pierce's letter in *Steward Machine* binds him and Pierce with a constitutional understanding that preserves "structural protections." Faction 2, it may be easily argued, is tethered to an understanding of organic law in America's distant past. Opinions contrary to Faction 2 are aberrations of fundamental legal thought. Should any opinion antithetical to Pierce and McReynold, and Scalia, Kennedy, Thomas, and Alito not be viewed as maligned legal analysis or the imposition of a political or social ideology?

The dissenting justices determine that the Individual Mandate fails constitutional calibration under the commerce and taxation clauses. Going straight to the jugular, the dissenters remark that the legislation

threatens th[e] [constitutional] order because it gives such an expansive meaning to the Commerce Clause that *all* private conduct (including failure to act) becomes subject to federal control, effectively destroying the Constitution's division of governmental powers.

For ease of explanation, the justices state that simply because Americans are in the "market" for food does not give the Government the wherewithal to state what people must buy.

Some may refer to the dissent's food example as extreme. If so, is a federal mandate that a farmer cannot produce a crop for his own benefit extreme? Is a mandate to purchase something that is not needed an extreme? Regardless of the mandate, the implications of incremental increases in federal power over centuries are not without repercussions. With the imposition of the social security scheme in 1937 and an indirect tax on earnings from labor, an unthinkable posture in America's past, is a mandate to purchase health insurance or pay a penalty unexpected progression? What is the next newly-discovered federal power? The Government may as well dispense with its burden to coin money, which is no longer does, and mandate digital currency and microchips in order for Americans to engage in commerce.

The dissenting justices are correct to warn against the notion that "commerce is everything." If commerce becomes everything, liberty dies. Clearly the Individual Mandate would "alter the accepted constitutional relation between the citizens and the National Government."

Under the taxing argument, the dissenting justices converge on the terms “penalty” and “tax” as “mutually exclusive.” They argue that the Individual Mandate may not be both a penalty and a tax. They acknowledge the core issue: Congress mandates that “individuals maintain minimum essential coverage, enforced by a penalty.” The dissenting justices appropriately distinguish that

[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.’

We are dealing with specifics—concrete ones. Under a general representation that the Federal Government’s power only goes so far, periods of American history reveal that Congress pushed the limits of power by perverting terms and their meanings. Wisdom underscores the premise that words serve as the borders of power. If words and their meanings are neglected and nuanced into confusion, the general perspective of limited governance is compromised, specifics are ignored, and the Government stretches beyond what was never possible. The dissenting justices highlight this attack against liberty. After distinguishing a “tax” from a “penalty”, they vehemently stress,

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 one commits a wrong a penalty is leveled, not a tax. To deviate from this premise is to manipulate the DNA of terms, skew the rightful application and enforcement of law, and destroy structural protections.

The dissenting justices conclude that a tax assessed for failure to comply with the Individual Mandate is a violation of the law.

We never have classified as a tax an exaction imposed for violation of the law, and so too, we never have classified as a tax an exaction described in the legislation itself as a penalty.

The justices are adamant and state,

... we have never—never—treated as a tax an exaction which faces up to the critical difference between a tax and a penalty, and explicitly denominates the exaction a “penalty.”

The justices even note the assurance of the Solicitor General that section 5000A does not impose a “legal obligation.” Since a penalty is “punishment for an unlawful act or omission,” the dissenting justices conclude “that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it,” a certain violation of a judicial structural protection.

Based upon their arguments under the commerce and taxation clauses, the dissent dignifies their opinion as tethered to the Constitution, narrowly channeled for centuries through a myriad of challenges. They enforced the Constitution in a manner consistent with its drafters, President Pierce, and Justice McReynolds. The Federal Government may not compel an American to buy health insurance. The Government may not define the failure to do so as unlawful and impose a penalty deemed a tax, much less a direct tax.

### Faction 3

Ginsburg challenges the majority's interpretation under the Commerce Clause and the Necessary and Proper Clause. She believes ObamaCare is permissible under each and asserts that, with precedent established by *Steward Machine*, the Federal Government has broad powers. Noticeably absent is Ginsburg's explanation as to why these powers were not in existence previously.

Are we to conclude that a crisis, such as the Depression, albeit temporary, germinates formerly unknown broad or specific constitutional powers that are then exercised in perpetuity? What are the implications when federal governance is influenced by a fleeting turbulence? Perhaps the greatest impact is that people are burdened by permanent powers, though once non-existent, powers which inevitably expand. Such is Ginsburg's conclusion with taxation. Ginsburg agrees the Individual Mandate is a tax and wholeheartedly supports the federal taxing power to compel citizens do something that was inexcusable only yesterday.

The following is a portion of Ginsburg's dissent:

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.

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

Since 1937, our precedent has recognized Congress' large authority to set the Nation's course in the economic and social welfare realm. See *United States v. Darby*, 312 U. S. 100, 115 (1941) (overruling *Hammer v. Dagenhart*, 247 U. S. 251 (1918), and recognizing that "regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37 (1937) ("[The commerce] power is plenary and may be exerted to protect interstate commerce no matter what the source of the dangers which threaten it." (internal quotation marks omitted)). THE CHIEF JUSTICE's crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress' efforts to regulate the national economy in the interest of those who labor to sustain it. See, e.g., *Railroad Retirement Bd. v. Alton R. Co.*, 295 U. S. 330, 362, 368 (1935) (invalidating compulsory retirement and pension plan for employees of carriers subject to the Interstate Commerce Act; Court found law related essentially "to the social welfare of the worker, and therefore remote from any regulation of commerce as such"). It is a reading that should not have staying power.

A

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



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

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

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

woman who, healthy one day, became a quadriplegic the next due to an auto accident).

To manage the risks associated with medical care—its high cost, its unpredictability, and its inevitability—most people in the United States obtain health insurance. Many (approximately 170 million in 2009) are insured by private insurance companies. Others, including those over 65 and certain poor and disabled persons, rely on government-funded insurance programs, notably Medicare and Medicaid. Combined, private health insurers and State and Federal Governments finance almost 85% of the medical care administered to U. S. residents. See Congressional Budget Office, CBO's 2011 Long-Term Budget Outlook 37 (June 2011).

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

## B

The large number of individuals without health insurance, Congress found, heavily burdens the national health-care market. See 42 U. S. C. §18091(2). As just noted, the cost of emergency care or treatment for a serious illness generally exceeds what an individual can afford to pay on her own. Unlike markets for most products, however, the inability to pay for care does not mean that an uninsured individual will receive no care. Federal and state law, as well as professional obligations and embedded social norms, require hospitals and physicians to provide care when it is most needed, regardless of the patient's ability to pay. See, *e.g.*, 42 U. S.

C. §1395dd; Fla.Stat. §395.1041(3)(f) (2010); Tex. Health & Safety Code Ann. §§311.022(a) and (b) (West 2010); American Medical Association, Council on Ethical and Judicial Affairs, Code of Medical Ethics, Current Opinions: Opinion 8.11—Neglect of Patient, p. 70 (1998–1999 ed.).

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

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

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

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

The failure of individuals to acquire insurance has other deleterious effects on the health-care market. Because those without insurance generally lack access to preventative care, they do not receive treatment for conditions—like hypertension and

diabetes—that can be successfully and affordably treated if diagnosed early on. See Institute of Medicine, National Academies, *Insuring America’s Health: Principles and Recommendations* 43 (2004). When sickness finally drives the uninsured to seek care, once treatable conditions have escalated into grave health problems, requiring more costly and extensive intervention. *Id.*, at 43–44. The extra time and resources providers spend serving the uninsured lessens the providers’ ability to care for those who do have insurance. See Kliff, *High Uninsured Rates Can Kill You—Even if You Have Coverage*, *Washington Post* (May 7, 2012) (describing a study of California’s health-care market which found that, when hospitals divert time and resources to provide uncompensated care, the quality of care the hospitals deliver to those with insurance drops significantly), available at [http://www.washingtonpost.com/blogs /ezra-klein/post/high-uninsured-rates-can-kill-you-even-if-you-have-coverage/2012/05/07/gIQALNHN8T\\_print.html](http://www.washingtonpost.com/blogs /ezra-klein/post/high-uninsured-rates-can-kill-you-even-if-you-have-coverage/2012/05/07/gIQALNHN8T_print.html).

## C

States cannot resolve the problem of the uninsured on their own. Like Social Security benefits, a universal health-care system, if adopted by an individual State, would be “bait 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). See also Brief for Commonwealth of Massachusetts as *Amicus Curiae* in No. 11–398, p. 15 (noting that, in 2009, Massachusetts’ emergency rooms served thousands of uninsured, out-of-state residents). An influx of unhealthy individuals into a State with universal health care would result in increased spending on medical services. To cover the increased costs, a State would have to raise taxes, and private health-insurance companies would have to increase premiums. Higher taxes and increased insurance costs would, in turn, encourage businesses and healthy individuals to leave the State.

States that undertake health-care reforms on their own thus risk “placing themselves in a position of economic disadvantage as compared with neighbors or competitors.” *Davis*, 301 U. S., at 644. See also Brief for Health Care for All, Inc., et al. as *Amici Curiae* in No. 11–398, p. 4 (“[O]ut-of-state residents continue to seek and receive millions of dollars in uncompensated care in Massachusetts

hospitals, limiting the State's efforts to improve its health care system through the elimination of uncompensated care."').Facing that risk, individual States are unlikely to take the initiative in addressing the problem of the uninsured, even though solving that problem is in all States' best interests. Congress' intervention was needed to overcome this collective action impasse.

## D

Aware that a national solution was required, Congress could have taken over the health-insurance market by establishing a tax-and-spend federal program like Social Security. Such a program, commonly referred to as a single-payer system (where the sole payer is the Federal Government), would have left little, if any, room for private enterprise or the States. Instead of going this route, Congress enacted the ACA, a solution that retains a robust role for private insurers 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). As explained below, by employing these tools, Congress was able to achieve a practical, altogether reasonable, solution.

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

The minimum coverage provision serves a further purpose vital to Congress' plan to reduce the number of uninsured. Congress knew that encouraging individuals to purchase insurance would not suffice to solve the problem, because most of the uninsured are not uninsured by choice.<sup>1</sup> Of particular concern to Congress were people who, though desperately in need of insurance, often cannot acquire it: persons who suffer from preexisting medical conditions.

Before the ACA's enactment, private insurance companies took an applicant's medical history into account when setting insurance rates or deciding whether to insure an individual. Because

individuals with preexisting medical conditions cost insurance companies significantly more than those without such conditions, insurers routinely refused to insure these individuals, charged them substantially higher premiums, or offered only limited coverage that did not include the preexisting illness. See Dept. of Health and Human Services, *Coverage Denied: How the Current Health Insurance System Leaves Millions Behind 1* (2009) (Over the past three years, 12.6 million nonelderly adults were denied insurance coverage or charged higher premiums due to a preexisting condition.).

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

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

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

market Washington experienced when the State passed a law requiring coverage for preexisting conditions).

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

Massachusetts, Congress was told, cracked the adverse selection problem. By requiring most residents to obtain insurance, see Mass. Gen. Laws, ch. 111M, §2 (West 2011), the Commonwealth ensured that insurers would not be left with only the sick as customers. As a result, federal lawmakers observed, Massachusetts succeeded where other States had failed. See Brief for Commonwealth of Massachusetts as *Amicus Curiae* in No. 11–398, p. 3 (noting that the Commonwealth's reforms reduced the number of uninsured residents to less than 2%, the lowest rate in the Nation, and cut the amount of uncompensated care by a third); 42 U. S. C. §18091(2)(D) (2006 ed., Supp. IV) (noting the success of Massachusetts' reforms).<sup>2</sup> In coupling the minimum coverage provision with guaranteed issue and community-rating prescriptions, Congress followed Massachusetts' lead.

In sum, Congress passed the minimum coverage provision as a key component of the ACA to address an economic and social

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

## II

### A

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

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



SEC, 327 U. S. 686, 705 (1946) (“[The commerce power] is an affirmative power commensurate with the national needs.”).

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

## B

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

Until today, this Court’s pragmatic approach to judging whether Congress validly exercised its commerce power was guided by two familiar principles. First, Congress has the power to regulate economic activities “that substantially affect interstate commerce.” *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 (“[E]ven if appellee’s activity be local and though it may not be regarded as commerce, it may still, *whatever its nature*, be reached by Congress if it exerts a substantial economic effect on interstate commerce.” (emphasis added)); *Jones & Laughlin Steel Corp.*, 301 U. S., at 37.

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.” (internal quotation marks omitted)). When appraising such legislation, we ask only (1) whether Congress had a “rational basis” for concluding that the regulated activity substantially affects interstate commerce, and (2) whether there is a “reasonable connection between the regulatory means selected and the asserted ends.” *Id.*, at 323–324. 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).

## C

Straightforward application of these principles would require the Court to hold that the minimum coverage provision is proper

Commerce Clause legislation. Beyond dispute, Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce. Those without insurance consume billions of dollars of health-care products and services each year. See *supra*, at 5. Those goods are produced, sold, and delivered largely by national and regional companies who routinely transact business across state lines. The uninsured also cross state lines to receive care. Some have medical emergencies while away from home. Others, when sick, go to a neighboring State that provides better care for those who have not prepaid for care. See *supra*, at 7–8. Not only do those without insurance consume a large amount of health care each year; critically, as earlier explained, their inability to pay for a significant portion of that consumption drives up market prices, foists costs on other consumers, and reduces market efficiency and stability. See *supra*, at 5–7. Given these far-reaching effects on interstate commerce, the decision to forgo insurance is hardly inconsequential or equivalent to “doing nothing,” *ante*, at 20; it is, instead, an economic decision Congress has the authority to address under the Commerce Clause. See *supra*, at 14–16. 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. See *supra*, at 9–11. See also Brief for State of Maryland and 10 Other States et al. as *Amici Curiae* in No. 11–398, p. 28 (hereinafter Maryland Brief) (“No insurance regime can survive if people can opt out when the risk insured against is only a risk, but opt in when the risk materializes.”).

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

#### D

Rather than evaluating the constitutionality of the minimum coverage provision in the manner established by our precedents, THE CHIEF JUSTICE relies on a newly minted constitutional doctrine. The commerce power does not, THE CHIEF JUSTICE announces, permit Congress to “compe[l] individuals to become active in commerce by purchasing a product.” *Ante*, at 20 (emphasis deleted).

#### 1

#### a

THE CHIEF JUSTICE’s novel constraint on Congress’ commerce power gains no force from our precedent and for that reason alone warrants disapprobation. See *infra*, at 23–27. But even assuming, for the moment, that Congress lacks authority under the Commerce Clause to “compel individuals not engaged in commerce to purchase an unwanted product,” *ante*, at 18, such a limitation would be inapplicable here. Everyone will, at some point, consume health-care products and services. See *supra*, at 3. Thus, if THE CHIEF JUSTICE is correct that an insurance purchase requirement can be applied only to those who “actively” consume health care, the minimum coverage provision fits the bill.

THE CHIEF JUSTICE does not dispute that all U. S. residents participate in the market for health services over the course of their lives. See *ante*, at 16 (“Everyone will eventually need health care at a time and to an extent they cannot predict.”). But, THE CHIEF JUSTICE insists, the uninsured cannot be considered active in the market for health care, because “[t]he proximity and degree of connection between the [uninsured today] and [their] subsequent commercial activity is too lacking.” *Ante*, at 27.

This argument has multiple flaws. First, more than 60% of those without insurance visit a hospital or doctor’s office each year. See *supra*, at 5. Nearly 90% will within five years.<sup>4</sup> 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.” (internal quotation marks omitted)).<sup>5</sup> Second, it is Congress’ role, not the Court’s, to delineate the boundaries of the market the Legislature seeks to regulate. THE CHIEF JUSTICE defines the health-care market as including only those transactions that will occur either in the next instant or within some (unspecified) proximity to the next instant. But Congress could reasonably have viewed the market from a long-term perspective, encompassing all transactions virtually certain to occur over the next decade, see *supra*, at 19, not just those occurring here and now.

Third, contrary to THE CHIEF JUSTICE’s contention, our precedent does indeed support “[t]he proposition that Congress may dictate the conduct of an individual today because of prophesied future activity.” *Ante*, at 26. In *Wickard*, the Court upheld a penalty the Federal Government imposed on a farmer who

grew more wheat than he was permitted to grow under the Agricultural Adjustment Act of 1938 (AAA). 317 U. S., at 114–115. He could not be penalized, the farmer argued, as he was growing the wheat for home consumption, not for sale on the open market. *Id.*, at 119. The Court rejected this argument. *Id.*, at 127–129. Wheat intended for home consumption, the Court noted, “overhangs the market, and if induced by rising prices, tends to flow into the market and check price increases [intended by the AAA].” *Id.*, at 128.

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.*

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

Maintaining that the uninsured are not active in the health-care market, THE CHIEF JUSTICE draws an analogy to the car market. An individual “is not ‘active in the car market,’” THE CHIEF JUSTICE observes, simply because he or she may someday buy a car. *Ante*, at 25. The analogy is inapt. The inevitable yet unpredictable need for medical care and the guarantee that emergency care will be provided when required are conditions nonexistent in other markets. That is so of the market for cars, and of the market for broccoli as well. Although an individual *might* buy a car or a crown of broccoli one day, there is no certainty she will ever do so. And if she eventually wants a car or has a craving for broccoli, she will be obliged to pay at the counter before receiving the vehicle or nourishment. She will get no free ride or food, at the expense of another consumer forced to pay an inflated price. See *Thomas More Law Center v. Obama*, 651 F. 3d 529, 565 (CA6 2011) (Sutton, J., concurring in part) (“Regulating how citizens pay for what they

already receive (health care), never quite know when they will need, and in the case of severe illnesses or emergencies generally will not be able to afford, has few (if any) parallels in modern life.”). Upholding the minimum coverage provision on the ground that all are participants or will be participants in the health-care market would therefore carry no implication that Congress may justify under the Commerce Clause a mandate to buy other products and services.

Nor is it accurate to say that the minimum coverage provision “compel[s] individuals . . . to purchase an unwanted product,” *ante*, at 18, or “suite of products,” *post*, at 11, n. 2 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ.). If unwanted today, medical service secured by insurance may be desperately needed tomorrow. Virtually everyone, I reiterate, consumes health care at some point in his or her life. See *supra*, at 3. Health insurance is a means of paying for this care, nothing more. In requiring individuals to obtain insurance, Congress is therefore not mandating the purchase of a discrete, unwanted product. Rather, Congress is merely defining the terms on which individuals pay for an interstate good they consume: Persons subject to the mandate must now pay for medical care in advance (instead of at the point of service) and through insurance (instead of out of pocket). Establishing payment terms for goods in or affecting interstate commerce is quintessential economic regulation well within Congress’ domain. See, e.g., *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 118 (1942). Cf. *post*, at 13 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ.) (recognizing that “the Federal Government can prescribe[a commodity’s] quality . . . and even [its price]”).

THE CHIEF JUSTICE also calls the minimum coverage provision an illegitimate effort to make young, healthy individuals subsidize insurance premiums paid by the less hale and hardy. See *ante*, at 17, 25–26. This complaint, too, is spurious. Under the current health-care system, healthy persons who lack insurance receive a benefit for which they do not pay: They are assured that, if they need it, emergency medical care will be available, although they cannot afford it. See *supra*, at 5–6. Those who have insurance bear the cost of this guarantee. See *ibid.* By requiring the healthy uninsured to obtain insurance or pay a penalty structured as a tax, the minimum coverage provision ends the free ride these individuals currently enjoy.

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

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).

Arguing to the contrary, THE CHIEF JUSTICE notes that "the Constitution gives Congress the power to 'coin Money,' in addition to the power to 'regulate the Value thereof,'" and similarly "gives Congress the power to 'raise and support Armies' and to 'provide and maintain a Navy,' in addition to the power to 'make Rules for the Government and Regulation of the land and naval Forces.'" *Ante*, at 18–19 (citing Art. I, §8, cls. 5, 12–14). In separating the power to regulate from the power to bring the subject of the regulation into existence, THE CHIEF JUSTICE asserts, "[t]he language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated." *Ante*, at 19.

This argument is difficult to fathom. Requiring individuals to obtain insurance unquestionably regulates the interstate health-insurance and health-care markets, both of them in existence well before the enactment of the ACA. See *Wickard*, 317 U. S., at 128 ("The stimulation of commerce is a use of the regulatory function



quite as definitely as prohibitions or restrictions thereon.”). Thus, the “something to be regulated” was surely there when Congress created the minimum coverage provision.<sup>6</sup>

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

In concluding that the Commerce Clause does not permit Congress to regulate commercial “inactivity,” and therefore does not allow Congress to adopt the practical solution it devised for the health-care problem, THE CHIEF JUSTICE views the Clause as a “technical legal conception,” precisely what our case law tells us not to do. *Wickard*, 317 U. S., at 122 (internal quotation marks omitted). 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). Failing to learn from this history, THE CHIEF JUSTICE plows ahead with his formalistic distinction between those who are “active in commerce,” *ante*, at 20, and those who are not.

It is not hard to show the difficulty courts (and Congress) would encounter in distinguishing statutes that regulate “activity” from those that regulate “inactivity.” As Judge Easterbrook noted, “it is possible to restate most actions as corresponding inactions with the same effect.” *Archie v. Racine*, 847 F. 2d 1211, 1213 (CA7 1988) (en banc). Take this case as an example. An individual who opts not to purchase insurance from a private insurer can be seen as actively selecting another form of insurance: self-insurance. See *Thomas More Law Center*, 651 F. 3d, at 561 (Sutton, J., concurring in part) (“No one is inactive when deciding how to pay for health care, as self insurance and private insurance are two forms of action for addressing the same risk.”). The minimum coverage provision could therefore be described as regulating activists in the self-insurance market.<sup>7</sup> *Wickard* is another example. Did the statute there at issue target activity (the growing of too much wheat) or inactivity (the farmer’s failure to purchase wheat in the marketplace)? If anything, the Court’s analysis suggested the latter. See 317 U. S., at 127–129. At bottom, THE CHIEF JUSTICE’s and the joint dissenters’ “view that an individual cannot be subject to Commerce Clause regulation absent voluntary, affirmative acts that enter him or her into, or affect, the interstate market expresses a concern for individual liberty that [is] more redolent of Due Process Clause arguments.” *Seven-Sky*, 661 F. 3d, at 19. See also *Troxel v. Granville*, 530 U. S. 57,

65 (2000) (plurality opinion) (“The [Due Process] Clause also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests.” (internal quotation marks omitted)). Plaintiffs have abandoned any argument pinned to substantive due process, however, see 648 F. 3d 1235, 1291, n. 93 (CA11 2011), and now concede that the provisions here at issue do not offend the Due Process Clause.<sup>8</sup>

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. See, *e.g., ante*, at 23 (Allowing Congress to compel an individual not engaged in commerce to purchase a product would “permi[t] Congress to reach beyond the natural extent of its authority, everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.”(internal quotation marks omitted)). The joint dissenters express a similar apprehension. See *post*, at 8 (If the minimum coverage provision is upheld under the commerce power then “the Commerce Clause becomes a font of unlimited power, . . . the hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor sacred nor profane.” (internal quotation marks omitted)). This concern is unfounded.

First, THE CHIEF JUSTICE could certainly uphold the individual mandate without giving Congress *carte blanche* to enact any and all purchase mandates. As several times noted, the unique attributes of the health-care market render everyone active in that market and give rise to a significant free-riding problem that does not occur in other markets. See *supra*, at 3–7, 16–18, 21.

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. In *Lopez*, for example, the Court held that the Federal Government lacked power, under the Commerce Clause, to criminalize the possession of a gun in a local school zone. Possessing a gun near a

school, the Court reasoned, “is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.” 514 U. S., at 567; *ibid.* (noting that the Court would have “to pile inference upon inference” to conclude that gun possession has a substantial effect on commerce). Relying on similar logic, the Court concluded in *Morrison* that Congress could not regulate gender-motivated violence, which the Court deemed to have too “attenuated [an] effect upon interstate commerce.” 529 U. S., at 615.

An individual’s decision to self-insure, I have explained, is an economic act with the requisite connection to interstate commerce. See *supra*, at 16–17. Other choices individuals make are unlikely to fit the same or similar description. As an example of the type of regulation he fears, THE CHIEF JUSTICE cites a Government mandate to purchase green vegetables. *Ante*, at 22–23. One could call this concern “the broccoli horrible.” Congress, THE CHIEF JUSTICE posits, might adopt such a mandate, reasoning that an individual’s failure to eat a healthy diet, like the failure to purchase health insurance, imposes costs on others. See *ibid.*

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

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

Supplementing these legal restraints is a formidable check on congressional power: the democratic process. See *Raich*, 545 U. S., at 33; *Wickard*, 317 U. S., at 120 (repeating Chief Justice Marshall’s “warning that effective restraints on [the commerce power’s]

exercise must proceed from political rather than judicial processes” (citing *Gibbons v. Ogden*, 9 Wheat. 1, 197 (1824)). As the controversy surrounding the passage of the Affordable Care Act attests, purchase mandates are likely to engender political resistance. This prospect is borne out by the behavior of state legislators. Despite their possession of unquestioned authority to impose mandates, state governments have rarely done so. See Hall, Commerce Clause Challenges to Health Care Reform, 159 U. Pa. L. Rev. 1825, 1838 (2011).

When contemplated in its extreme, almost any power looks dangerous. The commerce power, hypothetically, would enable Congress to prohibit the purchase and home production of all meat, fish, and dairy goods, effectively compelling Americans to eat only vegetables. Cf. *Raich*, 545 U. S., at 9; *Wickard*, 317 U. S., at 127–129. Yet no one would offer the “hypothetical and unreal possibilit[y],” *Pullman Co. v. Knott*, 235 U. S. 23, 26 (1914), of a vegetarian state as a credible reason to deny Congress the authority ever to ban the possession and sale of goods. THE CHIEF JUSTICE accepts just such specious logic when he cites the broccoli horrible as a reason to deny Congress the power to pass the individual mandate. Cf. R. Bork, *The Tempting of America* 169 (1990) (“Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom.”). But see, *e.g.*, *post*, at 3 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ.) (asserting, outlandishly, that if the minimum coverage provision is sustained, then Congress could make “breathing in and out the basis for federal prescription”). 31

### 3

To bolster his argument that the minimum coverage provision is not valid Commerce Clause legislation, THE CHIEF JUSTICE emphasizes the provision’s novelty. See *ante*, at 18 (asserting that “sometimes the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent for Congress’s action” (internal quotation marks omitted)). While an insurance-purchase mandate may be novel, THE CHIEF JUSTICE’s argument certainly is not. “[I]n almost every instance of the exercise of the [commerce] power differences are asserted from previous exercises of it and made a ground of attack.” *Hoke v. United States*, 227 U. S. 308, 320 (1913). See, *e.g.*, Brief for Petitioner in *Perez v. United States*, O. T.

1970, No. 600, p. 5 (“unprecedented exercise of power”); Supplemental Brief for Appellees in *Katzenbach v. McClung*, O. T. 1964, No. 543, p. 40 (“novel assertion of federal power”); Brief for Appellee in *Wickard v. Filburn*, O. T. 1941, No. 59, p. 6 (“complete departure”). For decades, the Court has declined to override legislation because of its novelty, and for good reason. As our national economy grows and changes, we have recognized, Congress must adapt to the changing “economic and financial realities.” See *supra*, at 14–15. Hindering Congress’ ability to do so is shortsighted; if history is any guide, today’s constriction of the Commerce Clause will not endure. See *supra*, at 25–26.

III  
A

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

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

Recall that one of Congress' goals in enacting the Affordable Care Act was to eliminate the insurance industry's practice of charging higher prices or denying coverage to individuals with preexisting medical conditions. See *supra*, at 9–10. The commerce power allows Congress to ban this practice, a point no one disputes. See *United States v. South-Eastern Underwriters Assn.*, 322 U. S. 533, 545, 552–553 (1944) (Congress may regulate “the methods by which interstate insurance companies do business.”).

Congress knew, however, that simply barring insurance companies from relying on an applicant's medical history would not work in practice. Without the individual mandate, Congress learned, guaranteed-issue and community rating requirements would trigger an adverse-selection death-spiral in the health-insurance market: Insurance premiums would skyrocket, the number of uninsured would increase, and insurance companies would exit the market. See *supra*, at 10–11. When complemented by an insurance mandate, on the other hand, guaranteed issue and community rating would work as intended, increasing access to insurance and reducing uncompensated care. See *supra*, at 11–12. The minimum coverage provision is thus an “essential par[t] of a larger regulation of economic activity”; without the provision, “the regulatory scheme [w]ould be undercut.” *Raich*, 545 U. S., at 24–25 (internal quotation marks omitted). Put differently, the minimum coverage provision, together with the guaranteed issue and community-rating requirements, is “‘reasonably adapted’ to the attainment of a legitimate end under the commerce power”: the elimination of pricing and sales practices that take an applicant's medical history into account. See *id.*, at 37 (SCALIA, J., concurring in judgment).

## B

Asserting that the Necessary and Proper Clause does not authorize the minimum coverage provision, THE CHIEF JUSTICE focuses on the word “proper.” A mandate to purchase health insurance is not “proper” legislation, THE CHIEF JUSTICE urges, because the command “undermine[s] the structure of government established by the Constitution.” *Ante*, at 28. If long on rhetoric, THE CHIEF JUSTICE's argument is short on substance. THE CHIEF JUSTICE cites only two cases in which this Court concluded that a federal statute impermissibly transgressed the Constitution's

boundary between state and federal authority: *Printz v. United States*, 521 U. S. 898 (1997), and *New York v. United States*, 505 U. S. 144 (1992). See *ante*, at 29. The statutes at issue in both cases, however, compelled *state officials* to act on the Federal Government’s behalf. 521 U. S., at 925–933 (holding unconstitutional a statute obligating state law enforcement officers to implement a federal gun-control law); *New York*, 505 U. S., at 176–177 (striking down a statute requiring state legislators to pass regulations pursuant to Congress’ instructions). “[Federal] laws conscripting state officers,” the Court reasoned, “violate state sovereignty and are thus not in accord with the Constitution.” *Printz*, 521 U. S., at 925, 935; *New York*, 505 U. S., at 176.

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.” (internal quotation marks omitted)).

Lacking case law support for his holding, THE CHIEF JUSTICE nevertheless declares the minimum coverage provision not “proper” because it is less “narrow in scope” than other laws this Court has upheld under the Necessary and Proper Clause. *Ante*, at 29 (citing *United States v. Comstock*, 560 U. S. \_\_\_\_ (2010); *Sabri v. United States*, 541 U. S. 600 (2004); *Jinks v. Richland County*, 538 U. S. 456 (2003)). THE CHIEF JUSTICE’s reliance on cases in which this Court has *affirmed* Congress’ “broad authority to enact federal legislation” under the Necessary and Proper Clause, *Comstock*, 560 U. S., at \_\_\_\_ (slip op., at 5), is underwhelming.

Nor does THE CHIEF JUSTICE pause to explain *why* the power to direct either the purchase of health insurance or, alternatively, the payment of a penalty collectible as a tax is more far-reaching than other implied powers this Court has found meet under the Necessary and Proper Clause. These powers include the power to enact criminal laws, 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. See also *Jinks*, 538 U. S., at 463 (affirming Congress’ power to alter the way a



state law is applied in state court, where the alteration “promotes fair and efficient operation of the federal courts”).<sup>10</sup>

In failing to explain why the individual mandate threatens our constitutional order, THE CHIEF JUSTICE deserves future courts. How is a judge to decide, when ruling on the constitutionality of a federal statute, whether Congress employed an “independent power,” *ante*, at 28, or merely a “derivative” one, *ante*, at 29. Whether the power used is “substantive,” *ante*, at 30, or just “incidental,” *ante*, at 29? The instruction THE CHIEF JUSTICE, in effect, provides lower courts: You will know it when you see it.

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

Second, and perhaps most important, the minimum coverage provision, along with other provisions of the ACA, addresses the very sort of interstate problem that made the commerce power essential in our federal system. See *supra*, at 12–14. The crisis created by the large number of U. S. residents who lack health insurance is one of national dimension that States are “separately incompetent” to handle. See *supra*, at 7–8, 13. See also Maryland Brief 15–26 (describing “the impediments to effective state policymaking that flow from the interconnectedness of each state’s healthcare economy” and emphasizing that “state-level reforms cannot fully address the problems associated with uncompensated care”). Far from trampling on States’ sovereignty, the ACA attempts a federal solution for the very reason that the States, acting separately, cannot meet the need. Notably, the ACA serves the general welfare of the people of the United States while retaining a prominent role for the States. See *id.*, at 31–36 (explaining and illustrating how the ACA affords States wide latitude in implementing key elements of the Act’s reforms).<sup>11</sup>

## IV

In the early 20th century, this Court regularly struck down economic regulation enacted by the peoples' representatives in both the States and the Federal Government. See, e.g., *Carter Coal Co.*, 298 U. S., at 303–304, 309–310; *Dagenhart*, 247 U. S., at 276–277; *Lochner v. New York*, 198 U. S. 45, 64 (1905). THE CHIEF JUSTICE's Commerce Clause opinion, and even more so the joint dissenters' reasoning, see *post*, at 4–16, bear a disquieting resemblance to those long-overruled decisions. Ultimately, the Court upholds the individual mandate as a proper exercise of Congress' power to tax and spend “for the . . . general Welfare of the United States.” Art. I, §8, cl. 1; *ante*, at 43–44. I concur in that determination, which makes THE CHIEF JUSTICE's Commerce Clause essay all the more puzzling. Why should THE CHIEF JUSTICE strive so mightily to hem in Congress' capacity to meet the new problems arising constantly in our ever developing modern economy? I find no satisfying response to that question in his opinion.<sup>12</sup>

1 According to one study conducted by the National Center for Health Statistics, the high cost of insurance is the most common reason why individuals lack coverage, followed by loss of one's job, an employer's unwillingness to offer insurance or an insurers' unwillingness to cover those with preexisting medical conditions, and loss of Medicaid coverage. See Dept. of Health and Human Services, National Center for Health Statistics, Summary Health Statistics for the U. S. Population: National Health Interview Survey—2009, Ser. 10, No. 248, p. 71, Table 25 (Dec. 2010). “[D]id not want or need coverage” received too few responses to warrant its own category. See *ibid.*, n. 2. 10 NATIONAL FEDERATION OF INDEPENDENT BUSINESS v. SEBELIUS Opinion of GINSBURG, J.

2 Despite its success, Massachusetts' medical-care providers still administer substantial amounts of uncompensated care, much of that to uninsured patients from out-of-state. See *supra*, at 7–8. 13 Cite as: 567 U. S. \_\_\_\_ (2012) Opinion of GINSBURG, J.

3 Alexander Hamilton described the problem this way: “[Often] It would be beneficial to all the states to encourage, or suppress[,] a particular branch of trade, while it would be detrimental . . . to attempt it without the concurrence of the rest.” *The Continentalist No. V*, in 3 Papers of Alexander Hamilton 75, 78 (H. Syrett ed. 1962). Because the concurrence of all States was exceedingly difficult to obtain, Hamilton observed, “the experiment would probably be left untried.” *Ibid.* 14 NATIONAL FEDERATION OF INDEPENDENT BUSINESS v. SEBELIUS Opinion of GINSBURG, J.

4 See Dept. of Health and Human Services, National Center for Health statistics, Summary Health Statistics for U. S. Adults: National Health Interview Survey 2009, Ser. 10, No. 249, p. 124, Table 37 (Dec. 2010). 5 Echoing THE CHIEF JUSTICE, the joint dissenters urge that the minimum coverage provision impermissibly regulates young people who “have no intention of purchasing [medical care]” and are too far “removed from the [health-care] market.” See post, at 8, 11. This criticism ignores the reality that a healthy young person may be a day away from needing health care. See supra, at 4. A victim of an accident or unforeseen illness will consume extensive medical care immediately, though scarcely expecting to do so. 20 NATIONAL FEDERATION OF INDEPENDENT BUSINESS v. SEBELIUS Opinion of GINSBURG, J.

5 Echoing THE CHIEF JUSTICE, the joint dissenters urge that the minimum coverage provision impermissibly regulates young people who “have no intention of purchasing [medical care]” and are too far “removed from the [health-care] market.” See post, at 8, 11. This criticism ignores the reality that a healthy young person may be a day away from needing health care. See supra, at 4. A victim of an accident or unforeseen illness will consume extensive medical care immediately, though scarcely expecting to do so.

6 THE CHIEF JUSTICE’s reliance on the quoted passages of the Constitution, see ante, at 18–19, is also dubious on other grounds. The power to “regulate the Value” of the national currency presumably includes the power to increase the currency’s worth—i.e., to create value where none previously existed. And if the power to “[r]egulat[e] . . . the land and naval Forces” presupposes “there is already [in existence] something to be regulated,” i.e., an Army and a Navy, does Congress lack authority to create an Air Force? 25 Cite as: 567 U. S. \_\_\_\_ (2012)

7 THE CHIEF JUSTICE’s characterization of individuals who choose not to purchase private insurance as “doing nothing,” ante, at 20, is similarly questionable. A person who self-insures opts against prepayment for a product the person will in time consume. When aggregated, exercise of that option has a substantial impact on the health-care market. See supra, at 5–7, 16–17. 27 Cite as: 567 U. S. \_\_\_\_ (2012)

8 Some adherents to the joint dissent have questioned the existence of substantive due process rights. See McDonald v. Chicago, 561 U. S. \_\_\_, \_\_\_ (2010) (THOMAS, J., concurring) (slip op., at 7) (The notion that the Due Process Clause “could define the substance of th[e] righ[t to liberty] strains credulity.”); Albright v. Oliver, 510 U. S. 266, 275 (1994) (SCALIA, J., concurring) (“I reject the proposition that the Due Process Clause guarantees certain (unspecified) liberties[.]”). Given these Justices’ reluctance to interpret the Due Process Clause as guaranteeing liberty interests, their willingness to plant such protections in the Commerce Clause is striking. 28 NATIONAL FEDERATION OF INDEPENDENT BUSINESS v. SEBELIUS Opinion of GINSBURG, J.

9 The failure to purchase vegetables in THE CHIEF JUSTICE’s hypothetical, then, is not what leads to higher health-care costs for others; rather, it is the failure of individuals to maintain a healthy diet, and the resulting obesity, that creates the

cost-shifting problem. See ante, at 22–23. Requiring individuals to purchase vegetables is thus several steps removed from solving the problem. The failure to obtain health insurance, by contrast, is the immediate cause of the cost-shifting Congress sought to address through the ACA. See supra, at 5–7. Requiring individuals to obtain insurance attacks the source of the problem directly, in a single step. 30 NATIONAL FEDERATION OF INDEPENDENT BUSINESS v. SEBELIUS Opinion of GINSBURG, J.

10 Indeed, Congress regularly and uncontroversially requires individuals who are “doing nothing,” see ante, at 20, to take action. Examples include federal requirements to report for jury duty, 28 U. S. C. §1866(g) (2006 ed., Supp. IV); to register for selective service, 50 U. S. C. App. §453; to purchase firearms and gear in anticipation of service in the Militia, 1 Stat. 271 (Uniform Militia Act of 1792); to turn gold currency over to the Federal Government in exchange for paper currency, see *Nortz v. United States*, 294 U. S. 317, 328 (1935); and to file a tax return, 26 U. S. C. §6012 (2006 ed., Supp. IV)

11 In a separate argument, the joint dissenters contend that the minimum coverage provision is not necessary and proper because it was not the “only . . . way” Congress could have made the guaranteed-issue and community-rating reforms work. Post, at 9–10. Congress could also have avoided an insurance-market death spiral, the dissenters maintain, by imposing a surcharge on those who did not previously purchase insurance when those individuals eventually enter the health insurance system. Post, at 10. Or Congress could “den[y] a full income tax credit” to those who do not purchase insurance. *Ibid.* Neither a surcharge on those who purchase insurance nor the denial of a tax credit to those who do not would solve the problem created by guaranteed-issue and community-rating requirements. Neither would prompt the purchase of insurance before sickness or injury occurred. But even assuming there were “practicable” alternatives to the minimum coverage provision, “we long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be ‘absolutely necessary’ to the exercise of an enumerated power.” *Jinks v. Richland County*, 538 U. S. 456, 462 (2003) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 414–415 (1819)). Rather, the statutory provision at issue need only be “conducive” and “[reasonably] adapted” to the goal Congress seeks to achieve. *Jinks*, 538 U. S., at 462 (internal quotation marks omitted). The minimum coverage provision meets this requirement. See supra, at 31–33.

12 THE CHIEF JUSTICE states that he must evaluate the constitutionality of the minimum coverage provision under the Commerce Clause because the provision “reads more naturally as a command to buy insurance than as a tax.” Ante, at 44. THE CHIEF JUSTICE ultimately concludes, however, that interpreting the provision as a tax is a “fairly possible” construction. Ante, at 32 (internal quotation marks omitted). That being so, I see no reason to undertake a Commerce Clause analysis that is not outcome determinative.

## Analysis – Faction 3

Ginsburg’s argument under the Commerce Clause supports the proposition that Americans are liable to the Individual Mandate in large measure, even if unstated, because of federal jurisdiction or presumption thereof. Ginsburg’s use of generalities and absence of specifics provide confirmation.

Ginsburg argues that “since 1937” Congress has had “large authority to set the course in the Nation’s economic and social welfare realm” and “regulations of commerce that do not infringe some constitutional prohibition” are legitimate. Ginsburg fails to define “constitutional prohibition.” Her failure is reflective of a justice’s license to express, however artfully and ineffectively, a broad position without nailing down specific merits. Such ploys forbid, by design, expression of the whole truth. Ginsburg is, therefore, unaccountable.

Ginsburg does not acknowledge the historical backdrop of congressional power under the Commerce Clause prior to 1937. She cannot possibly think that backdrop did not have fixed constitutional prohibitions at least more rigid than after 1937 and most certainly in 2102. Prior to 1937, Americans had greater awareness that the Constitution constituted specifically what the Federal Government may or may not do. These limits necessitate that the context of federal power, or absence thereof, rests upon jurisdiction, whether presumed by the Government or unwittingly assented to by private citizens. For example, under Article 1, Section 8, the United States may

make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers... vested by this Constitution in the Government of the United States...

while under the Second Amendment the words are “shall not be infringed.” The Government may make laws necessary concerning health care, but to what extent? To the abridgment of what shall not be infringed, be it the right to contract or the right to be left alone?

The Constitution prohibits the Government from imposing where it may not and conveys plenary power where permitted. Federal control over a territory or possession is strikingly different than its influence over

any of the 50 States. This fact cannot be overstated. If Ginsburg or any justice offered complete transparency, Americans would have full disclosure as to the extent of federal jurisdiction over whom, what, and where, rather than presumptions in defiance of constitutional mandates that apply to the Government alone. The legislative and executive branches had no greater constitutional control in 1937 than in 1854 and the Supreme Court did not have greater latitude to interpret then or presently. The Constitution did not become malleable over time. The Constitution currently constitutes limited government and it always has.

Actual federal jurisdiction or its mere presumption is the Government's best kept secret. That the Federal Government may *legally*, as distinguished from lawfully, interpret and act without full disclosure further cloaks the secret. Where does this leave uninformed Americans with respect to ObamaCare and the Individual Mandate? Americans presume the law applies to them. They perceive the Government as credible. They presume the Court's judgment as credible. The law stands uncontested. The Government's secret is preserved.

Ginsburg does not explain that those who accepted social security in 1937 and thereafter came under the Government's control for purposes of federal classification and taxation. Congressional powers were not increased. Congress always had the power to tax federal citizens, those within its jurisdiction. Citizens who rejected the federal scheme of social security, those outside of federal oversight, were unaffected. This is complete constitutional jurisdictional context the Government will not share.

Ginsburg deliberates the legitimacy of ObamaCare without weighing jurisdiction. She has no need to address jurisdiction. All three federal branches presume jurisdiction over all Americans. Ginsburg does not even hint that some may be unaffected by ObamaCare and the Individual Mandate as non participants of social security and non taxpayers. She does not identify a class outside of ObamaCare enforcement. When people willingly assent to federal jurisdiction, the Government presumes jurisdiction thereafter, even at the expense of capturing those outside its purview. As such, there is little need to disclose the limits of any law. With such a posture, one must appreciate the intent and limits of any law by defining the words employed.

Is the compelled purchase of an unwanted product or service a constitutional prohibition? It is for those outside federal jurisdiction. Ginsburg does not make such an admission in her legal analysis. She argues, generally, that all individuals are eventually, at some point, within

the health care market, unlike other markets, and are, therefore, liable to buy insurance or pay a penalty. She uses the art of generalizing with non-specifics like “‘practical’ considerations” and “‘actual experience’” as the threshold for congressional power under the Commerce Clause. These non-specifics are hastened to importance when she cites the need to regulate activities which “substantially affect interstate commerce.”

Ginsburg never gives credence to the idea that one who does not buy health insurance is inactive and has no impact on the national market. One’s impact, “clearly non-existent,” is the equivalent of being outside federal control, and renders federal authority to enforce the Individual Mandate “clearly non-existent.” Many would reasonably argue the Government is “constitutionally prohibited” from mandating anything or anyone not with its domain.

Is Congress able to impose a tax upon those who are inactive in the health insurance market because they are federal citizens? If so, could it be argued that Congress has no “rational basis” that a federal citizen’s inactivity will affect interstate commerce and there is no reasonable connection between the “regulatory means selected and the asserted ends?”

Ginsburg escapes this dilemma by couching one who is uninsured as being within a “class” of the collective uninsured and then argues being healthy is self-insurance and active in the market. Not unlike the chimpanzee that swings from high to low with ease, Ginsburg reaches the echelon of the national health care market down to “individuals who fail to obtain insurance.” Contrary to the majority of justices, she believes Congress has the authority under the Commerce Clause to compel Americans to buy health care insurance.

No better illustration of Ginsburg’s generalizing with broad brush strokes accented with non-specifics is her reference to the idea that “[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.” A supposed “evil,” which obviously must be defined at the time it raises its ugly head, affords Congress the wherewithal to capture what could not have been the day before, even if some of the captured are innocent and should be left alone.

We should not be surprised that Ginsburg’s deliberation ties one general thought with another and avoids accountability to an underlying specific power. For example, she relies upon the precedent of the farmer penalized for growing too much wheat for personal use as justification for

congressional authority to “dictate the conduct of” one against a “prophesied future activity.” What is the specific power invoked?

She then chastises Roberts’ reference to the car market and one’s inactivity with buying a vehicle as an “inapt” comparison to the purchase of health insurance. However, she fails to note that one may self-propel to a destination as easily as self-insure into an unknown future. With such porous reasoning, she rejects that those who are “healthy” should not subsidize others who are neglectful of their well-being and incapable of self-propelling themselves anywhere, those who are an obvious cause for escalating industry costs for their lack of sound health.

When Ginsburg attempts to tackle the argument from both the majority and the dissent that “an individual cannot be subject to Commerce Clause regulation absent voluntary and affirmative acts,” she airs her disregard for liberty and forces her social and political ideologies. This point is proved when she cites her main argument that everyone is involved in the health care market at some point, a weak refrain in need of its own insurance policy. Incredulously, Ginsburg suggests the commerce power would never be unbridled. As she paints the Commerce Clause, is it not unbridled? Ginsburg is wild enough to diametrically oppose the majority opinion and depart from “constitutional prohibitions” as a means to compound America into one common mass.



## Faction 1

Since Roberts and the majority reject the enforcement of ObamaCare under the Commerce Clause and the Necessary and Proper Clause, we will focus primarily on their reasoning under the Taxing Clause.

The following is a portion of Roberts' majority opinion:

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

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

The Federal Government "is acknowledged by all to be one of enumerated powers." *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.

Indeed, the Constitution did not initially include a Bill of Rights at least partly because the Framers felt the enumeration of powers sufficed to restrain the Government. As Alexander Hamilton put it, "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS." *The Federalist* No. 84, p. 515 (C. Rossiter ed. 1961). And when the Bill of Rights was ratified, it made express what the enumeration of powers necessarily implied: "The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people." U. S. Const., Amdt. 10. The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions. See, e.g., *United States v. Comstock*, 560 U. S. \_\_\_\_ (2010).

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

"State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of

sovereign power.” *New York v. United States*, 505 U. S. 144, 181 (1992) (internal quotation marks omitted). Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens’ daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which “in the ordinary course of affairs, concern the lives, liberties, and properties of the people” were held by governments more local and more accountable than a distant federal bureaucracy. *The Federalist* No. 45, at 293 (J. Madison). The independent power of the States also serves as a check on the power of the Federal Government: “By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.” *Bond v. United States*, 564 U. S. \_\_\_, \_\_\_ (2011) (slip op., at 9–10).

This case concerns two powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to the police power. The Constitution authorizes Congress to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Art. I, §8, cl. 3. Our precedents read that to mean that Congress may regulate “the channels of interstate commerce,” “persons or things in interstate commerce,” and “those activities that substantially affect interstate commerce.” *Morrison*, *supra*, at 609 (internal quotation marks omitted). 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) (conditioning federal highway funds on States raising their drinking age to 21).

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

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 co-ordinate 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*, *supra*, at 175–176.

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

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 (ND 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.

Other Courts of Appeals have also heard challenges to the individual mandate. The Sixth Circuit and the D. C. Circuit upheld

the mandate as a valid exercise of Congress's commerce power. See *Thomas More Law Center v. Obama*, 651 F. 3d 529 (CA6 2011); *Seven-Sky v. Holder*, 661 F. 3d 1 (CAD6 2011). The Fourth Circuit determined that the Anti-Injunction Act prevents courts from considering the merits of that question. See *Liberty Univ., Inc. v. Geithner*, 671 F. 3d 391 (2011). That statute bars suits "for the purpose of restraining the assessment or collection of any tax." 26 U. S. C. §7421(a). A majority of the Fourth Circuit panel reasoned that the individual mandate's penalty is a tax within the meaning of the Anti-Injunction Act, because it is a financial assessment collected by the IRS through the normal means of taxation. The majority therefore determined that the plaintiffs could not challenge the individual mandate until after they paid the penalty.<sup>1</sup>

We granted certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit with respect to both the individual mandate and the Medicaid expansion. 565 U. S. \_\_\_\_ (2011). Because no party supports the Eleventh Circuit's holding that the individual mandate can be completely severed from the remainder of the Affordable Care Act, we appointed an amicus curiae to defend that aspect of the judgment below. And because there is a reasonable 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.<sup>2</sup>

### III

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

## A

The Government's first argument is that the individual mandate is a valid exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause. According to the Government, the health care market is characterized by a significant cost-shifting problem. Everyone will eventually need health care at a time and to an extent they cannot predict, but if they do not have insurance, they often will not be able to pay for it. Because state and federal laws nonetheless require hospitals to provide a certain degree of care to individuals without regard to their ability to pay, 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. See Brief for America's Health Insurance Plans et al. as Amici Curiae in No. 11– 393 etc. 8–9.



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

1

The Government contends that the individual mandate is within Congress's power because the failure to purchase insurance "has a substantial and deleterious effect on interstate commerce" by creating the cost-shifting problem. Brief for United States 34. The path of our Commerce Clause decisions has not always run smooth, see *United States v. Lopez*, 514 U. S. 549, 552–559 (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*, 317 U. S., at 127–128.

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.<sup>3</sup> 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) (slip op., at 25) (internal quotation marks omitted). 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 of the land and naval Forces.” *Id.*, cls. 12–14. If the power to regulate the armed forces or the value of money included the power to bring the subject of the regulation into existence, the specific grant of such powers would have been unnecessary. The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated. See *Gibbons*, 9 *Wheat.*, at 188 (“[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said”).<sup>4</sup>

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” (emphasis in original; internal quotation marks omitted)); 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”); see also post, at 15, 25–26, 28, 32 (GINSBURG, J., concurring in part, concurring in judgment in part, and dissenting in part).<sup>5</sup>

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

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

*Wickard* has long been regarded as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity,” *Lopez*, 514 U. S., at 560, 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. See *Seven-Sky*, 661 F. 3d, at 14–15 (noting the Government's inability to "identify any mandate to purchase a product or service in interstate commerce that would be unconstitutional" under its theory of the commerce power). To consider a different example in the health care market, many Americans do not eat a balanced diet. That group makes up a larger percentage of the total population than those without health insurance. See, e.g., Dept. of Agriculture and Dept. of Health and Human Services, *Dietary Guidelines for Americans 1* (2010). The failure of that group to have a healthy diet increases health care costs, to a greater extent than the failure of the uninsured to purchase insurance. See, e.g., Finkelstein, Trogdon, Cohen, & Dietz, *Annual Medical Spending Attributable to Obesity: Payer- and Service-Specific Estimates*, 28 *Health Affairs* w822 (2009) (detailing the "undeniable link between rising rates of obesity and rising medical spending," and estimating that "the annual medical burden of obesity has risen to almost 10 percent of all medical spending and could amount to \$147 billion per year in 2008"). Those increased costs are borne in part by other Americans who must pay more, just as the uninsured shift costs to the insured. See Center for Applied Ethics, *Voluntary Health Risks: Who Should Pay?*, 6 *Issues in Ethics* 6 (1993) (noting "overwhelming evidence that individuals with unhealthy habits pay only a fraction of the costs associated with their behaviors; most of the expense is borne by the rest of society in the form of higher insurance premiums, government

expenditures for health care, and disability benefits”). Congress addressed the insurance problem by ordering everyone to buy insurance. Under the Government’s theory, Congress could address the diet problem by ordering everyone to buy vegetables. See Dietary Guidelines, *supra*, at 19 (“Improved nutrition, appropriate eating behaviors, and increased physical activity have tremendous potential to . . . reduce health care costs”).

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

That is not the country the Framers of our Constitution envisioned. James Madison explained that the Commerce Clause was “an addition which few oppose and from which no apprehensions are entertained.” The Federalist No. 45, at 293. While Congress’s authority under the Commerce Clause has of course expanded with the growth of the national economy, our cases have “always recognized that the power to regulate commerce, though broad indeed, has limits.” *Maryland v. Wirtz*, 392 U. S. 183, 196 (1968). The Government’s theory would erode those limits, permitting Congress to reach beyond the natural extent of its authority, “everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.” The Federalist No. 48, at 309 (J. Madison). Congress already enjoys vast power to regulate much of what we do. Accepting the Government’s theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.<sup>6</sup>

To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers, who were “practical statesmen,” not metaphysical philosophers. *Industrial Union Dept., AFL–CIO v. American Petroleum Institute*, 448 U. S. 607, 673 (1980) (Rehnquist, J., concurring in judgment). As we have explained, “the framers of the Constitution were not mere visionaries, toying with speculations or theories, but practical men, dealing with the facts of political life as they understood them,

putting into form the government they were creating, and prescribing in language clear and intelligible the powers that government was to take.” *South Carolina v. United States*, 199 U. S. 437, 449 (1905). The Framers gave Congress the power to regulate commerce, not to compel it, and for over 200 years both our decisions and Congress’s actions have reflected this understanding. There is no reason to depart from that understanding now.

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

The Government repeats the phrase “active in the market for health care” throughout its brief, see *id.*, at 7, 18, 34, 50, but that concept has no constitutional significance. An individual who bought a car two years ago and may buy another in the future is not “active in the car market” in any pertinent sense. The phrase “active in the market” cannot obscure the fact that most of those regulated by the individual mandate are not currently engaged in any commercial activity involving health care, and that fact is fatal to the Government’s effort to “regulate the uninsured as a class.” *Id.*, at 42. Our precedents recognize Congress’s power to regulate “class[es] of activities,” *Gonzales v. Raich*, 545 U. S. 1, 17 (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’ . . .” (emphasis deleted)).

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

risk pool to include healthy individuals, which will lower health insurance premiums”). If the individual mandate is targeted at a class, it is a class whose commercial inactivity rather than activity is its defining feature.

The Government, however, claims that this does not matter. The Government regards it as sufficient to trigger Congress’s authority that almost all those who are uninsured will, at some unknown point in the future, engage in a health care transaction. Asserting that “[t]here is no temporal limitation in the Commerce Clause,” the Government argues that because “[e]veryone subject to this regulation is in or will be in the health care market,” they can be “regulated in advance.” Tr. of Oral Arg. 109 (Mar. 27, 2012).

The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent. We have said that Congress can anticipate the effects on commerce of an economic activity. See, e.g., *Consolidated Edison Co. v. NLRB*, 305 U. S. 197 (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, *post*, at 20–21, 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.” Reply Brief for United States 19. But cars and broccoli are no more purchased for their “own sake” than health insurance. They are purchased to cover the need for transportation and food. The Government says that health insurance and health care financing are “inherently integrated.” Brief for United States 41. But that does not mean the compelled purchase of the first is properly regarded as a regulation of the second. No matter how “inherently integrated” health insurance and health care consumption may be, they are not the same thing: They involve different transactions, entered into at different times, with different providers. And for most of those targeted by the mandate, significant health care needs will be years, or even decades, away. The proximity and degree of connection between the mandate and the subsequent commercial activity is too lacking to justify an exception of the sort urged by the Government. The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to “regulate Commerce.”

2

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

The power to “make all Laws which shall be necessary and proper for carrying into Execution” the powers enumerated in the Constitution, Art. I, §8, cl. 18, vests Congress with authority to enact provisions “incidental to the [enumerated] power, and conducive to its beneficial exercise,” *McCulloch*, 4 *Wheat.*, at 418. Although the Clause gives Congress authority to “legislate on that vast mass of incidental powers which must be involved in the constitution,” it



does not license the exercise of any “great substantive and independent power[s]” beyond those specifically enumerated. *Id.*, at 411, 421. Instead, the Clause is “merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant.” *Kinsella v. United States ex rel. Singleton*, 361 U. S. 234, 247 (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 \_\_\_ (slip op., at 5) (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) (alterations omitted) (quoting *The Federalist* No. 33, at 204 (A. Hamilton)); see also *New York*, 505 U. S., at 177; *Comstock*, *supra*, at \_\_\_ (slip op., at 5) (KENNEDY, J., concurring in judgment) (“It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause . . .”).

Applying these principles, the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. For example, we have upheld provisions permitting continued confinement of those already in federal custody when they could not be safely released, *Comstock*, *supra*, at \_\_\_ (slip op., at 1–2); criminalizing bribes involving organizations receiving federal funds, *Sabri v. United States*, 541 U. S. 600, 602, 605 (2004); and tolling state statutes of limitations while cases are pending in federal court, *Jinks v. Richland County*, 538 U. S. 456, 459, 462 (2003). The individual mandate, by

contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.

This is in no way an authority that is “narrow in scope,” Comstock, *supra*, at \_\_\_ (slip op., at 20), or “incidental” to the exercise of the commerce power, McCulloch, *supra*, at 418. Rather, such a conception of the Necessary and Proper Clause would work a substantial expansion of federal authority. No longer would Congress be limited to regulating under the Commerce Clause those who by some preexisting activity bring themselves within the sphere of federal regulation. Instead, Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it. Even if the individual mandate is “necessary” to the Act’s insurance reforms, such an expansion of federal power is not a “proper” means for making those reforms effective.

The Government relies primarily on our decision in *Gonzales v. Raich*. In *Raich*, we considered “comprehensive legislation 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 (emphasis added). Just as the individual mandate cannot be sustained as a law regulating the substantial effects of the failure to purchase health insurance, neither can it be upheld as a “necessary and proper” component of the insurance reforms. The commerce power thus does not authorize the mandate. *Accord, post*, at 4–16 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ., dissenting).

## B

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

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

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

The most straightforward reading of the mandate is that it commands individuals to purchase insurance. After all, it states that individuals "shall" maintain health insurance. 26 U. S. C. §5000A(a). Congress thought it could enact such a command under the Commerce Clause, and the Government primarily defended the law on that basis. But, for the reasons explained above, the Commerce Clause does not give Congress that power. Under our precedent, it is therefore necessary to ask whether the Government's alternative

reading of the statute—that it only imposes a tax on those without insurance—is a reasonable one.

Under the mandate, if an individual does not maintain health insurance, the only consequence is that he must make 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.” *Supra*, at 13–14. 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. Congressional Budget Office, *Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act* (Apr. 30, 2010), in *Selected CBO Publications Related to Health Care Legislation, 2009–2010*, p. 71 (rev. 2010).

It is of course true that the Act describes the payment as a “penalty,” not a “tax.” But while that label is fatal to the application of the Anti-Injunction Act, *supra*, at 12–13, it does not determine whether the payment may be viewed as an exercise of Congress’s taxing power. It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress’s choice of label on that question. That choice does not, however, control whether an exaction is within Congress’s constitutional power to tax.

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

We have similarly held that exactions not labeled taxes nonetheless were authorized by Congress’s power to tax. In the *License Tax Cases*, for example, we held that federal licenses to sell liquor and lottery tickets—for which the licensee had to pay a fee—could be sustained as exercises of the taxing power. 5 *Wall.*, at 471. And in *New York v. United States* we upheld as a tax a “surcharge” on out-of state nuclear waste shipments, a portion of which was paid to the Federal Treasury. 505 U. S., at 171. 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); cf. *Quill Corp. v. North Dakota*, 504 U. S. 298, 310 (1992) (“[M]agic words or labels” should not “disable an otherwise constitutional levy” (internal quotation

marks omitted)); *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, 363 (1941) (“In passing on the constitutionality of a tax law, we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it” (internal quotation marks omitted)); *United States v. Sotelo*, 436 U. S. 268, 275 (1978) (“That the funds due are referred to as a ‘penalty’ . . . does not alter their essential character as taxes”).<sup>7</sup>

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; see also, e.g., *Kurth Ranch*, 511 U. S., at 780–782 (considering, inter alia, the amount of the exaction, and the fact that it was imposed for violation of a separate criminal law); *Constantine*, supra, at 295 (same).

The same analysis here suggests that the shared responsibility payment may for constitutional purposes be considered a tax, not a penalty: First, for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more.<sup>8</sup> It may often be a reasonable financial decision to make the payment rather than purchase insurance, unlike the “prohibitory” financial punishment in *Drexel Furniture*. 259 U. S., at 37. 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.<sup>9</sup>

None of this is to say that the payment is not intended to affect individual conduct. Although the payment will raise considerable

revenue, it is plainly designed to expand health insurance coverage. But taxes that seek to influence conduct are nothing new. Some of our earliest federal taxes sought to deter the purchase of imported manufactured goods in order to foster the growth of domestic industry. See W. Brownlee, *Federal Taxation in America* 22 (2d ed. 2004); cf. 2 J. Story, *Commentaries on the Constitution of the United States* §962, p. 434 (1833) (“the taxing power is often, very often, applied for other purposes, than revenue”). Today, federal and state taxes can compose more than half the retail price of cigarettes, not just to raise more money, but to encourage people to quit smoking. And we have upheld such obviously regulatory measures as taxes on selling marijuana and sawed-off shotguns. See *United States v. Sanchez*, 340 U. S. 42, 44–45 (1950); *Sonzinsky v. United States*, 300 U. S. 506, 513 (1937). Indeed, “[e]very tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed.” *Sonzinsky*, *supra*, at 513. That §5000A seeks to shape decisions about whether to buy health insurance does not mean that it cannot be a valid exercise of the taxing power.

In distinguishing penalties from taxes, this Court has explained that “if the concept of penalty means anything, it means punishment for an unlawful act or omission.” *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. Brief for United States 60–61; Tr. of Oral Arg. 49–50 (Mar. 26, 2012).

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

creating four million outlaws. It suggests instead that the shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance.

The plaintiffs contend that Congress's choice of language—stating that individuals “shall” obtain insurance or pay a “penalty”—requires reading §5000A as punishing unlawful conduct, even if that interpretation would render the law unconstitutional. We have rejected a similar argument before. In *New York v. United States* we examined a statute providing that “[e]ach State shall be responsible for providing . . . for the disposal of . . . low-level radioactive waste.” 505 U. S., at 169 (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.<sup>10</sup>

The joint dissenters argue that we cannot uphold §5000A as a tax because Congress did not “frame” it as such. *Post*, at 17. In effect, they contend that even if the Constitution permits Congress to do exactly what we interpret this statute to do, the law must be struck down because Congress used the wrong labels. An example may help illustrate why labels should not control here. Suppose Congress enacted a statute providing that every taxpayer who owns a house without energy efficient windows must pay \$50 to the IRS. The amount due is adjusted based on factors such as taxable income and joint filing status, and is paid along with the taxpayer's income tax return. Those whose income is below the filing threshold need not pay. The required payment is not called a “tax,” a “penalty,” or anything else. No one would doubt that this law imposed a tax, and was within Congress's power to tax. That conclusion should not change simply because Congress used the



word “penalty” to describe the payment. Interpreting such a law to be a tax would hardly “[i]mpos[e] a tax through judicial legislation.” Post, at 25. Rather, it would give practical effect to the Legislature’s enactment.

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

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

Even when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a “head tax” or a “poll tax”), might be a direct tax. See *Springer v. United States*, 102 U. S. 586, 596–598 (1881). Soon after the framing, Congress passed a tax on ownership of carriages, over James Madison’s objection that it was an unapportioned direct tax. *Id.*, at 597. This Court upheld the tax, in part reasoning that apportioning such a tax would make little sense, because it would have required taxing carriage owners at dramatically different rates depending on how many carriages were in their home State. See *Hylton v. United States*, 3 Dall. 171, 174 (1796) (opinion of Chase, J.). The Court was unanimous, and those Justices who wrote opinions either directly asserted or strongly suggested that only two forms of taxation were direct: capitations and land taxes. See *id.*, at 175; *id.*, at 177 (opinion of Paterson, J.); *id.*, at 183 (opinion of Iredell, J.).

That narrow view of what a direct tax might be persisted for a century. In 1880, for example, we explained that “direct taxes,

within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate.” Springer, *supra*, at 602. In 1895, we expanded our interpretation to include taxes on personal property and income from personal property, in the course of striking down aspects of the federal income tax. *Pollock v. Farmers’ Loan & Trust Co.*, 158 U. S. 601, 618 (1895). That result was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes. See *Eisner v. Macomber*, 252 U. S. 189, 218–219 (1920).

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

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

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

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

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. *Supra*, at 35–36. 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) (quoting *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U. S. 218, 223 (1928) (Holmes, J., dissenting)).

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.<sup>11</sup>

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

## D

JUSTICE GINSBURG questions the necessity of rejecting the Government's commerce power argument, given that §5000A can be upheld under the taxing power. *Post*, at 37. 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.

1 The Eleventh Circuit did not consider whether the Anti-Injunction Act bars challenges to the individual mandate. The District Court had determined that it did not, and neither side challenged that holding on appeal. The same was true in the Fourth Circuit, but that court examined the question *sua sponte* because it viewed the Anti-Injunction Act as a limit on its subject matter jurisdiction. See *Liberty Univ.*, 671 F. 3d, at 400–401. The Sixth Circuit and the D. C. Circuit considered the question but determined that the Anti-Injunction Act did not apply. See *Thomas More*, 651 F. 3d, at 539–540 (CA6); *Seven-Sky*, 661 F. 3d, at 5–14 (CADC).

2 We appointed H. Bartow Farr III to brief and argue in support of the Eleventh Circuit’s judgment with respect to severability, and Robert A. Long to brief and argue the proposition that the Anti-Injunction Act bars the current challenges to the individual mandate. 565 U. S. \_\_\_\_ (2011). Both amici have ably discharged their assigned responsibilities.

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”).

4 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 (CADC 2011); brackets and some internal quotation marks omitted). But to reach this conclusion, the case cited by JUSTICE GINSBURG relied on a dictionary in which “[t]o order; to command” was the fifth-alternative definition of “to direct,” which was itself the second-alternative definition of “to regulate.” See *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 (defining the commerce power as the power “to prescribe the rule by which commerce is to be governed”).

5 JUSTICE GINSBURG cites two eminent domain cases from the 1890s to support the proposition that our case law does not “toe the activity versus inactivity line.” Post, at 24–25 (citing *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 335–337 (1893), and *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 657–659 (1890)). The fact that the Fifth Amendment requires the payment of just compensation when the Government exercises its power of eminent domain does not turn the taking into a commercial transaction between the landowner and the Government, let alone a government-compelled transaction between the landowner and a third party.

6 In an attempt to recast the individual mandate as a regulation of commercial activity, JUSTICE GINSBURG suggests that “[a]n individual who opts not to purchase insurance from a private insurer can be seen as actively selecting another form of insurance: self-insurance.” Post, at 26. But “self-insurance” is, in this context, nothing more than a description of the failure to purchase insurance. Individuals are no more “activ[e] in the self-insurance market” when they fail to purchase insurance, *ibid.*, than they are active in the “rest” market when doing nothing.

7 *Sotelo*, in particular, would seem to refute the joint dissent’s contention that we have “never” treated an exaction as a tax if it was denominated a penalty. Post, at 20. We are not persuaded by the dissent’s attempt to distinguish *Sotelo* as a statutory construction case from the bankruptcy context. Post, at 17, n. 5. The dissent itself treats the question here as one of statutory interpretation, and indeed also relies on a statutory interpretation case from the bankruptcy context. Post, at 23 (citing *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U. S. 213, 224 (1996)).

8 In 2016, for example, individuals making \$35,000 a year are expected to owe the IRS about \$60 for any month in which they do not have health insurance. Someone with an annual income of \$100,000 a year would likely owe about \$200. The price of a qualifying insurance policy is projected to be around \$400 per month. See D. Newman, CRS Report for Congress, *Individual Mandate and Related Information Requirements Under PPACA* 7, and n. 25 (2011).

9 We do not suggest that any exaction lacking a scienter requirement and enforced by the IRS is within the taxing power. See post, at 23–24 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ., dissenting). Congress could not, for example, expand its authority to impose criminal fines by creating strict liability offenses enforced by the IRS rather than the FBI. But the fact the exaction here is paid like a tax, to the agency that collects taxes—rather than, for example, exacted by Department of Labor inspectors after ferreting out willful malfeasance— suggests that this exaction may be viewed as a tax.

10 The joint dissent attempts to distinguish *New York v. United States* on the ground that the seemingly imperative language in that case was in an “introductory provision” that had “no legal consequences.” Post, at 19. We did not rely on that reasoning in *New York*. See 505 U. S., at 169–170. Nor could we have. While the Court quoted only the broad statement that “[e]ach State shall be responsible” for its waste, that language was implemented through operative provisions that also

use the words on which the dissent relies. See 42 U. S. C. §2021e(e)(1) (entitled “Requirements for non-sited compact regions and non-member States” and directing that those entities “shall comply with the following requirements”); §2021e(e)(2) (describing “Penalties for failure to comply”). The Court upheld those provisions not as lawful commands, but as “incentives.” See 505 U. S., at 152–153, 171–173.

11 Of course, individuals do not have a lawful choice not to pay a tax due, and may sometimes face prosecution for failing to do so (although not for declining to make the shared responsibility payment, see 26 U. S. C. §5000A(g)(2)). But that does not show that the tax restricts the lawful choice whether to undertake or forgo the activity on which the tax is predicated. Those subject to the individual mandate may lawfully forgo health insurance and pay higher taxes, or buy health insurance and pay lower taxes. The only thing they may not lawfully do is not buy health insurance and not pay the resulting tax.

## Analysis - Faction 1

Roberts fails to exercise Justice Story's fundamental and objective analysis. Absent a particular emphasis on words, meanings, and grammatical construction, the Roberts Court fails to dignify the full complement of its authority and responsibility. The reverse is true. The Court curtails its efforts and delivers a conclusion well short of its judicial capacity. The dilution of the Court's authority is apparent when Roberts notes that the Court "... do[es] not consider whether the Act embodies sound policies," but "only whether Congress has the power under the Constitution to enact the challenged provisions." Roberts qualifies his use of "sound" by stating, "That judgment is entrusted to the Nation's elected leaders."

Whether or not a policy is sound, generally, depends upon more than whether or not Congress has constitutional power, specifically. For example, federal confiscation of all guns in America would not be a sound policy and Congress has no authority to do so. A requirement that all Americans apply for and receive a social security number is not sound policy and is a constitutional prohibition. For more reasons than the Government's impotence, a mandate that all Americans purchase and eat spinach daily is not sound policy. In order to dignify the Court's proper constitutional role, it must, however it is achieved, concede to the unsoundness of policies without relying solely upon the question of congressional authority.

If Roberts employs the term "sound" as a ruse to indicate his personal judgment of a flawed idea and avoid professional accountability to express that judgment, he dishonors a "*topic of political controversy*" which caused "*popular declamation and alarm*." Declamation and alarm stem from the unsoundness of ObamaCare. The question of congressional power to enact the challenged provisions is merely one of many elements of policy soundness. Roberts, by limiting his judgment of a policy to power alone, shirks an obligation to assess it as unsound for other deficiencies.

Does Roberts impose limits upon the Court to congressional authority alone? If so, the Court renders less than sound jurisprudence. Let there be no doubt, a Congress that polices public inactivity in the present will legislate diets in the future. Moreover, Court approval of



expanding federal jurisdiction (power) without defeating elements of policy review makes sound tomorrow what was previously not.

Should the Court question the soundness of a congressional policy that all Americans paint their homes the color blue? Should it question whether regulating inactivity in any market is sound? While the question of power is central to the Constitution, if the Court isolates its conclusions to congressional authority, it will justify any power by the narrowest of interpretations. The Court will ski down the slippery slope to unfettered congressional power as it splinters a law to save it upon the slimmest of margins that the power exists, if fairly possible. The unsound is manifested by virtue of a new power borne from unsound policy.

ObamaCare is viable because the Court determines the Individual Mandate penalty is a tax—not a sound power—that gives birth to an unsound policy. Roberts' effort to isolate the soundness of ObamaCare to Congress' power to tax to the exclusion of other policy aspects falls short of sound judicial discipline.

In *Steward Machine*, Justice Cardozo labored greatly to justify his rationale that

Indeed, [property] ownership itself, as we had occasion to point out the other day, is only a bundle of rights and privileges invested with a single name. *Henneford v. Silas Mason Co., Inc.*, March 29, 1937, - U. S. -. "A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively." *Ibid.* Employment is a business relation, if not itself a business. It is a relation without which business could seldom be carried on effectively. The power to tax the activities and relations that constitute a calling considered as a unit is the power to tax any of them. The whole includes the parts. *Nashville C. & St. L. Ry. Co. v. Wallace*, 288 U. S. 249, 267, 268. [brackets added]

Although an unsound policy is applied to those who are without federal jurisdiction, Cardozo interpreted the taxing of employment by isolating individual faggots of property ownership and taxing the unit as a whole. Does Roberts not have the duty to reconcile that separate faggots of policy analysis may not be discarded simply because a particular faggot is inconvenient? Moreover, the collective faggots of soundness are inherently tied to specific faggots, not just the faggot of power. Roberts may not embrace the relevance of power to the exclusion of other aspects and the unsoundness of the policy in its entirety.

In *Wickard*, the Supreme Court determined that a farmer—one farmer—could not grow an excess of wheat for personal use. Was this sound policy? Notwithstanding other faggots of policy review, when did Congress acquire the constitutional power to legislate so narrowly? If preventing a single farmer from growing excess wheat was unsound before *Wickard*, which indicates a lack of power, did the policy become sound with the fabrication and exercise of this never before realized power? The Court viewed both the policy to control the price and prohibit self-production and self-consumption of wheat, the challenged provision, as sound.

In light of *Wickard*, the Supreme Court is hypocritical concerning at least one faggot of ObamaCare policy review. In *Wickard*, the Court “validated” the soundness of controlling the price of wheat to an extreme by mandating the cessation of conduct of a private citizen, who was, for all intents and purposes, inactive in the wheat market. Why? He was on private land and engaged with private property. In ObamaCare, the Court “validated” the soundness of controlling the health insurance market by mandating that all private citizens who are inactive in that market use private property to purchase insurance or pay a penalty. The question of congressional oversight of any given market notwithstanding, Government policies over one or all private citizens and their private activity or inactivity concerning private property must be ripe for the Court’s judgment as unsound.

If *Wickard* is not a *sound* example, consider the hypothetical gun confiscation and compelled spinach consumption. Roberts fancies and advances the proposition that the Court may avoid characterizing a legislative policy as unsound, yet justify congressional power to impose it. As with *Wickard*, the threshold of federal power expands when a tentative and subservient Court, with artificial and self-imposed limits, defers unquestioningly to unsound congressional policy forays.

If the Supreme Court does not act as an equal and co-ordinate branch of government, Congress triumphs with the likes of *Wickard* and ObamaCare. A determination that Congress has the authority to mandate that citizens without health insurance buy coverage or pay a penalty is not sound under any aspect of policy analysis. The power does not exist, unless one is a federal citizen! Collective policy analysis proves that an attempt to penalize or tax those who are inactive is to create a power from what is not sound.

Roberts concludes his opening observation with,

Resolving this controversy requires us to examine both the limits of the Government's power, and our own limited role in policing those boundaries.

He rightly acknowledges the limits of power the Government may exercise. When he cites the limits of the Court's power, we must conclude he ignores individual faggots which comprise the Court's collective authority that must be applied "distributively." Roberts' constricted soundness argument hampers the Court to an unconstitutional fault. Given the substantial public angst against ObamaCare before its enactment, the people and States were hopeful for and expected redemption from a sound Supreme Court and a constitutionally-minded Chief Justice.

Inexplicably, Roberts proceeds to distill the main function of the Supreme Court as

necessary to ask whether the Government's alternative reading of the statute—that it only imposes a tax on those without insurance—is a reasonable one.

The Government argues, "... 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." Roberts clarifies that 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.

While a *man of normal intellect and conscience* begs for the difference between the two, Roberts does not.

If we have learned anything from reading the dissent opinion, it is that some justices exercise judicial restraint by toeing a narrow line of thought only to reject the expansion of federal power. Other justices exercise loose latitude to interpret precedent to expand federal power. As such, a majority opinion which justifies the likes of ObamaCare must travel the wide and worn path of inventiveness; for, it is by fabrication that mutations of power are borne.

The Government clearly calls the exaction against those who do not buy insurance a "tax." Roberts' willingness to buy what the Government

sells is disconcerting. Since the Government reasons that the Individual Mandate is “not a legal command to buy insurance,” but the failure to do so is “just another thing the Government taxes, like buying gasoline or earning income,” Roberts asserts,

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.

Roberts fails to acknowledge that one must willingly buy gasoline—a voluntary act that precipitates an excise tax. An unwillingness to buy health insurance is not the equivalent. The comparison is judicial folly and the very reason the Court should not defer to power alone as justification for the enactment and approval of a law.

If Roberts’ comparison of gasoline and health insurance purchases is not absurd, Roberts substantiates the merits of the “tax” because it is handled like a tax—enforced through the tax code and paid by taxpayers to the Internal Revenue Service. “This process yields the essential feature of any tax: it produces at least some revenue for the Government.” Does Roberts ignore that the “revenue for the Government” is acquired by force, or as some would say, theft? Does handling of one thing make it the equivalent of another? This is not sound judicial analysis. One may attempt to use a hammer as an apple and an apple as a hammer, but the two will never be same and they will never satisfy the same purpose.

Roberts asserts, “exactions not labeled taxes nonetheless were authorized by Congress’s power to tax.” Notwithstanding the Government’s use of the term “tax,” Roberts remarks of Congress’ power under the taxing clause as sufficient for the assessment.

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.’

In Roberts’ judgment, “[M]agic words or labels’ should not ‘disable an otherwise constitutional levy.’” At the heart of his argument is the “practical operation, not its definition or the precise form of descriptive words which may be applied to it.” Unlike Story, Roberts is not concerned with the proper use and meaning of terms as the borders of delineated power. Moreover, to what extent is the operation “practical” when what

is practical is not congruent with what something actually is? The hammer may no sooner be eaten than the apple may drive a nail.

We should not be surprised when Roberts finally states, “That the funds due are referred to as a ‘penalty’... does not alter their essential character as taxes.” His approach is in keeping with the radical notion that as long as the “process yields the essential feature of a tax” —revenue to the Government—regardless that the penalty is leveled against one who does nothing, unlike buying gasoline, then all is well. This slippery slope envelops “inactivity” of private citizens as being within the orbit of congressional taxing authority. Is it not reasonable to expect a man of normal intellect and conscience to grapple with the soundness of Roberts’ narrow interpretation?

Roberts, as with many former justices, searches multiple permutations of strained legal thought until he reaches the desired conclusion. This is often accomplished with the use of precedent to press the meanings of terms and grammatical construction through impassable conduits of legal reasoning. To be sure, the Supreme Court has practiced this legal craft for centuries only to defeat any remaining respect for constrained constitutional power.

The pain taken to deem the Individual Mandate penalty a tax is not unlike the demise of the meaning of the word and concept of “marriage.” Marriage is no longer considered the union of a man and a woman. This term, which has been applied for thousands of years, is now reduced to include a class that never could have been served by the proper definition and never will. A hammer will always be a hammer and an apple will always be an apple.

A society that dismisses the error of labeling same-sex unions as marriages or hammers as apples allows the Court to turn a penalty into a tax and sanction the inaction of citizens as somehow within congressional oversight. Whether reviewing marriage, apples, taxation, or the scope of government over inactivity, every attempt should be made to declare an end that is proper and just. The Supreme Court may mandate that same-sex partners be granted *the contract to marry*, but the end would scale appropriately if the proper term were used to satisfy and dignify that end. This is equally true for congressional taxing power.

Noteworthy is how Roberts arrives at the conclusion that a penalty is a tax. He reasons the “shared responsibility payment” is equal to the Drexel Furniture Supreme Court case. In Drexel, employers were fined for using child labor and the Court held the “tax” was a “penalty.” Employers

were fined for doing something and doing it with evil intent, a policy enforced by the Department of Labor. Roberts states,

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.

In Roberts’ view, since 1) the tax is far less than the price of health insurance, 2) there is no evil intent, and 3) the IRS collects the payment, the penalty must be a tax. Roberts reasons to this end with the premise that an Act of Congress must be saved if possibly viewed as constitutional. If a penalty may be viewed as a tax to salvage ObamaCare, that is the road the Court will and does take.

Roberts focuses on the significance of a “penalty.” He cites the Court’s rationale that “if the concept of penalty means anything, it means punishment for an unlawful act or omission.” He continues.

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.

Failure to buy insurance must be an omission and, therefore, a penalty. What was not permissible under the Commerce Clause or the Necessary and Proper Clause is made so under the Taxing Clause. Citizens are forced to buy insurance or pay a penalty, which is, ipso facto, a tax, if only because it is handled like a tax.

Roberts acknowledges that upwards of four million people will pay the penalty and states, “We would expect Congress to be troubled by that prospect if such conduct were unlawful.” Roberts does not call into question that Congress is not troubled with the idea of mandating a purchase of anything. Is this sound? Is the mandate unlawful? He does not question that Congress penalizes citizens for being inactive in the marketplace. Is this sound? Roberts personally escorts Congress’ interpretation and the Court’s subsequent validation that penalizing or taxing Americans is the only way to justify the Individual Mandate as constitutional. By ignoring terms and their meanings, or any other credible interpretations of law or precedent, Congress and the Court

ensure that federal power is broadened to encompass the taxation of inactivity.

Roberts' majority succeeds simply because the majority ignores the reasoning expressed by the dissent. The dissent admonishes in a Justice Storyesque manner that labels, such as "penalty" and "tax", must be applied properly. Roberts refutes the importance of labels by suggesting Congress may enact "a statute providing that every taxpayer who owns a house without energy efficient windows must pay \$50 to the IRS." When he explains that the "required payment is not called a 'tax,' a 'penalty,' or anything else", he suggests, "No one would doubt that this law imposed a tax, and was within Congress's power to tax." To buttress his conclusion, he opines,

That conclusion [the Individual mandate is a tax within congressional power to tax] should not change simply because Congress used the word "penalty" to describe the payment.  
[brackets added]

Roberts' majority opinion dismantles the framework of fundamental taxation prescribed by the Constitution. Roberts ignores structural prohibitions with a single interpretation. Hubris at the expense of liberty does not come cheaply.

With direct reference to the dissenting opinion, Roberts surmises, "Interpreting such a law to be a tax would hardly '[i]mpos[e] a tax through judicial legislation.'" He declares, "Rather, it would give practical effect to the Legislature's enactment." If Roberts refuses to acknowledge the public outrage over ObamaCare on both constitutional and liberty grounds, he will never accept his explanation as wholly untenable. The Court, under Roberts' direction, imposes a tax through judicial legislation. Roberts' denial of this fact confirms the Court's contrived and self-imposed limits. Roberts, as if with a dismissive wave of the hand and an indifferent sigh, gratuitously avoids not only judging this congressional policy as unsound and, consequentially, the power to tax as unsound, he renders the Court's judgment unsound.

Recall that Roberts stated, "... we have a duty to construe a statute to save it, if fairly possible..." Any standard dictionary defines "construe" as "interpret." Nonetheless, he places emphasis on a duty to *construe*. If Robert construes the ObamaCare statute to save it, the Court must construe the penalty as a tax in order to justify congressional discretion

that it has power to impose this tax. Roberts' interpretation that the tax is not a result of "judicial legislation" is judicial malpractice.

If Roberts is inclined to "interpret such a law to be a tax," whether done by Congress, the Court, or both, the Court sanctions the law as a tax, enacted legislatively, enforced by the executive, and sanctioned by the judiciary. The Court may not construe that Congress alone interpreted the penalty as a tax. This would not be sound. If the Court construes to a fault (absent its own interpretation), which leads to an unconstitutional interpretation by Congress, the Court's self-imposed limits defeat its own *individual mandate*—to enforce the Constitution and, specifically, the Taxation Clauses.

Congress may not impose a direct tax upon the American people. It has no such authority. When a direct tax is imposed by Congress, the Court has an obligation to determine, interpret, or construe—whatever the label—this violation of a structural prohibition. The dissenting justices conclude the Individual Mandate is a direct tax. If the majority finds that Congress may deem the penalty an indirect tax, the Court may not conclude that the mandate is direct, if the intent is to save the law. If the tax is actually direct in nature, the various factions of the court, with even more applications of flawed legal analysis, avoid their responsibility to curtail congressional acts. Failure to serve as a governor upon errant legislation results in unconstitutional interpretations by the Court and demonstrates that the Court is, itself, without a governor.

Remarkably, Roberts does not seem to appreciate the possibility that, as acknowledged by the dissent, with and through ObamaCare, the Court establishes judicial precedent for a direct tax upon those outside of federal control. When Roberts states "Interpreting such a law to be a tax would hardly "[i]mpos[e] a tax through judicial legislation," he defies that his Court settles the matter as a plausible taxing power and tax subject to expansion by some future Court. The Roberts Court establishes precedent under the guise of a (direct) tax imposed with ObamaCare that will end in Court approval of future legislation which mandates that everyone buy or not buy certain products for any number of reasons. Courtesy of Roberts, his Court serves as the launching pad for further expansion of federal power achieved generally without the proper and specific use of terms and their meanings. The Constitution and the law are relative. Life becomes problematic. Liberty dies.

The demise of the Constitution and liberty is proved when Roberts refers to the *Hylton v United States* case.



Even when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a “head tax” or a “poll tax”), might be a direct tax.

Congress did not assess a direct tax. As confirmed by the Supreme Court, Congress enacted an indirect excise. Roberts should not have placed emphasis upon what is or is not a direct tax, but what was assessed after all. Concerning Hylton, Congress collected a tax upon consumers’ deliberate choice to ride in carriages. The tax was not upon carriages directly. Direct apportionment did not apply. Rather, if one chose to engage in the activity of riding a carriage, just as Roberts refers to the purchase of gasoline, a tax was collected as an indirect consequence. To be clear, if no one chose to ride a carriage, note the inactivity, the Government did not receive revenue from commerce by a constitutional indirect tax.

That Roberts attributes the Individual Mandate as constitutional based upon Hylton is not sound. In 1796, Americans knew what and why something was labeled more so than today. If the Supreme Court needed to clarify that the tax in Hylton was an indirect excise and not direct, so be it. At least citizens were not forced to ride a carriage or suffer a penalty, tax, fine, assessment, or whatever properly applied moniker, simply for being inactive in the transportation market. Is it not transparent that the machinations of legal thought from 1796 to 1854 and into the 21<sup>st</sup> century are a means of calling constitutional what is not? For justices like Roberts, the ends justify the means regardless of the casualties, be it liberty, a man’s finances, his choice to be inactive in the marketplace, or the right to be left alone.

Roberts does state that, in Hylton,

The Court was unanimous, and those Justices who wrote opinions either directly asserted or strongly suggested only two forms of taxation were direct: capitations and land taxes.

Is Roberts’ intention to summarily dismiss the possibility that the Individual Mandate is a direct tax? There are only two forms of taxation, direct and indirect. Indirect taxes are those paid voluntarily when one freely engages in the activity or buys the product subject to tax. If one chooses not to buy health insurance, thereby avoiding the excise, how is the imposition of the Individual Mandate anything but a direct tax? Americans are forced to buy insurance or be taxed.

We must reconcile a fallacy at this point. The Roberts Court appears to believe that the Federal Government may tax people individually in the first place. This is not true. The Federal Government may impose a direct tax, but only as required by the Constitution. The tax must be apportioned among the several States. A percentage of the total direct tax would be assessed against a State based upon its proportional percentage of the nation's total population. The State would determine how to collect the apportioned amount. The tax would not necessarily entail an assessment upon every State citizen and the Federal Government would have no say in the matter. This is as the Founding Fathers designed. The Federal Government may never be in a position to impose or influence a direct tax upon citizens.

Is Roberts' position that "A tax on going without health insurance does not fall within any recognized category of direct tax" actually true? Roberts says, "Capitations are taxes paid by every person, 'without regard to property, profession, or any other circumstance.'" Since this is not correct conclusion in practical operation, it would stand to reason that if an American did nothing, as in "or any other circumstance," a tax for not buying health insurance must be direct as a mandate. Is this any different from the school yard bully who demands that others pay him to use the playground? The bully demands what he places directly upon those who have no choice. Such is the case with ObamaCare. The Individual Mandate is not and cannot be an indirect tax; it must be direct.

Roberts obfuscates further. He states,

The whole point of the shared responsibility payment is that it is triggered by specific circumstances—earning a certain amount of income but not obtaining health insurance.

His reference to "specific circumstances" does not make the mandate any less direct. In fact, since *taxpayers* are the targeted class, one may argue the tax is direct upon those *individuals*. If the Supreme Court suspends its responsibility to properly define and apply the terms "penalty" and "tax," as well as "direct" and "indirect," it neglects to label a direct tax as direct.

A discerning justice cannot escape that any tax assessed as a result of an election, whether one chooses to purchase cigarettes or gasoline, must be indirect. Only a direct tax remains. For those who do not elect to buy health insurance, the Individual Mandate must be direct upon them. Roberts' suggestion that "The payment is also plainly not a tax on the ownership of land or personal property" is void of common sense. Did he

not already state “Capitations are taxes paid by every person, ‘without regard to property, profession, or any other circumstance?’”

Since we know the Government’s secret regarding jurisdiction, let’s distill the truth of the matter. As opposed to handling the Individual Mandate as a direct tax apportioned among the States, which the Government will and may never do, Congress sought to penalize taxpayers themselves, those already within the jurisdiction of congressional taxing power and subject to an indirect tax. Those ensnared within this word, tax, and jurisdictional scheme are taxed indirectly. Taxpayers, we must conclude are within federal jurisdiction upon election for a federal benefit or status. However, it would be a direct tax upon those outside of federal control, but captured by the wide ObamaCare net.

Roberts continues to mischaracterize direct taxation. He says there may “be a more fundamental objection to a tax on those who lack health insurance,” as the tax is “for an omission, not an act.” Roberts posits,

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.

While a lay person would challenge that there is no difference between abstaining from commerce and not being taxed for abstaining, Roberts does not.

Roberts says “... it is abundantly clear the Constitution does not guarantee that individuals may avoid taxation through inactivity.” Based upon the fundamentals of taxation alone, his position lacks merit. Distinctly absent is any explanation for his groundless conclusion. Since indirect taxes are elections and, as a practice, direct taxes are no longer used by the Federal Government, and have not been used for some time, one may not be taxed simply for being inactive. The idea that the Individual Mandate penalty is a tax upon inactivity is a constitutional impossibility. To believe so is federal folly, if only judicially.

The Constitution, as Roberts is aware, applies exclusively to the United States Government, which is exactly why this document is revered. The Constitution constrains the Federal Government from doing what it may not and enumerates what is permitted. The first Ten Amendments were inserted to protect rights that stress Government constraints.

The absurdity of Roberts' argument leads to his equally untenable position that

A capitation, after all, is a tax that everyone must pay simply for existing, and capitations are expressly contemplated by the Constitution.

We already dispatched with the deception that the Federal Government may tax citizens directly. We must acknowledge that Americans are not and cannot be taxed for simply existing. Such a tax has never been imposed in the history of the American Republic. To suggest that such a tax is possible is fallacious. Moreover, coupled with the Tax Clauses, such a tax is inconsistent with Roberts' observation that the Commerce Clause "protects us from federal regulation... so long as we abstain from the regulated activity." If one exists and is not involved in a regulated activity, why would private citizens be subject to taxation?

Roberts suggests the opposite. "But from its creation, the Constitution has made no such promise with respect to taxes." Once again, the Constitution applies to the Federal Government and does not "promise" Americans anything. It stipulates what the Government may or may not do. Remarkably, Roberts secures a quote by Benjamin Franklin for support, "... in this world nothing can be said to be certain, except death and taxes." Franklin's words add no redeeming value to Roberts' position. One may easily avoid taxation by inactivity as die from inactivity.

The argument of inactivity, Roberts proffers, "depends on whether Congress can exercise what all acknowledge to be **the novel course of directing individuals** to purchase insurance." (Notably, although he refers to the Commerce Clause to make this observation, Roberts acknowledges what is new as "**directing individuals** to purchase insurance", yet, he refuses to promote the possibility the Individual Mandate is a **direct tax**.) He explains, "Congress's use of the Taxing Clause to encourage buying something is, by contrast, not new." Though he contradicts himself by referring to a "novel course" that is "not new," unbelievably, he cites "tax incentives" to encourage purchases. Compelling a purchase is vastly different from encouraging a purchase. Roberts frustrates and confuses his argument when he uses the word "encourage."

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.

Now, we must brace ourselves for the next point. Since he *soundly defeated* all opposing arguments, Roberts states,

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.

Roberts' presumption and conclusion are without constitutional basis. This sets the stage for Roberts' revelation that, while there are limits to congressional taxing power,

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.

If this is not enough to escalate declamation and alarm, Roberts states the Individual Mandate is a tax within the taxing power and "... we need not here decide the precise point at which an exaction becomes so punitive that the taxing power does not authorize it." Roberts summarily discounts as punitive a tax that is nearly a thousand dollars while he states that the "power to tax is not the power to destroy while this Court sits." Just as any amount of a tax is relative, with any legal interpretation, the "power to destroy" is relative to the time in which the quote is used and the tax legislation is run through the judicial gauntlet.

As Roberts explains,

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

His cavalier perspective provides him with but one conclusion. A tax imposition "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." Although he uses the word "willingly," Roberts cannot possibly hold the view that one has a choice when he is mandated to do something or be penalized.

After reading the disparate opinions from three factions, one may easily conclude that the rights and liberty of Americans are but an

afterthought to the majority of justices. Such is the impact of presumption and the unwitting waltz by millions of Americans into federal jurisdiction, Americans who sought federal benefits and received a corresponding federal status. Contrary to the Founding Fathers, President Pierce, Justice McReynolds, and Justices Story, Thomas, Scalia, and Kennedy, Chief Justice Roberts and his crew disparage the Constitution and defeat liberty. While the dissenting justices are congruent with Story and those who voiced public declamation and alarm, the disciplined who defined terms within the grammatical framework of the Constitution, Roberts shuns these deferential and fundamental practices. He does not choose to defeat the proposition that the Constitution permitted such a tax. This may be history's greatest blemish upon the Roberts Court.

While Roberts and the majority employ a number of mutually exclusive conditions as fodder to presume ObamaCare as constitutional, their logic is wanting. Any man of normal intellect and conscience knows ObamaCare is unconstitutional for the same reasons. The Constitution was written for comprehension by the average man. Americans do not need legal scholars to explain the cause of angst ObamaCare creates within the minds and hearts of those who wish to be free.

While Roberts concludes the penalty is a tax, the people conclude differently; the penalty is a penalty. Roberts calls the tax an indirect excise; the people know it is as a direct tax. Roberts determines Congress has power over the inactivity of private citizens; the people know this is impossible. Roberts creates general impressions by and through flawed specifics while the people covet incontestable specifics which perpetuate generalizations that are timeless and true.

What is axiomatic to a free people makes it difficult to reconcile Roberts' conclusions. He claims, "The Federal Government does not have the power to order people to buy health insurance." A free people already know this to be true. Roberts states, "Section 5000A would therefore be unconstitutional if read as a command." Yet, under the Constitution, Roberts formalizes, "The Federal Government does have the power to impose a tax on those without health insurance." At the beginning of his opinion, Roberts writes,

... it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance.

Even though his logic, process, discipline, and integrity are suspect, he concludes, "Section 5000A is therefore constitutional, because it can reasonably be read as a tax."

Meanwhile, most Americans are dumbfounded with Roberts' conclusions akin to Alice in Wonderland-like<sup>8</sup> insanity with a Kafkaesque and Orwellian ring. How does a so called indirect tax upon inactivity avoid the label of a command when Americans are mandated to buy required health insurance or be penalized with a tax that is direct and Americans are without federal jurisdiction and enforcement?

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<sup>8</sup> [https://www.adobe.com/be\\_en/active-use/pdf/Alice\\_in\\_Wonderland.pdf](https://www.adobe.com/be_en/active-use/pdf/Alice_in_Wonderland.pdf)

## The Art of the Con(stitution)

There is perhaps no greater threat to liberty than the power wielded by five Supreme Court Justices who, as it should be labeled, *splinter* an argument to the ridiculous. To splinter is the purposeful reduction and distortion of logic and truth; splintering is the rejection of balance in an argument with the intent to reach a contrived conclusion. As a practice, splintering either narrows or broadens by narrowing an argument for the convenience of marginalizing or dismissing a complete and healthy alternative. Splintering exists throughout the ObamaCare decision. The main dissent opinion dignifies a penalty for what it actually is, a penalty, and that a tax may be nothing but a tax; but the majority splinters the whole when it offers a penalty as a tax because, among other reasons (note the splintering), *the penalty is treated like a tax*. The majority needed a splintered interpretation as the basis for its conclusion that Congress was compliant with the Constitution.

Feigned legal analysis allows the Court to follow behind Congress with the aim of policing, splintering, unsound and unconstitutional legislation into the *constitutional*. The effects of splintering are beyond question. Although Congress exceeds what was unacceptable in the past, the Court sanctifies such congressional power in the present by splintering to the ridiculous. We need only consider Chief Justice Roberts' argument concerning the Anti-Injunction Act.

The Anti-Injunction Act forbids the nonpayment of a tax with the filing of a suit. A taxpayer must first pay the tax and then sue for a refund. The reasoning is that the Government would suffer from less revenue if taxes were not paid. By ensuring payment, the Government continues to function.

Given our extensive study of ObamaCare, we are in an ideal position to weigh Roberts' analysis about the Anti-Injunction Act, which he addresses at the start of his majority opinion. His analysis was deliberately withheld until now. In light of generalizations, the use of specifics and non specifics, and other legal analysis ploys, like splintering, we must understand the totality of these ploys to appreciate the demise of liberty. Doing so allows us to witness how the Court perverts the law as a means to consecrate what is unconstitutional.



Here is Roberts’ opinion concerning the Anti-Injunction Act and its application to ObamaCare.

II

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

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

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

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

Amicus argues that even though Congress did not label the shared responsibility payment a tax, we should treat it as such under the Anti-Injunction Act because it functions like a tax. It is

true that Congress cannot change whether an exaction is a tax or a penalty for constitutional purposes simply by describing it as one or the other. Congress may not, for example, expand its power under the Taxing Clause, or escape the Double Jeopardy Clause's constraint on criminal sanctions, by labeling a severe financial punishment a "tax." See *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 36–37 (1922); *Department of Revenue of Mont. v. Kurth Ranch*, 511 U. S. 767, 779 (1994).

The Anti-Injunction Act and the Affordable Care Act, however, are creatures of Congress's own creation. How they relate to each other is up to Congress, and the best evidence of Congress's intent is the statutory text. We have thus applied the Anti-Injunction Act to statutorily described "taxes" even where that label was inaccurate. See *Bailey v. George*, 259 U. S. 16 (1922) (Anti-Injunction Act applies to "Child Labor Tax" struck down as exceeding Congress's taxing power in *Drexel Furniture*).

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

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

The Government disagrees. It argues that §5000A(g)(1) does not direct courts to apply the Anti-Injunction Act, because

§5000A(g) is a directive only to the Secretary of the Treasury to use the same “methodology and procedures” to collect the penalty that he uses to collect taxes. Brief for United States 32–33 (quoting *Seven-Sky*, 661 F. 3d, at 11).

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

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

That argument has force only if §6201(a) is read in isolation. The Code contains many provisions treating taxes and assessable penalties as distinct terms. See, e.g., §§860(h)(1), 6324A(a), 6601(e)(1)–(2), 6602, 7122(b). There would, for example, be no need for §6671(a) to deem “tax” to refer to certain assessable penalties if the Code already included all such penalties in the term “tax.” Indeed, amicus’s earlier observation that the Code requires assessable penalties to be assessed and collected “in the same manner as taxes” makes little sense if assessable penalties are themselves taxes. In light of the Code’s consistent distinction between the terms “tax” and “assessable penalty,” we must accept the Government’s interpretation: §6201(a) instructs the Secretary that his authority to assess taxes includes the authority to assess

penalties, but it does not equate assessable penalties to taxes for other purposes.

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

From the outset, Roberts explains the “need to be sure we have the authority” to adjudicate ObamaCare. Only with the proper authority may the Court determine if Congress has the power to impose the Individual Mandate as a tax. Roberts notes, “The... challenge to the mandate thus seeks to restrain the penalty’s future collection.” This poses no insignificant conundrum. If the penalty is a tax, the Anti-Junction Act precludes the Court from “turning to the merits.” Should we be surprised that the Government argues the penalty is not a tax? After all, Congress needs Court approval to quell the political and legal declamation and alarm that the legislation is unconstitutional. Thus, Congress needs to ensure that the Court has the requisite authority to decide there is congressional constitutional authority to enact ObamaCare, however the Court or Congress justifies that authority.

Roberts is in an unfortunate position. He must determine whether the penalty is a tax and, if so, foreclose upon the Court’s involvement and place Congress in a precarious spot. What is a Chief Justice to do? We know the answer by now. Roberts determines the Individual Mandate is a penalty and not a tax under the Anti-Injunction Act. This is quite a contradiction to Roberts’ blessing in the latter portion of his decision that the penalty is a tax which Congress “need[ed] to be sure [it] h[ad] the authority.”

With remarks from Amicus that the IRS treats the penalty as a tax, exactly as Roberts did in his majority opinion, Roberts rejects this reasoning for purposes of the Anti-Injunction Act. Roberts nimbly asserts the Anti-Injunction Act applies to taxes. He then boldly declares,

Congress, however, chose to describe the “[s]hared responsibility payment” imposed on those who forgo health insurance not as a “tax,” but as a “penalty.” §§5000A(b), (g)(2). There is no immediate reason to think that a statute applying to “any tax” would apply to a “penalty.”

Is Roberts the least hesitant when he resolves,

Congress's decision to label this exaction a "penalty" rather than a "tax" is significant because the Affordable Care Act describes many other exactions it creates as 'taxes.'?

Then, with the fail-safe use of presumption, he introduces the refined art of splintering.

Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.

For both Roberts and Congress, the end is not as important as the means to that end.

What are sane people to think? Is a penalty not a tax so the Court may have the authority to substantiate congressional legislative authority to tax? This question acquires greater weight when Roberts decrees,

It is true that Congress cannot change whether an exaction is a tax or a penalty for constitutional purposes simply by describing it as one or the other.

Is this not what Roberts accomplishes?

The Court's reluctance to pass upon the soundness of congressional policy is sourced within the art of splintering. What else justifies the divide between judicial oversight in 1819 and 2012? Reluctance to defend what is sound is a pervasive posture of the modern Supreme Court, a posture Roberts employs when he defers to congressional latitude to handle how its own creations "relate to each other." How Congress' creations relate is Roberts' justification that the Anti-Injunction Act does not apply to ObamaCare, a conclusion that is convenient for the Court and fortunate for Congress.

However, Roberts' words, "... the best evidence of Congress's intent is the statutory text" paint him into the proverbial corner. That corner becomes problematic with his observation that, "We have thus applied the Anti-Injunction Act to statutorily described 'taxes' even where that label was inaccurate." Lest we lose perspective, the Court determined the Individual Mandate penalty to be a tax whether this was accurate or not.

Roberts notes that the Anti-Injunction Act was inapplicable to the “Child Labor Tax” in *Drexel Furniture*. He said,

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.

When life is viewed “through the looking-glass”<sup>9</sup> of Congress, as viewed “through the looking-glass” of the Court

Congress can, of course, describe something as a penalty but direct that it, nonetheless, be treated as a tax for purposes of the Anti-Injunction Act.

With such duplicity, Roberts provides cover for Congress with his admonishment that, since the Individual Mandate is not on par with any other tax/penalty subject to the Anti-Injunction Act, it does not apply.

Rather than belabor the ins and outs of splintered interpretation for both *ObamaCare* and the Anti-Injunction Act, a man of normal intellect and conscience might expect the Supreme Court to state plainly,

In *ObamaCare*, Congress enacted a penalty that must be treated as a penalty and only a penalty to preclude the enforcement of the Anti-Injunction Act. If the penalty is deemed a tax, the Court cannot adjudicate *ObamaCare*. The Federal Government has proffered that the Anti-Injunction Act does not apply. The Court agrees. Since the penalty is not a tax, the Court was able to decide whether or not Congress had the power to impose the Individual Mandate penalty as a tax. With this judicial authority in hand, because the penalty was not a tax, the Court decided that Congress may deem the penalty a tax with power under the Taxing Clause. Thus, hereafter, the penalty will be deemed a tax to allow the Individual Mandate to survive constitutional scrutiny and, thereby, escape humiliating defeat. The means by which the Court justifies either of the foregoing conclusions may and will defy reason. While we appreciate that Americans find it contemptible that the Supreme Court and the Federal Government play both ends to the middle, such declamation and alarm has no bearing upon the Court or how

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<sup>9</sup> [https://en.wikipedia.org/wiki/Through\\_the\\_Looking-Glass](https://en.wikipedia.org/wiki/Through_the_Looking-Glass)

Congress, the President, and Court view their ever evolving constitutional roles.

In the absence of such directness, Roberts defers to the Government and does not invoke the Anti-Injunction Act. Why? He splinters that the Individual Mandate directs “the Secretary of the Treasury to use the same ‘methodology and procedures’ to collect the penalty that he uses to collect taxes.” Roberts closes his rationale with,

In light of the Code’s consistent distinction between the terms “tax” and “assessable penalty,” we must accept the Government’s interpretation: §6201(a) instructs the Secretary that his authority to assess taxes includes the authority to assess penalties, but it does not equate assessable penalties to taxes for other purposes.

With his belief that the penalty is not a tax for purposes of the Anti-Injunction Act, does Roberts contradict the balance of his majority opinion that the penalty is a tax? Any number of references within his majority opinion supports his decision that the penalty is a tax. Consider the following incomplete list of Roberts’ statements:

- 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.
- ... 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.
- 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.
- No one would doubt that this law imposed a tax, and was within Congress’s power to tax.
- That conclusion [the Individual Mandate is a tax within congressional power to tax] should not change simply because Congress used the word “penalty” to describe the payment.
- 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*.

Knowing that the Constitution defines and limits the scope of the Federal Government, the Supreme Court's seal of approval for ObamaCare defies logic and destroys liberty. Whether we examine jurisdiction, taxation, or federal control over inactivity, the Court's response is unsound. At a minimum, Robert's opinion leaves Americans even more puzzled.

Where does this leave liberty? The answer is as simple as it is self-evident. Beginning in 1937, when the legislative, executive, and judicial branches began to weasel and worm into every facet of a free people's existence, liberty began to sneak out the back door of the Republic. Quite telling, in 2012, while the people did voice declamation and alarm, they did relatively little to reverse ObamaCare. A liberty-minded people would have mounted an offensive rather than capitulate. Capitulation is the most telling response. No response reflects no rebuttal and furthers presumed federal jurisdiction. Congress, the President, and the Court did the same; all three branches presumed jurisdiction.

This brings us back to Ginsburg. With a thorough understanding of presumed and actual federal jurisdiction over taxpayers, which more than substantiates ObamaCare and the Court's conclusion, one may be inclined to ask: Am I liable, if only by presumption? The answer is a certainty. How does one rebut the presumption and the attendant liability? While the answer is beyond the scope of this book, this is the path to follow. A challenge to wholesale federal oversight is necessary if liberty is to take its rightful place in America.

There is a tremendous contrast between liberty that thrived in the first half of the American Republic and its waning presence in the latter. Objective analysis of any point in time, whether 1792, 1854, 1862, 1937 or 2012, reveals subtle and flagrant blows to the mindset and philosophy of liberty. As if touching tangibles, we may weigh the influence of decision makers, actions, words, legal ploys, deception, ignorance, arrogance, splintering and more.

While one might be inclined to grant absolute deference to a man wrapped in a flowing black robe and honor his words based upon his title as "Chief Justice," the sober-minded seek credible reasons for his decisions, reasons buried deeply within the unstated, reasons obscured because of legal ploys, like splintering. If the sober-minded understand the reasons for the plausibility of ObamaCare, any actions they undertake will be predicated upon their love of liberty. If no action is taken, they deserve what they get, forced federal health care and further loss of liberty.



As Chief Justice, one may easily conclude that Roberts cares less for liberty than his priority to save a statute at any cost. If Roberts had humbled himself and defined words and applied their meanings in the spirit of Story, Scalia, Thomas, Kennedy, and Alito, he would have tipped the scales for a 5 to 4 decision in defeat of ObamaCare. This would have squelched public declamation and alarm and advanced the cause of liberty and all associated God-given rights. A referendum against ObamaCare would have equaled the influence of any constitutionally-minded jurist sitting in Roberts' stead. If the lawyer who wrote the Amicus Brief and defended the Anti-Injunction Act as applicable were a justice on the high court, ObamaCare might not have been reviewed favorably, much less sanctioned. Such is the power of one man.

The alteration of any aspect of American history may have netted a different outcome for ObamaCare in 2012. Is a result from an altered past any different than a maligned interpretation of the past in the present in support of ObamaCare? The result is the same. Historical context begs for objective and full disclosure.

With objective and complete disclosure, we rest upon certainties that prove unconstitutional authority. We are certain the Federal Government is limited in scope. We are certain of the right to be left alone, especially when inactive. With certainty, we may rebut generalizations and specifics held by those with either narrow or broad perspectives that do not provide transparency. We are certain that loyalty to maligned perspectives breeds reflexive and unquestioning support for federal initiatives like ObamaCare. Such blindness, not unlike America's blindness to the implications of actual or presumptive federal jurisdiction, speaks to ignorance, ideology, or motivations that are inconsistent with what is certain.

Contrasting the dissent opinion with those of Ginsburg and Roberts is necessary. We know with certainty that, except for the power they wield, the justices who backed the majority opinion are no different than Americans in possession of what is perceived full disclosure and objective analysis. Measured by the level of declamation and alarm from twenty-five States and innumerable citizens, the ObamaCare initiative may be viewed as yet another drop down the slippery slope to comprehensive and irreversible federal control. Regardless of the federal initiative, be it social security or universal health care, the vice is tightened with every unconstitutional interpretation by Congress or the Court, or in the case of ObamaCare, the President.

To appreciate the frightening extent of federal control and America's nearly complete loss of liberty, refer to the hypothetical of a man's inability to get a job or passport without an SSN. This hypothetical is now a reality in America. While securing a job without an SSN has been problematic for decades, if only because employers are too fearful to contradict the IRS and "the law" that does not exist or apply, in 2016, the Federal Government denied passports for those without an SSN.

We have traversed eighty years since 1937, the year the Supreme Court adjudicated *Steward Machine* and acknowledged the *soundness* of the federal social security scheme, a scheme which lures Americans into federal control. We know that those who accept this benefit become federal persons, individuals, and taxpayers or fiduciaries within the jurisdiction of the United States Government. We are dealing with certainties; we have full disclosure and are objective about these facts. We defined legal terms. We understand the proper application of their meanings. We read the statutes. With a new law, the Government exercises a new power, the novelty of rejecting passport applications without an SSN, a far greater harm than the ObamaCare Individual Mandate.

Let's review even more certainties. By virtue of the Constitution, the Federal Government is limited in power and scope. The Government may only control what it creates. Those who accept a federal benefit are creations under federal law or they are fiduciaries of those creations, which still makes them federal creations. Conversely, those who either do not accept a federal benefit or rescind acceptance of that benefit, akin to 26 USC 6013(g)(4)(a), rebut both federal jurisdiction and the presumption.

A law which allows the Federal Government to deny passports to applicants without SSNs presupposes that Americans are legally defined as federal citizens. This is the unstated premise embraced by the Supreme Court that ensured the viability of ObamaCare. The impact from this unstated premise is nothing less than staggering. If Americans are not able to travel outside of their country, they are imprisoned within their country. They are not free. While comparisons are odious, which is the greater affront to liberty, the denial of the natural right to travel or the mandate to buy health insurance?

Actual or presumed federal citizenship and the power to deny passports may be defeated. Such a defeat begins with knowing who one is under the law. For example, there is an historical distinction between an *American* and a *United States citizen*.

- A “U.S. Citizen” upon leaving the District of Columbia becomes involved in “interstate commerce”, as a “resident” does not have the common-law right to travel, of a Citizen of one of the several States. *Hendrick v Maryland S.C. Reporter’s Rd.* 610-625 (1914)
- ... the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal Government. *Maxwell v Dow*, 20 SCR 448 at 455
- The only absolute and unqualified right of a United States citizen is to residence within the territorial boundaries of the United States... *U.S. v Valentine*, 288 F. Supp. 957
- Therefore, the U. S. citizens residing in one of the states of the union, are classified as property and franchises of the federal government as an “individual entity.” *Wheeling Steel Corp v Fox*, 298 U.S. 193 (1936)
- The rights and privileges, and immunities which the fourteenth constitutional amendment and Rev. St. section 1979, for its enforcement, were designated to protect, are such as belonging to citizens of the United States as such, and not as citizens of a state”. *Wadleigh v. Newhall* 136 F. 941 (1905)6
- We have in our political system a Government of the United States and a government of each of the several states. Each is distinct from the other and each has citizens of its own...*U.S. v. Cruikshank*, 92 U.S. 542 (1876)
- In the Constitution of the United States the word "citizen" is generally, if not always, used in a political sense to designate one who has the rights and privileges of a citizen of a state or of the United States. It is also used in the first section of the Fourteenth Amendment. *Baldwin v. Franks*, 120 U.S. 678
- A person is born subject to the jurisdiction of the United States, for purposes of acquiring citizenship at birth, if his or her birth occurs in territory over which the United States is sovereign, even though another country provides all governmental services within the territory, and the territory is subsequently ceded to the other country. *3C Am Jur 2d, Aliens and Citizens, §2689, Who is born in United States and subject to United States jurisdiction*
- Citizenship of the United States is defined by the Fourteenth Amendment and federal statutes, but the requirements for citizenship of a state generally depend not upon definition but the

constitutional or statutory context in which the term is used. *Risewick v. Davis*, 19 Md. 82, 93 (1862); *Halaby v. Board of Directors of University of Cincinnati*, 162 Ohio St. 290, 293, 123 N.E.2d 3 (1954) and authorities therein cited.

- ...he was not a citizen of the United States, he was a citizen and voter of the State, ... One may be a citizen of a State and yet not a citizen of the United States. *McDonel v. The State*, 90 Ind. 320 (1883)]

In the interests of objective and complete disclosure, the United States Government denies passports to prevent those with outstanding federal tax or child support obligations from traveling. However, if a private citizen never had an SSN or revoked and rescinded the use of one, even if he never had an outstanding tax or child support obligation, the Government could not confirm him as a federal person or a corresponding fiduciary with pecuniary liabilities. Is it reasonable to conclude that since the Federal Government may not attribute the debts of a federal entity to a private citizen exercising a natural right to travel, the Government may not deny him a passport? Moreover, as discussed earlier, the only requirements to secure a passport is proof of identification and allegiance to the United States of America.

Is an American's lack of liability for social security taxes and the Individual Mandate tax any different? If one does not have an SSN, he need not rebut the presumption of federal jurisdiction. In fact, an American without an SSN would not be in the Government's database as a federal person. He cannot be a nonresident alien individual or a resident alien individual. He is without certain congressional taxes from federal benefits and is not burdened by the underlying federal statutes and regulations. When the Government applies laws broadly, without discrimination, it creates federal persons of all Americans and expects all passport applicants to provide an SSN or lose more of their coveted liberty.

The Government's denial of passports parallels its enforcement of ObamaCare. All Americans are presumed to be within federal jurisdiction for any and all purposes. How does one escape what is pervasively applied? The general presumption that all Americans are federal persons precludes specifics that some are not. What is general is eventually perceived, applied, and accepted as true and creates the implication that specifics to the contrary are false. All the while, specifics that are true prove the general to be false.

The generalization that all Americans are gratuitously within federal jurisdiction for whatever reason could not have survived in 1792, 1854, 1862 or 1895. However, in 1937, 2012, and 2016, with, respectively, the initiatives of social security, ObamaCare, and the denial of passports without an SSN, the reverse is true. That Americans are federal persons by presumption is certain. Why is there such a disparity between 1792 and 2016? What specifics justify this shift? Moreover, why is this false generalization unchallenged? We know the answers already. Americans are reluctant to seek objective disclosure and offer an appropriate rebuttal.

In 2000, I revoked and rescinded the use of a social security number. I served documents upon the Secretary of State, the Secretary of the Treasury, and the Social Security Administration. In 2002, I submitted an application for a passport without a social security number. I disclosed that I did not have one. I provided extensive verification of identification and affirmed allegiance to the United States of America. The United States Passport Agency, which is under the State Department, mailed my passport within six weeks. I received a passport without an SSN.

In May 2017, I attempted to renew my passport. I went to the agency's office in Washington, D. C. and paid for expedited service. The agent asked for a social security number. When I disclosed that I did not have one, she asked me to sign a sworn affidavit attesting to this fact. She then looked into her records and confirmed that I did not provide an SSN in 2002. After paying the fee, she gave me assurances that I would receive a new passport within two weeks. It never came. In its stead, I received a letter asking for an SSN. Even after providing extensive documentation and legal explanations that I was not a federal person and the law was limited in application, I received a full denial from the agency in August, 2017.

I am not a federal person or fiduciary of a federal person with an outstanding tax obligation. I do not have a child support obligation that prevents me from getting a passport. These are the reasons that would prohibit passport renewal for a federal person. However, I was denied a passport for failure to provide a social security number. Is this any different than stating that since one is not a federal person, he is not able to get a passport? This question must be answered.

To illustrate the importance I placed upon my singular act of revoking and rescinding the use of an SSN, I mailed a comprehensive document signed under penalty of perjury to the Social Security Administration in November of 2016. Although I effectively did the same

in 2000, given the nature of the Federal Government, I chose to memorialize my decision with such measures that would ensure the document was admissible in a court of law.

The SSA replied with a letter filled with generalizations supported by specifics that apply to *federal persons*. With respect to my status and efforts, the generalizations and specifics are false. Before we review the language, let's reaffirm some fundamentals. The Federal Government cannot have jurisdiction over those who are not within its purview. The United States is a corporation, a legal fiction that exists within Washington D. C. and exercises only those powers delegated to it under Article 1, Section 8 of the Constitution. The Social Security Administration (SSA) is a federal agency with limited powers to satisfy the requirements of the federal statute under 42 USC and the regulations under 20 CFR. Those within federal jurisdiction or employees in a trade or business on behalf of the United States are obligated to comply, voluntarily, with the SSA. With a solid understanding of legal terms, we are more aware of jurisdictional issues and the limited scope of federal authority.

Noteworthy, the SSA letter I received is without a signature and is not signed under penalty of perjury or with any attestation to the truth of the matter by an agent of the agency. This is a classic form letter, a template behind which the SSA and the government hides. Federal agencies use the prestige of the government without an officer or federal agent accountable for agency arbitrary decisions or actions. Most Americans would accept this SSA response as law and would not rebut the conclusions. This is the desired effect. The Government cannot risk thousands of informed Americans who are not within or employed by the *United States* resigning as trustees or fiduciaries to legal fictions, federal entities.

The SSA letter begins with "People cannot voluntarily end their participation in the program." Is this true? Perhaps for those obligated under the law. Does this statement affect those who are not within SSA authority in the first place? No. The SSA then offers, "Unless specifically *exempt* by law, *everyone* working in the *United States* must pay Social Security taxes." This statement is true for *everyone* working in the *United States*; they *must* pay these *taxes* unless *exempt*. Since the SSA *presumes* that I am such a *person* and ignores my *rebuttal* of its presumption, the agency refuses to acknowledge the truth that I am without its authority.

The SSA then states "A *person* must voluntarily file an application to receive Social Security *benefits*." This statement is true for those *within* the authority of the *United States* and those *without its authority* who

*accept the benefits?* We must recall that a benefit is accepted voluntarily. Moreover, benefits are taxed by excise, an indirect tax, that must be paid as a result of accepting the privilege. This is vital to understand. The Federal Government does not have the wherewithal to *force* Americans to *voluntarily* accept any benefit.

The agency then says, "Once you have a Social Security number, we cannot cancel or destroy the record." I do not object to the SSA stating what *it* cannot do, whether true or not. I am only concerned about my responsibilities and the SSA's attendant responsibilities and liabilities. The SSA underscores its position with, "The Supreme Court has upheld the constitutionality of the Social Security Act." Based upon our research regarding ObamaCare, we must agree. The Court has confirmed that *the Act*, a federal statute, is legitimate and enforceable within the constraints of congressional taxing power. What does the exercise of a legitimate constitutional power have to do with an American living in freedom within the several States outside the congressional taxing jurisdiction for a particular tax tied to the acceptance of a federal privilege?

Finally, as if the foregoing discussion is not enough proof concerning the limits of federal authority, the SSA states,

The United States Citizenship and Immigration Services has *jurisdiction* over the issue of *citizenship*. Please direct any questions you may have about citizenship to the U. S. Citizenship and Immigration Services...

Let's examine this important disclosure. If an American is born within one of the 50 States of the Union, is he not a Citizen of that State and, thus, a Citizen of the ***united*** States of America? Why would an American ever need to interact with this federal agency about citizenship?

The *United States* Government has a constitutional responsibility to oversee immigration and to grant a legal status to those entering the *United States*. It does not grant citizenship to those born within the 50 States. We already established that the Supreme Court held that one could be a Citizen of the several States but not a *citizen of the United States*. The *United States* may have citizens of its own while the 50 States have distinct citizens. Why would an American, who is not a federal person, fall under the auspices of the United States Citizenship and Immigration Service? This is a federal agency. Didn't the Supreme Court acknowledge that Congress could determine how its own creations relate

to each other? Wouldn't a *federal person* relate with the United States Citizenship and Immigration Service as to its status?

Americans who enter the *United States* for a federal benefit or status are *within* the jurisdiction of the *United States*. This is beyond dispute. The *United States* has plenary power within its jurisdiction and grants citizenship to those within its domain. We need only recognize the efforts of any President to deny access to illegal aliens and terrorists, those who do not have citizenship or *permission* to enter America. Meanwhile, the Federal Government cannot deny entry or exit to those who have a legal status, whether by Green Card, Visa, or passports. May the Government capriciously and frivolously affect the reasonable ingress or egress of Americans?

This SSA letter should give us reason to ponder the implications of unchecked federal authority. The more *power* Americans shamelessly concede to the *United States*, especially unlawful and unconstitutional power, the less freedom they possess. With ObamaCare, we see the devastating impact of splintering. When the Government gains greater power by splintering incrementally and with undetected means, it acquires what was impossible and inconceivable. What was unthinkable becomes possible, a result of individual and collective ignorance.

To understand the authority that precipitated federal control of the entire health care system, we must revert to the question of jurisdiction. Within Roberts' ObamaCare majority opinion, he frequently employs one salient distinction. He defines those liable for the Individual Mandate tax as *taxpayers*. Yes, the *United States* is merely exercising authority, narrowly defined, over those who are narrowly defined and within the scope of federal authority. Congress legislates and controls who and what are within its domain. Naturally, Congress requires *U. S. persons* within its control to comply with federal power exercised within the *United States*.

Now, ask this question: Are you able to rebut what Roberts and the Supreme Court narrowly articulated in writing? Are you within the class liable? Who is responsible for assessing and collecting the fines or penalties associated with a *U. S. person's* failure to subscribe to Obama Care? *It is the Internal Revenue Service*. Are you a taxpayer or a non taxpayer? Have you considered how and why the *United States* Congress has power to legislate the particulars of America's health care system? Are you liable to anything and everything that Congress dictates by legislation simply because you are pigeon-holed into a class of *persons* beholden to the Federal Government with and through the IRS? Finally, are you able to discern when a general representation is fallacious



because specifics prove otherwise? Or do you accept generalizations because you have no specifics?

## Splintering

There is a reason to splinter a word, message, meaning or intent. That reason is to deceive. Deception is employed for specific ends. An official may communicate to a class of people with the intent to draw those without that class into voluntary compliance. Those who are in positions of authority may believe so fervently in their ideological, religious, social or political message to the point of blindness. They are incapable or unwilling to concede to what is in order to engender what is not. Conversely, a messenger may not know a message is splintered or that he is a pawn within a larger scheme. Then there are those who hear a message intended for a particular group and believe they are included.

Splintering, which is a divisive and destructive tool, is only limited by a lack of imagination. The number of faggots within splintering is nearly limitless to the Government. The impact of splintering upon Supreme Court decisions has been incalculable; the harm brought to America and liberty is beyond doubt. Splintering is the means to distort generalizations and specifics with the intent to engineer a desired outcome. This is what occurred with ObamaCare.

Splintering must be expected when there is no unanimous consensus. While consensus does not necessarily represent truth, it underscores acceptance of a fundamental message. Divergent opinions offer scant agreement and specifics would apply only to a given interpretation. Each of the three ObamaCare factions, each with a divergent opinion, splinters to some small or significant degree.

Some of the ObamaCare factions splinter ideas narrowly to justify a narrow position. Other factions splinter ideas narrowly to apply a sweeping representation. The narrowness or broadness of an interpretation reflects a move from the center to the periphery, with the center representing truth and the periphery the obscured and extreme.

At the outset of the ObamaCare case, all three factions splinter a narrow representation of the legal terms *individual* and *person* and apply them broadly to all Americans. Each faction uses these terms without defining them. The terms *individual/individuals* and *person* and *persons* are used 452 and 87 times respectively throughout ObamaCare. By contrast, *citizen* and *citizens* are used 42 times and *American* and *Americans* 44 times. The disparity is 539 to 86.

Numbers do not lie. Presumption, one of the many faggots of splintering, allows the factions to apply individual and person pervasively

to all Americans. Because of the prestige of the Government alone, which is yet another faggot of splintering, Americans do not dare question the narrow interpretation and broad application that they are legally defined by the Federal Government as federal *persons* and *individuals*.

As we learned earlier, the use of *individual* and *person*, legal terms defined within the tax code, is not without purpose. Each faction refers to the tax code as the means to enforce the Individual Mandate tax. Faction 2, however, consistent with its conclusion that the Individual Mandate may not be a tax, does not sanction the code's application. Yet, Faction 2 does not reject the premise that all Americans are brought within the scope of the Individual Mandate as a penalty. If Faction 2 were to declare that not all Americans may be *persons* or *individuals* within federal jurisdiction for all things, this position would scale with Faction 2's criticism of the dissent's opinion for the Necessary and Proper Clause that "application rests upon a theory that everything is within federal control simply because it exists."

Although this may be the only time Faction 2 splinters, and it may have done so by omission, to its credit, it states,

The dissent claims that we "fai[l] to explain why the individual mandate threatens our constitutional order." Ante, at 35. But we have done so. It threatens that order because **it gives such an expansive meaning to the Commerce Clause that all private conduct (including failure to act) becomes subject to federal control, effectively destroying the Constitution's division of governmental powers.** Thus the dissent, on the theories proposed for the validity of the Mandate, **would alter the accepted constitutional relation between the individual and the National Government.**

Faction 2 clearly identifies that the Government and the *individual*, however defined, have a relationship that should not be altered. Reference to "all private conduct" is reassuring if *persons* are not "subject to federal control". Faction 2 continues.

The Federal Government can address whatever problems it wants **but can bring to their solution only those powers that the Constitution confers**, among which is the power to regulate commerce. None of our cases say anything else. **Article I contains no whatever-it-takes-to-solve-a-national problem power.**

With such certainty, one would have expected Faction 2 to clarify that not every person or individual may be liable for ObamaCare. Even though Faction 2 “cannot rewrite the statute,” it may identify who is or is not within federal enforcement of the statute before or as it judges its merits or demerits. Justice Story would have applauded Faction 2 had it determined that the statute’s words and grammatical construction eliminated the possibility that the law applied to everyone.

Each faction presumes that all Americans are within the scope of federal authority. This should be instructive and used for the defense of liberty. The Government demands compliance from all citizens without questioning their status or federal limits. However, if Americans are to be free and the Government accountable, Americans should question their status and the role of the Government. If Americans do not assert their status as a basic tenet of a statute’s application, they will not appreciate how the Government and Court splinter to an unconstitutional act.

### Faction 3

Curiously, Faction 3 alone, with Ginsburg at the helm, uses the term “U. S. Residents” in its opinion without defining the term. By omission or intentionally, she must presume all Americans are that label. Then, with a slew of statistics to depict the desperate state of the health insurance industry, Ginsburg ties U. S. Residents to the statistics without acknowledging the merits of the health care system until the ObamaCare initiative.

Statistics are easily manipulated to mold a biased outcome, as Ginsburg does with her list of numbers. She uses statistics deliberately to impart a supposedly ironclad finding. However, an impartial use of statistics would include all numbers. For example, along with the number of times *individual* and *person* are used throughout ObamaCare, I offered the number for *citizen* and *American*. Both sets convey a more objective representation. Numbers are not opinions and giving numbers for both sides of the argument may lead to a more reliable and balanced conclusion. For example, there is less need to ask why the legal terms *individual* and *person* are used from the tax code without explanation when the term *tax* and *taxes* are used 512 times within the ObamaCare decision. Most would realize the significance of the tax code. Now, had Ginsburg shared positive pre-ObamaCare health insurance industry numbers along with the negative, she would have established parity.

The statistics tar baby is furthered with Ginsburg's failure to forecast the downside of a post-ObamaCare health insurance market. Such splintering is in sharp contrast to her rosy, but yet-to-be-realized-world with ObamaCare. Disingenuous analysis is incomplete analysis. Ginsburg does not dignify analyst prognostications of escalating costs to *individuals* or risk to private insurers after ObamaCare, risk that would force them to leave markets. Ginsburg's omission may be for one simple fact; she wants a "single payer system."

The numbers for the social security ponzi scheme are no different. Ginsburg must know this federal scheme is on a path to bankruptcy and has been for decades. Social Security has underperformed and forebodes the fate of a federally controlled health care market. Yet, Ginsburg is silent on this possibility.

Even with the presumption that all Americans are *individuals* liable for ObamaCare, the use of slanted numbers to justify the failure of the insurance market and her emphasis on the superlatives of federal schemes, without mention of their demise, Ginsburg splinters further with the faggot of declarations. "States cannot resolve the problem of the uninsured on their own." Unfounded absolutes offered by those with no practical business or political experience do nothing but deceive. Perhaps she is unaware. However, Ginsburg summarily discounts the precedent tendered by Justice Cardozo in *Steward Machine* that a State may terminate its participation in the federal social benefits scheme. She ignores that a State is competently supreme to the National Government and, as a result, Ginsburg misapplies federal power in the present, even the likes of Cardozo could not have foreseen.

The following is from Cardozo's *Steward Machine* opinion:

Alabama is still free, without breach of an agreement, to change her system over night. **No officer or agency of the national Government can force a compensation law upon her or keep it in existence.** No officer or agency of that Government, either by suit or other means, can supervise or control the application of the payments.

Finally and chiefly, abdication is supposed to follow from section 904 of the statute and the parts of section 903 that are complementary thereto. Section 903 (a) (3). By these the Secretary of the Treasury is authorized and directed to receive and hold in the Unemployment Trust Fund all moneys deposited therein by a state agency for a state unemployment fund and to invest in obligations

of the United States such portion of the Fund as is not in his judgment required to meet current withdrawals. We are told that Alabama in consenting to that deposit has renounced the plenitude of power inherent in her statehood.

The same pervasive misconception is in evidence again. All that the state has done is to say in effect through the enactment of a statute that her agents shall be authorized to deposit the unemployment tax receipts in the Treasury at Washington. Alabama Unemployment Act of September 14, 1935, section 10 (i). **The statute may be repealed. Section 903 (a) (6). The consent may be revoked. The deposits may be withdrawn. The moment the state commission gives notice to the depository that it would like the moneys back, the Treasurer will return them. To find state destruction there is to find it almost anywhere.** With nearly as much reason one might say that a state abdicates its functions when it places the state moneys on deposit in a national bank.

There are very good reasons of fiscal and governmental policy why a State should be willing to make the Secretary of the Treasury the custodian of the fund. His possession of the money and his control of investments will be an assurance of stability and safety in times of stress and strain. A report of the Ways and Means Committee of the House of Representatives, quoted in the margin, develops the situation clearly. **(13)** Nor is there risk of loss or waste. The credit of the Treasury is at all times back of the deposit, with the result that the right of withdrawal will be unaffected by the fate of any intermediate investments, just as if a checking account in the usual form had been opened in a bank.

The inference of abdication thus dissolves in thinnest air when the deposit is conceived of as dependent upon a statutory consent, and not upon a contract effective to create a duty. By this we do not intimate that the conclusion would be different if a contract were discovered. Even sovereigns may contract without derogating from their sovereignty. *Perry v. United States*, 294 U. S. 330, 353; 1 Oppenheim, *International Law*, 4th ed., 493, 494; Hall, *International Law*, 8th ed., 107; 2 Hyde, *International Law*, 489. The states are at liberty, upon obtaining the consent of Congress, to make agreements with one another. Constitution, Art. 1, section 10, par. 3. *Poole v. Fleeger*, 11 Pet. 185, 209; *Rhode Island v. Massachusetts*, 12 Pet. 657, 725. We find no room for doubt that they may do the like with Congress if the essence of their statehood is maintained

without impairment. **(14)** Alabama is seeking and obtaining a credit of many millions in favor of her citizens out of the Treasury of the nation. Nowhere in our scheme of government-in the limitations express or implied of our federal constitution-do we find that she is prohibited from assenting to conditions that will assure a fair and just requital for benefits received. But we will not labor the point further. An unreal prohibition directed to an unreal agreement will not vitiate an act of Congress, and cause it to collapse in ruin.

*Fifth:* Title III of the act is separable from Title IX, and its validity is not at issue.

The essential provisions of that title have been stated in the opinion. As already pointed out, the title does not appropriate a dollar of the public moneys. It does no more than authorize appropriations to be made in the future for the purpose of assisting states in the administration of their laws, if Congress shall decide that appropriations are desirable. The title might be expunged, and Title IX would stand intact. Without a severability clause we should still be led to that conclusion. The presence of such a clause (Section 1103) makes the conclusion even clearer. *Williams v. Standard Oil Co.*, 278 U. S. 235, 242; *Utah Power & Light Co. v. Pfof*, 286 U. S. 165, 184; *Carter v. Carter Coal Co.*, 298 U. S. 238, 312.

Ginsburg would have been more effective had she forecasted how the States could have “resolved the problem of the uninsured” on their own. Lacking this approach, the precedent established by Steward Machine morphs into what was never intended and furthers Ginsburg’s belief in a “collective action impasse” and that a “national solution [is] required”.

A supposed crisis and national solution afford Ginsburg the latitude to cite, miraculously so, “new tools” for Congress. With the exception of a “requirement that most individuals obtain private health insurance coverage,” which is the Individual Mandate, she does not identify the new tools. Now, are the tools *new* in the sense that they have existed for two-hundred and forty one years and were discovered only recently, or are the tools newly derived from a legitimate or splintered federal power? No matter how realized, the existence of new tools was necessary for Ginsburg to surmise that “by employing these tools, Congress was able to achieve a practical, altogether reasonable, solution”. While the other factions defeat ObamaCare, Ginsburg, under the same clauses of the Constitution, concludes differently. If the divide is too great, it must be bridged by splintering with “new tools.”

Though one would contend that persuasion must be the heart of any legal argument, the faggot of persuasion must be splintering. Ginsburg employs persuasion as an adjunct to the preceding and other faggots. She states,

The minimum coverage provision advances this objective **by giving potential recipients of health care a financial incentive** to acquire insurance.

The new tool, the mandate, gives an incentive that is, for all intents and purposes, punitive, at least in a non legal and financial sense. Not all splintering is effectively employed and sometimes it damages the message and impugns the messenger. When Ginsburg calls the incentive a “**toll**,” which is a “**tax penalty**,” an expression that is not even in 26 U. S. C. §5000A, her argument is weakened.

There are no stronger faggots of splintering than projection and expectation. Humanity is riddled with the practice of projecting what is expected. Projection may be appropriate when exercised by an employer or a superior seeking exacting performance standards. However, projection is misplaced when those without authority or experience create unwarranted, unwanted, and unrealistic impositions. Generally speaking, a free people abhor being told to do something that was not expected previously.

Ginsburg imposes a projection upon private business, exactly the same projection imposed by Congress, “ensure that individuals with medical histories have access to affordable insurance.” Justices without practical business experience expect private insurers to ignore fundamental business principles in order to satisfy implausible legislative aims. Ginsburg derides private insurers for assessing (rightly projecting) health insurance applicants based upon their medical history, a sound business decision which leads insurers to refuse coverage, increase the cost of coverage, or offer limited coverage.

By projecting, Ginsburg concurs with a congressional scheme to compromise these prudent business decisions. Congress expects and, therefore, projects “guaranteed issue,” “community rating,” and a mandate that the uninsured buy insurance to the detriment of the uninsured and private insurers. If the Court projects what Congress expects of private businesses, any superior claim, be it liberty or the right to contract, is relegated in importance.



Ginsburg refers to an adverse scenario involving seven States which placed projections upon private insurers. She notes the insurers could “raise premiums dramatically to cover their ever-increasing costs or they can exit the market.” This is what happened. Ginsburg ignored immutable laws of science, the science of business, rather than defer to alternative solutions for the number of the uninsured.

To burden private business with unfair projections and, in turn, citizens with mandated purchases are to impose unnecessarily. Ginsburg imposes without projecting the possibility that insurers would exit the market under tenuous ObamaCare realities. Not unlike the demise of the social security scheme, this is exactly what occurred. Ironically, what Ginsburg projects as necessary and proper under the Necessary and Proper Clause proved disastrous for liberty and the market after implementation of ObamaCare.

At the core of deception is distortion. Ironically, distortion may be so negligible that it remains undetected when grafted into a larger message. The lesser message becomes one with the greater. Ginsburg refers to a greater message expressed by George Washington:

We are either a United people, or we are not. If the former, let us, in all matters of general concern act as a nation, which ha[s] national objects to promote, and a national character to support.

Ginsburg echoes this quote with reference to James Madison: “As a result of the ‘want of concert in matters where common interest requires it,’ the ‘national dignity, interest, and revenue [have] suffered.’” Ginsburg adds, “What was needed was a ‘national Government . . . armed with a positive & compleat authority in all cases where uniform measures are necessary.’” She gratuitously grafts a subordinate message to a theme that looms large throughout American history and over the American Republic: the Government is available for all things national. Ginsburg’s assertion that ObamaCare rightly falls within the purview of the Commerce Clause as a national interest or crisis distorts what is actually national and constitutional in scope.

Although done under the General Welfare Clause, by comparison, Justice Story explained the scope of national exigencies.

Congress has not an unlimited power of taxation; but it is limited to specific objects, the payment of the public debts, and providing for the common defense and general welfare. A tax, therefore, laid by

Congress for neither of the objects, would be unconstitutional, as an excess of its legislative authority.

Ginsburg is not so disciplined. Such is the allure of distortion. Riding the coattails of a seasoned sentiment since this Country's founding, a sentiment consistent with the proper application of the Commerce Clause for national interests alone, Ginsburg effectively executes distortion. She distorts her definition of national interest with an already established precedent. When her projected version is viewed against this backdrop without proper context, she promotes her version as credible. Since Ginsburg wholeheartedly supports the Individual Mandate as a tax, we would be wise to heed Story's definition of general national matters.

Without the support of a majority, Ginsburg believes the number of uninsured and the rising cost of health care is a general national problem under the Commerce Clause. Why? She agrees that "the States are separately incompetent," but asserts "the Constitution was of necessity a 'great outlin[e],' not a detailed blueprint." If we accept that the States are incompetent, the Constitution would and should serve as an outline and not a blueprint. Meanwhile, Ginsburg supports ObamaCare as if the Constitution is a blueprint.

When a lesser message is severed from the greater, distortion fails to have the intended effect. This is why Ginsburg is unable to project her "practical" considerations and understanding of "actual experience" into a consensus. Her definition of a general national interest is inconsistent with a 1776 perspective, which has certainly been altered over the years, but not to a Ginsburg-radical sense in 2012. Is there any doubt that, to Ginsburg, a 1937 Court decision to impose Social Security and a 1942 decision to limit one farmer's excessive production of wheat led to a 2012 judicial decree under all constitutional clauses that all Americans inactive in the market must buy health insurance or pay a tax? Under this context, Ginsburg will never view the relationship between sound congressional judgment and health care as "clearly non-existent" or that "Congress acted irrationally." Nor will she accept as folly that the Individual Mandate is a "'reasonable connection' to Congress' goal of protecting the health-care market from **the disruption caused by individuals who fail to obtain insurance.**"

Ginsburg demonstrates that splintering is no more than mischaracterization. However labeled, and no matter how extreme the means or ends, Ginsburg uses black hole splintering as another means to mischaracterize. Black holes consume indiscriminately and completely.

They consume time, matter, and, in the case of Congress and the Court, projections that may never materialize.

Ginsburg presumes, in spite of “the manner established by our precedents,” that Chief Justice Roberts “relies on a newly minted constitutional doctrine,” a *new* tool that is different than her “new tools.” She rejects Roberts’ belief that the Commerce Clause does not permit the purchase of health insurance. While she says “Everyone will, at some point, consume health-care products and services,” she rejects Roberts’ claim that the time health care is purchased is the overriding concern. With her black hole, she swallows en masse what she finds untenable. In her estimation, what she deems irrational must disappear.

Ginsburg accomplishes this astronomical feat by referring to her splintered one-sided statistics as proof of the proximate need for health care as the predicate for the Individual Mandate. In this light, she supports what the congressional black hole captures.

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.

Congress could reasonably have viewed the market from a long-term perspective, encompassing all transactions virtually certain to occur over the next decade, see *supra*, at 19, not just those occurring here and now.

Not surprisingly, Ginsburg refuses to concede that her black hole does not affect the food or car markets. Her confidence is borne from a new “evil” that justifies a congressional “role... to delineate the boundaries of the market.” Ginsburg does concede, however, that “precedence” (which is not embraced by all justices in the sense of “we”) supports “[t]he proposition that Congress may dictate the conduct of an individual today because of prophesied future activity.” The individual and prophesied future activities are unaffected by the gravitational effects of black holes.

Ginsburg would have all believe that everyone is controlled by Congress because of what they will do. Without addressing the flaw in her argument, for not all will do some future activity, she relies upon relatively new comprehensive congressional control of all individuals. As

Congress presumes control, does the Court increase Government power by altering the past precedent of restraint to a new unbridled precedent?

Ginsburg's rejection of Robert's position that the car and broccoli markets are no different from health insurance is marginalizing, splintering that shape-shifts thoughts and words. Ginsburg does not weigh congressional power on a market to market basis; she equates the health care market to the purchase of a single product within another market. For a balanced perspective, Ginsburg should compare the health care industry with the transportation and food markets and discount specific reference to cars and broccoli. "Virtually everyone" uses transportation and buys food.

Roberts' position is not lessened by his use of cars, or bicycles, scooters, cars, taxis, buses, airplanes, and even shoes within the massive transportation market. And he is no less effective referring to apples, spinach or filtered water within the food market. He could have referred to cataract surgery, knee replacement, or massage therapy within the health care industry. The question is one of federal control over a market, not control over an individual within that market. If the likes of Ginsburg distort an argument by marginalizing purchases of unique products against a macro industry, rather than industry to industry comparisons against federal oversight, they splinter an argument for greater control over both entire markets and individuals.

Americans may forgo products and services within any market. All have the liberty and right to refuse an unwanted purchase, a purchase that may not be mandated. Any deviation from this baseline must be upon the keenest, unassailable, and non splintered power. When the Government mandates purchases, it is time to challenge federal encroachment under the strictest scrutiny. Granting a pass to unconstitutional encroachment gives rise to the possibility the Federal Government may deem that inactivity is activity, penalties are taxes, and mandating the purchase of insurance "regulates the interstate health-insurance and health-care markets" and "regulat[es] activists in the self-insurance market."

The euphemistic effect of converting an extremely healthy person into a self-insurance activist defeats the "warning that effective restraints on [the commerce power's] exercise must proceed from political rather than judicial processes." Ginsburg's repackaged philosophy of sound health as activism is a judicial splintering of power that furthers "political resistance," as well as judicial resistance, and is proof that Ginsburg fails to realize exactly why "state governments have rarely" imposed

mandates. Generally, legislators would not dare stoop to her level of splintering. Perhaps state officials are wise enough to know that robbing their citizens of liberty is political folly.

Ginsburg would be wise to recall that the ObamaCare vote in the House of Representatives and Senate lacked support of an entire political party, a defining political statement and proof of the advancement of an ideological agenda. Is such a polarizing vote a “novelty” and convenient for Ginsburg? She justifies it as a novelty by stating,

[I]n almost every instance of the exercise of the [commerce] power differences are asserted from previous exercises of it and made a ground of attack.

Whatever the constitutional clause she applies, Ginsburg stresses, “[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.” Aside from the fact that the Constitution was written with great discernment and not chosen, how does she arrive at this conclusion when “No political dreamer was ever wild enough to think of breaking down the lines which separate the states and compounding them into one common mass?”

Does the Constitution even hint of “regulating individuals?” When did the Government manifest this belief as a “practical operation?” With no constitutional basis for controlling individuals, federal acts against individuals must be proximate and the predicate for justifying this power.

### Faction One

No greater authority and trust was bestowed upon Roberts than to preserve the Constitution and America’s republican form of government. Many would argue that if Chief Justice Roberts extols constitutional principles save one, he denies the Constitution.

Who would not take comfort in Roberts’ sound argument under the Commerce Clause? He prizes that “the National Government possesses only limited powers; the States and the people retain the remainder.”

By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.

Roberts shares,

The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.

He relies upon the wisdom of past justices to limit federal power. Roberts adheres to the language,

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.

With such sound quotes and a balance constitutional philosophy, it is a marvel that Roberts decides that the Individual Mandate is constitutional.

However, Roberts is not infallible. Whether it is a question of motivation, weakness, or ideology, he splinters. His words that the Court could not “disavow restraints on federal power that the Constitution carefully constructed” were neutered on his watch and at his discretion. While Roberts splinters with his failure to define *individual*, he splinters significantly when he determines that the penalty is a tax. This is splintering by substitution and negates his impeachable arguments under the Commerce and Necessary and Proper Clauses.

Justices do not typically mix their arguments. Rather, they establish an argument under the Commerce Clause, for example, and prove their position. Then they move to their next argument. If a final argument supports a congressional act as constitutional upon the weakest measures, when the previous arguments ensured defeat, the statute survives. The point is clear. A tone of constancy may ring defeat through five arguments only to have a tone-deaf argument on inferior grounds chart America’s fate.

Roberts establishes a tone of constitutional constraint until his infamous argument under the Tax Clause. His decision is no different than government and private institutions proclaiming liberty for centuries throughout the land on any number of fronts and with various old tools only to state that the people are not free for some baseless reason. According to Roberts, he reconciles the defeat of liberty with the use a novelty. He commingles words and decides the *penalty argument is now a tax argument*. He uses other arguments to support his questionable constitutional conclusion.

If Roberts' tax position defeats each of his impregnable arguments, they must be inferior and his tax position superior. To illustrate, imagine a free people breathes oxygen (liberty) uninterrupted since the country's founding only to be denied this life source because of a federal act. The reason oxygen is denied is only because the strongest positions for oxygen are defeated. The substitution of a word for another is the same as the substitution of arguments. For example, if people believe a "peasant" boy is a "prince" and the prince ascends the throne, are his decrees "royal" and should they have the intended effect? Why not, unless the decrees are rebutted for lack of authority? The boy's status brings subsequent policies into question, just as an oxygen-rich people may be an oxygen-denied people from a change in policy.

In order to effectively illustrate the power of substitution, we will ignore that Roberts offers specific positions in support of each argument and apply the tone of these positions to all. When we commingle them, we may find that Roberts proves the general implausibility of the Individual Mandate under any and all arguments. Here are some positions that Roberts employs:

- The Government may not "compel citizens to act as the Government would have them act"
- The Government's position would "erode... limits" and permit "Congress to reach beyond the natural extent of its authority, 'everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.'"
- 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.

- Congress may not regulate “classes of individuals, apart from any activity in which they are engaged.”
- If the individual mandate is targeted at a class, it is a class whose commercial inactivity rather than activity is its defining feature.
- 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.

We may conclude that Roberts would never sanction the loss of liberty with a new grant or derivation of federal power. Yet, he does so under the Tax Clause. Roberts must justify his ObamaCare decision after all. Otherwise, there is no conceivable way to support the lack of congressional power to “requir[e] individuals to purchase health insurance” under any clause. Roberts accepts the Government’s claim that the mandate is not “ordering individuals to buy insurance,” but “a tax on those who do not buy that product.” This is the substitution of one credible conclusion for what is false and the equivalent of his substitution of the tax for a penalty. Roberts proves as much when he states, “The text of a statute can sometimes have more than one possible meaning.”

With both the Commerce and Taxing Clauses in question, Roberts asserts “... if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so.” What the Commerce Clause forbids, the Tax Clause somehow permits. Roberts confuses the issue with his “no vehicles in the park” which may prohibit the bicycles analogy that he fails to explain. How does this analogy support the premise that the Taxing Clause may accomplish what the Commerce Clause forbids?

Under the Commerce Clause, Roberts offered an explanation of the ObamaCare statute that applies universally to all of his arguments, even his tax argument. People may not be denied air to breathe because of a peculiar angle of an obscure argument. Royal decrees are not valid simply because people believe the king is legitimate. Yet, in Roberts’ world, absolutes must fall to lesser claims.

Roberts does not determine the validity of ObamaCare by choosing between two possible meanings of one law, “no vehicles in the park;” he compares a sound constitutional argument with an unassociated and highly questionable argument that may not be constitutional. His highly questionable argument “overhangs” and overrides the stronger



argument. Is he able to do this? Certainly. He did so. However, “no vehicles in the park” may include tractor trailers, mule carts, but not rickshaws, just as “no pecuniary payments in the act” may include fines, penalties and fees, but not taxes. Roberts creates a problem.

Roberts does not weigh two interpretations of one law, he compares one organic law, Commerce, with another organic law, Taxation. Moreover, he makes this comparison even though the tax argument is unprecedented and fails to support the historical precedent that the Federal Government may not accomplish what ObamaCare seeks, a direct tax of Americans based upon their inactivity.

Roberts splinters by substitution to avoid a determination that the Individual Mandate may not be a tax. It is a novelty and convenient. The penalty is a tax and, as such, is the antecedent that the tax is authentic under organic law. If only for purposes of ObamaCare, a new taxing power is manifested even though Roberts’ other arguments strongly forbid it. Roberts does not ski to the bottom of the slope; he falls.

As ominous and foreboding as the unanimous one party vote for ObamaCare in both the House and Senate is a slim one vote majority by the Court that renders a penalty a tax and increases federal power to do the unthinkable and unacceptable, tax inactivity. As discussed in the analysis of Faction 1’s opinion, Roberts stands upon shaky ground. Substitution of micro details of what may or may not be a tax ushers in substitution of the macro that the tax is supreme over all other clauses, if only because the Tax Clause is a broader power.

To fully appreciate that, by substitution, 1) the penalty is a tax and 2) the Tax Clause defeats the concept of limited government and power and all other constitutional clauses, Roberts advances the presumption that 1) liberty is subordinate to all federal power and 2) individuals are under direct federal control. Otherwise, Roberts would not have been able to corner the market on inactivity, a precedent which will be substituted into even more disastrous decisions in the future.

Splintering at the expense of Justice Story’s fundamental analysis compromises judicial oversight to such a degree that the interpretation of a statute is “fairly possible” by narrow interpretations to the extremely narrow. Or, it is fairly possible by narrow interpretations to the extremely broad, in order to save the law from being unconstitutional. The power of substitution enables Roberts to reinforce that “the breadth of Congress’s power to tax is greater than its power to regulate commerce,” while claiming “the taxing power does not give Congress the same degree of

control over individual behavior.” We must, in the alternative, accept Roberts’s advice that

... 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.

Roberts does not embrace this wisdom. He does not employ words in their natural sense. Splintering *destroys while the Roberts’ Court sits*.

## Of Normal Intellect and Conscience

I am neither a lawyer nor legal scholar. I am an American of “normal intellect and conscience.” I read the Constitution and court cases. My assessment of ObamaCare, having analyzed the decision, is that, for Americans outside of federal jurisdiction, the Supreme Court could not have confirmed Congress’ conclusion that ObamaCare is sound or that Congress has the authority to impose the Individual Mandate. However, for Americans who elected to become federal persons or individuals as defined by the tax code and are within the jurisdiction of the United States Government, the Supreme Court’s decision is reasonable. Congress may determine how its creations relate to each other. The facts are plain and transparent. Jurisdiction, whether actual or presumed, allows the Government to do what most believe is impossible.

I was surprised with Roberts’ ObamaCare opinion. If only for how he is esteemed, I did not understand his reasons or motivation. Yet, given my lack of understanding, my dismay was unwarranted. If Americans witness the Government’s acquisition of power without knowing their status, their wrath is not justified.

The Court’s ObamaCare decision intrigued me. I wanted to know how and why the Federal Government decides and acts as it does, which is no different than it has done in the past and no different than other corrupt and deceitful governments. I wanted to understand why ObamaCare became a possibility.

A survey of American history and Supreme Court precedent reveals how and why the Federal Government continues its onslaught on liberty. While many would disagree with the comparison that the denial of a passport for the lack of a social security number is no different than repressive regimes around the world, the result is the same. People are controlled, condemned, and conquered. Is the fact that more Americans are imprisoned than other citizens from any other country not on par with regimes that oppress its citizens in other ways?

Statistics are revealing. Comparisons and contrasts offer brutal insight. For example, why may South Africans travel to America with a passport obtained without an SSN, while Americans are denied a passport without an SSN? Do you associate freedom more with South Africa or America? Why does Congress label a healthy lifestyle as self-insurance

and a healthy person an activist while unhealthy people burden the system unnecessarily? Are not fat and lazy people activists as well?

The idea that Americans are free is a fallacy, a fallacy which allows people to ignore indicators that belie a representation of freedom. When Americans accept that they must buy health insurance or accept an SSN to get a passport, they anesthetize themselves from reality. They cannot see that they are not free. In such a syndrome, they are unable to measure the amount of liberty that existed in the past or identify the specifics that eroded liberty over time.

Those who are not deceived about the lack of freedom appreciate that decisions and actions have intended and unintended consequences. They know the acceptance of federal benefits places them under federal jurisdiction to whatever degree. A decision to become an officer in the U. S. Army is a decision to be immersed within federal jurisdiction. A decision to accept unemployment benefits has federal jurisdictional implications, as does the decision to have a checking account or to obtain a federally backed loan. However, it is only when the United States Government determines that everyone must buy health insurance or be penalized that people are jarred and humbled by the Government's power and their fleeting liberty.

Once jarred, as if violently awoken from dreamland existence, the never defined "American Dream," the challenge is to gauge the misuse and abuse of power and identify when and how America became less than it once was. There are factors which indicate remarkable and regrettable change. A partial list of factors is: time, events, jurisdiction, rights, power and constraints, agendas, whether political, social or ideological, national statistics, words and their meanings and grammatical construction of statutes. Viewed in isolation or as an aggregate, these factors portray a telling story. Moreover, when all factors are observed in unison from age to age, context, particularly the forward and cumulative progression of ever evolving context, is maintained. The picture is not fractured; a whole representation is seen and accepted as reliable.

With diagrams, we compare and contrast liberty and the influence of the Federal Government. Various factors may reveal constancy or extremes for both. Although any analysis of factors and their relevance may be subjective, if there is a deviation over time, that alone is significant. We want to understand how and why thoughts or actions change and then weigh the corresponding impact on liberty and Government influence. We should be able to answer 1) What happened? 2) Why did it happen? 3) What is the impact on liberty?

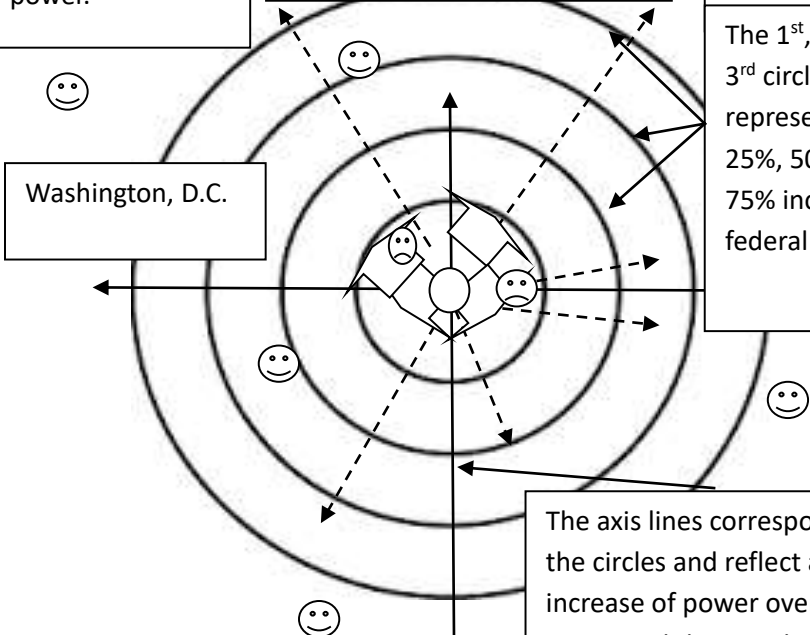
The Federal Government has unlimited powers over all federal possessions and exercises plenary power.


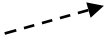





Except for powers under Article 1, Section 8 of the Constitution, the States and people are beyond the scope of the Federal Government and exist in freedom.

Each circle represents an increase of federal control over the States and people.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> circle represent a 25%, 50%, and 75% increase in federal power.

The axis lines correspond with the circles and reflect an increase of power over the States and the people.



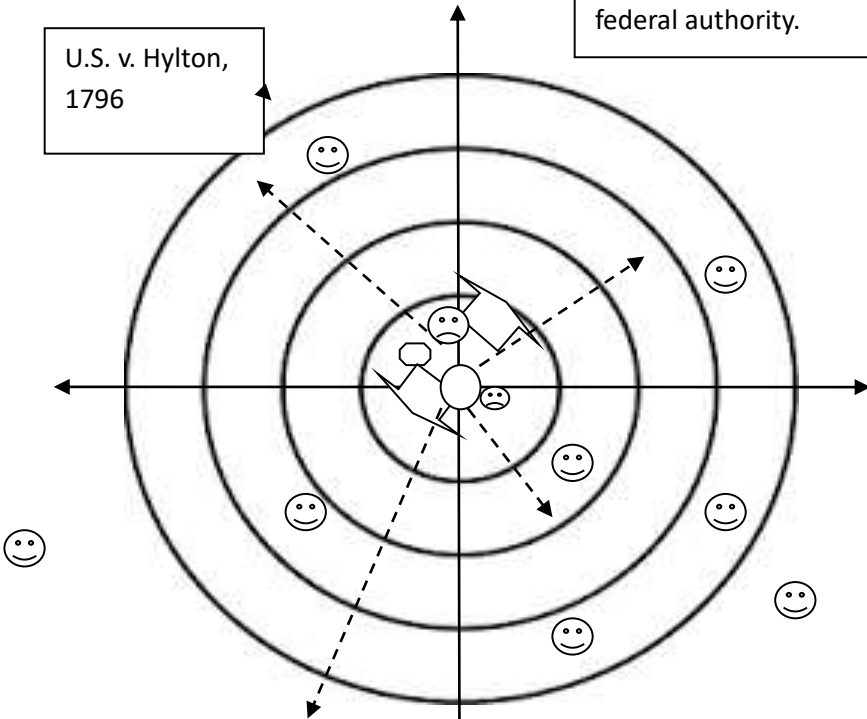
- Legend**
-  Absolute federal power
  -  Federal power under Article 1, Section 8
  -  State citizens
  -  Federal citizens
  -  Center circle is Washington, D. C.
  -  Federal Act or Court Decision
  -  Presumed or actual increase of federal power

## Hylton v. United States, 1796

In 1796, in U.S. v. Hylton, the Federal Government passed an indirect tax on carriages.

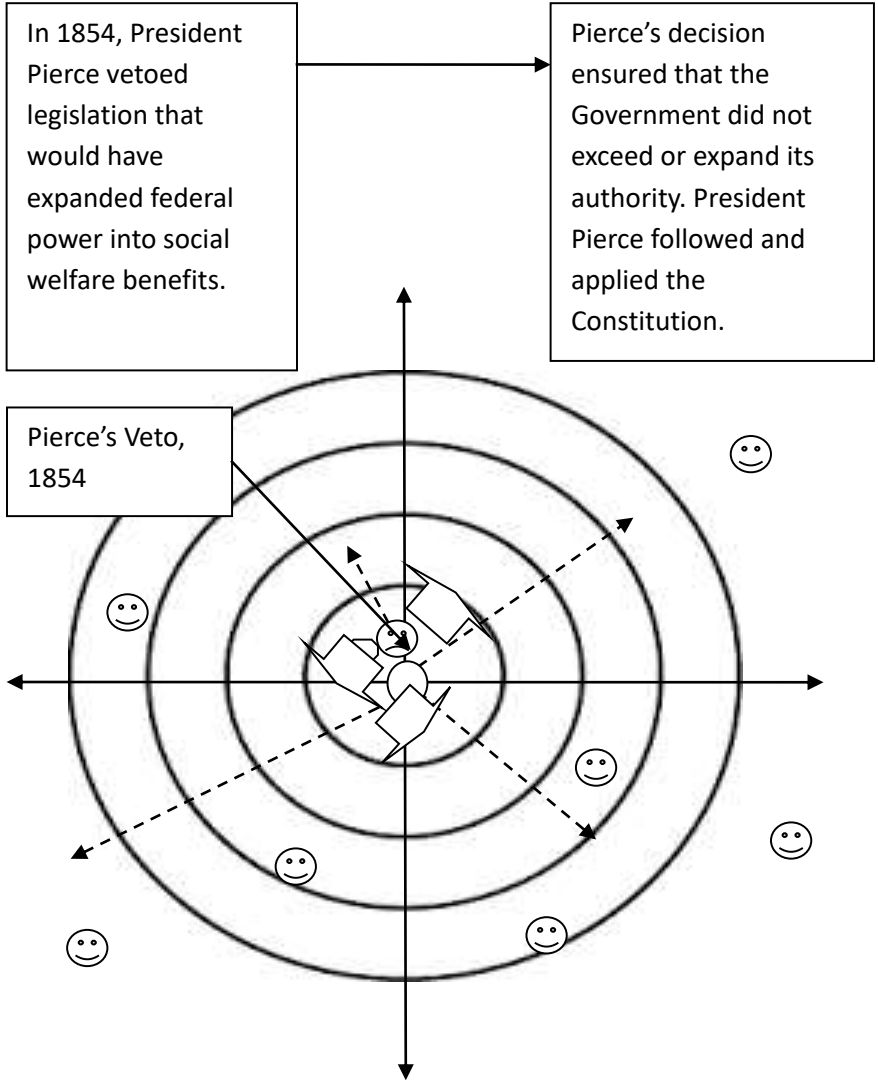
The Court's decision ensured that the Government did not exceed its authority. The Court followed and applied the Constitution. Hylton was a decision that did not expand federal authority.

U.S. v. Hylton,  
1796



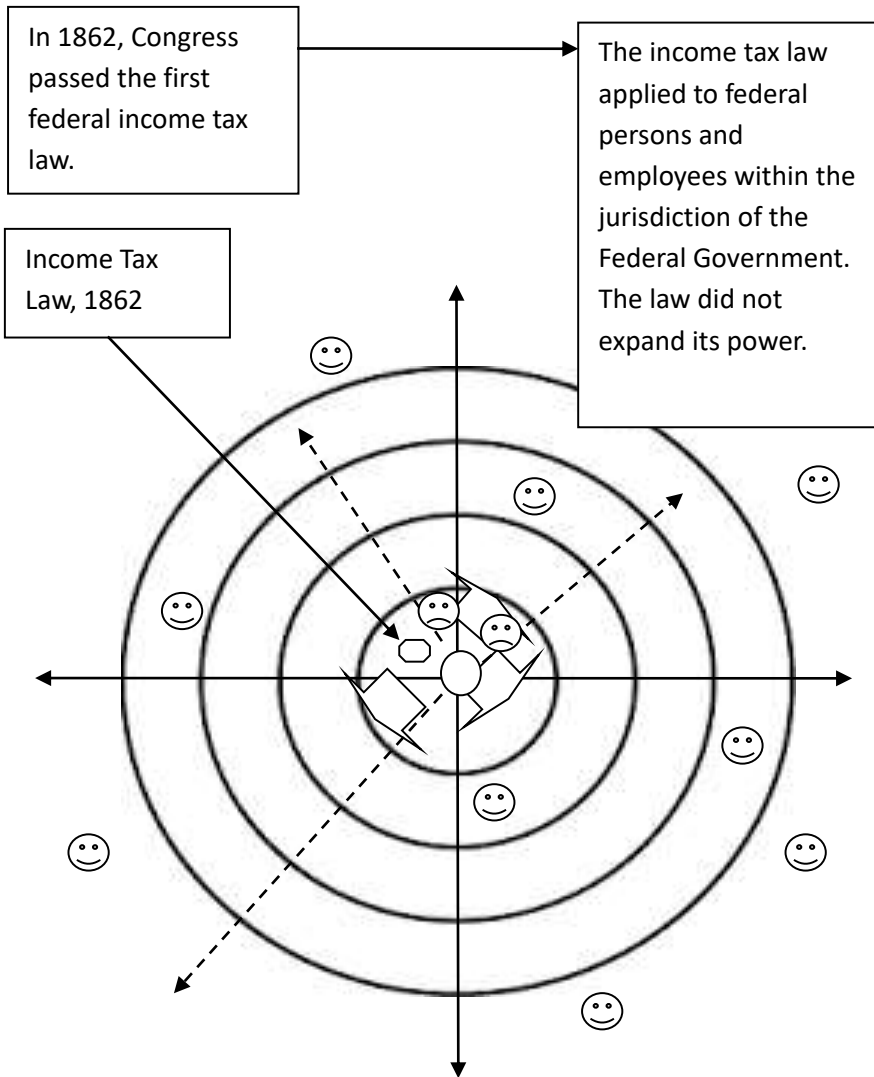
1) What happened? The Government implemented an indirect tax. 2) Why did it happen? To raise revenue. 3) What was the impact on liberty? There was no impact. Liberty and the Government were as before the Act.

## President Pierce's Veto, 1854



- 1) What happened? President Pierce vetoed social welfare legislation.
- 2) Why did it happen? Pierce knew social welfare was not a federal power.
- 3) What was the impact on liberty? There was no impact. Liberty and the Government remained as before the veto.

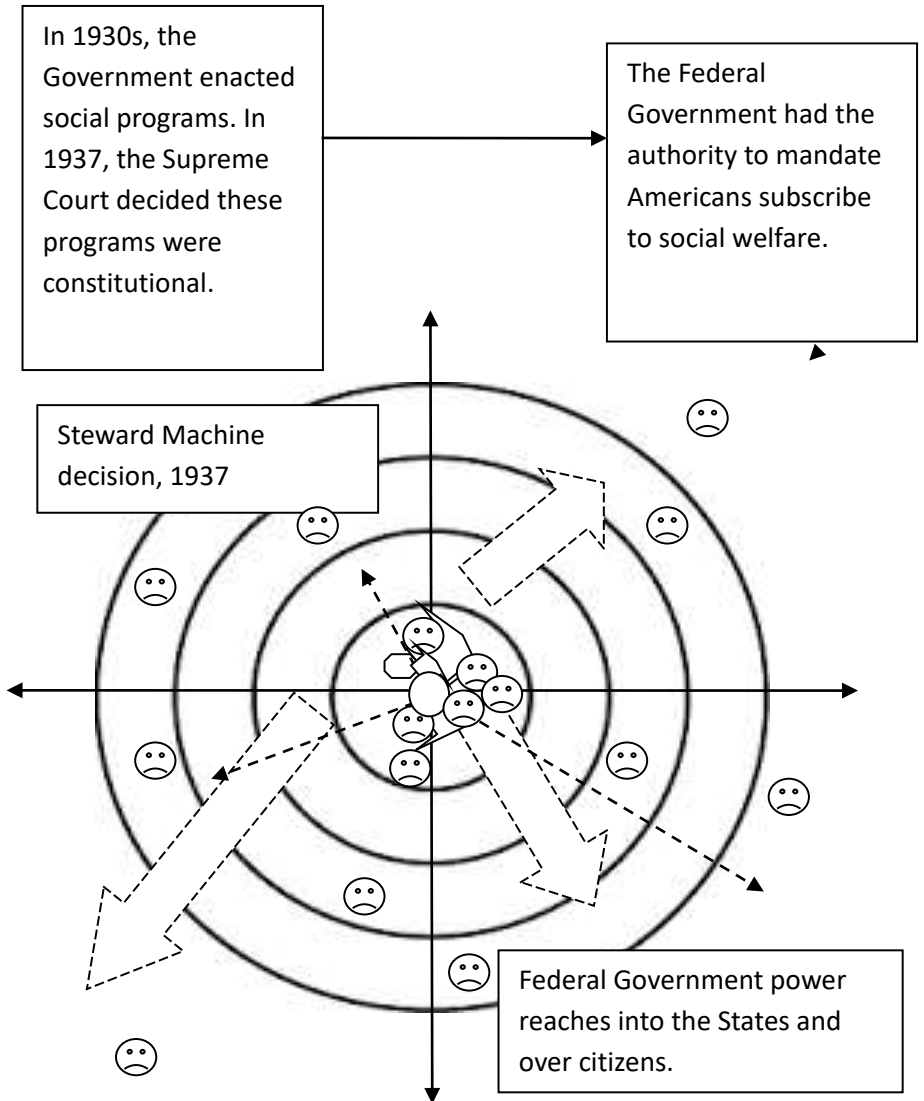
## The Income Tax Act of 1862



1) What happened? The Government enacted the first income tax. 2) Why did it happen? To raise revenue for the war. 3) What was the impact on liberty? There was no impact. Liberty and the Government remained as before the Act. Only those within federal jurisdiction were taxed.

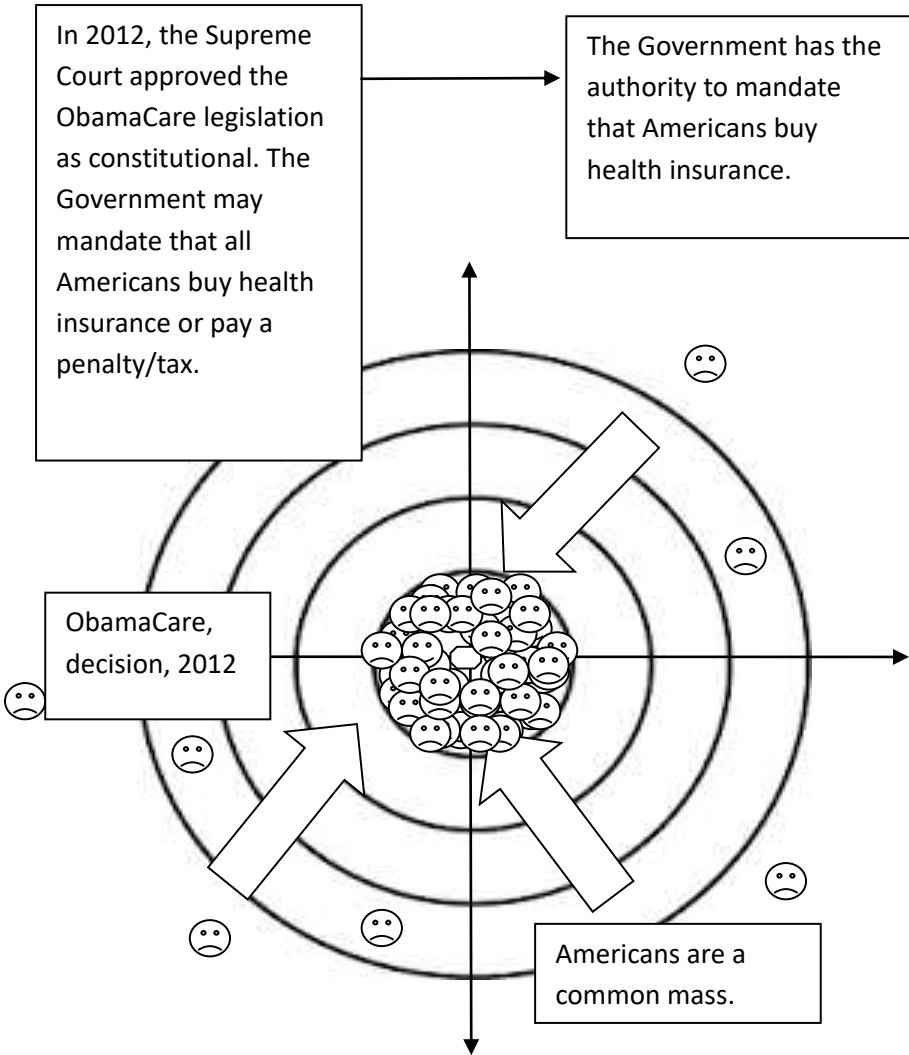


## Steward Machine Co., v. Davis, 1937



1) What happened? The Government enacted social programs. 2) Why did it happen? To provide relief. 3) What was the impact on liberty? The Government presumed control over all Americans. The people presumed they had no choice. Under such force, the Government draws every person within its orbit and liberty suffers.

## ObamaCare, 2012



1) What happened? The Government enacted ObamaCare. 2) Why did it happen? To provide relief. 3) What was the impact on liberty? Since all Americans are presumed federal persons within federal jurisdiction, they are liable for ObamaCare. Americans have no choice but to purchase health insurance or pay a tax. Liberty dies as quickly as the people relinquish control over their lives.

The diagrams of the 1796 Hylton case, Pierce's 1854 veto, and the 1862 Income Tax Act show that Americans were unaffected by each. This is appropriate. Why would Americans be under greater federal control after these decisions? In fact, the Federal Government, it may be stated, acted with restraint because it could not unduly influence the American people. The Constitution binds the Government to established limits.

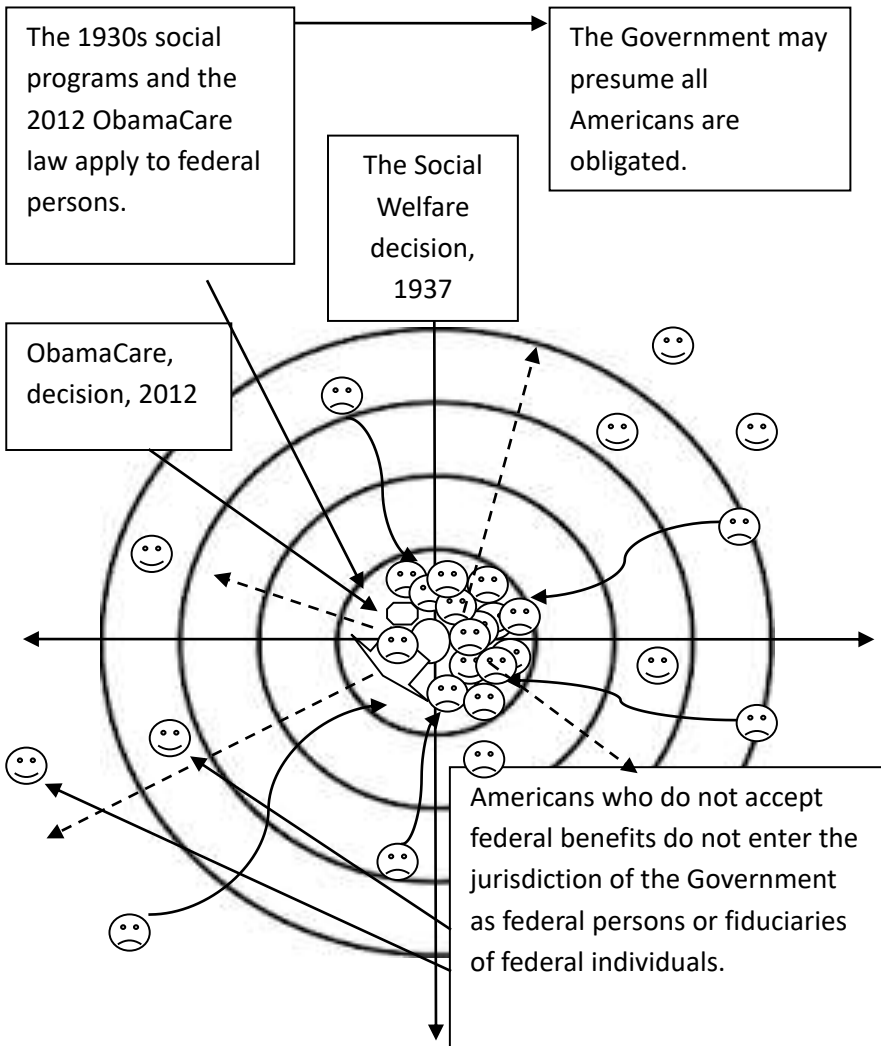
The diagrams that depict the 1937 Steward Machine decision and Robert's 2012 ObamaCare opinion offer a contrasting perspective. All Americans are within federal jurisdiction. This is a major revelation. The Federal Government must have power over State citizens. Since the Government has power, it does not exercise restraint.

We must conclude that the foregoing diagrams, especially the last two, accurately reflect American history and the people's collective mindset in 2018. They believe, generally, that they are under federal control. Is this true? If it is true, when did it begin? What rights exist and which ones have been effectively extinguished? For example, is one's right to contract still sacrosanct if the Federal Government may compel him and a private insurer to enter a contract for health insurance? No.

You may have noted that none of the diagrams reflect the Government's secret. As explained earlier, the Government acquires federal jurisdiction by presumption. When both the Government and the people presume that a specific act applies, the general authority to do so is cemented. People have no idea that their lives could be outside of federal control just as those who lived in 1796, 1854, and 1862. People only see general federal control and specific acts that supposedly reinforce this federal authority. Honestly, without an education, why would people not believe they are federal persons and individuals?

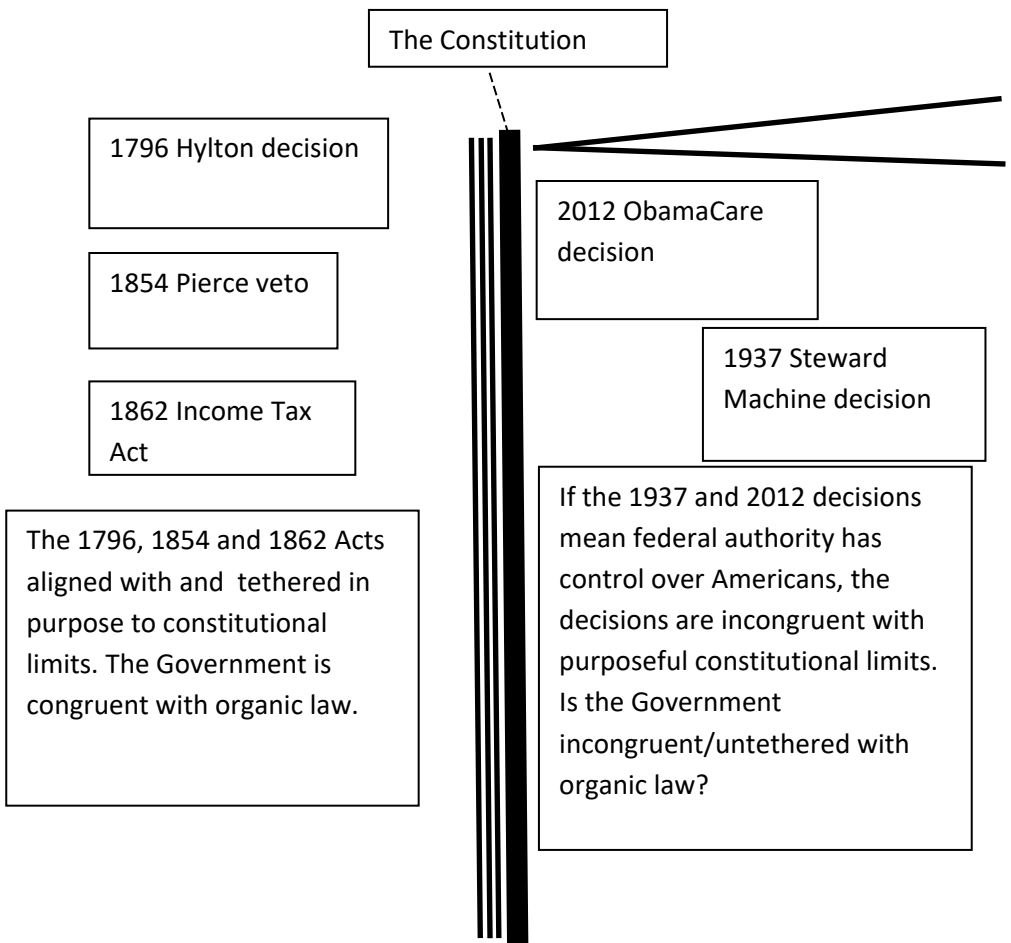
The next two diagrams depict the Government's secret. The Government may presume authority over all Americans as federal citizens; but if some are not and they are State citizens only, the presumption fails. Americans may effectively rebut a federal presumption that they are liable for legislation X, Y, and Z as readily as they may accept federal benefit A, B, and C. They may refute or accept federal jurisdiction.

## Steward Machine Co., v. Davis, 1937 and ObamaCare, 2012

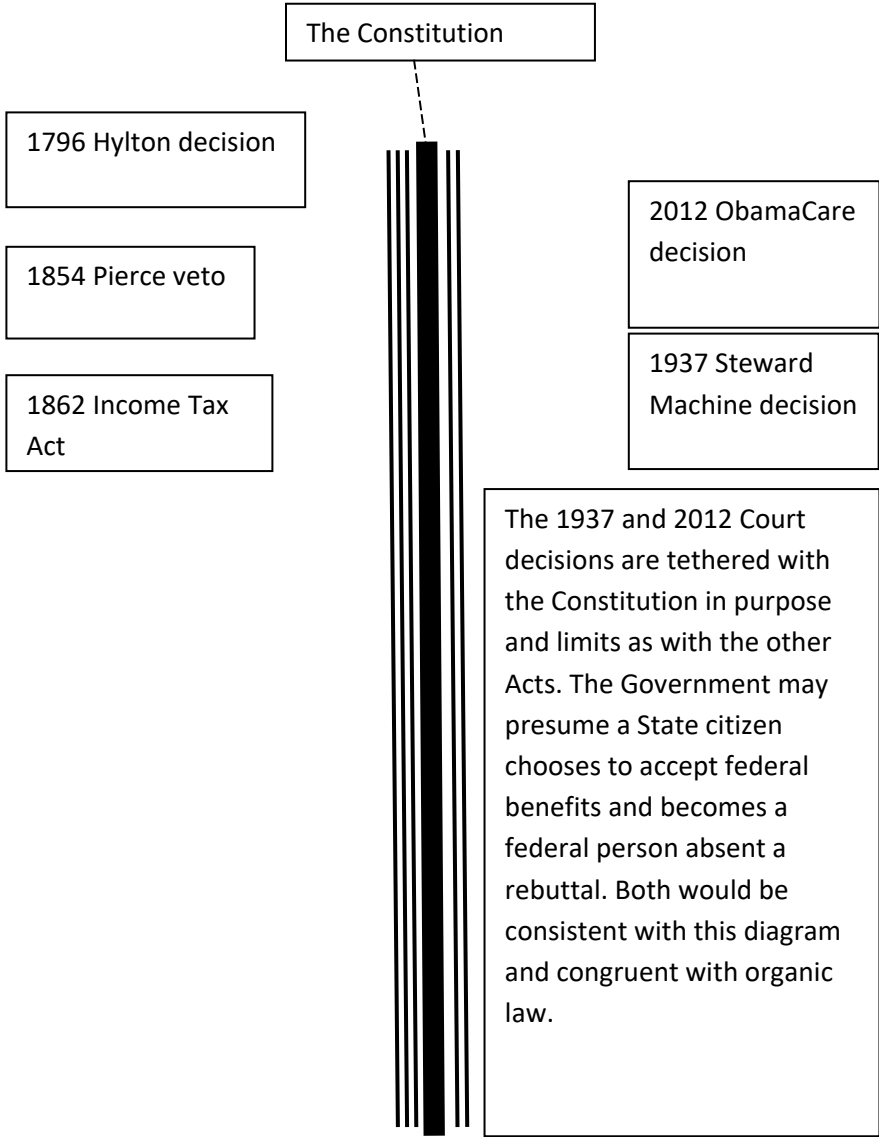


1) What happened? The Government enacted social programs. 2) Why did it happen? To provide financial relief. 3) What was the impact on liberty? If Americans accepted the benefits, they became federal persons under federal jurisdiction, while those who did not remained as before, free.

If the last two diagrams were not enough to prove that 1) the Government has jurisdiction and 2) one may rebut the presumption of federal authority, weigh the following diagrams. Our objective is to prove that, in order to expand power, the Government acts broadly and with impunity by presumption. If all that separates the Government from greater power and breaching known constitutional limits is presumption, the three branches will craft presumed authority, even on a conspiratorial basis, and make all Americans federal persons. Otherwise, Government officials would know that they violate the Constitution. If the Government is violating the Constitution, the 1937 and 2012 Court decisions would not be congruent with or tethered to the Constitution.



The Federal Government must be compliant with the Constitution. As such, the 1937, and 2012 Court decisions must be congruent with organic law. Presumption must be the only means to bring Americans and state citizens without federal control into federal jurisdiction. In what other way would the Government acquire the means to tax a free people for inactivity? A free people must be or presumed to be federal persons or consent to the same.



## The Solution

Wisdom dictates that doing nothing rather than making an unwise decision and strength is required to achieve this end. The United States Supreme Court wields extraordinary power. Ironically, its greatest power rests within its restraint. If precedent has taught us anything, we learned that leaders have used restraint when they could have been inventive and extra-constitutional.

The Supreme Court in *Hylton* could conclude no differently; the tax on carriages was indirect. The justices did not make the tax more than it was. The Court did not mandate that those who were inactive in the transportation market had to hire a carriage or pay a penalty. The Income Tax Act of 1862 included no more than the targeted class, federal employees. The Federal Government did not presume beyond the parameters of the law to envelop more than those liable. President Pierce deferred in 1854 and vetoed legislation enacted without constitutional restraint. Pierce's decision may not have been popular among some circles, but it was an easy choice with the strength of organic law.

Was the 1937 Supreme Court without restraint and, perhaps, unbridled with its *Steward Machine* decision? If the Court knew that social welfare benefits were for federal persons, the Court was unrestrained within federal jurisdiction alone, which was perfectly constitutional. If the Court and the other two branches presumed every person was liable and acted extra-constitutionally, the Federal Government was unbridled with those outside its domain.

The Court's *ObamaCare* decision in 2012 is no different. The Court confronts a path that forks to the left and right. The path to the left accepts all Americans as actual or presumed individuals within federal control and liable for the Individual Mandate. The path to the right is the unspoken truth that not all are liable for not all are individuals within federal jurisdiction. We know now that the path to the right is not and will not be expressed; and we know the reason for this lack of objective and full disclosure.

The American people did not challenge unrestrained power and presumption when it was exercised wrongly in the past. Consequently, decisions misunderstood in the past became precedent misunderstood today. This may be the most significant observation thus far. If power, presumption, and precedent do anything, they perpetuate a perception

that cripples a supposedly free people. What is the solution? How does America reclaim her lost liberty? There are many answers; but one stands alone.

The dissenting justices in *ObamaCare*, Faction 2, exhort the Court to educate the people. Such wisdom not only reflects restraint, it is a dignified response of humility and deference for the American people, their liberty, and the Court's true strength. The dissenters know that if the people are to be free and the Government constrained, the Court must do what is right even if it is tough. The dissenters' wisdom will lay dormant when the whole truth is not expressed; and the truth will lay dormant when splintering abounds.

If the Supreme Court is to educate the people, there must be a practical means. Moreover, the means must inherently involve the "practical operation" of the Court. How the Court arrives at its decisions must be instructive. Otherwise, the Court fosters confusion and confusion is what we have with *ObamaCare*. If the people do not hear a plausible justification for any final opinion and they are confused, the Court does not educate and its conclusion cannot be informed.

If the Court were to write decisions in a *Storyesque* approach and define terms, apply equally defined meanings and defer to the proper grammatical construction of a statute, the Court would adhere to fundamental and constitutional objectives and educate by happenstance and by design. For example, if the Supreme Court procedurally defaulted to a statutory review which:

- identified and defined key terms and how applied
- identified and defined key phrases and how applied
- determined the proper grammatical construction of a statute
- established the context and scope of a specific power or the lack of a power

The Court would at a minimum:

- define established federal jurisdiction
- identify constitutional powers
- defeat unconstitutional acts
- exercise strength by restraint
- educate Congress, the President, and the people



- preserve and protect the Constitution

With this practical operation, this procedure, the Supreme Court may measure its performance against a judicial benchmark, a benchmark that forecloses upon the creation of benchmarks created by the Federal Government that defeat liberty and the Constitution. The 1937 *Steward Machine* decision is an ideal illustration. The Cardozo decision established a milestone that all Americans are liable for social security, which was Congress' intent, presume the law applied to all.

Had the Court followed an established procedure and, more importantly, disclosed specific procedural findings within its decision, the justices would have defined key terms and phrases, identified the proper application and limitations of each, determined the grammatical construction of the statute, and established the context and scope of federal power. Specifically, Cardozo would have stated that 1) *individuals* were those within federal jurisdiction and those who entered that jurisdiction by accepting a federal benefit; 2) the construction of the statute preserved States' and State citizens' rights; 3) and the Federal Government, if it presumed control, had to disclose this fact as an inherent lack of power.

The result would have been remarkable. The American people would have realized they were not *individuals* obligated to accept Social Security. They would have learned of the sanctity of the States and their own rights and the impotence of the Federal Government. The people would have known of the Government's presumption and that any presumption could be rebutted with evidence to the contrary. This new tool would have checked any errant conclusion and effectively limited federal authority. The Court would have established jurisdiction, identified constitutional powers, defeated unconstitutional acts, exercised restraint, educated the people, and preserved the Constitution.

In 2012, had the Roberts Court followed this protocol, it would have defined the terms *individual* and *tax* and *Individual Mandate* and their respective meanings, grammatically diagrammed the statute as prohibitive of universal application, and established proper constitutional authority. The Roberts Court would have looked to the hypothetical Cardozo precedent that not all Americans are compelled to accept a federal privilege and not all State citizens are within federal control. The Roberts Court would have accomplished what the 1937 Court should have done and furthered a precedent of liberty.

However, there is one primary caution. The implementation of any procedure is problematic if the justices do not agree with the definition of terms or constitutional powers. For example, if there is a wide disparity for the definition of tax and penalty, how could the Court determine if Congress has a particular power to tax? This brings us back to the question of the soundness of a policy, not just the soundness of a congressional power. If the Court fails to establish a majority consensus as to a term's definition, the Court fosters what is unsound, a new definition, a new tool, in order to justify a new power.

If an equal number of justices believe a tax is a penalty and the other half does not, and this occurs because the justices cannot agree to the simple definition of either tax or penalty, what is the definition? If one more justice agrees with either side of the impasse, is the definition of tax and penalty resolved by a simple majority? Hardly. This is exactly what Roberts did. The implications are profound. The conclusion that a penalty is a tax conveys greater power; and Congress may now control inactive people, a power that is inherently unconstitutional.

The "marriage" example is no different. When the Supreme Court recognized same-sex unions<sup>10</sup> as "marriage," the term did not become what it never was and may never be. Even if the Courts impose a new definition of marriage as inclusive of two men or women, is it truth, or is the Court merely recognizing congressional intent for gays to enter into a civil contract for the disposition of estates, benefits, etc.

The Supreme Court makes mistakes. The *Roe v Wade* decision did not make an unborn baby any less human and alive because they are under the number of weeks the Court established as the threshold of viability. In a 5 to 4 decision in the 1894 *Pollock v. Farmer's Loan and Trust* case, the Court determined that a tax on investment income was a direct tax when, in fact, the tax was indirect. Justice White, one of the dissenters in *Pollock*, wrote the majority decision in the 1915 *Brushaber v Union Pacific Railroad* case that reversed the error. In *Wade*, the death of life is still murder to many. In *Brushaber*, the correct definition of "income" was clarified.

We are nearing a quarter of a century since America's founding. During that history all three branches have made legal, ethical, and moral mistakes. Did the Roberts Court commit the final and most devastating error to liberty? One may argue that the Court's decision to justify congressional oversight of inactivity in one market is the death of liberty

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<sup>10</sup> *Obergefell v. Hodges*, June 26, 2015

generally. Roberts' definition of a penalty as a tax is the specific that conveys greater general power to create extra-constitutional acts in the future.

The denial of passports to Americans who have no SSN is not a coincidence in 2016. The Federal Government knows, not presumes, Americans are no longer passionate about their *freedom*; the Government knows Americans would never question that they have no freedom. Americans do not know what it means to be free and the Government is complicit with this end.

There are a number of indicators that depict the demise of America. We are the most incarcerated country in the world. We are the most obese people. We are no longer the best educated or most free. These generally accepted facts foretell of a people who care little for liberty. Americans are saddled with ignorance, apathy, greed, and fear. These are not the virtues of an educated and resolute people. One should not be alarmed that the Federal Government began to control inactivity in 2012 and deny passports for the lack of social security numbers in 2016.

There is a faint sound and swaying of bushes in the distance as liberty makes its final dash. There is no need to close the back door. All has been splintered to folly.

## Childlike

A group of children were playing together when, suddenly, all nine of them witnessed an event so harrowing they reported it to the authorities. Each child accounted for his personal observations in a written statement. After the officials read the documents, they discovered three distinct representations of the event. The children were unable and unwilling to agree to the facts. They were unwilling to define the most basic. They refused to reconcile their divergent interpretations. Three factions formed. How did the officials discern the truth? Did they accept the interpretation held by the faction with a majority of children?

Splinters, splinters everywhere  
People did not think,  
Splinters, splinters everywhere  
Liberty did shrink.

## About the Author



James Bowers Johnson is the father of Cory, Heather, Timothy, and Emma. A Virginian, he was graduated from the Virginia Military Institute in 1987. As a Distinguished Military Graduate, he received an Army Commission and served in the field of Military Intelligence.

He was unjustly incarcerated for four years for allegedly failing to sign a piece of paper for the federal government. You may read about his incredible story in [The End of Justice](#), a revelation as to why America is the most incarcerated country in the world. He also wrote [The Ledge](#) an insightful explanation as to how and why struggle and suffering are essential to life. He wrote [The Rebutted Presumption](#) and [The Crossing](#).

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