NATIONAL FEDERATION OF INDEPENDENT BUSINESS ET AL. *v.* SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 11–393. Argued March 26, 27, 28, 2012—Decided June 28, 2012*

Facts:

In 2010, Congress enacted the Patient Protection and Affordable Care Act in order to increase the number of Americans covered by health insurance and decrease the cost of health care. One key provision is the individual mandate, which requires most Americans to maintain "minimum essential" health insurance coverage. 26 U. S. C. §5000A.For individuals who are not exempt, and who do not receive health insurance through an employer or government program, the means of satisfying the requirement is to purchase insurance from a private company. Beginning in 2014, those who do not comply with the mandate must make a "[s]hared responsibility payment" to the Federal Government. §5000A(b)(1). The Act provides that this "penalty" will be paid to the Internal Revenue Service with an individual's taxes, and "shall be assessed and collected in the same manner" as tax penalties. §§5000A(c), (g)(1).
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*Twenty-six States, several individuals, and the National Federation of Independent Business brought suit in Federal District Court ,challenging the constitutionality of the individual mandate ***. The Court of Appeals for the Eleventh Circuit concluded that Congress lacked authority to enact the individual mandate. Finding the mandate severable from the Act's other provisions, the Eleventh Circuit left the rest of the Act intact.*

ROBERTS, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–C, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined; an opinion with respect to Part IV, in which BREYER and KAGAN, JJ., joined; and an opinion with respect to Parts III–A, III–B, and III–D.

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).

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. *** 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.
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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.
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This case concerns two powers that the Constitution does grant the Federal Government, but which must beread 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).
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The questions before us must be considered against the background of these basic principles.

I

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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).

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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.

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II

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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).

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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).

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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, how- ever, 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.
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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.

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 argues that because there is cost shifting from people without insurance to the hospitals to insurance companies who raise rates on those who pay insurance that Congress how power under the commerce clause to address this cost shifting via the individual mandate.]

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. 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. ***

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." ***

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.

*** [discussion of *Wickard*] ***

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). *** 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."

*** [The government argued that because everyone will eventually have to participate in the health care market that this is regulation of future economic activity and thus within the commerce clause.] ***

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.
***
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

[A discussion that the necessary and proper clause does not expand the commerce clause to cover the individual mandate]

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.
***
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.*** 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. ***

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. [Examples followed]

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 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. 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.

***

But taxes that seek to influence conduct are nothing new.*** 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.

***

In distinguishing penalties from taxes, this Court has explained that "if the concept of penalty means anything, it means punishment for an unlawful act or omission."*** While the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful. Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. 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.

[There was a discussion about whether this tax would be unconstitutional under Article I, Section 9, Clause 4, where each state has to pay the same amount of tax for direct taxes – this argument was rejected.]

***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. *** 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. *** Third,

although the breadth of Congress's power to taxis greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior. *** By contrast, Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more.
***

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

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

It is so ordered.

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

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) *** 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. *** 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 ***

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*.

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").
***

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, ***

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

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.

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." ***

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.

***

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

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

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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 expandedthat beyond (what Madison thought it meant) taxing and spending for those aspects of the general welfare that werewithin the Federal Government's enumerated powers, see *United States* v. *Butler*, 297 U. S. 1, 65–66 (1936).***

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).[1] 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.

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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).

[summary of cases that supreme court said Congress did not have authority to do something under the commerce clause starting with cases in 1992]

Gonzalez v. Raich'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).

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.

***

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.[2] Such a definition of market participants is unprecedented, and were it to be a premise for the exercise of national power, it would have no principled limits.

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Wickard v. *Filburn* has been regarded as the most expansive assertion of the commerce power in our history. A close second is *Perez* v. *United States*, 402 U. S. 146 (1971), which upheld a statute criminalizing the eminently local activity of loan-sharking. Both of those cases, however, involved commercial *activity.* To go beyond that, and to say that the failure to grow wheat or the refusal to make loans affects commerce, so that growing and lending can be federally compelled, is to extend federal power to virtually everything. All of us consume food, and

when we do so the Federal Government can prescribe what its quality must be and even how much we must pay. But the mere fact that we all consume food and are thus, sooner or later, participants in the "market" for food, does not empower the Government to say when and what we will buy. That is essentially what this Act seeks to do with respect to the purchase of health care. It exceeds federal power.

II

The Taxing Power

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

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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." (Emphasis added.) It commands that every "applicable individual *shall* . . . ensure that the individual . . . is covered under minimum essential coverage." *Ibid.* (emphasis added). And the immediately following provision states that, "[i]f . . . an applicable individual . . . fails to meet the *requirement* of subsection
(a) . . . there is hereby imposed . . . a *penalty*." §5000A(b)(emphasis added). And several of Congress' legislative "findings" with regard to §5000A confirm that it sets forth a legal requirement and constitutes the assertion of regulatory power, not mere taxing power.

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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. *** Eighteen times in §5000A itself and elsewhere throughout the Act, Congress called the exaction in§5000A(b) a "penalty."

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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.

III
The Anti-Injunction Act

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

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

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The rhetorical device that tries to cloak this argument in superficial plausibility is the same device employed in arguing that for constitutional purposes the minimum-coverage provision is a tax: confusing the question of what Congress *did* with the question of what Congress *could have done.* What qualifies as a tax for purposes of the Anti-Injunction Act, unlike what qualifies as a tax for purposes of the Constitution, is entirely within the control of Congress.

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What the Government would have us believe in these cases is that the very same textual indications that show this is *not* a tax under the Anti-Injunction Act show that it *is* a tax under the Constitution. That carries verbal wizardry too far, deep into the forbidden land of the sophists.

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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.