

**Electronic Supplement 2014 for
Civil Rights and Constitutional Litigation**

by

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Chapter 1. Add to Section B.3 after paragraph 3 in the *Note on the Court's (New) Unified Approach to Fourth Amendment Cases*

4. The Court appeared to confirm a new unified approach to Fourth Amendment cases in **Plumhoff v. Rickard**, ___ U.S. ___, 134 S.Ct. 2012 (2014). Police shot and killed a motorist fleeing a traffic stop at high speed, firing multiple shots when the suspect spun out in a parking lot, collided with a police cruiser, and continued to hit another cruiser with an officer standing nearby. The Sixth Circuit refused to dismiss a case by the decedent's estate, distinguishing *Scott* and finding no qualified immunity because of a clear violation of the Fourth Amendment. In reversing, the near-unanimous Supreme Court alluded to its "reasonableness test," citing both *Graham* and *Garner* in the same sentence. It noted that because Rickard had driven very dangerously before and was trying to get away again when he was shot, the case was indistinguishable from *Scott*. The Court also specifically rejected an argument that firing too many shots made the force used unreasonable:

"It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended. . . . Here, during the 10-second span when all the shots were fired, Rickard never abandoned his attempt to flee. Indeed, even after all the shots had been fired, he managed to drive away and to continue driving until he crashed. This would be a different case if petitioners had initiated a second round of shots after an initial round had clearly incapacitated Rickard and had ended any threat of continued flight, or if Rickard had clearly given himself up. But that is not what happened."

(a) By emphasizing again the danger that the suspect presented to the officers and the community, *Plumhoff* appears to echo a theme found in *Garner*, and a gun appears to be just one method by which a person might present such a danger; all these extreme dangers justify police shootings. Does this holding effectively authorize more police shootings?

(b) On the other hand, the quoted language from *Plumhoff* seems to contemplate a temporal end to the danger a suspect presents – the chase may end with an incapacitated suspect who is incapable of presenting a danger, or the suspect might simply surrender. Do these observations reduce the number of future police shootings? Will they focus future trials on the issue of whether a suspect has given up? (To the extent that ordinary persons may know constitutional law, does this properly encourage suspects to create no extreme dangers or to cease them as soon as possible?)

(c) A passenger in the fleeing car had also been put at risk by the police shots, but the Court noted that the driver had also put the passenger at risk and should not be permitted to benefit by the risk created to third-parties in the car. What would be the result if the passenger, also killed in the incident, had brought her own suit against police under § 1983?

Chapter 1. Add to Section B.3 in the *Note on Other Fourth Amendment Cases and the Wider Influence of Fourth Amendment Concepts* the following

subparagraph to paragraph 1.

(c) The Court’s unanimous opinion in **Riley v. California**, ___ U.S. ___, 134 S.Ct. ___ (June 25, 2014), refused to make a blanket exception for cell phone searches by police, ruling that such searches required a warrant absent one of the usual exceptions created by Fourth Amendment law. Significantly, the Court rejected the standard exception justifying warrantless searches incident to an arrest, including searches to prevent destruction of evidence. Chief Justice Roberts’s opinion emphasized that “[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee’s person” because cell phones combine so many diverse functions and have such “immense storage capacity” that they contain far more private information than even one’s home. Would *Riley* apply to a lost cell phone? One that had not been password-protected?

Chapter 1. Add to Section D.3 after Malley v. Briggs and the Note on Qualified Immunity and Civil Procedure.

Messerschmidt v. Millender

Supreme Court of the United States, 2012
___ U.S. ___, 132 S.Ct. 1235 (2012)

Chief Justice Roberts delivered the Opinion of the Court.

[Believing that his girlfriend “had called the cops on him,” Bowen shot at her five times with a sawed-off shotgun and threatened to kill her. She reported the incident to police, adding that Bowen was a gang member. One Det. Messerschmidt confirmed that Bowen was a Crips member (with a 17-page rap sheet) and found an address he had used in the past. He later obtained a search warrant at those premises for “[a]ll handguns, rifles, or shotguns,” “evidence showing street gang membership,” and other items. A supporting affidavit gave the details of the shooting of Bowen’s girlfriend and the Detective’s search of public records that showed Bowen’s gang membership and his address. A magistrate approved the warrant. When the warrant was served, a 70-year-old woman, Millender, and some younger children answered the door. The ensuing search turned up Millender’s shotgun and a letter addressed to the suspect Bowen. The Millenders later sued Messerschmidt and others under §1983 alleging an illegal search of their home. The federal court found the warrant overbroad for seeking (i) all firearms, not just the one used in the alleged shooting, and (ii) gang material without proof that the shooting was gang-related. Both trial and appellate courts rejected claims of qualified immunity.]

* * * Qualified immunity “gives government officials breathing room to make reasonable but mistaken judgments,” and “protects ‘all but the plainly incompetent or those who knowingly violate the law.’ ” *Ashcroft v. al-Kidd*, 563 U.S. ___, 131 S.Ct. 2074, 2085 (2011) (quoting *Malley v. Briggs*). “[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the ‘objective legal reasonableness’ of the action,

assessed in light of the legal rules that were ‘clearly established’ at the time it was taken.” *Anderson v. Creighton*.

Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in “objective good faith.” *United States v. Leon*. Nonetheless, under our precedents, the fact that a neutral magistrate has issued a warrant authorizing the allegedly unconstitutional search or seizure does not end the inquiry into objective reasonableness. Rather, we have recognized an exception allowing suit when “it is obvious that no reasonably competent officer would have concluded that a warrant should issue.” *Malley*. The “shield of immunity” otherwise conferred by the warrant will be lost, for example, where the warrant was “based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,” *Leon*. [Showing circumstances meeting this exception, however, presents a “high threshold” for plaintiffs.]

The Millenders contend . . . that their case falls into this narrow exception. According to the Millenders, the officers “failed to provide *any* facts or circumstances from which a magistrate could properly conclude that there was probable cause to seize the broad classes of items being sought,” and “[n]o reasonable officer would have presumed that such a warrant was valid.” We disagree.

[*Firearms Search.*] With respect to the warrant's authorization to search for and seize all firearms, the Millenders argue that [no reasonable officer would have thought that use of one shotgun in a shooting would have given probable cause to search for all shotguns.]

Even if the scope of the warrant were overbroad in authorizing a search for all guns when there was information only about a specific one, that specific one was a sawed-off shotgun with a pistol grip, owned by a known gang member, who had just fired the weapon five times in public in an attempt to murder another person, on the asserted ground that she had “call[ed] the cops” on him. Under these circumstances – set forth in the warrant – it would not have been unreasonable for an officer to conclude that there was a “fair probability” that the sawed-off shotgun was not the only firearm Bowen owned. And it certainly would have been reasonable for an officer to assume that Bowen's sawed-off shotgun was illegal. Cf. 26 U.S.C. §§ 5845(a), 5861(d) [federal law banning sawed-off shotguns]. Evidence of one crime is not always evidence of several, but given Bowen's possession of one illegal gun, his gang membership, his willingness to use the gun to kill someone, and his concern about the police, a reasonable officer could conclude that there would be additional illegal guns among others that Bowen owned.

A reasonable officer also could believe that seizure of the firearms was necessary to prevent further assaults on [the victim.] California law allows a magistrate to issue a search warrant for items “in the possession of any person with the intent to use them as a means of committing a public offense,” and the warrant application submitted by the officers specifically referenced this provision as a basis for the search. Bowen had already attempted to murder [the victim] once with a firearm, and had yelled “I'll kill you” as she tried to escape from him. A reasonable officer could conclude that

Bowen would make another attempt on her life and that he possessed other firearms “with the intent to use them” to that end.

Given the foregoing, it would not have been “entirely unreasonable” for an officer to believe, in the particular circumstances of this case, that there was probable cause to search for all firearms and firearm-related materials.

[*Gang Materials Search.*] With respect to the warrant's authorization to search for evidence of gang membership, the Millenders contend that “no reasonable officer could have believed that the affidavit presented to the magistrate contained a sufficient basis to conclude that the gang paraphernalia sought was contraband or evidence of a crime.” [This was because, they say, the shooting was an ordinary “spousal assault” case.]

This effort to characterize the case solely as a domestic dispute, however, is misleading. Messerschmidt began his affidavit in support of the warrant by explaining that he “has been investigating an assault with a deadly weapon incident” and elaborated that the crime was a “spousal assault *and* an assault with a deadly weapon.” The affidavit also stated that Bowen was “a known Mona Park Crip gang member” “based on information provided by the victim and the [state’s gang database],” and that he had attempted to murder [the victim] after becoming enraged that she had “call[ed] the cops on [him].” A reasonable officer could certainly view Bowen's attack as motivated not by the souring of his romantic relationship * * * but instead by a desire to prevent [the victim] from disclosing details of his gang activity to the police. * * *

It would therefore not have been unreasonable— based on the facts set out in the affidavit— for an officer to believe that evidence regarding Bowen's gang affiliation would prove helpful in prosecuting him for the attack on [the victim]. Not only would such evidence help to establish motive, either apart from or in addition to any domestic dispute, it would also support the bringing of additional, related charges against Bowen for the assault. See, e.g., Cal.Penal Code Ann. § 136.1(b)(1) (West 1999) (It is a crime to “attempt [] to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from ... [m]aking any report of that victimization to any ... law enforcement officer”).

[The evidence of gang activity might also be useful in establishing Bowen’s identity so as to prove spousal assault or to disprove some possible defenses.] Given Bowen's known gang affiliation, a reasonable officer could conclude that gang paraphernalia found at the residence would be an effective means of demonstrating Bowen's control over the premises or his connection to evidence found there.⁷

⁷ The Fourth Amendment does not require probable cause to believe evidence will *conclusively* establish a fact before permitting a search, but only “probable cause . . . to believe the evidence sought *will aid* in a particular apprehension or conviction.” Even if gang evidence might have turned out not to be conclusive because other members of the Millender household also had gang ties, a reasonable

Whatever the use to which evidence of Bowen's gang involvement might ultimately have been put, it would not have been "entirely unreasonable" for an officer to believe that the facts set out in the affidavit established a fair probability that such evidence would aid the prosecution of Bowen for the criminal acts at issue. Leon.

Whether any of these facts, standing alone or taken together, actually establish probable cause is a question we need not decide. Qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments." The officers' judgment that the scope of the warrant was supported by probable cause may have been mistaken, but it was not "plainly incompetent." Malley.

On top of all this, the fact that the officers sought and obtained approval of the warrant application from a superior and a deputy district attorney before submitting it to the magistrate provides further support for the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause. * * * The officers thus "took every step that could reasonably be expected of them." In light of the foregoing, it cannot be said that "no officer of reasonable competence would have requested the warrant." Malley. Indeed, a contrary conclusion would mean not only that Messerschmidt and Lawrence were "plainly incompetent," but that their supervisor, the deputy district attorney, and the magistrate were as well.

We rejected in *Malley* the contention that an officer is automatically entitled to qualified immunity for seeking a warrant unsupported by probable cause, simply because a magistrate had approved the application. And because the officers' superior and the deputy district attorney are part of the prosecution team, their review also cannot be regarded as dispositive. But by holding in *Malley* that a magistrate's approval does not automatically render an officer's conduct reasonable, we did not suggest that approval by a magistrate or review by others is irrelevant to the objective reasonableness of the officers' determination that the warrant was valid. * * * The fact that the officers secured these approvals is certainly pertinent in assessing whether they could have held a reasonable belief that the warrant was supported by probable cause.

The question in this case is not whether the magistrate erred in believing there was sufficient probable cause to support the scope of the warrant he issued. It is instead whether the magistrate so obviously erred that any reasonable officer would have recognized the error. The occasions on which this standard will be met may be rare, but so too are the circumstances in which it will be appropriate to impose personal liability on a lay officer in the face of judicial approval of his actions. Even if the warrant in this case were invalid, it was not so obviously lacking in probable cause that the officers can be considered "plainly incompetent" for concluding otherwise. Malley. The judgment of the Court of Appeals denying the officers qualified immunity must therefore be reversed.

officer could still conclude that evidence of gang membership would help show Bowen's connection to the residence. Such evidence could, for example, have displayed Bowen's gang moniker ("C Jay") or could have been identified by [the victim] as belonging to Bowen.

It is so ordered.

Justice BREYER, concurring. [Omitted]

Justice KAGAN, concurring in part and dissenting in part.

[The gun search was entitled to qualified immunity, but the search regarding gang materials was not. This is because membership in even the worst gang does not violate California law, so the officers could not search for gang paraphernalia just to establish Bowen's ties to the Crips. Instead, the police needed probable cause to believe that such items would provide evidence of an actual crime – and as the Court acknowledges, the only crime mentioned in the warrant application was the assault on [the victim]. The problem for the Court is that nothing in the application supports a link between Bowen's gang membership and that shooting. * * * *

Justice SOTOMAYOR, with whom Justice GINSBURG joins, dissenting.

The fundamental purpose of the Fourth Amendment's warrant clause is “to protect against all general searches.” *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931). [To reinforce this goal, the Fourth Amendment requires particularity in describing things to be seized and their relation to a specific crime.]

In this case, police officers investigating a specific, non-gang-related assault committed with a specific firearm (a sawed-off shotgun) obtained a warrant to search for all evidence related to “any Street Gang,” “[a]ny photographs ... which may depict evidence of criminal activity,” and “any firearms.” They did so for the asserted reason that the search might lead to evidence related to other gang members and other criminal activity, and that other “[v]alid warrants commonly allow police to search for ‘firearms and ammunition.’” That kind of general warrant is antithetical to the Fourth Amendment.

The Court nonetheless concludes that the officers are entitled to qualified immunity because their conduct was “objectively reasonable.” I could not disagree more. All 13 federal judges who previously considered this case had little difficulty concluding that the police officers' search for any gang-related material violated the Fourth Amendment. And a substantial majority agreed that the police's search for both gang-related material and all firearms not only violated the Fourth Amendment, but was objectively unreasonable. Like them, I believe that any “reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause.” *Malley v. Briggs*.

The Court also hints that a police officer's otherwise unreasonable conduct may be excused by the approval of a magistrate, or more disturbingly, another police officer. That is inconsistent with our focus on the objective reasonableness of an officer's decision to submit a warrant application to a magistrate, and we long ago rejected it. See *Malley*. * * * *

Note on Synergy Between Probable Cause and Qualified Immunity

1. The Chief Justice's opinion in *Messerschmidt* comes quite close to stating that the officers actually possessed probable cause to search for both guns and gang materials, but in the end the majority decides only that no reasonable officer would have thought that he clearly lacked probable cause for the search. Does the elasticity of the first term – probable cause – reinforce the elasticity of the second – a reasonable officer? Does the difficulty of deciding the first issue work synergistically to make it more difficult for a court to find fault on the second issue?

(a) What characteristics of probable cause are cited by both the majority and dissent to reinforce their positions? Does the dissent find more certainty than actually exists? Does the majority render probable cause so easy to establish that it is virtually always present?

(b) Notice the subtle change introduced by the majority when it describes qualified immunity as ordinarily available after a warrant is sought and issued. Does the shifting of a psychological burden to the plaintiff to establish that an “exception” applies tend to ensure that exceptions will be rare? Is the burden heightened by describing it as a “high threshold”?

(c) To the extent that the notions of probable cause and reasonable officer are both somewhat imprecise, is it inevitable that judges will divide on both issues? Is the real importance of *Messerschmidt* that it warns lower court judges that they should seldom rule against officers, at least when a warrant has been sought and granted? Does *Messerschmidt* in the end establish a prophylactic rule that will encourage officers to seek warrants?

2. Recall the idea from *Malley* that causation is to be measured against the background of tort liability found in state common law. As *Messerschmidt* backs away from the apparently fixed ruling in *Malley*, it mentions nothing about common law concepts to justify its evolved position. On what does the Court ground its new view – constitutional law (specifically the Fourth Amendment)? Section 1983? The Court's own views of the correct societal balance between suspects's and officers's interests?

3. As qualified immunity doctrine has evolved, the Court has released officers from personal liability not only where the law is unsettled, but also for reasonable mistakes that an officer might make even when the law is otherwise settled. Its commitment to both may appear in **Wood v. Moss**, ___ U.S. ___, 134 S.Ct. 2056 (2014), where Justice Ginsburg's unanimous opinion excused federal agents for cordoning off protesters trying to approach President Bush. First, she noted that no federal case had recognized a right to approach the President in all circumstances, then she appeared to emphasize the second factor, noting the Court was “[m]indful that “[o]fficers assigned to protect public officials must make singularly swift, on the spot, decisions whether the safety of the person they are guarding is in jeopardy” (second brackets in original).

(a) Should this “mindfulness” of the difficulty officials face extend only to officers protecting

the President and other high officials? To all police officers who protect the public? To all public servants because they have difficult jobs? Put differently, is the second factor added to qualified immunity apply only to police officers?

(b) Assume the broader view that qualified immunity should protect all police officers as they perform the difficult task of searching for and arresting criminals. Do these cases effectively reverse *Monroe v. Pape*, at least on the specific topic of Fourth Amendment violations? If the Court plays a legitimate role in expanding § 1983 to solve a perceived social problem, is it equally legitimate for the Court to subtract from that coverage when it thinks the solution is creating its own new problems? If one believes that the Court is playing the role of common-law judges in molding § 1983 – and in molding the Constitution – then can there be no neutral, objective criticism of the Court?

(c) Assume that the concept of probable cause is inherently incapable of precise determination. The *Messerschmidt* Court seems to think that such imprecision requires some laxity in enforcing § 1983 because, otherwise, every officer would be held financially liable whenever a federal judge, backwardly applying the imprecise term, declares a Fourth Amendment violation. But are there not many other areas of constitutional law that are similar imprecise, thus excluding public servants from liability, even when their decisions were not made in haste? See *Lane v. Franks*, ___ U.S. ___, 134 S.Ct. ___ (June 19, 2014) (school officials violated First Amendment in firing administrator for testifying about corruption at trial, applying *Pickering* balancing test; nevertheless, qualified immunity applies because no case previously applied test to same facts). Cf. *Town of Greece v. Galloway*, ___ U.S. ___, 134 S.Ct. ___ (June 6, 2014) (whether town’s prayer practices violate Establishment Clause requires “fact-intensive” inquiry) (plurality opinion).

Chapter 1. Add to Section F.2 after paragraph 3 in the *Note on the Rules Governing Award of Injunctions in § 1983 Actions*.

(d) Without citing either *Lyons* or *Rizzo*, the Court in **Susan B. Anthony List v. Driehaus**, ___ U.S. ___, 134 S.Ct. ___ (April 22, 2014), upheld standing for groups challenging the constitutionality of an Ohio law permitting “anyone” to file a criminal complaint against a person who makes false statements concerning the voting record of a candidate during an election campaign. The Court observed that the plaintiff had previously been threatened with violating the state law and adequately alleged that it intended to make more such statements in future elections were it not for “arguable” threat of enforcement of the Ohio law, thus it had suffered “injury in fact.” The Court did not purport to decide the issue of whether an injunction would in fact correct the injury, but it noted that the fact that “anyone” could file a complaint made it more likely that the groups would be affected again in the future. Is this why the Court failed to cite *Lyons*?

Chapter 1. Add to Section F.2 after paragraph 3 in the *Note on Standing and the Res Judicata Effect of Prior Judgments*.

(c) Broadly citing *Steffel*, a unanimous Court recently in **Susan B. Anthony List v. Driehaus**, ___ U.S. ___, 134 S.Ct. ___ (April 22, 2014), recognized standing for a political-action group previously threatened with enforcement of criminal law when it claimed an intention to pursue the same activity in future election cycles. Injury in fact to support standing arises “where [plaintiff] alleges “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.” Is this an accurate summation of *Steffel*?

Chapter 5. Add at the end of the Chapter, after the *Note on Title II and Congress' Commerce Clause Power.*

National Federation of Independent Business v. Sebelius

___ U.S. ___, 132 S.Ct. 2566, 183 L.Ed.2d 450

Supreme Court of the United States, 2012

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

Today we resolve constitutional challenges to two provisions of the Patient Protection and Affordable Care Act of 2010: the individual mandate, which requires individuals to purchase a health insurance policy providing a minimum level of coverage; and the Medicaid expansion, which gives funds to the States on the condition that they provide specified health care to all citizens whose income falls below a certain threshold. We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions.

* * *

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 [possessed by the states, the general, unlimited sovereigns]. 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.” [In the Spending Clause of Art. I, § 8, cl. 1, Congress is also authorised to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”] Put simply, Congress may tax

and spend. This grant gives the Federal Government considerable influence even in areas where it cannot directly regulate. * * * [Congress also has the supplementary power under the Necessary and Proper Clause, Art. I, § 8, cl. 18.]

I

In 2010, Congress enacted the Patient Protection and Affordable Care Act, 124 Stat. 119. The Act aims to increase the number of Americans covered by health insurance and decrease the cost of health care. The Act's 10 titles stretch over 900 pages and contain hundreds of provisions. This case concerns constitutional challenges to two key provisions, commonly referred to as the individual mandate [or requirement to pay a “penalty” for failure to comply with the mandate to purchase insurance] and the Medicaid expansion [or requirement that the states, as a condition for continuing to receive federal Medicaid payments – now about 10% of most states’ budgets, must expend from their own funds additional payments to poor beneficiaries. In enacting the individual mandate Congress relied on its power under the Commerce Clause; in enacting the Medicaid expansion it relied on its power under the Spending Clause. Individuals and states subject to these provisions brought these suits.]

II

[This suit is not prohibited by the Anti-Injunction Act, 26 U.S.C. § 7421(a). For the purposes of this statute, Congress’ designation of the payment in the individual mandate as a “penalty” means that it is not a tax subject to the Act. Constitutional considerations are different and are treated below.]

III [Individual Mandate; Commerce Clause]

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 [despite its statutory labeling as a “penalty”]. 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). [To prevent persons from purchasing insurance only when they need it, passing the initial costs on to others, the Act levies a “penalty” for failure to purchase insurance.]

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. [Our precedents recognize that Congress has power not only over interstate commerce itself, but also activity that has a substantial effect on interstate commerce, even if only an aggregation of effects that would individually be insubstantial.]

Given its expansive scope, it is no surprise that Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time. But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product.³ Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes “the most telling indication of [a] severe constitutional problem ... is the lack of historical precedent” for Congress's action. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. ___, 130 S.Ct. 3138 (2010) (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.

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

³ The examples of other congressional mandates cited by Justice GINSBURG, *post*, at 2627, 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”).

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 [v. Ogden]*, 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”).

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.

[Even *Wickard v. Filburn*, our most expansive Commerce Clause case, does not support the individual mandate. There at least the farmer was engaging in production of wheat, and his own production interfered with limits on interstate production of wheat; there is no suggestion in the case that a wholly inactive consumer could have been compelled to purchase wheat to support interstate price of wheat.] The farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce. The Government’s theory here would effectively override that limitation, by establishing that individuals may be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have them do.

Indeed, the Government’s logic would justify a mandatory purchase to solve almost any problem. To consider a different example in the health care market, many Americans do not eat a balanced diet. That group makes up a larger percentage of the total population than those without health insurance. 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, Trogon, 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). 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. [In short, the Government's theory would give the federal government not the limited powers that the Constitution provides, but wholly unlimited powers.]⁶

To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers, who were “practical statesmen,” not metaphysical philosophers. * * * The Framers gave Congress the power to *regulate* commerce, not to *compel* it, and for over 200 years both our decisions and Congress's actions have reflected this understanding. There is no reason to depart from that understanding now.

* * *

The 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. [In effect, the individual mandate requires young adults inactive in the health insurance market to subsidize older persons who need health care. The fact that these persons may need health insurance in the future, and may engage in interstate commerce then, does not make them active in commerce today.] If the individual mandate is targeted at a class, it is a class whose commercial inactivity rather than activity is its defining feature. [An argument based on predicted future activity, once again, provides the federal government

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.” 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, than they are active in the “rest” market when doing nothing.

with unlimited power that is inconsistent with our constitutional plan.]

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” [contained in other parts of the Act.] 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. [Our cases have recognized a wide scope for this power, including laws that are merely “convenient” or “useful” for carrying into effect other Congressional powers.]

[Yet, each] of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. * * * 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 not power “incidental” to another power; it is unlimited power.]

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.

[For constitutional purposes, the word “penalty” in the Act is not important; rather the actual effect is important. In order to avoid a finding of unconstitutionality, “penalty” in the Act may be regarded as a tax, especially because the Act itself requires that the “penalty” be enforced at the time of filing yearly income tax returns and paid to the general income taxing authority, the Internal Revenue Service. The fact that the penalty cannot by law exceed the cost of insurance and is usually less than the cost of insurance also suggest that the “penalty” is functionally a tax. And it is function that is constitutionally important, not the label.]

Our precedent demonstrates that Congress had the power to impose the exaction in [the individual mandate] under the taxing power, and that [it] need not be read to do more than impose a tax. That is sufficient to sustain it. The “question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.”

* * *

IV [Medicaid Expansion; Spending Clause]

A

The States also contend that the Medicaid expansion exceeds Congress's authority under the Spending Clause. [The Spending Clause grants Congress the power “to pay the Debts and provide for the ... general Welfare of the United States.” U.S. Const., Art. I, § 8, cl. 1. The States] claim that Congress is coercing the States to adopt the changes it wants by threatening to withhold all of a State's Medicaid grants, unless the State accepts the new expanded funding and complies with the conditions that come with it. This, they argue, violates the basic principle that the “Federal Government may not compel the States to enact or administer a federal regulatory program.”

There is no doubt that the Act dramatically increases state obligations under Medicaid. [The current Medicaid program primarily covers only “needy” persons, predominantly pregnant women, poor persons, and some persons with substantial disabilities. The Affordable Care Act substantially expands coverage, expanding the care given to poor persons and for the first time requiring states to provide free health care to substantial numbers of middle class persons. Initially, the federal government has promised to pay all of the increased expense, but soon those payments will decrease, leaving states with the obligation to tax and spend billions of dollars to pay for the federally-required benefits.]

[Our cases interpreting the Spending Clause do not draw a bright line between what is permissible and what is impermissible. We have analogized to the idea of a contract, holding the Congressional mandates and money that leave a state a meaningful opportunity to decide whether to participate are acceptable; coercive offers that leave no realistic choice to the States are forbidden. Our concern here has been with ensuring that States retain their roles as independent sovereigns. We also have stated that it is unacceptable for Congress to require states to act in circumstances where Congress can claim the political credit for acting, but leaves the bill for the States to pay.]

Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system. “[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.” Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer. But when the State has no choice, the Federal Government can achieve its objectives without accountability, just as in *New York* [where we invalidated a federal requirement that states take responsibility for nuclear waste] and *Printz* [where we invalidated a Congressional requirement that state officials, paid for with state funds, enforce a controversial federal law]. Indeed, this danger is heightened when Congress acts under the Spending Clause, because Congress can use that power to implement federal policy it could not impose directly under its [other] enumerated powers.

[Of course,] Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds. In the typical case we look to the States to defend their prerogatives by adopting “the simple expedient of not yielding” to federal [invitations] when they do not want to embrace the federal policies as their own. *Massachusetts v. Mellon*, 262 U.S. 447 (1923). The States are separate and independent sovereigns. Sometimes they have to act like it.

The States, however, argue that the Medicaid expansion is far from the typical case. They object that Congress has “crossed the line distinguishing encouragement from coercion,” *New York, supra*, in the way it has structured the funding: Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States' existing Medicaid funds. The States claim that this threat serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage effected by the Act.

Given the nature of the threat and the programs at issue here, we must agree. We have upheld Congress's authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the “general Welfare.” [A particular problem arises when Congress expands an existing expenditure program to which a State has already consented; in one case we even upheld a very minor federal threat to withhold 5% of existing funding for highway programs – with an impact of only 1% on the state budget -- if States did not agree to wholly new federal conditions (lowering the minimum age for consumption of alcohol, thus affecting inebriated driving). But that sanction was very mild. Here the threat is to cut all existing funds – billions of dollars – if states do not agree to expanded program requirements in the Affordable Care Act.]

* * * Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs. See Nat. Assn. of State Budget Officers, Fiscal Year 2010 State Expenditure Report, p. 11, Table 5 (2011); 42 U.S.C. § 1396d(b). The Federal Government estimates that it will pay out approximately \$3.3 trillion between 2010 and 2019 in order to cover the costs of *pre-expansion* Medicaid. Brief for United States 10, n. 6. In addition, the States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid. [This is not a small or mild impact on State budgets, which we have approved in the past.] The threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.¹⁴

¹⁴ Justice GINSBURG observes that state Medicaid spending will increase by only 0.8 percent after the expansion. [But the amount subject to loss if the federal government cuts all grants is exceptionally large.] More importantly, the size of the new financial burden imposed on a State is irrelevant in analyzing whether the State has been coerced into accepting that burden. “Your money or your life” is a coercive proposition, whether you have a single dollar in your pocket or \$500.

* * *

Nothing in our opinion precludes Congress from offering funds * * * to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding. [Congress has included within the Affordable Care Act a severability clause that tells us that Congress wishes to have the remainder of the statute remain even if we hold part of it unconstitutional. Therefore, our holding today finds unconstitutional only this threat to take away existing Medicaid funds; Congress may attach conditions to the new funds it offers, but not the existing funds.]

* * *

The Affordable Care Act is constitutional in part and unconstitutional in part. The individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it. In this case, however, 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. Such legislation is within Congress's power to tax.

As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding. The remedy for that constitutional violation is to preclude the Federal Government from imposing such a sanction. That remedy does not require striking down other portions of the Affordable Care Act.

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

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.

* * *

Since 1937, our precedent has recognized Congress' large authority to set the Nation's course in the economic and social welfare realm [, citing cases from the 1930's]. 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[, citing a case from the early 1930's]. It is a reading that should not have staying power.

[The Affordable Care Act reforms a market in health care that is national and in which every resident of America participates, whether they purchase insurance or use hospitable services without insurance coverage. Moreover, the costs for consumers in the market are enormous and unpredictable, particularly for the large number of uninsured persons. But in the end, everyone consumes health care, regardless of whether they have purchased insurance. And the costs for uninsured persons are often passed on to others through the higher costs others must pay for insurance. The enormity and nationwide nature of the problem mean that no one state can solve the problems found in the system. The national solution found in the Affordable Care Act was therefore necessary.]

The Commerce Clause, it is widely acknowledged, “was the Framers' response to the central problem that gave rise to the Constitution itself.” Under the Articles of Confederation, the 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. [The present Constitution therefore gave Congress control over interstate commerce, so that national economic problems – both those that involve interstate commerce itself and those that affect interstate commerce – could receive national solutions.]

Straightforward application of these principles would require the Court to hold that the [individual mandate] is proper Commerce Clause legislation. Beyond dispute, Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce. Those without insurance consume billions of dollars of health-care products and services each year. Those goods are produced, sold, and delivered largely by national and regional companies who routinely transact business across state lines. The uninsured also cross state lines to receive care. Some have medical emergencies while away from home. Others, when sick, go to a neighboring State that provides better care for those who have not prepaid for care. [Moreover, the inability of the uninsured to pay for many services drives up the costs for other consumers, impacting the national market in health care and insurance. The individual mandate rationally relates to solving these problems.]

“[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 [v. McClung]. Congress' enactment of the minimum coverage provision, which addresses a specific interstate problem in a practical, experience-informed manner, easily meets this criterion.

[The Chief Justice’s idea that Congress is forcing a person to consume a product is irrelevant because all persons already consume health care; it is simply unpredictable when that event will occur. His distinction between activity and inactivity is also not supported by our precedents.]. In *Wickard [v. Filburn]*, 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. “[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. In another context, this Court similarly upheld Congress' authority under the commerce power to compel an “inactive” landholder to submit to an unwanted sale. See *Monongahela Nav. Co. v. United States*, 148 U.S. 312 (1893) (“[U]pon the [great] power to regulate commerce [,]” Congress has the authority to mandate the sale of real property to the Government, where the sale is essential to the improvement of a navigable waterway (emphasis added)); *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641 (1890) (similar reliance on the commerce power regarding mandated sale of private property for railroad construction).

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 (C.A.7 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. The [individual mandate] could therefore be described as regulating activists in the self-insurance market. *Wickard* is another example. Did the statute there at issue target activity (the growing of too much wheat) or inactivity (the farmer's failure to purchase wheat in the marketplace)? If anything, the Court's analysis suggested the latter. [The distinction, in any event, is meaningless.]

[As for the expansion of Medicaid, the Chief Justice bases his holding on the idea that this expansion is radically different. But expansion of Medicaid and related spending has been a constant feature of the law since it was first adopted, with over 50 amendments since 1950 and a constant increase in dollars spent on the program. The only thing different about the Affordable Care Act is the degree to which it radically increases federal funds given to the States – from a low of about 50% of expenditures pre-Act to 90% by 2020 under the Affordable Care Act. Moreover, the Act gives States substantial authority to choose how to implement the Act within broad federal parameters.]

Congress' authority to condition the use of federal funds is not confined to spending programs as first launched. The legislature may, and often does, amend the law, imposing new conditions grant recipients henceforth must meet in order to continue receiving funds. [Prior to today, “the Court has never ruled that the terms of any grant crossed the indistinct line between temptation and coercion.” It should not do so today because this is not a new program but a mere expansion of an existing program to which states have already consented.]

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

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

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

* * *

[We agree with the Chief Justice that the individual mandate is unconstitutional under the Commerce Clause and that the Medicaid Expansion is not supportable by the Spending Clause.]

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. 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.

[We disagree with the Chief Justice's conclusion that the individual mandate may be sustained under Congress's power to tax.] The issue is not whether Congress had the *power* to frame the minimum-coverage provision as a tax, but whether it *did* so. [By enacting a "penalty," Congress explicitly chose not to use its taxing power, and we have never in history held a penalty to be so minor that it is a mere tax. Therefore, there is no occasion for us to rule on whether a tax, in this circumstance, would have been constitutional.]

[Finally, having found both the individual mandate and the Medicaid expansion unconstitutional, we must decide whether to invalidate all other provisions in the Act. Because these provisions are so central to how the entire statutory scheme works, we believe that (i) the remaining parts of the Act cannot function alone and (ii) that leaving the remainder of the statute functional would be to authorize a scheme Congress would not have enacted. The entire statute must therefore fall.]

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

Justice THOMAS, dissenting. [Omitted]

Note on the Sebelius Case in Theory and In Fact

1. The Chief Justice's theory about the limits of the Commerce Clause, articulated in *Sebelius*, leaves all precedents intact. Title II, predicated on existing commerce among the states, is not affected by his observation that the Affordable Care Act fails because it compels commerce that does not yet exist.

(a) The difference between the majority and the dissent on the Commerce Clause seems to depend on how one perceives the facts. The majority sees interstate commerce as not yet extant – and becoming extant only after being compelled through purchase of insurance, thus making it subject to the majority's criticism as a bootstrap-type argument. The dissent emphasizes the many ways in which interstate commerce already exists in health care, viewing the compulsion to purchase insurance in the interstate market as simply a part of existing interstate commerce. When a problem may be viewed either of two ways, is there a default position that may act as tie-breaker?

(b) The Chief Justice and his colleagues in the majority seem to rely as a default rule on the concept that Article I intended to create a federal government of limited powers – powers supreme when granted but limited. Is it their need to find a limit to federal power that compels their decision? Is this concern better labeled as “theoretical” or “practical”?

2. The *Sebelius* case attracted substantial political attention before it was decided, and the underlying statute passed Congress without a single vote from Republicans in the Senate. Viewed in the political context, was hyper-politicization of the Affordable Care Act in Congress a mere precursor to its hyper-politicization at the Court?

(a) The Chief Justice's *Sebelius* opinion found two provisions of a major federal programmatic statute unconstitutional under two different provisions of the Constitution. One statutory provision survived, but only after naming it a tax. Should *Sebelius* be read not as an important theoretical case but as a warning shot across the bow of Congress for the future? Alternatively, should *Sebelius* be read more positively as cementing and securing the prior status quo, including Congress's power to act against discrimination either by persons in interstate commerce or by persons using federal funds? Did the Court in the end fail to summon a majority to kill the entire Affordable Care Act?

(b) The year following the *Sebelius* decision, in **Shelby County v. Holder**, added to Chapter 7 in this supplement, the Court overturned a critical provision of the Voting Rights Act of 1965. The dominant theme of the majority opinion, again by the Chief Justice, was that “times have changed,” making previously appropriate remedies no longer appropriate. A secondary theme, however, emphasized that the unconstitutional provision seriously interfered with state sovereignty by treating states unequally. Given that *Sebelius* holds unconstitutional only a provision affecting states and that *Holder* does the same, are these cases more about separation of state and federal powers than about

civil rights and equality of persons?

3. In **Burwell v. Hobby Lobby, Inc.**, ___ U.S. ___, 134 S.Ct. ___ (June 30, 2014), a divided 5-4 Court held that a federal statute intended to protect civil rights, the Religious Freedom Restoration Act (RFRA), see pages 905-07 in the principal text, rendered illegal certain administrative regulations (adopted under the ACA) that required employers to pay for post-fertilization contraceptives that violated their religious beliefs. The case is not only significant for the limitations it places on the Affordable Care Act, but also because it recognizes that federal statutes creating rights may limit federal regulatory power.

Chapter 6. Add at the end of the introductory paragraphs to Chapter 6.

Although the Supreme Court has held that Congress may not “coercively” use its Spending Power to force states to act as Congress wishes, there is no reason to believe that Title VI presents any such problem. In **National Federation of Independent Business v. Sebelius**, ___ U.S. ___, 132 S.Ct. 2566 (2012), the Court ruled that a provision in the Affordable Care Act violated the Constitution because it not only conditioned future federal funding to states on adoption of new federal health care standards; it also threatened states with loss of all other federal funds relating to health care for the poor – a significant part of modern state budget expenditures. Does that precedent threaten Title VI? It seems unlikely. Although Title VI’s non-discrimination demand arguably added a further condition to existing federal programs, that condition applied only to federal programs intended to benefit third parties. The condition therefore merely continued the original federal insistence that its money be spent as directed – on all eligible beneficiaries, now clarified to mean all eligible persons without discrimination. Furthermore, for both state and private grantees, Title VI reinforces demands already applicable under § 1981 and the Equal Protection Clause.² (For further consideration of this issue, see the addition to Chapter 5 in this supplement, where the *Sebelius* case is reproduced.)

Chapter 7. Add at the end of Chapter 7B.4, following the last paragraph of the *Note on Underlying Considerations Affecting Coverage of State Governments*.

5. The constitutional issues affecting constitutional power to regulate discrimination by private employers stands in stark contrast to those affecting governments. Coverage is based on the effect that employers have on interstate commerce, essentially the same issue raised in Chapter 5 regarding the public accommodations provisions of the 1964 Act. Although the Court in **National Federation**

² To the extent that Title VI’s effects test, see section A *infra*, attaches additional nonconstitutional requirements (e.g., the disparate impact requirements), states might have a stronger argument, at least if the costs of attaining the supra-constitutional requirement were high. Consider this issue when reading section A.

of Independent Business v. Sebelius, ___ U.S. ___, 132 S.Ct. 2566 (2012), struck down one provision of the Affordable Care Act, its rationale left in place precedents upholding Title VII. In *Sebelius*, the Court reasoned that Congress could not compel purchase of a product in interstate commerce, then use the compelled interstate activity to justify use of its Commerce Clause power. By contrast, Title VII applies only to employers already engaged in existing interstate commerce. See 42 U.S.C. § 2000e (“‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year”).

Chapter 8. Add to paragraph 6 of the *Note on Congressional Power to Change the Substantive Scope of the Constitution* in Section A.

(c) In *Burwell v. Hobby Lobby, Inc.*, ___ U.S. ___, 134 S.Ct. ___ (2014), the Supreme Court held that RFRA has continued force when not directed against States. In that case the Court ruled that RFRA overturned federal regulations adopted to enforce the Affordable Care Act (“ObamaCare”) when those regulations conflicted with the rights created by RFRA.

Chapter 8. Add at the end of Section A, after the *Note on Congressional Power to Change the Substantive Scope of the Constitution*.

SHELBY COUNTY v. HOLDER

___ U.S. ___, 133 S.Ct. 2612

Supreme Court of the United States, 2013

Chief Justice ROBERTS delivered the opinion of the Court.

The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5 of the Act required States to obtain federal permission before enacting any law related to voting – a drastic departure from basic principles of federalism. And § 4 of the Act applied that requirement only to some States – an equally dramatic departure from the principle that all States enjoy equal sovereignty. This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting * * *. Reflecting the unprecedented nature of these measures, they were scheduled to expire after five years. See Voting Rights Act of 1965, § 4(a), 79 Stat. 438.

Nearly 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031. There is no denying, however, that the conditions that originally

justified these measures no longer characterize voting in the covered jurisdictions. By 2009, “the racial gap in voter registration and turnout [was] lower in the States originally covered by § 5 than it [was] nationwide.” *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 203–204 (2009). Since that time, Census Bureau data indicate that African–American voter turnout has come to exceed white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent. See Dept. of Commerce, Census Bureau, *Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States* (Nov. 2012) (Table 4b).

At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act’s extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time ago, “the Act imposes current burdens and must be justified by current needs.” *Northwest Austin*.

I

[The Voting Rights Act of 1965 contained in § 2 a general nationwide ban on racial discrimination in voting, enforceable by private lawsuits in federal court. Section 5 went much further, reversing the usual presumption of constitutionality and requiring certain jurisdictions to suspend their literacy tests for voting and to “preclear” any new voting standard or practice by submitting it to federal authorities for approval; only if the jurisdiction could prove that the change had neither the purpose nor the effect of causing racial discrimination was the change permitted. These “covered jurisdictions” were identified by a formula in §4(b) as any jurisdiction having a literacy test in 1964 and a voter turnout or registration of less than 50% in the 1964 election. The formula resulted in coverage of most states in the Old Confederacy after 1965, but successive amendments extended § 5 to reach also Texas, Arizona, and Alaska, as well as counties across the nation, from New Hampshire and New York to Florida, from South Dakota to California, and more. Successive amendments also restricted opportunities to seek removal from coverage. We have upheld all these extensions, covering 1965 to 2006. We now confront the 2006 extension, scheduled to last 25 more years. It is challenged by a county in Alabama that is subject to § 5 because it falls within the coverage formula of § 4(b).]

II

In *Northwest Austin*, we stated that “the Act imposes current burdens and must be justified by current needs.” And we concluded that “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.” *Ibid*. These basic principles guide our review of the question before us.

The Constitution and laws of the United States are “the supreme Law of the Land.” U.S. Const., Art. VI, cl. 2. State legislation may not contravene federal law. The Federal Government does not, however, have a general right to review and veto state enactments before they go into effect. A

proposal to grant such authority to “negative” state laws was considered at the Constitutional Convention, but rejected in favor of allowing state laws to take effect, subject to later challenge under the Supremacy Clause. See 1 Records of the Federal Convention of 1787, pp. 21, 164–168 (M. Farrand ed. 1911). [Outside the strictures of the Supremacy Clause, states remain free to order and structure their governments as they wish, preserving the “integrity, dignity, and residual sovereignty of the States” as well as securing “to citizens the liberties that derive from the diffusion of sovereign power.”]

Not only do States retain sovereignty under the Constitution, there is also a “fundamental principle of *equal* sovereignty” among the States. *Northwest Austin*, supra, [and other precedents going back to 1845. As] we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.

The Voting Rights Act sharply departs from these basic principles. It suspends “*all* changes to state election law – however innocuous – until they have been precleared by federal authorities in Washington, D.C.” States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own, subject of course to any injunction in a § 2 action. [Such submission to the Attorney General or a court in Washington, D.C., can take years for decision, and during the process the burden of proof of nondiscrimination falls on the covered jurisdiction.]

All this explains why, when we first upheld the Act in 1966, we described it as “stringent” and “potent.” [*South Carolina v. Katzenbach*.] We recognized that it “may have been an uncommon exercise of congressional power,” but concluded that “legislative measures not otherwise appropriate” could be justified by “exceptional conditions.” [These conditions included over a hundred years of racial discrimination in voting and widespread use in some states of stratagems and devices designed to limit voting by African-Americans. This resulted in African-American voter turnout that was approximately 50 percentage points lower than that for whites in the affected areas.]

At the time, the coverage formula – the means of linking the exercise of the unprecedented authority with the problem that warranted it – made sense [because its two factors – use of a literacy test in 1964 and total voter turnout or registration below 50% in 1964 – coincided with the states that had long used literacy tests to accomplish racial discrimination in voting.] It accurately reflected those jurisdictions uniquely characterized by voting discrimination “on a pervasive scale,” linking coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement. The formula ensured that the “stringent remedies [were] aimed at areas where voting discrimination ha[d] been most flagrant.”

Nearly 50 years later, things have changed dramatically. * * * In the covered jurisdictions, “[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.” *Northwest Austin*. The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years. See § 6, 84 Stat. 315; § 102, 89 Stat. 400. Those conclusions are not ours alone.

Congress said the same when it reauthorized the Act in 2006, writing that “[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices.” § 2(b)(1), 120 Stat. 577. The House Report elaborated that “the number of African-Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982,” and noted that “[i]n some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters.” H.R.Rep. 109–478, at 12 (2006), 2006 U.S.C.C.A.N. 618, 627. That Report also explained that there have been “significant increases in the number of African-Americans serving in elected offices”; more specifically, there has been approximately a 1,000 percent increase since 1965 in the number of African-American elected officials in the six States originally covered by the Voting Rights Act.

[Now African-American voter turnout exceeds that of whites in all of the originally covered states, except one, where the difference is negligible. Moreover, attempted perpetuated of race-based discrimination in voting has declined to negligible levels as measured by the Attorney General’s own statistics.] In the first decade after enactment of § 5, the Attorney General objected to 14.2 percent of proposed voting changes. In the last decade before reenactment, the Attorney General objected to a mere 0.16 percent.

* * *

Respondents do not deny that there have been improvements on the ground, but argue that much of this can be attributed to the deterrent effect of § 5, which dissuades covered jurisdictions from engaging in discrimination that they would resume should § 5 be struck down. Under this theory, however, § 5 would be effectively immune from scrutiny; no matter how “clean” the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for the good behavior.

The provisions of § 5 apply only to those jurisdictions singled out by § 4. We now consider whether that coverage formula is constitutional in light of current conditions.

III

When upholding the constitutionality of the coverage formula in 1966, we concluded that it was “rational in both practice and theory.” Katzenbach. The formula looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both. By 2009, however, we concluded that the “coverage formula raise[d] serious constitutional questions.” Northwest Austin. As we explained, a statute’s “current burdens” must be justified by “current needs,” and any “disparate geographic coverage” must be “sufficiently related to the problem that it targets.” The coverage formula met that test in 1965, but no longer does so.

Coverage today is based on decades-old data and eradicated practices. The formula captures

States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. § 6, 84 Stat. 315; § 102, 89 Stat. 400 [(1972)]. And voter registration and turnout numbers in the covered States have risen dramatically in the years since. Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. There is no longer such a disparity.

In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.

The Government's defense of the formula is limited. First, the Government contends that the formula is “reverse-engineered”: Congress identified the jurisdictions to be covered and *then* came up with criteria to describe them. [We accepted a similar argument in *Katzenbach* because the factors in § 4(b) actually reflected the discriminatory record. Today they do not.] Here, by contrast, the Government's reverse-engineering argument does not even attempt to demonstrate the continued relevance of the formula to the problem it targets. And in the context of a decision as significant as this one – subjecting a disfavored subset of States to “extraordinary legislation otherwise unfamiliar to our federal system,” *Northwest Austin* – that failure to establish even relevance is fatal.

The Government falls back to the argument that because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States Congress identified back then – regardless of how that discrimination compares to discrimination in States unburdened by coverage. This argument does not look to “current political conditions,” *Northwest Austin* * * * [As we noted above, those conditions have changed drastically.]

In defending the coverage formula, the Government, the intervenors, and the dissent also rely heavily on data from the record that they claim justify disparate coverage. Congress compiled thousands of pages of evidence before reauthorizing the Voting Rights Act. [There is much dispute about what this record shows.] Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the “pervasive,” “flagrant,” “widespread,” and “rampant” discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time. *Katzenbach*; *Northwest Austin*.

But a more fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day. The dissent relies on “second-generation barriers,” which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes. That does not cure the problem. Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on the § 4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution. We cannot pretend that we are reviewing an updated statute, or try our hand at updating the statute ourselves, based on the new record compiled by Congress. Contrary to the dissent's contention, we

are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.

* * *

There is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago. If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story. And it would have been irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time. But that is exactly what Congress has done.

Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2. We issue no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an “extraordinary departure from the traditional course of relations between the States and the Federal Government.” Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

The judgment of the Court of Appeals is reversed.

It is so ordered.

Justice THOMAS, concurring.

I join the Court's opinion in full but write separately to explain that I would find § 5 of the Voting Rights Act unconstitutional as well. [Because of the change in conditions since 1965, the requirements of § 5 can no longer be considered appropriate remedies. Remedies appropriate for prior conditions do not remain appropriate when conditions change.]

Justice GINSBURG, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

In the Court's view, the very success of § 5 of the Voting Rights Act demands its dormancy. Congress was of another mind. Recognizing that large progress has been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated. The question this case presents is who decides whether, as currently operative, § 5 remains justifiable, this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments “by appropriate legislation.” With overwhelming support in both Houses, Congress concluded that, for two prime reasons, § 5 should continue in force, unabated. First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would guard against backsliding. Those

assessments were well within Congress' province to make and should elicit this Court's unstinting approbation.

[The Voting Rights Act of 1965 reversed a century of inaction and ineffectiveness, as individualized cases failed to prevent recurring racial discrimination in voting. And it has been hugely effective, leading to the registration of more blacks in the first five years after 1965 than in all the years preceding the Act. But secondary barriers, such as those relating the conduct of elections and the drawing of boundaries, remain, and the Voting Rights Act remains necessary for eliminating these barriers. Congress amassed a voluminous 15,000-page record of continuing intentional racial discrimination to support the 2006 extension, and President Bush signed the 25-year extension into law. We must defer to Congress fact-finding abilities and the record it has compiled, especially in light of § 2 of the Fifteenth Amendment giving Congress explicit power to enforce the amendment.]

For three reasons, legislation *reauthorizing* an existing statute is especially likely to satisfy the minimal requirements of the rational-basis test. First, when reauthorization is at issue, Congress has already assembled a legislative record justifying the initial legislation. Congress is entitled to consider that preexisting record as well as the record before it at the time of the vote on reauthorization.

Second, the very fact that reauthorization is necessary arises because Congress has built a temporal limitation into the Act. It has pledged to review, after a span of years (first 15, then 25) and in light of contemporary evidence, the continued need for the VRA. Cf. *Grutter v. Bollinger* (anticipating, but not guaranteeing, that, in 25 years, “the use of racial preferences [in higher education] will no longer be necessary”).

Third, a reviewing court should expect the record supporting reauthorization to be less stark than the record originally made. Demand for a record of violations equivalent to the one earlier made would expose Congress to a catch-22. If the statute was working, there would be less evidence of discrimination, so opponents might argue that Congress should not be allowed to renew the statute. In contrast, if the statute was not working, there would be plenty of evidence of discrimination, but scant reason to renew a failed regulatory regime.

This is not to suggest that congressional power in this area is limitless. It is this Court's responsibility to ensure that Congress has used appropriate means. The question meet for judicial review is whether the chosen means are “adapted to carry out the objects the amendments have in view.” The Court's role, then, is not to substitute its judgment for that of Congress, but to determine whether the legislative record sufficed to show that “Congress could rationally have determined that [its chosen] provisions were appropriate methods.” [The record here clearly meets this test. In fact, the record before Congress showed that there were more Attorney-General objections between 1982 and 2004 (626) than there were between 1965 and the 1982 reauthorization (490). Moreover, Attorney-General requests for more information led to more than 800 modifications driven by a need to ensure non-discrimination. There was further explicit evidence that piecemeal litigation remained as ineffective as it was before passage of the 1965 Act.]

True, conditions in the South have impressively improved since passage of the Voting Rights Act. Congress noted this improvement and found that the VRA was the driving force behind it. But Congress also found that voting discrimination had evolved into subtler second-generation barriers, and that eliminating preclearance would risk loss of the gains that had been made. Concerns of this order, the Court previously found, gave Congress adequate cause to reauthorize the VRA [in 1972].

[The coverage formula remains valid as well because of the continuing record of racial discrimination in the originally covered jurisdictions. This specific evidence showing continued discrimination, as well as the fact that covered jurisdictions account for a disproportionate share of individual suits for intentional discrimination, makes the coverage formula identifying those states constitutional. The continuing availability of the “bailout mechanism” allows jurisdictions who are not culpable to escape § 5’s coverage. Certainly, this plaintiff, with its history of discrimination, has no standing to raise any legitimate claims by jurisdictions that might be unfairly burdened.]

[I also dissent because today’s] unprecedented extension of the equal sovereignty principle outside its proper domain – the admission of new States – is capable of much mischief. Federal statutes that treat States disparately are hardly novelties. See, *e.g.*, 28 U.S.C. § 3704 (no State may operate or permit a sports-related gambling scheme, unless that State conducted such a scheme “at any time during the period beginning January 1, 1976, and ending August 31, 1990”); 26 U.S.C. § 142(l) (EPA required to locate green building project in a State meeting specified population criteria); [and more]. Do such provisions remain safe given the Court's expansion of equal sovereignty's sway?

In the Court's conception, it appears, defenders of the VRA could not prevail upon showing what the record overwhelmingly bears out, *i.e.*, that there is a need for continuing the preclearance regime in covered States. In addition, the defenders would have to disprove the existence of a comparable need elsewhere. See Tr. of Oral Arg. 61–62 (suggesting that proof of egregious episodes of racial discrimination in covered jurisdictions would not suffice to carry the day for the VRA, unless such episodes are shown to be absent elsewhere). I am aware of no precedent for imposing such a double burden on defenders of legislation.

The sad irony of today's decision lies in its utter failure to grasp why the VRA has proven effective. The Court appears to believe that the VRA's success in eliminating the specific devices extant in 1965 means that preclearance is no longer needed. With that belief, and the argument derived from it, history repeats itself. The same assumption – that the problem could be solved when particular methods of voting discrimination are identified and eliminated – was indulged and proved wrong repeatedly prior to the VRA's enactment. Unlike prior statutes, which singled out particular tests or devices, the VRA is grounded in Congress' recognition of the “variety and persistence” of measures designed to impair minority voting rights. In truth, the evolution of voting discrimination into more subtle second-generation barriers is powerful evidence that a remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding. [I would affirm the Court of Appeals.]

Note on Time and Other Limits to Remedial Power

1. Chief Justice Roberts emphasizes two important factors that limit the remedial power previously recognized in the two *Katzenbach* cases from the 1960's. First, he notes that current remedies must reflect current realities, thus implying a time limit to remedies. Second, and apparently dispositively, however, he notes that the coverage formula of § 4(b) fails to identify areas of the country where serious racial problems in voting can be found, thus implying a classic failure of Congress to fit the remedy topically to the problem. Consider the first of these issues.

(a) Congress originally adopted the Voting Rights Act in 1965, 48 years before the Court handed down the *Holder* decision. Re-read the facts related in the first *Katzenbach* case: it is impossible to argue that the very same conditions exist today, is it not? Notice how Chief Justice Roberts uses modern data on preclearance objections to argue that preclearance is no longer necessary because there are so few modern problems to catch. Why does the dissent distrust the data?

(b) The idea of time limits for remedies was seen earlier in the *Grutter* decision, as cited (and reconstrued) in the dissenting opinion. It seems intuitive that there must be time limits on any remedy: could Congress extend the Voting Rights Act in perpetuity? If no, is the issue how far Congress can extend the remedy? Cf. *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (in determining term of years for copyright protection, “we defer substantially to Congress,” though Court suggests that “perpetual” copyright would be beyond Congressional power). In *Eldred*, the Court distinguished its practice of more closely reviewing Congress’s remedial legislation under the Civil War Amendments by noting that these gave Congress power to enforce a right created in the Amendments, not the power (as in the Copyright Clause) to create the right itself. *Id.* at 218. Did the Court in *Holder* see Section 5 as essentially creating a new right, not a remedy?

(c) The dissent tries to respond to the majority by arguing that original voting problems may have been largely cured but that “second generation” – or new – problems have arisen that preclearance can work to solve. Essentially, the dissent argues that the same remedial scheme is appropriate for solving a new range of problems. Did the majority fear that after the second generation there would be a third and fourth generation of problems, justifying an unending role for preclearance – a new right to have state voting laws reviewed in advance of implementation?

2. Now consider the second issue raised by the majority: the coverage formula of § 4(b) fails to identify areas of the country where serious racial problems in voting can be found, thus implying a classic failure of Congress to fit the remedy topically to the problem. In the end, the Court overturns not § 5 of the 1965 Act, but § 4(b) – the coverage formula that identifies jurisdictions to which § 5 applies.

(a) The majority seems to object to the coverage formula not only on the ground that it increasingly has grown to include jurisdictions geographically unconnected to the original problems detected in 1965, but that the coverage formula depends on use of a literacy test. This is very

problematic for the majority because the literacy test has been outlawed nationwide since the 1970 Voting Rights Act. See the previous Note. Each successive re-enactment of the Voting Rights Act, therefore, brings in new jurisdictions that did not even have a literacy test at the time the re-enactments were adopted.. How does the dissent respond?

(b) Ordinarily, the classic problem of determining adequate congruence or “fit” between ends and means has been measured by the rational basis test, a test not used for the Civil War Amendments because they create power to enact a remedy, not a new right. See *Eldred*, ¶ 1(b) supra. Chief Justice Roberts also ratchets up the argument for closer scrutiny by recognizing a right to equal treatment of states. Is this idea implicit in *Katzenbach v. South Carolina*?

3. Was Congress to blame for the eventual failure of the Voting Rights Act? In retrospect, the first *Katzenbach* case seems to indicate that the Court is approving the Act as an exceptional measure, largely justified by the fact that the coverage formula in § 4(b) in fact identifies jurisdictions that had an explicit and egregious history of voting discrimination. Moreover, on a theoretical level, by the early 2000's there has been no literacy test for a third of a century, and thus obviously no present discrimination could have resulted from such a test.

(a) Consider the politics of the Voting Rights Act. How were such large majorities created for passage of the extensions? As you read the cases from the era when § 5 was enforced, consider why both parties in Congress might have preferred preclearance and its rules, regardless of the desires of local politicians.

(b) Why did Congress not create a new coverage formula – a re-written § 4(b) – when it extended the Voting Rights Act? Because of changed times and the resulting spectrum of gravity of discrimination, was it essentially impossible to craft a new coverage formula? If so, what does that say about the continuing viability of the old formula? Put differently, who should bear the burden when a previously ideal solution becomes less tenable? The covered jurisdictions or the minority voters?