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## ORIGINALISM AND THE “INDIVIDUAL MANDATE”: ROUNDING OUT THE GOVERNMENT’S CASE FOR CONSTITUTIONALITY

Dan T. Coenen \*

### INTRODUCTION

From all appearances, the Supreme Court now is examining whether the new health care act’s minimum coverage provision—often referred to as the “individual mandate”—comports with the grants of power made to Congress by the Commerce Clause and Necessary and Proper Clause. The Court is considering this question against the backdrop of submissions made by the Solicitor General supporting the law and by a group of respondents vigorously attacking the law’s constitutionality. In a separate and more elaborate paper, I suggest that the two sides took dramatically different strategic approaches to the case.<sup>1</sup> The Solicitor General emphasized how the minimum coverage provision was of practical importance to Congress’s comprehensive effort to make health insurance policies broadly affordable on equal terms. Among other things, he argued that the provision guards against the risk that individuals would game the system by strategically waiting until they were ill to buy policies at a favorable, nondiscriminatory price. Although the government relied in part on *McCulloch v. Maryland*<sup>2</sup> to support the constitutionality of the minimum coverage provision, its argument was overwhelmingly based on modern precedents and pragmatic considerations.<sup>3</sup>

In striking contrast, the respondents rushed to occupy the originalist high ground. Time after time, in both their briefs and oral arguments, they drew attention to *The Federalist*, the “great Chief Justice,” Hamilton, Madison, “the framing generation,” “the founding,” and “the Framers.”<sup>4</sup> Counsel for the respondents took care to direct the Justices’ attention to the “text of the Constitution” and the purportedly “unprecedented” character of

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<sup>1</sup> Dan T. Coenen, *The Originalist Case for the “Individual Mandate”: Rounding Out the Government’s Argument in the Health Care Case* (Univ. of Ga. Law Research Paper Series, Paper No. 12-05, 2012), available at <http://ssrn.com/abstract=2053795> (link).

<sup>2</sup> 17 U.S. (4 Wheat.) 316 (1819) (link).

<sup>3</sup> Coenen, *supra* note 1, at 4–6.

<sup>4</sup> E.g., Transcript of Oral Argument at 60, 64, 73, 100, 107, *Dep’t of Health & Human Servs. v. Florida*, No. 11-398 (U.S. argued Mar. 27, 2012) [hereinafter Oral Argument] (link); see Coenen, *supra* note 1, at 7–9.

the minimum coverage provision.<sup>5</sup> They also sought to draw on the Framers’ original purposes by arguing that invalidation of the minimum coverage provision would vindicate “individual freedom,” while ensuring that the federal government would not come to possess “plenary power.”<sup>6</sup>

In my earlier work, I argued that these contrasting strategies raised a serious risk for the Solicitor General’s defense of the minimum coverage provision by creating the impression that the respondents held a much stronger hand than the government with regard to originalist lines of reasoning.<sup>7</sup> I also observed that the government in fact had— notwithstanding the picture painted by its non-originalist strategy—a powerful set of originalist arguments it could have made to the Court.<sup>8</sup> In this Essay, I seek to identify the central arguments that the Solicitor General might have offered but did not advance, while also focusing on key questions presented by the Justices at oral argument.

Part I of the Essay makes the case that a proper originalist understanding of the constitutional text supports Congress’s enactment of the minimum coverage provision. Part II reinforces this conclusion by showing that key originalist sources—including *The Federalist*, statements from the ratification debates, and constitutional precedents from the early Republic—indicate that the provision does not transgress state-protective limits placed by the Framers on the federal legislative power. Part III argues that, contrary to the respondents’ suggestions, the Necessary and Proper Clause was never intended to embody a freestanding liberty-based restriction on federal power that renders the minimum coverage provision invalid. Finally, Part IV demonstrates the error in the respondents’ contention that permitting Congress to pass the health insurance “mandate” would give it virtually limitless power, including in enacting mandates of all sorts. All of these observations buttress the same overarching conclusion: Contrary to the implication raised by the parties’ contrasting submissions, powerful arguments based on the words and deeds of the Framers themselves offer much support for the constitutionality of the minimum coverage provision.

## I. THE MANDATE AND TEXT

Any good originalist argument must begin with the constitutional text. The Commerce Clause of Article I, Section 8, Clause 3, provides that Congress may “regulate Commerce . . . among the several States.”<sup>9</sup> In a

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<sup>5</sup> Oral Argument, *supra* note 4, at 54, 81, 107.

<sup>6</sup> *Id.* at 107–08. These quotations are taken solely from the oral arguments of the respondents. For a far more extensive summary of the parties’ competing lines of argument, including as reflected in their briefs, see Coenen, *supra* note 1, at 3–15.

<sup>7</sup> *Id.* at 14–15.

<sup>8</sup> *Id.* at 15–60.

<sup>9</sup> U.S. CONST. art. I, § 8, cl. 3 (link).

## NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

series of decisions, the Court has held that this text permits Congress to control the availability and quality of products that move in interstate markets, as well as “the prices at which the commodities in that commerce are dealt in.”<sup>10</sup> This embracing vision of the commerce power is grounded in indications from early in our history that the power is “plenary” in scope, “may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”<sup>11</sup>

In addition, the Commerce Clause does not stand alone. Rather, it is supplemented by the Necessary and Proper Clause of Article I, Section 8, Clause 18, which specifies that Congress may “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”<sup>12</sup> As Chief Justice Marshall explained for a unanimous Court in *McCulloch*, the ratifiers (of which he was one) did not mean to permit Congress to pass only those laws that were “indispensable” to carrying Congress’s enumerated powers into execution. Rather, they understood the clause to authorize the enactment of statutes that were “useful” for that purpose.<sup>13</sup> And so, the argument goes, the minimum coverage provision is constitutional because it is “useful” in effectuating Congress’s aim of rendering insurance policies available, affordable, and adequately protective of the citizens who purchase them in an interstate market.<sup>14</sup>

How do the respondents seek to fend off this seemingly straightforward application of the originalist principles set forth in *McCulloch*? Advancing a textual argument, they claim that when the Framers created a congressional power to “regulate Commerce,” they must have meant that Congress could regulate only “people who are *already* in commerce”; thus, by implication, the Framers did not permit Congress “to create commerce” through the imposition of contractual mandates.<sup>15</sup>

This text-based argument faces three main problems. First, the broad word “regulate” on its face invites all forms of legal intervention, ranging from prohibition to discouragement to encouragement to compulsion—and

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<sup>10</sup> *Wickard v. Filburn*, 317 U.S. 111, 128 (1942) (link).

<sup>11</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197, 196 (1824) (link).

<sup>12</sup> U.S. CONST., art. I, § 8, cl. 18 (link).

<sup>13</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819) (link).

<sup>14</sup> See *Wickard*, 317 U.S. at 128 (noting that Congress may not only “regulate . . . prices at which commodities in [interstate commerce] are dealt in” but also “practices affecting such prices”). The respondents at no point argued that the sale of health insurance failed to qualify as commerce or that the sale of such insurance was so intrastate in nature that it did not involve “Commerce . . . among the several States.” As a result, arguments along those lines are not considered here. See also *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 539 (1944) (relying on “common parlance of the times in which the Constitution was written” to hold that Congress’s commerce power includes “the power to regulate trading in insurance to the same extent that it includes power to regulate other trades or businesses conducted across state lines” and adding that “[t]he modern insurance business holds a commanding position in the trade and commerce of our Nation”) (link).

<sup>15</sup> Oral Argument, *supra* note 4, at 56, 78 (emphasis added); *accord, e.g., id.* at 73.

that fact is not changed by specifying the subject to be regulated.<sup>16</sup> As a linguistic matter, for example, it seems clear enough that a power to “regulate education” would include the power to require children to attend school, even though such a requirement imposes a mandate that goes well beyond simply directing rules at those who are already in the classroom.<sup>17</sup> Thus, the respondents’ textual extrapolation stands in tension with the naturally commodious meaning of the very words on which they rely.<sup>18</sup>

Second, the respondents’ textual argument proves too much. In particular, if the respondents’ deal-only-with-people-who-are-already-in-commerce theory is sound, it would logically prohibit Congress from fostering—even through the use of non-mandates—the creation or significant expansion of any field of commerce (whether in ethanol, solar panels, pollution abatement technology, or whatever). As the state

<sup>16</sup> Among other things, this point finds support in Samuel Johnson’s dictionary, which was published shortly before the framing of the Constitution. See 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 514, 1619 (London, W. Strahan, 4th ed. 1773), quoted in *Seven-Sky v. Holder*, 661 F.3d 1, 16 (D.C. Cir. 2011) (“At the time the Constitution was fashioned, to ‘regulate’ meant, as it does now, ‘[t]o adjust by rule or method,’ as well as ‘[t]o direct.’ To ‘direct,’ in turn, included ‘[t]o prescribe certain measure[s]; to mark out a certain course,’ and ‘[t]o order; to command.’”), *petition for cert. filed*, 80 U.S.L.W. 3359, (U.S. Nov. 30, 2011) (No. 11-679) (link).

<sup>17</sup> To be clear, the point here is not that the federal government has the power to “regulate education.” The point instead is that, when we say that a state has the power to “regulate education,” a common and natural understanding of that term is that the state has the power to mandate school attendance. And if the term “regulate education” naturally includes the power to compel education, then the term “regulate Commerce” naturally includes the power to compel commerce.

<sup>18</sup> The state respondents also argue that the text of the Commerce Clause stands in telling contrast to the text of the Coinage Clause, which gives Congress both an initial power “to Coin money” and an additional power to “regulate the Value thereof.” U.S. CONST. art. I, § 8, cl. 5 (link). According to the state respondents, it is significant that the Commerce Clause granted Congress only the single power to regulate commerce and not, as with the Coinage Clause, “the separate power to bring into existence the object of regulation.” Brief for State Respondents on the Minimum Coverage Provision at 19, *U.S. Dep’t of Health & Human Servs. v. Florida*, No. 11-398 (U.S. Feb. 6, 2012) [hereinafter *State Respondents’ Brief*] (emphasis omitted) (link). The state respondents also contend that the Commerce Clause is rightly contrasted with clauses that specifically give Congress the powers “[t]o establish Post Offices,” U.S. CONST. art I, § 8, cl. 7 (emphasis added) (link), and “[t]o constitute Tribunals inferior to the supreme Court,” U.S. CONST. art I, § 8, cl. 9 (emphasis added), because no similar text gives Congress the power to “establish” or to “constitute” commerce. *State Respondents’ Brief*, *supra*, at 20. The implication of all these clauses, according to the state respondents, is that the Framers did not envision a federal power to “establish” or to “constitute”—that is, to *create* commerce, as purchase mandates would do—but only to regulate commerce that already existed. *Id.* at 19–20. Because of fundamental differences in linguistic context, however, this text-based argument is unavailing. In particular, as an originalist matter, the Coinage Clause sensibly empowered Congress both to coin money and to regulate its value because, without such phrasing, it would be unclear whether any federal power to coin federal money existed. The same logic, however, in no way dictates that the Framers could have been expected to set forth a power to “establish” or “constitute” commerce in parallel fashion, if they meant for such a power to exist. The reason why is that, regardless of the scope of congressional powers, “Commerce . . . among the several States”—unlike federal money, federal post offices, or lower federal courts—did and would exist regardless of the Framers’ actions. Thus, there was no need to deal with its creation in the Commerce Clause. Coenen, *supra* note 1, at 19 n.61.

respondents have rightly acknowledged, however, Congress should and does face no limits when it comes to “encouraging, enticing, and incentivizing individuals to enter into commercial transactions of all stripes.”<sup>19</sup> And so the “already in commerce” theory seems to be at war with itself.

Finally, whatever Congress might otherwise be able to do under the Commerce Clause alone, it can also pass “all Laws” that are necessary and proper for carrying its enumerated powers into execution.<sup>20</sup> Indeed, the whole point of the Necessary and Proper Clause is to vest Congress with a supplementary power—a power that, in its nature, reaches beyond what the enumerated power itself strictly provides. And so it follows that, whether or not Congress could enact a mandate under the Commerce Clause in and of itself, it was given the power under the Necessary and Proper Clause to enact “all Laws”—including mandates—to ensure “the beneficial exercise of [its] power” to regulate interstate commerce.<sup>21</sup>

## II. THE MANDATE AND FEDERALISM

Confronted with these textual problems, the respondents advance an alternative line of attack. They argue that the minimum coverage provision impinges on state power too much. In support of this claim, respondents make a variety of assertions—that the provision is “unprecedented,”<sup>22</sup> that it conflicts with the states’ historical control over health care,<sup>23</sup> that it reflects a wrongful effort by Congress to “bootstrap” on its enumerated authority,<sup>24</sup> and that it threatens to channel to Congress a plenary power that is inconsistent with the reservation of a general police power in the states.<sup>25</sup>

The stronger version of this argument—namely, that upholding the minimum coverage provision will effectively vest Congress with unlimited lawmaking discretion—confronts an obvious obstacle: modern decisions have repeatedly recognized state-protective principles under which many federal laws, including many mandates, lie beyond the federal legislative power.<sup>26</sup> In *United States v. Lopez*, for example, the Court broadly restricted Congress’s authority to regulate noneconomic activities pursuant to its commerce power.<sup>27</sup> Just as surely as that principle bars Congress from prohibiting gun possession in or near schools, it logically prohibits

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<sup>19</sup> State Respondents’ Brief, *supra* note 18, at 21–22.

<sup>20</sup> U.S. CONST., art. I, § 8, cl. 18 (link).

<sup>21</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 409 (1819) (link).

<sup>22</sup> Brief for Private Respondents on the Individual Mandate at 7, *U.S. Dep’t of Health & Human Servs. v. Florida*, No. 11-398 (U.S. Feb. 6, 2012) [hereinafter Private Respondents’ Brief] (link).

<sup>23</sup> *See id.* at 60.

<sup>24</sup> *Id.* at 43 (emphasis omitted).

<sup>25</sup> *See* State Respondents’ Brief, *supra* note 18, at 11; *see generally* Coenen, *supra* note 1, at 7–12, 14 (describing arguments set forth by respondents in their briefs and oral argument).

<sup>26</sup> *Id.* at 46–47, 49.

<sup>27</sup> *See* 514 U.S. 549, 567 (1995) (link).

Congress from mandating the carrying of guns in those areas as well.<sup>28</sup>

The weaker version of the argument posits that, all things considered, the Court should declare that the minimum coverage provision fails to qualify as “necessary and proper” because it simply poses too great a risk to state authority. This argument suffers from a troubling nebulosity. Even more important, it is at odds with at least six separate elements of the framing history.

First, whatever else one might say about the previously unrecognized limit that the respondents read into the Necessary and Proper Clause, such a restriction finds no meaningful support in the historical record of the drafting and ratification process. The respondents cite nothing from those materials that directly suggests that a law such as the minimum coverage provision lies beyond Congress’s granted powers. No passage in *The Federalist Papers*, for example, indicates that Congress lacks the power to impose an “individual mandate,” especially when doing so is seen by Congress as critical to the effective regulation of an interstate market.

Second, the revised system put in place by the Constitution in fact reflected “radical alterations” that channeled “new and extensive powers” to federal lawmakers.<sup>29</sup> Among other things, the Framers’ Constitution abolished the preexisting and woefully unsuccessful governing structure under which the federal Congress could direct legislative commands only at the states themselves.<sup>30</sup> The Framers chose instead an entirely new system under which congressional directives were to be aimed not at state governments, but at individual citizens.<sup>31</sup> And, by way of the Necessary and Proper Clause, the Framers vested Congress with what were understood to be “sweeping” powers,<sup>32</sup> unmistakably marked by flexibility, adaptability, and breadth.<sup>33</sup> Indeed, it was the creation of these vastly expanded powers

<sup>28</sup> See, e.g., Neil S. Siegel, *Four Constitutional Limits that the Minimum Coverage Provision Respects*, 27 CONST. COMMENT. 591, 598 (2011) (“[I]f the Court were to uphold the minimum coverage provision, it would remain beyond the scope of the commerce power for Congress to require individuals to possess firearms in their homes (or in school zones) on the ground that such possession, in the aggregate, substantially affects interstate commerce.”) (link).

<sup>29</sup> THE FEDERALIST NO. 84, at 584 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>30</sup> See THE FEDERALIST NO. 15, *supra* note 29, at 93 (Alexander Hamilton) (identifying this form of legislative authority as “[t]he great and radical vice in the construction of the existing Confederation”).

<sup>31</sup> See generally *New York v. United States*, 505 U.S. 144, 163–66 (1992) (collecting materials from the Constitution’s framing period that document this shift) (link).

<sup>32</sup> Thus, during the ratification period the provision became widely referred to as the “sweeping clause.” See THE FEDERALIST NO. 33, *supra* note 29, at 205 (Alexander Hamilton).

<sup>33</sup> See *infra* notes 37–62 and accompanying text. Not surprisingly, the scope of the Necessary and Proper Clause was seen by the Constitution’s opponents as so far-reaching that it became “a lightning rod for Antifederalist criticism.” John T. Valauri, *The Clothes Have No Emperor, or, Cabining the Commerce Clause*, 41 SAN DIEGO L. REV. 405, 429 (2004) (link). For further discussion of the pervasiveness of this criticism and federalist responses that reinforced the idea that powers granted by the clause were “in fact complex and doubtful and capable of great extension,” see Coenen, *supra* note 1, at 24 n.84 (quoting Herbert J. Storing, *What the Anti-Federalists Were For*, in THE COMPLETE ANTI-

## NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

that “require[d] a different organization of the federal government,” built on placing these “ample authorities” in a multi-branch lawmaking system internally structured to guard against abuses—in contrast to the “unsafe depository” of the “single body” that had all lawmaking responsibility under the Articles of Confederation.<sup>34</sup> It was also this far-reaching expansion of federal power that, in time, brought into being the many protections of liberty embodied in the Bill of Rights, including a Takings Clause responsive to the new federal government’s recognized authority to impose mandates directly on individual citizens to transfer their property even when they wished not to do so.<sup>35</sup> In short, while the respondents would read the Necessary and Proper Clause as foreclosing enactment of a broad category of congressional acts otherwise “useful” to implementing powers enumerated in Article I, the overall tenor of the framing cuts in the other direction. At the least, the respondents’ effort clashes with Justice Marshall’s upbraiding of Maryland in *McCulloch* for suggesting that the Necessary and Proper Clause “though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.”<sup>36</sup>

Third, as the text of the Necessary and Proper Clause makes clear, the Framers vested Congress with the power to make “all Laws”—not just some laws—that are necessary and proper for carrying its enumerated powers into execution. James Madison reaffirmed this controlling principle in *The Federalist No. 44*, when he observed that “wherever a general power to do a thing is given, every particular power necessary for doing it, is included.”<sup>37</sup> Alexander Hamilton confirmed this point in *The Federalist No. 31*, when he declared that:

A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible; free from every other control, but a regard to the public good and to the sense of

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FEDERALIST 1, 66 (Herbert J. Storing ed., 1981) (link).

<sup>34</sup> THE FEDERALIST NO. 84, *supra* note 29 at 584 (Alexander Hamilton). See generally Storing, *supra* note 33, at 54 (documenting core federalist view that “it is not sufficient to talk of the dangers of the powers granted when all admit that broad powers are necessary”; thus, “[t]he way to limit government effectively is not by niggardly grants of power . . . but by a properly designed complex internal structure”). In particular, the new Constitution provided powerful checks against the enactment of overreaching legislation by imposing the requirement of bicameral action by two very different legislative bodies and by empowering Presidents to veto laws even when passed by both chambers. See DAN T. COENEN, THE STORY OF THE FEDERALIST 118–25, 132–33 (2007).

<sup>35</sup> U.S. CONST. amend. V (link).

<sup>36</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 412 (1819) (link).

<sup>37</sup> THE FEDERALIST NO. 44, *supra* note 29, at 304–05 (James Madison) (emphasis added).

the people.”<sup>38</sup>

These passages, and others like them, reveal that the Framers meant for Congress, absent some trumping right located outside the Necessary and Proper Clause, to have access to “all the means” a legislature might use for executing its powers.<sup>39</sup> The respondents’ position, by contrast, would fence out from congressional use the particular set of means described as “individual mandates”—a position at odds with this important theme of our framing history.

Fourth, the Framers went beyond merely intending in a general way to vest Congress with all means for executing its enumerated powers. In keeping with the shift to a system under which Congress would regulate individuals rather than state governments, they also envisioned that the range of means given to Congress for carrying out its enumerated powers would match the broad range of legislative means placed in the hands of the states. Hamilton declared the controlling norm in *The Federalist No. 16*:

The government of the Union, like that of each State, must be able to address itself immediately to the hopes and fears of individuals . . . . It must in short, possess *all the means* and have a right to resort to *all the methods* of executing the powers, with which it is entrusted, that are possessed and exercised by the governments of the particular States.<sup>40</sup>

This principle is of obvious consequence here. The respondents, after all, do not argue that the states somehow lack authority to enact individual health insurance “mandates” pursuant to their general police powers. Indeed, Massachusetts has passed such a law, and the respondents have in no way questioned its propriety.<sup>41</sup> It follows—as an originalist matter—that the minimum coverage provision stands on firm ground under the Necessary and Proper Clause. Put simply, if the states can use insurance mandates as a means to advance the health and welfare of their people, Congress can use that same means when doing so is “useful” to improving the operations of

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<sup>38</sup> THE FEDERALIST NO. 31, *supra* note 29, at 195 (Alexander Hamilton) (emphasis added).

<sup>39</sup> See *infra* note 40 and accompanying text (quoting THE FEDERALIST NO. 16 (Alexander Hamilton)).

<sup>40</sup> THE FEDERALIST NO. 16, *supra* note 29, at 102–03 (Alexander Hamilton) (emphasis added). Notably, not only did the pro-Constitution authors of *The Federalist* recognize this principle, but fear-stricken antifederalists did as well. As was stated by the leading New York antifederalist writer, Brutus: “‘The powers, rights, and authority, granted to the general government by this constitution, are as complete, with respect to every object to which they extend, as that of any state government.’” Storing, *supra* note 33, at 66 (quoting Brutus).

<sup>41</sup> See Oral Argument, *supra* note 4, at 80 (argument of counsel for the state respondents).

## NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

interstate commerce.<sup>42</sup>

Fifth, the respondents' argument—which emphasizes the purportedly “unprecedented” character of the minimum coverage provision—misses the point that the Framers envisioned ambitious, innovative, and novel uses of legislative means over the long haul. As Hamilton explained in *The Federalist No. 34*:

Nothing therefore can be more fallacious, than to infer the extent of any power, proper to be lodged in the National Government, from an estimate of its immediate necessities. There ought to be a CAPACITY to provide for future contingencies, as they may happen; and, as these are illimitable in their nature, it is impossible safely to limit that capacity.<sup>43</sup>

Many others said the same thing. At the Constitutional Convention, for example, James Wilson proclaimed: “We should consider that we are providing a Constitution for future generations, and not merely for the peculiar circumstances of the moment.”<sup>44</sup> At the Massachusetts Ratification Convention, delegate Christopher Gore reiterated that “the exigencies of government are in their nature illimitable; so, then, must be the authority which can meet these exigencies.”<sup>45</sup> Chief Justice Marshall endorsed this same idea in *McCulloch* when he emphasized that our founding document was “intended to endure for ages to come.”<sup>46</sup> The designedly enduring character of that document signaled to the Great Chief Justice that Congress was meant to have “ample means” to implement its “ample powers,” so as to be able to respond to the “various crises of human affairs.”<sup>47</sup> Echoing Hamilton, Chief Justice Marshall recognized that, in the eyes of the Framers, “[i]t would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen by all, must have been seen dimly, and which can be best provided for as they occur.”<sup>48</sup> In short, the Framers

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<sup>42</sup> See *supra* notes 14–16 and accompanying text (discussing holding of *McCulloch*).

<sup>43</sup> THE FEDERALIST NO. 34, *supra* note 29, at 211 (Alexander Hamilton). In discussing the Necessary and Proper Clause, he added: “[W]e must bear in mind, that we are not to confine our view to the present period, but to look forward to remote futurity.” *Id.* at 210.

<sup>44</sup> JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 376 (Ohio Univ. Press rev. ed., 1984) (quoting James Wilson) (link); see also *id.* at 551 (“As we are laying the foundation for a great empire, we ought to take a permanent view of the subject and not look at the present moment only.” (quoting John Rutledge)) (link).

<sup>45</sup> 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 66 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott Co. 1891).

<sup>46</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (link).

<sup>47</sup> *Id.* at 408, 415 (emphasis in second quotation omitted).

<sup>48</sup> *Id.* at 415. The Chief Justice also identified an important related reason to afford Congress a full range of means for implementing its powers: the unfolding of the future would, and should, afford Congress “the capacity to avail itself of experience, to exercise its reason, and to accommodate its

crafted the Necessary and Proper Clause to vest in Congress “a power equal to every possible contingency” that a profoundly uncertain future might present.<sup>49</sup>

Finally, and in any event, our constitutional history signals that the minimum coverage provision is not “unprecedented” in a constitutionally relevant sense.<sup>50</sup> This is the case because our traditions have long endorsed a wide range of individual mandates, including mandates that interfere with individual liberty in far greater ways than by imposing a limited financial penalty on some individuals who fail to buy valuable insurance.<sup>51</sup> In *The Federalist*, for example, Hamilton deemed it clear that the federal government could mandate the entire citizenry to engage in the dangerous work of being members of a posse comitatus.<sup>52</sup> Congress has often imposed mandates in the form of military drafts, thus exposing citizens even to such extraordinary deprivations as facing death in battle.<sup>53</sup> With regard to private purchase mandates, just four years after the Constitution’s ratification Congress invoked its militia-related powers to require “every able-bodied white male,” from the ages of 18 to 45 to “provide himself” with “a good musket or firelock,” as well as “a sufficient bayonet and belt, two spare flints, and a knapsack,” and “a pouch with a box therein to contain not less than twenty-four cartridges.”<sup>54</sup> The respondents argue that these cases are beside the point because they deal with basic citizen responsibilities, including the duty to defend the country against foreign enemies. But this reasoning conflicts with another lesson of the framing era, which finds expression in *The Federalist No. 23*.

In that essay, Hamilton explored in detail “the objects to be provided for by a Federal Government” and “the quantity of power necessary to the accomplishment of those objects.”<sup>55</sup> His initial discussion focused on providing the broadest possible range of options to Congress in carrying out its powers over military matters. The need for this broad power emanated from an originalist justification that we already have encountered—that is, “[b]ecause it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them.”<sup>56</sup> Turning from the specific matter of military powers to the general matter of all federal powers, Hamilton continued to insist that Congress must have “the most ample authority for

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legislation to circumstances.” *Id.* at 415–16.

<sup>49</sup> THE FEDERALIST NO. 26, *supra* note 29, at 166 (Alexander Hamilton).

<sup>50</sup> For a more expansive discussion of this subject, see Coenen, *supra* note 1, at 28–36.

<sup>51</sup> For a description of the operation of the minimum coverage provision, see *id.* at 5 n.10.

<sup>52</sup> THE FEDERALIST NO. 29, *supra* note 29, at 182–83 (Alexander Hamilton).

<sup>53</sup> See, e.g., Selective Draft Law Cases, 245 U.S. 366 (1918) (link).

<sup>54</sup> Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271 (link).

<sup>55</sup> THE FEDERALIST NO. 23, *supra* note 29, at 146 (Alexander Hamilton).

<sup>56</sup> *Id.* at 147 (emphasis omitted).

fulfilling the objects committed to its charge,<sup>57</sup> lest the people be forced “improvidently to trust the great interests of the nation to hands, which are disabled from managing them with vigour and success.”<sup>58</sup> Most importantly, when it came to the Necessary and Proper Clause, Hamilton did not hesitate to place Congress’s military powers and Congress’s commerce powers on the same footing. He began the thought by observing: “Shall the Union be constituted the guardian of the common safety? Are fleets and armies and revenues necessary to this purpose? The government of the Union must be empowered to pass all laws, and to make all regulations which have relation to them.”<sup>59</sup> Then, in words freighted with significance here, he added: “*The same must be the case, in respect to commerce*, and to every other matter to which its jurisdiction is permitted to extend.”<sup>60</sup> In short, *The Federalist No. 23* makes clear that the Necessary and Proper Clause is an equal-opportunity grant of legislative authority. To the new federal Congress it gave “an *unconfined* authority, as to *all* those objects which are intrusted to its management.”<sup>61</sup> Thus, under the Necessary and Proper Clause, a purchase mandate that is useful to the regulation of interstate commerce is no less constitutionally valid than, for example, a military draft or musket mandate that is useful to the national defense.

All of these elements of our constitutional history point in the same direction. They signal that the term “all Laws” in the Necessary and Proper Clause really means “all Laws.” Thus, just as surely as Congress can use prohibitions, preemptive measures, regulatory discouragements, or regulatory incentives to implement its enumerated powers, so too may it use mandates so long as it is genuinely acting to carry those powers into execution.<sup>62</sup>

### III. THE MANDATE AND LIBERTY

In addition to their federalism-based claim, the respondents press the idea that the minimum coverage provision unduly interferes with individual liberty, urging in particular that its liberty-inhibiting character renders it not “proper” under the Necessary and Proper Clause. At oral argument, Justice Scalia presented questions that pushed in this same direction.<sup>63</sup> He noted that two earlier decisions, *Printz v. United States*<sup>64</sup> and *Alden v. Maine*,<sup>65</sup>

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<sup>57</sup> *Id.* at 149.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (emphasis added).

<sup>61</sup> *Id.* at 150 (emphasis added).

<sup>62</sup> On the dispositive role of the genuineness requirement in applying the “reasonably adapted” test recognized in *McCulloch*, including if some form of heightened scrutiny takes hold, see Coenen, *supra* note 1, at 41–42, 46–49.

<sup>63</sup> For this line of questioning by Justice Scalia, see Oral Argument, *supra* note 4, at 27–29.

<sup>64</sup> 521 U.S. 898 (1997) (link).

<sup>65</sup> 527 U.S. 706 (1999) (link).

had indicated that the challenged federal laws were not “proper” even though they were “reasonably adapted”—that is, “necessary” under the principles of *McCulloch*—for carrying into execution Congress’s commerce power.<sup>66</sup> He also observed—while sprinkling into the colloquy a reference to the Tenth Amendment—that “the argument here is that *the people* were left to decide whether they want to buy insurance or not.”<sup>67</sup> This tying of liberty-based considerations to the scope of Congress’s delegated powers (and to the flip-side treatment of non-delegated powers in the Tenth Amendment) finds expression in a 1993 Duke Law Journal article written by Gary Lawson and Patricia B. Granger and cited by the Court in *Printz*.<sup>68</sup> The article’s thesis is that the word “proper” was indeed meant by the Framers to impose sweeping limitations on Congress’s ability to enact even those laws that were (as Justice Scalia put it) “reasonably adapted” to implementing its enumerated powers.<sup>69</sup> Not surprisingly, the private respondents repeatedly cite the Lawson and Granger article in their brief. In particular, they point to the article in asserting that laws that are “proper” under Article I, section 8, Clause 18, “do not tread on the retained rights of individuals,” which embrace—so the respondents claim—“the power of choosing the private parties whom [citizens] will transfer property to or contract with.”<sup>70</sup>

There are problems with this line of analysis even before one turns to the historical arguments put forward by Lawson and Granger. To begin with, in neither *Printz* nor *Alden* did the Court find in the word “proper” a freestanding limitation on congressional authority; rather, in each case the Court declared that the challenged federal law failed to qualify as “proper” only after concluding that it offended a limiting principle rooted in the overarching structure of the Constitution.<sup>71</sup> Second, even if the Court did somehow mean to find a freestanding limit in the word “proper” in those cases, neither of them concerned the rights of private individuals. Rather, in each case the Court focused squarely on threats to the internal workings of

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<sup>66</sup> Oral Argument, *supra* note 4, at 27.

<sup>67</sup> *Id.* at 29 (emphasis added).

<sup>68</sup> *Printz*, 521 U.S. at 924 (citing Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993)).

<sup>69</sup> See Lawson & Granger, *supra* note 68, at 271.

<sup>70</sup> Private Respondents’ Brief, *supra* note 22, at 60–61 (quoting in part Lawson & Granger, *supra* note 68, at 272).

<sup>71</sup> Thus, the Court in *Printz* relied squarely on “the structure of the Constitution” together with indications from both framing history and congressional practice to find among the Constitution’s “essential postulate[s]” the principle that Congress could not commandeer state officials to enforce federal laws. *Id.* at 904–18. Likewise in *Alden* the Court invoked “the Constitution’s structure,” together with its history, to conclude that “the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today.” 527 U.S. 706, 713 (1999). For further discussion on how these cases “recognized structural principles logically extrapolated from the text, structure, and history of the Constitution,” see also Coenen, *supra* note 1, at 40 n.165, 44 n.190.

coordinate sovereign entities posed by direct congressional interference with the officers and the treasuries of the states themselves.<sup>72</sup>

To be sure, the Court may now be contemplating a move that goes far beyond *Printz* and *Alden* by adopting the rights-protective revisionist reading of the word “proper” put forward by Lawson and Granger. But if this is so, the Court should think again. Why? Because the originalist evidence strongly indicates that the word “proper” was not meant to put in place the full panoply of personal-rights protections later laid down in the Bill of Rights, together with (as the private respondents now are claiming) other fundamental liberties. Four reasons—each one powerful in itself—cut in favor of this conclusion.

First, the historical record of the making of our Constitution refutes, rather than supports, the idea that the founding generation saw the word “proper” as furnishing a cornucopia of individual-rights protections. Of particular importance, there is a striking dearth of evidence from the framing period that reflects any such understanding. This evidentiary void is especially telling because there was no more serious antifederalist critique of the proposed Constitution than that it failed to adequately protect individual rights.<sup>73</sup> Yet the leading federalists never countered this criticism—as they surely would have if they could have—by claiming that the word “proper” filled the gap by providing a font of personal-liberty protections.<sup>74</sup> The authors of *The Federalist*, for example, never indicated that the word “proper” stood as bulwark of individual rights, although they assured their readers that they would “endeavour to give a satisfactory answer to all the objections which shall have made their appearance that may seem to have any claim to your attention.”<sup>75</sup> In the end, the Framers’ silence about the meaning of the word “proper” speaks louder than their words. And it indicates that the term was not meant to work a transformative change in our governmental system by embedding a vast array of unenumerated individual rights in the grant of powers in Article I, Section 8.<sup>76</sup>

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<sup>72</sup> See *supra* note 71 (detailing the holdings of *Printz* and *Alden*).

<sup>73</sup> See, e.g., CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA* 245 (1986) (“When the Constitution was published in the newspapers after the Convention rose, and the Antifederalists gathered their strength for opposition, nothing created such an uproar as the lack of a bill of rights.”).

<sup>74</sup> See, e.g., J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 638–39 (“If readers of the proposed Constitution shared Lawson and Granger’s view of the term ‘proper,’ one would expect calls for a Bill of Rights to be met with the claim that the document already incorporated such protections. Instead, proponents of the Constitution made the less reassuring argument that Congress had been given no power to undermine cherished individual freedoms, such as freedom of speech.”) (link).

<sup>75</sup> THE FEDERALIST NO. 1, *supra* note 29, at 7 (Alexander Hamilton).

<sup>76</sup> For a detailed development of this point, including the limited discussion of the word “proper” and of natural rights during the ratification debates, see Coenen, *supra* note 1, at 37–40. My earlier paper also identifies and questions an alternative analysis to the effect that the minimum coverage provision runs afoul of nonconstitutional 18th-century principles of agency and administrative law, both

Second, as Professor Randy Beck has documented, the evidence provided in the actual historical record augurs against the Lawson and Granger thesis. As Beck puts the point, that record offers “numerous early expositions of the Necessary and Proper Clause that treat the propriety requirement as an internal restraint on the means-end relationship” between the congressional act and the relevant enumerated power, rather than a freestanding “external” constraint that in effect established wide-ranging individual rights.<sup>77</sup> In other words, “[h]istorical analysis . . . suggest[s] that one should view the propriety requirement as regulating the fit between congressional means and congressional ends, rather than as a textual hook for principles of . . . individual liberty.”<sup>78</sup>

Third, adopting Lawson and Granger’s view of the word “proper” would appear to produce anomalous, or at least very peculiar, results. It would dictate, for example, that “persons . . . would possess greater rights when Congress acted pursuant to the Necessary and Proper Clause than when it directly exercised its enumerated powers.”<sup>79</sup> It would also mean that the Framers oddly intended to give residents of states far-reaching individual-rights protections against the federal government while giving residents of territories—which Congress could regulate without resort to the Necessary and Proper Clause—no such protections at all.<sup>80</sup>

Finally, and most importantly, the argument that the word “proper” provides an expansive source of personal-liberty protections ignores the elephant in the room. Whatever else one might say about the ratification process, that process resulted in the adoption of the Bill of Rights. The chain of events that led to that adoption involved the persistent efforts of

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of which—according to some scholars—were imported into the Necessary and Proper Clause in keeping with general background understandings. *Id.* at 37 n.160 (discussing Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267 (2011)) (link).

<sup>77</sup> Beck, *supra* note 74, at 641; *see also id.* at 634–35, 641–48 (developing this distinction, as well as the historical evidence that cuts against the external-constraint understanding of the term “proper”).

<sup>78</sup> *Id.* at 627.

<sup>79</sup> *Id.* at 639.

<sup>80</sup> *See* Lawson & Granger, *supra* note 68, at 310–11, 324 & n.233, 328–30. According to Lawson and Granger, this differential treatment logically follows from the absence of the word “proper” in the clause that permits Congress to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U.S. CONST. art. IV, § 3 (link). Common sense suggests, however, no less of a need to afford rights protections to residents of territories than to residents of states, especially because the residents of territories, unlike the residents of states, lack any affiliation with a state government that stands ready to safeguard its citizens’ interests against federal overreaching. Indeed, Lawson and Granger go so far as to indicate that the Ninth Amendment operated to provide wide-ranging unenumerated protections to residents of states, but not to residents of territories, on the theory that it simply carried forward rights created by the word “proper.” What is more, they take this position even though the Ninth Amendment was adopted together with the first eight amendments, each of which applied equally to residents of states and territories. *See* Lawson & Granger, *supra* note 68, at 328–30. For a further elaboration of these points, and other critiques of the Lawson and Granger thesis, *see* Coenen, *supra* note 1, at 36–40.

## NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

antifederalists in making over and over, and winning in the end, the argument that an enumeration of rights was needed precisely because the Constitution vested Congress with far too expansive powers, especially because of its inclusion of the much-criticized “Sweeping Clause.”<sup>81</sup> This history negates the idea that the word “proper” was understood to protect individual freedoms in a broad fashion. Instead, it shows that the Necessary and Proper Clause was seen as a threat—rather than a boon—to personal liberties, and that the rightful protection of those liberties should and would come from enumerating protected *rights* independent of the Constitution’s listing of granted *powers*.<sup>82</sup> Put simply, the ratifying community did not see the word “proper” as providing far-reaching protections of individual liberty. Indeed, that is exactly why that community—with the ultimate endorsement of antifederalists and federalists alike—agreed to put in place the new and textually explicit protections of liberty embodied in the Bill of Rights.

Let us assume, however, that the Lawson and Granger thesis is correct and the word “proper” was, in fact, meant to protect fundamental individual rights. The respondents still have another hurdle to clear: They must show, in the face of the presumption of constitutionality, that the minimum coverage provision somehow offends those fundamental rights in a constitutionally intolerable way. That showing, however, is not easy to make. For starters, the respondents marshal no evidence from the history of the framing that a law such as the minimum coverage provision is improper in a rights-infringing sense. To be sure, they argue that the provision runs afoul of the norm that the government cannot “take[] property from A. and give[] it to B.”<sup>83</sup> Governmental action that meets that description, however, seems more rightly dealt with by the Fifth Amendment’s Takings Clause than by extrapolations from the word “proper” in Article I, Section 8. In any event, there is no mere “giv[ing]” of one’s property to another person here.

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<sup>81</sup> See, e.g., Storing, *supra* note 33, at 66 (developing this idea, including by posing the recurring question on the minds of antifederalists—“Who can overrule the pretensions of Congress that any particular law is ‘necessary and proper?’”—and then answering that question by quoting the antifederalist writer Old Whig II, who observed: “No one; unless we had a bill of rights to which we might appeal, and under which we might contend against any assumption of undue power and appeal to the judicial branch of the government to protect us by their judgments.”).

<sup>82</sup> See generally COENEN, *supra* note 34, at 176–78 (recounting this history).

<sup>83</sup> Private Respondents’ Brief, *supra* note 20, at 13, 61 (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.) (emphasis omitted)). Notably, in *Calder*, Justice Iredell took strong exception to Justice Chase’s suggestion that judges might enforce “[t]he ideas of natural justice” because those ideas are “regulated by no fixed standard.” *Id.* at 399 (opinion of Iredell, J.). In any event, Justice Chase’s comments in *Calder* did not involve the Necessary and Proper Clause. Instead, they targeted the sort of overreaching regulation by state governments that the internal structure of the new federal government was seen as countering at the federal level. See, e.g., THE FEDERALIST No. 10 (James Madison); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 523 (1989) (Scalia, J., concurring) (noting that “[a]n acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history”) (link).

Rather, the insurance buyer receives a policy of significant worth, and this is all the more the case because it is issued pursuant to a regulatory program designed to benefit all—including the reluctant buyer—over the long term. At the very least, our early history is not easily reconciled with the idea that the Constitution categorically bans all forced-acquisition mandates that target private transactions. If nothing else, the musket-purchase mandate of 1792 stands for that proposition.<sup>84</sup>

The respondents seek to overcome these critiques by offering an argument by analogy. They emphasize that in *New York v. United States* the Court deemed it unconstitutional for Congress to “commandeer[]” state legislatures by “compelling them to enact and enforce a federal regulatory program.”<sup>85</sup> Thus, they continue, Congress should likewise be unable to commandeer individuals by forcing them to enter into private purchase contracts. The two cases, however, are readily distinguishable on originalist grounds. Indeed, the entire rationale of the *New York* decision focused on the Framers’ specific plan to shift away from a system of federal legislative control over *states* to a system of federal legislative control over *individuals*.<sup>86</sup> Thus, time and again, the Court distinguished in that opinion between “congressional regulation of individuals” and “congressional requirements that States regulate.”<sup>87</sup> For this simple reason, the rationale of *New York* has no application to the minimum coverage provision. Indeed, precisely because that provision does directly target individuals, it comports with the Framers’ embrace of “a Constitution that confers upon Congress the power to regulate individuals, not States.”<sup>88</sup>

#### IV. THE MANDATE AND BROCCOLI

The respondents have one last arrow in their quiver. They say that upholding the minimum coverage provision will enable Congress to enact all sorts of terrible mandates, including the now-famous requirement that all Americans must regularly purchase broccoli. The teaching of the Framers, however, counsels skepticism toward this “Chicken Little” style of reasoning. As James Madison explained in *The Federalist No. 41*: “[I]n every political institution, a power to advance the public happiness, involves a discretion which may be misapplied and abused.”<sup>89</sup> John Rutledge, who had served as a key delegate at the Philadelphia Convention, likewise insisted at the South Carolina Ratification Convention that “the

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<sup>84</sup> See *supra* note 54 and accompanying text.

<sup>85</sup> 505 U.S. 144, 176 (1992) (quoting *Hodel v. Va. Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)) (link).

<sup>86</sup> See *New York v. United States*, 505 U.S. at 163–66 (discussing in detail historical evidence to this effect).

<sup>87</sup> *Id.* at 178.

<sup>88</sup> *Id.* at 166.

<sup>89</sup> THE FEDERALIST NO. 41, *supra* note 29, at 269 (James Madison).

## NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

very idea of power included a possibility of doing harm; and if the gentlemen would show the power that could do no harm, he would at once discover it to be a power that could do no good.”<sup>90</sup> The historian Herbert Storing rightly noted that federalist proponents of the Constitution made this same point “[a]gain and again.”<sup>91</sup> Justice Joseph Story thus stood on solid originalist ground when he declared in 1816 that “[i]t is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse.”<sup>92</sup>

In any event, the minimum coverage provision is readily distinguishable from the broccoli-purchase and similar mandates. Indeed, it is distinguishable based on originalist principles.<sup>93</sup> Among other things, the minimum coverage provision—in contrast to the broccoli mandate—is embodied in a comprehensive federal scheme that simultaneously helps and hurts both businesses and individuals, and these elaborate tradeoffs are indicative of a genuine legislative effort to remedy recognized flaws in a complex interstate market. This point is of particular importance because the Court in *Gonzales v. Raich* emphasized the presence of “a larger regulation of economic activity,” which otherwise “could be undercut,” when it upheld a regulation—namely, a ban on possessing medical marijuana—that standing alone would have been unsustainable under the commerce power.<sup>94</sup> No less significantly, in contrast to the hypothesized broccoli law, the minimum coverage provision: (1) addresses the race-to-the-bottom problem that arises from the predictable reluctance of states to develop reformatory insurance programs through which they might become a “bait to the needy and dependent elsewhere”<sup>95</sup>; (2) seeks to rectify the problem of health-insurance-driven “job lock,” which stifles the interstate migration of workers in ways that undermine national productivity; (3) deals with problems of interstate cost-shifting that result from a distinctive dynamic in the health care field—namely, that care is routinely supplied even to the non-paying uninsured, including persons who reside in other states, due to deeply rooted norms of altruism; (4) counteracts the specialized problem of persons’ strategically foregoing insurance coverage until they are ill, so as to cash in on the one-size-fits-all nondiscriminatory policy price; and (5) addresses, at bottom, a “truly national” problem that affects the well-being of millions of Americans, who are unable to afford a vital form of protection, as they to seek to participate productively in the

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<sup>90</sup> Storing, *supra* note 33, at 30 & 82 n.36 (quoting statement).

<sup>91</sup> *Id.* at 30.

<sup>92</sup> *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 344 (1816) (link).

<sup>93</sup> For a more elaborate development of the reasons why the minimum coverage provision is distinguishable, including as to the originalist roots of these distinctions, see Coenen, *supra* note 1, at 52–60.

<sup>94</sup> 545 U.S. 1, 24 (2005) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)) (link).

<sup>95</sup> *Helvering v. Davis*, 301 U.S. 619, 644 (1937) (link).

commerce of the nation.<sup>96</sup> For all of these reasons, the much-ballyhooed—and entirely imaginary—broccoli-purchase mandate is far removed from Congress’s effort to deal with the all-too-real crisis in health-care-related commerce that gave birth to the minimum coverage provision.

### CONCLUSION

This Essay responds to arguments that the minimum coverage provision is irreconcilable with the text and history of Article I of our Constitution. It suggests that the broad language of the Commerce and Necessary and Proper Clauses imposes no restriction on Congress’s ability to enact laws of this kind. Indeed, the history of the framing indicates that the ratifying community intended to authorize Congress to use all legislative means available to the states—including in highly innovative and adaptive ways—so long as it was genuinely acting to improve the operation of interstate markets. This Essay also points out that one of our earliest Congresses adopted a purchase mandate under its militia powers and that the Framers signaled that federal lawmakers would possess an equivalent power when acting under the Commerce Clause. These considerations, and others as well, cut sharply against the respondents’ argument that the minimum coverage provision offends constitutional principles of federalism.

To be sure, the respondents also assail that provision by invoking values of individual liberty. As this Essay demonstrates, however, the Framers did not intend that freestanding protections of individual liberty would find a home in the word “proper” or elsewhere in Article I, Section 8. Indeed, a central lesson of the framing history is that such protections were to be lodged in other provisions of the Constitution—most significantly, in the many safeguards of personal freedom set forth in the Bill of Rights. Notably, the respondents remain free to challenge the constitutionality of the minimum coverage provision under those provisions, including the express protection given to “liberty” and “property” by the Fifth Amendment. In the case as it now stands before the Supreme Court, however, no such argument has been presented.

In the end, the respondents ask the Court to strike down the minimum coverage provision—a key component of landmark legislation directed at a distinctive risk-spreading industry that confronts grave, practical difficulties—on the theory that the provision is functionally indistinguishable from random, weird, and wholly nonexistent laws that would force citizens to buy broccoli and other sundry items. In fact, however, the consequences the respondents so greatly fear would not logically follow from validating the minimum coverage rule, because that rule is demonstrably distinguishable from the mandates the respondents

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<sup>96</sup> *Lopez*, 514 U.S. at 568.

NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

have hypothesized. In effect, the respondents have called on the Court to throw out the baby with the bathwater even before any bathwater exists. What is more, they have done so based on a principle that stands in tension with the text of the Constitution, the history of its adoption, and its implementation in the early Republic.