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The Originalist Case for the “Individual Mandate”: Rounding out the Government’s Argument in the Health Care Case

By Dan T. Coenen*

(May 7, 2012)**

The Supreme Court has now received the briefs and heard the oral arguments in the landmark case that concerns the federal health care law. Much attention has focused on the law’s minimum coverage provision, or so-called “individual mandate,” and in particular its constitutionality under the Commerce Clause and the Necessary and Proper Clause. This Article offers two observations about the arguments made to the Court on that issue. First, it shows that the challengers of the minimum coverage provision adopted a strategy of emphasizing originalist reasoning, while the federal government focused its defense of the law on practical considerations and modern precedents. This difference in tactics, it is suggested, may prove to be of great consequence to the outcome of the case in light of the current Court’s marked receptivity to originalist analysis. Second, the Article suggests that – contrary to the impression created by the submissions of the parties – there are in fact powerful originalism-based reasons for concluding that the minimum coverage provision is constitutional. Indeed, according to the treatment offered here, these arguments have their roots in all key elements of originalist discourse – the text of the Constitution, the background understandings that gave rise to the relevant clauses, and early congressional and judicial precedents. To be sure, different observers who take different views of constitutional analysis will reach different conclusions about the constitutionality of minimum coverage provision. But this Article contends that originalism-based arguments that were not fully aired before the Court cut strongly in favor of the provision’s constitutionality.

INTRODUCTION

The parties now have filed their briefs and presented their arguments in the Supreme Court case that concerns the constitutionality of the Patient Protection and Affordable Care Act (“PPACA”). In few instances in the long history of the Court has the advocacy of the parties stirred more interest, including among the Justices

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** Note from DTC: This paper has not yet been subject to a thorough law-journal-type cite check or the sort of fine-tuning that a helpful editorial review can produce. It does, however, reflect a research effort that I view as essentially complete and sets forth what I perceive to be the key features of a comprehensive line of line analysis. I very much welcome comments and corrections.

themselves.¹ Given the prominence of the case, the unprecedented political build-up to this juncture, and the exceptional skill of the advocates engaged in the legal contest, it is worth reflecting on the overarching litigation strategies that the parties' written briefs and oral presentations reflect. It also is worth considering what their crafters might have argued but left unsaid.

In this essay, I reflect on these matters with a focus on the most publicized issue raised by the case: whether the minimum coverage provision – referred to by many as the “individual mandate” – was a permissible exercise of Congress’s powers under the Commerce Clause and the Necessary and Proper Clause. I do so with humility. Presenting a case to the Supreme Court is a supremely difficult task. And it is all the more difficult when (1) the case concerns a public policy issue that dominates our time because of its pressing, even life-or-death, importance to millions of Americans, (2) the case occupies a center-stage position in our national politics as a pitched battle for the presidency moves forward, and (3) the case holds the potential to restructure core features of our constitutional doctrine. Of particular interest to me is the manner in which lawyers in the case dealt with originalist lines of argument. This interest stems in part from my past work with the Federalist Papers² and other framing-era sources that concern Congress’s commerce-related powers.³ But that interest emanates most of all from practical realities. Originalism is on the rise in the Supreme Court.⁴ Thus, lawyers must always attend to it as they shape arguments for the Court’s consideration.

Against this backdrop, I offer two main observations. First, I note that the parties in the case took markedly different approaches to the subject of originalism. The challengers of the minimum coverage provision adopted a strategy of moving with aggressiveness to capture the originalist high ground. Meanwhile, the Solicitor General focused his defense of the law on practical considerations and modern precedents. In Part I of this essay, I suggest that the federal government’s approach carried with it a significant risk, which is not hard to see: A downplaying of originalist arguments may well have sent a message, however unintended, that the minimum coverage provision is not defensible based on originalist principles.

My second observation focuses on arguments that the Solicitor General might have offered but chose not to advance. The key point is that there are important originalism-based arguments that support the validity of the minimum coverage provision. Indeed, considerations that cut in favor of that result have their roots in all key elements of originalist discourse – the text of the Constitution, the recognized purposes

¹ See *infra* notes 5-8 and accompanying text.

² DAN T. COENEN, *THE STORY OF THE FEDERALIST: HOW HAMILTON AND MADISON RECONCEIVED AMERICA* (2007).

³ DAN T. COENEN, *CONSTITUTIONAL LAW: THE COMMERCE CLAUSE* (2004).

⁴ See Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 3-4 (2007) (describing originalism’s “reversal of fortune,” evidenced in part by the sympathy for originalist interpretation expressed by Supreme Court nominees in recent confirmation hearings and the growing use of originalist reasoning in Court opinions); see also COENEN, *supra* note 2, at 213-14 (documenting increase in citations of *The Federalist* in Supreme Court opinions in recent decades).

and background understandings that gave rise to the relevant clauses, and early congressional and judicial precedents. In Part II, I identify these arguments. In doing so, I seek to show why it is wrong to conclude that that an originalist stance inexorably compels rejection of the minimum coverage provision. In fact, I believe that the original materials supply strong and specific reasons to sustain it.

I. THE BRIEFS, THE ORAL ARGUMENTS, AND THEIR MESSAGES

A. The Briefs in Brief

It is emblematic of the significance of the health care case that the Supreme Court brought to it an unprecedented approach for briefing and oral argument. In an order entered on November 14, 2011, the Court granted certiorari on three separate substantive issues: (1) whether Congress's enumerated powers reached far enough to permit enactment of the minimum coverage provision; (2) whether conditions placed on state access to federal Medicaid funds exceeded Congress's power under the Spending Clause; and (3) whether invalidation of the minimum coverage provision would render the health care law inoperative in its entirety under governing principles of severability.⁵ The Court then laid down extraordinary rules for oral argument, setting aside almost five hours for discussion of these three substantive issues, including two hours devoted exclusively to the constitutionality of the minimum coverage provision.⁶ No less exceptional was the Court's establishment of a novel scheme for briefing in the case, which permitted much more extensive treatment of the minimum coverage provision than would have been permitted under the Court's generally applicable rules.⁷ To be sure, a portion of each brief on that issue would be devoted to the question, not considered here, whether the minimum coverage provision was a constitutional exercise of the congressional taxing power.⁸ The lion's share of briefing on the minimum coverage issue, however, was

⁵ Grant of Certiorari at 3, *Dep't of Health and Human Servs. v. Florida*, No. 11-393 (Nov. 14, 2011), available at <http://www.supremecourt.gov/orders/courtorders/111411zor.pdf> (identifying the three questions presented to be addressed); see also Adam Winkler, *Supreme Court Grants Review of Key Case Testing Constitutionality of Health Law*, 80 U.S.L.W. 648, 648 (BNA) (Nov. 15, 2011); see generally *Patient Protection and Affordable Care Act Cases*, U.S. SUPREME COURT, <http://www.supremecourt.gov/docket/PPACA.aspx>. Apart from these substantive issues, the Court also granted certiorari on a jurisdictional question concerning whether the substantive issues are properly suited for decision at this time. *Id.*

⁶ Grant of Certiorari, *supra* note 5, at 3.

⁷ That scheme departed from the ordinary rule, which permits (1) the petitioner to file a single brief not exceeding 15,000 words on all issues, (2) the respondent then to file a responsive brief not exceeding 15,000 words, and (3) the petitioner finally to file a reply brief not exceeding 6,000 words. SUP. CT. R. 33. Instead, the briefing order in the health care case first declared that entirely separate briefings should take place on each substantive question before the Court. Order Setting Briefing Schedule, 565 U.S. __ (2011), available at <http://www.supremecourt.gov/docket/PDFs/120811zr.pdf>. It next provided that the federal-government petitioner and each of the two sets of respondents—that is, the 26 state respondents and the five private-party respondents—could file main briefs not exceeding 16,500 words on each such issue and that the petitioner could then, again on each issue, submit a reply brief not exceeding 6,600 words. *Id.*

⁸ By way of background, the federal government defended the minimum coverage provision on two independent grounds: (1) that it involved a permissible exercise of the Commerce Clause and the Necessary and Proper Clause, and (2) that it involved a permissible exercise of the taxing power. Brief for

destined to be devoted to the question I do consider – namely, whether that law constituted a valid exercise of the Congress’s commerce-related powers.

We turn now to what the parties chose to do with the exceptional briefing opportunities that the Court afforded to them on this issue.

1. The Petitioners’ Brief

The Petitioners’ Brief comprised three parts. The first 16 pages dealt with the background of the PPACA, highlighting the longstanding problem of the shifting of health care costs by uninsured individuals to others. This problem, as the government explained, has pushed up the prices of services for all patients and accordingly the costs of payouts for insurers. Insurers in turn have had to raise rates, thus causing more and more persons to become unable to afford health care coverage (p. 8).⁹ Also by way of background, this section of the brief summarized the efforts of modern Presidents—ranging from Franklin Roosevelt to Harry Truman to Richard Nixon to Bill Clinton—to engineer comprehensive health care reform (pp. 12-16). The discussion highlighted the wide-ranging changes effected by the PPACA in addition to the minimum coverage provision—including the expansion of government-provided insurance for low-income citizens, the fostering of more employer-sponsored insurance plans by way of new tax incentives, the creation of innovative health insurance exchanges designed to facilitate greater efficiencies through the pooling of buying power, and the provision of subsidies to low-income individuals subject to the minimum coverage provision (pp. 2-16). Of particular significance, the Act places new obligations on insurance providers that expand both the quality and the availability of health insurance policies, including for individuals not already benefited by regulations previously targeted at government-provided and large-private-employer plans (pp. 9-11). These new rules, for example, outlawed lifetime caps on benefits, limited insurer use of premium payments to cover administrative costs, and required coverage of adult children up to the age of 26 (p. 10). Of greatest importance here, the PPACA made applicable to all insurance policies two key rules previously targeted only at certain employer-provided plans—namely, that insurers could not rely on an applicant’s medical history or condition either (1) to deny that applicant coverage or (2) to charge that applicant higher premiums.

Petitioner at 9-10, *Dep’t of Health and Human Servs. v. Florida*, No. 11-393 (filed Jan. 6, 2012) [hereinafter “Petitioners’ Brief”]. Only the former line of argument is considered here.

⁹ In the interest of directness and simplicity, citations to the pages of the particular brief under discussion, and to oral argument transcripts, are set forth briefly in the text itself, rather than in dozens of separate footnotes. In addition to the Petitioners’ Brief, the following briefs were filed by the parties: Brief for State Respondents on the Minimum Coverage Provision, *Dep’t of Health and Human Servs. v. Florida*, No. 11-398 (Feb. 6, 2012) [hereinafter “State Respondents’ Brief”]; Brief for Private Respondents on the Individual Mandate, *Dep’t of Health and Human Servs. v. Florida*, No. 11-398 (Feb. 6, 2012) [hereinafter “Private Respondents’ Brief”]; Reply Brief for Petitioners at 13-14, *Dep’t of Health and Human Servs. v. Florida*, No. 11-398 (March 7, 2012) [hereinafter “Reply Brief”]. Some references to the Transcript of Oral Argument, *Dep’t of Health and Human Servs. v. Florida* (Mar. 27, 2012) (No. 11-398) [hereinafter “Oral Argument”] also appear in the body of the article.

The second section of the federal government’s brief, entitled Summary of Argument, spanned pages 17 to 21. It focused on explaining why the minimum coverage provision “works in tandem with the Act’s other provisions to expand the availability and affordability of health insurance coverage” (p. 18). In particular, both the must-insure and premium-nondiscrimination requirements would, without some general-purchase rule, “create a spiral of higher costs and reduced coverage because individuals can wait to enroll until they are sick” (p. 18). According to the Solicitor General, Congress could properly adopt the minimum coverage provision to negate this problem, as well as to address the more general problem of cost-shifting by uninsured persons, which has “rais[ed] the average family’s annual health insurance premiums by more than \$1000” (p. 19). This was especially so, the Solicitor General continued, because the respondents acknowledged that Congress could require payment for actual health services with insurance even while challenging the buy-insurance-in-advance approach reflected in the minimum coverage provision. According to the Solicitor General, this attempted distinction between point-of-sale insurance acquisition and pre-point-of-sale insurance acquisition made no practical sense, especially because of the “economic realities of insurance (which must be obtained before the need to use it arises)” and “the well-established legal duty of health care providers to provide emergency care regardless of ability to pay (which makes restrictions at the ‘point of sale’ infeasible as well as inhumane)” (p. 20). For these reasons, Congress’s “decision to adopt a minimum coverage provision was eminently reasonable” in light of the “wide latitude” it enjoys “when deciding how best to achieve its constitutional objectives” (p. 19).¹⁰

As this recapitulation indicates, the Summary of Argument focused on the practical need for and operation of the minimum coverage provision. It did not mention the text of the Commerce Clause or the Necessary and Proper Clause, and cited only two supportive authorities—one Supreme Court case from 1981 and another from 1941.

The longer “Argument” section of the Solicitor General’s brief, which dealt with the commerce power issue on pages 21-52, proceeded in the same vein. It mentioned the seminal 1819 decision in *McCulloch v. Maryland*¹¹ and its instruction that the federal

¹⁰ Along the way, the government also detailed the scope and operation of the minimum coverage provision, including in terms meant to show why the “mandate” label applies to it only in a loose sense, if at all. See Petitioners’ Brief, *supra* note 8, at 11-12. In particular, under the PPACA, any “applicable individual shall ... ensure” that that individual “is covered under minimum essential coverage.” 42 U.S.C. § 5000A(d). The PPACA further specifies that these provisions are to be administered by taxing authorities pursuant to statutes in the tax code. More specifically, after full phase in of the Act, persons who fail to comply with the “shall ensure” provision will be subject to a tax penalty that is equal to the greater of \$695 or 2.5% of taxable income (subject to an actual-insurance-cost-based cap). 26 U.S.C. § 5000A. The PPACA further specifies that the term “applicable individual” does not cover persons who are in prison or who can claim religious objection and the tax-based penalty does not take hold for several groups of individuals, including (1) persons who do not satisfy the income threshold for income-tax filing; (2) persons deemed unable to afford coverage because purchasing the lowest-priced individual insurance would cost more than 8% of household income; (3) and persons exempted by regulation of the Department of Health and Human Services due to individual hardship. 26 U.S.C. § 5000A(e)(1)-(5). Finally, “the Act provides that the IRS may not use criminal prosecutions, notices of federal tax liens, or levies on property to collect an unpaid penalty.” Petitioners’ Brief, *supra* note 8, at 54 (citing 26 U.S.C. § 5000A(g)(2)).

¹¹ 17 U.S. (4 Wheat.) 316 (1819).

government must have “ample means” for executing its enumerated powers, including authority to enact laws that are “useful” to those powers’ “beneficial exercise” (pp. 22-23).¹² The discussion of permissible means, however, began with a 1937 case (pp. 21-22), drew overwhelmingly on post-New Deal authorities (*see* pp. V-VII), and cited some twenty modern articles or legislative submissions, prepared by law professors and economists, that sought to show the sensibility of the minimum coverage law (*see* pp. XI-XVII). The focus, in short, was on “the mechanics of health insurance” and “this Court’s precedents” (p. 37).¹³

The Solicitor General’s argument is far richer than this brief summary suggests. Its thrust, however, was unmistakably non-originalist. Indeed, not a single reference to any founding-era materials apart from *McCulloch* made an appearance until page 48, at which point the government offered a one-paragraph refutation of the suggestion that “[t]here is no textual support in the Commerce Clause for respondents’ ‘inactivity’ limitation” as to what Congress can properly “regulate.” That discussion, in turn, focused on a recent lower-court allusion to Samuel Johnson’s 1773 dictionary, which defined the word “regulate” to include the power to “direct,” which in turn was defined as including the power to “order” and to “command.”¹⁴ Even this discussion, however, moved quickly to the “new era of federal regulation under the commerce power” marked by a “practical approach” pursuant to which the Court has eschewed categorical distinctions that would *ipso facto* remove from congressional control such things as “‘production,’ ‘manufacturing,’ [or] ‘mining’” (pp. 48-49).¹⁵ Just as surely as the modern Court had rejected those categorical exclusions, the Solicitor General argued, it should now reject the challengers’ efforts to mark off purchase mandates as inherently beyond the reach of federal action under the Commerce and Necessary and Proper Clauses.

In all of this, there was not one citation to the records of the Constitutional Convention, to *The Federalist Papers*, or to any other materials connected with the framing and ratification process. There was no effort to draw on either background assumptions of the framing generation or its perception of the underlying purposes of the relevant constitutional provisions. There was no discussion about the actions of early Congresses or about what the creators of the original Constitution did *not* say about the

¹² The quoted language comes from *McCulloch*, 17 U.S. (4 Wheat.) at 409, 413.

¹³ The Solicitor General also expanded on the idea that the respondents’ earlier concessions in the litigation logically supported the constitutionality of the minimum coverage provision. Most importantly, he noted that the respondents had acknowledged in the lower court that the federal government could pass a law that required any patient who actually sought medical services to pay for those services by way of insurance, since the federal government would then be seen as regulating an actual and freely made commercial exchange, rather than forcing such an exchange to occur (p. 37). According to the federal government, there was no functional difference for constitutional purposes between forcing the use of insurance at the point of sale and forcing the acquisition of insurance before a sale of medical services occurred (p.38). This was especially true, according to the Solicitor General, because of the common-sense fact that virtually all persons do secure medical services at some point, often on a regular basis, and the additional fact that insurance provides the traditional and ordinary method of paying for medical services (pp. 37-38).

¹⁴ *Id.* at 48 (citing *Seven-Sky v. Holder*, 661 F.3d 1, (D.C. Cir. 2011), *petition for cert. pending*, No. 11-679 (filed Nov. 30, 2011) (quoting 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 514, 1619 (4th ed. 1773))).

¹⁵ The internally quoted language comes from *United States v. Lopez*, 514 U.S. 549, 554 (1995).

respondents’ now-proposed limits on the Necessary and Proper Clause. Indeed, with regard to the issue concerning Congress’s commerce-related authority to regulate, there was no citation to any case, apart from *McCulloch*, that was decided before 1922—including no citation to the Marshall Court’s seminal 1824 commerce-power ruling in *Gibbons v. Ogden*.¹⁶ In short, apart from brief allusions to *McCulloch* and Samuel Johnson’s dictionary, the petitioners’ brief included no discussion of originalist matters at all.¹⁷

2. The Respondent-States’ Brief

In striking contrast to the argument put forward by the United States, the brief of the state respondents gave extensive attention to originalist concerns.¹⁸ As stated in the final sentence of the first paragraph of the brief’s Introduction: “The extraordinary power that the federal government claims here is simply incompatible with our founding document.” (p. 1). Support for this argument came from James Madison’s observation in *The Federalist* that federal powers were meant to be “few and defined,” while state powers remained “numerous and indefinite” (p. 18; *see also* pp. 28-29).¹⁹ The state respondents also highlighted historical understandings that “federalism secures . . . liberties” (p. 31; *see also* pp. 18, 31-32),²⁰ pitching hard the proposition that the power-validating approach defended by the Solicitor General was effectively “uncabined” – so much so that, unless the minimum coverage law were struck down, “Congress could simply force within its regulatory reach all those who would remain outside it” (p. 11). Especially to be feared would be follow-up laws that compelled the purchase of cars (pp. 12, 23, 27, 29-30), life insurance (p. 47), or favored “agricultural products” (p. 30). Indeed, according to the state respondents, the government’s theory would produce such a constitutional “revolution” (p. 1) that it would empower the federal government to “force everyone to visit the dentist twice a year” (p. 29) and even compel individual choices about “marriage, divorce, and childrearing” (p. 28). All of this demonstrated that the minimum coverage provision was “antithetical to the core values of our Nation” (p. 18).

The state respondents also found support for their challenge in the constitutional text. The ability to “regulate commerce,” the state respondents urged, on its face envisions a “power to regulate *existing* commercial intercourse,” not “to compel

¹⁶ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

¹⁷ Perhaps the Solicitor General chose to rely on amicus curiae briefs to present arguments that targeted the founders’ evidenced intentions, and some amicus briefs did sound originalist themes. *See, e.g.*, Brief Amici Curiae of State Legislators from All Fifty States, the District of Columbia and Puerto Rico Supporting Petitioners (Minimum Coverage Provision), No. 11-398 (filed Jan. 12, 2012). Put simply, however, no amicus brief treated the originalist case for the constitutionality of the minimum coverage provision in a way that approaches the detail offered in this Article.

¹⁸ The lawsuit that culminated in the Supreme Court’s grant of review was initiated by groups of both private-party and state plaintiffs. Joining the brief filed in the Supreme Court were 26 separate states. *See* State Respondents’ Brief, *supra* note 9, at ii-iii.

¹⁹ Madison’s language comes from THE FEDERALIST No. 45, at 313 (Jacob E. Cooke ed., 1961).

²⁰ The phrase comes from *New York v. United States*, 505 U.S. 144, 181 (1992) (citing *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

individuals to enter commerce” (p. 11).²¹ This distinction, they added, “would have been . . . obvious . . . to the framing generation” (p. 11), in part because *The Federalist* indicated that the members of that generation viewed “[t]he commerce power . . . as relatively innocuous” (p. 16; *see also* p. 18).²² Indeed, if the commerce power had been understood to let Congress control even “how people spend their money” then “surely . . . specific amendments would have been proposed to cabin the exercise of such an extraordinary power” (p. 32). Seeking to turn the Court’s pro-regulatory post-New-Deal jurisprudence back on the federal government, the state respondents added that the danger of government tyranny by way of government mandate was magnified by “the breadth of the modern conception of commerce” (p. 11). According to the challengers, the federal government was never given the “the power to compel individuals to engage in commerce in order more effectively to regulate commerce” (p. 1). Such an “unbounded” and “unprecedented” authority (p. 10) “smacks of the police power, which the framers reserved to the states” (p. 11).

Put forward to confirm this conception of the original plan was the claim that the federal government could not “ground the individual mandate in any comparable historical . . . practice” (p. 22).²³ Also, for two separate reasons, the Necessary and Proper Clause did not help the government’s case. First the minimum coverage provision failed because “[t]he Constitution authorizes Congress to ‘carry[] into Execution’ its enumerated powers, not to expand its enumerated powers by creating problems in need of extraconstitutional solutions” (p. 35). Second, the law failed to qualify as “proper” under principles set forth long ago in *McCulloch* (p. 35). This was the case not only because of the sweeping interferences with liberty that the minimum coverage provision both posed and portended, but also because that provision reached into “the States’ police powers to

²¹ The state respondents also argued that the text of the Commerce Clause was tellingly contrasted with the text of the Coinage Clause and the clauses that concern formation of the armed forces (p. 19). The former, for example, granted Congress two powers: an initial power “to Coin money” and an additional power “to regulate the Value thereof.” U.S. CONST. art. I, § 8, cl. 5. It was significant, according to the state respondents, 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.” State Respondents’ Brief, *supra* note 8, at 19. Also in contrast with the Commerce Clause were the clauses that specifically gave Congress the powers “To Establish Post Offices,” U.S. CONST. art I, § 8, cl. 7 (emphasis added), and “To constitute Tribunals inferior to the supreme Court,” U.S. CONST. art I, § 8, cl. 9 (emphasis added), because no similar text gave Congress the power to “[e]stablish” or to “constitute” commerce. State Respondents’ Brief, *supra* note 8, at 20. The implication of all these clauses, according to the state respondents, was that the framers did not envision a federal power to “[e]stablish” 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).

²² In support of this proposition, the state respondents cited THE FEDERALIST NO. 45, *supra* note 19, at 314 (James Madison), which indicated that the “new power” to regulate commerce was “an addition that few oppose, and from which no apprehensions are entertained” (p. 16). The state respondents also relied on *McCulloch* by arguing that the minimum coverage provision could not rightly be viewed as a mere “means by which other objects are accomplished,” but instead involved the independent exercise of “great substantive and independent power” (p. 34; quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411(1819)).

²³ As explained by the state respondents: “If Congress really had this remarkable authority, . . . both our Constitution and our constitutional history would look fundamentally different” (p. 1). Indeed, “[w]e would not have a federal government with limited and enumerated powers, or States that continue to enjoy dignity and residual sovereignty” (p. 1).

protect the health and safety of their citizens” (p. 37).²⁴ For these reasons, the minimum coverage law did not qualify as “proper” under the teaching of *McCulloch* because it clashed with “the . . . spirit of the constitution” (p. 45).²⁵ In the words of *The Federalist*, it was “merely [a] usurpation, and . . . deserve[s] to be treated as such.”²⁶

Finally, the state respondents challenged the Solicitor General’s contention that the minimum coverage provision could be characterized as a regulation of the health services market, as opposed to the separate health-insurance market. The law, they urged, “forces individuals to purchase *insurance*” and “does not require individuals to *use* that insurance” (p. 12). In other words, as the Court of Appeals had held, the health insurance market differs from the health services market, and the minimum coverage provision controls activity only in the former (p. 9; *see also* pp. 24-26). Thus the law did not regulate the economic “activity” of securing health care but only the “inactivity” of declining to make a contract (pp. 6-8). And that was something the federal government could not do.

3. The Private Respondents’ Brief

The private respondents devoted sixty-two pages to arguing that the minimum coverage provision exceeded Congress’s powers under the Commerce Clause and the Necessary and Proper Clause. This discussion was wide-ranging, but there can be no doubt that it was crafted with care to align with originalist themes.

Before turning to their core legal arguments, the private respondents challenged the federal government’s description of the real-world effects of the PPACA. They argued, for example, that the danger of opportunistic behavior posed by currently healthy persons’ waiting to secure coverage—a key risk the minimum coverage provision supposedly guarded against—was exaggerated because (1) the PPACA itself permits insurers to impose coverage waiting periods, thus making such gamesmanship

²⁴ Quoting from *Gibbons v. Ogden*, the respondents asserted that “[s]ince its earliest days, the Court has recognized that ‘health laws of every description’ are among ‘that immense mass of legislation . . . which can be most advantageously exercised by the States themselves’” (p. 37; quoting 22 U.S. (9 Wheat.) 1, 78 (1824)).

²⁵ *McCulloch*, 17 U.S. (4 Wheat.) at 421.

²⁶ THE FEDERALIST No. 33, *supra* note 19, at 207 (Alexander Hamilton). This conclusion found further support in concerns about government “accountability” (p. 1). The problem was that “legislation raising taxes . . . is supposed to be difficult to pass,” and the installation of regulations is normally checked by opposition to those regulations by the persons on whom they impose duties and costs (p. 2). “But if taxes can be disguised as mandates to enter into unwanted [contracts] and the regulated [entities, here insurance companies, can be] enticed by the promise of expanded business via those compelled transactions, the normal democratic process cannot perform its vital and intended limiting function” (p. 2). Here this problem had reared its head because the PPACA prohibited “insurers from denying, canceling, capping, or increasing the cost of insurance based on an individual’s preexisting health conditions or history” (p. 6). But the law simultaneously mollified the industry by having the “mandate . . . subsidize costs created by [these] other provisions” (p. 6). It might be, the state respondents acknowledged, that the federal interest underlying the minimum coverage provision was “powerful” (p. 43) or even “uniquely strong” (p. 47). But that did not change the core feature of the original plan – namely, that Congress may not “enact legislation that is ‘inconsistent with the federal structure of our Government’” (p. 44; quoting *New York v. United States*, 505 U.S. 144, 177 (1992)).

“enormously risky,” and (2) Congress in any event “could have prevented [this danger] by imposing a cut-off date or age for invoking the ‘nondiscrimination’ protections” (pp. 3-4).²⁷ As a result, according to the private respondents, “the predominant purpose and effect of conscripting the uninsured individuals affected by the mandate was . . . to force *most* of them to purchase insurance that was economically disadvantageous for them, but economically advantageous for insurers and their customers” (p. 5). And such a law, “commanding citizens to subsidize voluntary participants in the insurance industry through disadvantageous contracts,” powerfully exemplified “the threat to individual liberty that occurs when Congress exceeds its limited and enumerated powers” (p. 7).

In significant respects, the private respondents’ argument tracked the argument set forth by the state respondents. Repeated was the idea that “forcing people into commerce does not regulate commerce” (p. 7) and that the Court’s decisions about “activities that substantially affect interstate commerce” do not cover “the inactivity regulated by the mandate—*i.e.*, the non-purchase of health insurance” (p. 15).²⁸ The private respondents also argued that Congress could not “reduce a regulatory scheme’s costs for regulated parties by further regulating strangers to that scheme who are otherwise beyond its power” (p. 43).²⁹ To be sure, the must-insure and nondiscrimination rules of the PPACA would create new difficulties by causing insurance price to rise. But because “Congress’ powers are derived from the Constitution, not its own statutes, . . . Congress cannot be allowed to *bootstrap* additional regulatory powers based solely on the burdens that its own statutes create” (p. 43).

The private respondents also took aim at the Solicitor General’s suggestion that Congress could require the acquisition of health insurance on the theory that doing so

²⁷ In similar fashion, the private respondents challenged the Solicitor General’s depiction of the minimum coverage provision as a logical response to the problem of uninsured individuals’ securing free care and thus distorting the health care market, including through the transfer of massive costs to insurance firms and their policyholders. One difficulty with this argument, according to the private respondents, was that most cost shifting was attributable to the poor (who would not be subject to the minimum coverage provision in any event) as opposed to healthy, non-poor, uninsured persons (who both need health care the least and pay for it most often) (pp. 4-5).

²⁸ The private respondents also professed to find support for their position in the Court’s modern precedents. Those precedents, they contended, reflected limiting principles that showed that the minimum coverage provision did not qualify as “necessary” for carrying Congress’s power to regulate interstate commerce into effect. At the heart of this argument lay the idea that persons regulated pursuant to the Necessary and Proper Clause must be engaging in “conduct” that “negatively affects commerce” (p. 8). The private respondents urged that the minimum coverage provision did not meet this test because “the uninsured’s *defining* characteristic is their *non-participation* in commerce,” (pp. 8-9), as opposed to engaging in affirmative activity that “interferes with interstate commerce” or creates an “impediment to the effective execution of a commercial regulatory scheme” (p. 8; *see also* p. 29). Simply “refusing to consume a good,” according to the private respondents, could “not interfere with the market for that good or its regulation” (p. 32). *See* Private Respondents’ Brief, *supra* note 9, at 21 (claiming that “[n]o case” authorizes a federal regulation simply because “the regulation itself will substantially affect interstate commerce”).

²⁹ The private respondents seemed ready to argue, in particular, that even the risk of opportunistic behavior was not subject to congressional control because Congress’s own regulatory scheme created that risk. Such a result, in their view, was required lest Congress be empowered, for example, to force Americans to buy GM cars as a means of helping along the operation of separate laws aimed at bailing out the auto industry in an effort to secure its survival. *See* Private Respondents’ Brief, *supra* note 9, at 45-46.

targeted activity in the form of the routine participation of uninsured persons in the market for health services – as opposed to (as respondents would have it) the inactivity of not buying insurance. The problem with this reasoning, these respondents asserted, was that “Congress lacks the power to regulate a practice that is *outside* the commerce power simply because *some* of those who engage in it are also statistically likely to engage in regulable conduct *in the future*” (p. 10). Otherwise, Congress could force every single American to buy mortgage insurance on the theory that a substantial percentage of citizens will at some point in time purchase a home with a secured loan (p. 52).

The parade of horribles argument did not stop there. The private respondents urged, for example, that the Solicitor General’s theory would permit Congress to force all Americans to buy life and burial insurance, since death – just as surely as illness – comes to us all. And if Congress could act to hold down health care costs by forcing the purchase of insurance, why could it not mandate the purchase of exercise equipment or healthy foods? According to the private respondents, the government’s theory would even permit Congress to force teetotalers to buy beer, since those who abstain from buying health care services cannot logically be distinguished from those who abstain from alcohol, at least if one is to characterize the failure to buy a product as an “economic activity” (p. 30). On the federal government’s theory, according to the private respondents, Congress could force the purchase not only of cars (p. 46), but even of condoms (p. 33).

This slippery-slope reasoning might be seen as embodying something other than an originalist argument. The private respondents, however, took care to wrap all of their claims in originalist trappings. The very first words of the argument section of their brief referred to “The Founders,” who, the private respondents emphasized, “denied the National Government’ a ‘plenary police power’ . . .” (p. 11). In an effort to highlight the legal difference between purchasing and not purchasing, they reached back to BLACKSTONE’S COMMENTARIES, which were cited in support of the “traditional distinction” between misfeasance and nonfeasance in Anglo-American law (p. 13). The private respondents referred repeatedly not only to *McCulloch*, but also to *Gibbons*, as well as to judicial opinions from 1795 and 1798 that were said to decry “mandates that ‘take[] property from A. and give[] it to B’” (p. 13).³⁰ Time and again, the private respondents emphasized the centrality of “individual liberty” to the framers (p. 13), which gained protection from our founding charter’s “diffusion of sovereign power” (p. 12). In short, the private respondents focused attention on “the framers” (pp. 36, 58), “the Founders” (pp. 20, 25), “the Founding era” (p. 61), “the framers’ generation” (p. 13), the “Founding-era public” (p.18), and “Founding-era legal usage” (p. 58).

Echoing a *McCulloch*-based argument advanced by their state collaborators, the private respondents also asserted that the minimum coverage provision was not “proper” under the Necessary and Proper Clause (p. 13). So it was for three main reasons. First, that provision reflected a “sharp break” from congressional tradition by imposing an

³⁰ In support of this proposition, the private respondents quoted from Justice Chase’s opinion in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798), and also cited *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795).

“unprecedented” duty on virtually all Americans (p. 7). Second, the law reflected an affront to the sovereign interests of the states in light of their ““traditional prerogatives and general authority to regulate for the health and welfare of their citizens”” (p. 60).³¹ Third, the law clashed with a core commitment to protecting liberty and property that marked “the Founding era” (p. 61). In the private respondents’ view, similar considerations had driven the Court’s 1992 decision in *New York v. United States*, which held that Congress cannot compel state legislatures to adopt laws in support of federal commerce-regulating programs.³² Seeking to build on this precedent, as well as the text of the Tenth Amendment, the private respondents urged that: “[J]ust as this Court rejected Congress’ novel attempt to use the commerce power to impose a mandate that ‘commandeer[ed]’ the States, . . . , so too should it reject Congress’ unprecedented mandate that commandeers ‘the people’ to purchase insurance for the benefit of insurance market participants” (p. 14).

4. The Reply Brief

The Solicitor General’s Reply Brief, like his main brief, focused on practical concerns. According to government lawyers, it was entirely sensible that Congress had undertaken “comprehensive market reforms,” which had been “advocated for decades” by experts (p. 2) to deal with “longstanding market distortions” (p. 1). Invalidating the minimum coverage provision thus “would mark a sharp departure from the approach this Court has historically followed” in deferring to the “the judgments of the democratically accountable Branches” in regulating matters of national economic policy (p. 2).

Contrary to the respondents’ suggestions, the law did not involve “an effort to create commerce out of thin air” (p. 2). Instead, it addressed “economic effects that already exist” because “the uninsured as a class routinely consume health care they cannot afford,” which is an “ongoing economic activity” that involves the provision of some \$43 billion in uncompensated service annually (pp. 2-3). The government’s Reply Brief, like its primary brief, focused attention on the respondents’ concessions. In particular, the Solicitor General faulted the respondents for ascribing determinative significance to “a mere matter of timing” (p. 4); according to him, it made no practical sense, given the all-but-universal demand for health care services, to say that federal law could compel the acquisition of insurance when one actually purchases those services (as respondents conceded it could do), but not at an earlier time (as the minimum coverage provision called for) (p. 4; *see also* p. 5). Nor was there merit to the respondents’ effort to bolster their timing-centered argument by stressing that those required to buy insurance are not legally required to use it. “Congress,” the Solicitor General responded, “could reasonably conclude that applying the minimum coverage provision before actual consumption of health care would be more effective in extending coverage, removing barriers to care, and reducing cost shifting than respondents’ alternative” (p. 5). In

³¹ Here the respondents quoted *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

³² 505 U.S. 144, 166-67 (1992).

addition, “Congress . . . could reasonably assume that individuals with health insurance would act rationally and use it to pay their health insurance bills” (p. 5).³³

The Solicitor General also placed emphasis on practical considerations in challenging the respondents’ characterization of the minimum coverage provision as essentially a mandate placed on healthy people to subsidize insurance companies and their highest-risk customers. Such a view, the Reply Brief argued, (1) overlooked the complex mix of rights and duties put in place for all citizens by the PPACA and other provisions of federal law, (2) ignored the long-term value of health insurance (particularly when provided to everyone on nondiscriminatory basis, when significantly subsidized for many purchasers, and when made subject to controls on costs generated by federal intervention), and (3) turned a blind eye to the Court’s past rulings (such as in the minimum-wage and milk-price-support contexts) that broadly permitted Congress to readjust the free-market positions of economic actors to address pressing national economic problems (pp. 10-11).

The Solicitor General also took on the respondents’ parade of horribles argument. To begin with, forced purchases of things like cars did not involve “pre-existing economic activity analogous to the uncompensated consumption of health care,” which generated “massive risk-shifting and cost-shifting” within the health care market (p. 6). These problems, the government added, had arisen largely because of the widespread provision of free medical care to the uninsured—a practice that resulted from a distinctive humanitarian “societal consensus” that Congress may “take . . . as a given when it regulates” (p. 20). This consideration, in turn, sharply distinguished the respondents’ hypotheticals concerning flood, funeral, and life insurance because, for example, a funeral home does not “have an obligation to bury the indigent” (p. 19). No less important, the “tight connection” between the PPACA’s minimum coverage provision and its must-insure and nondiscriminatory-pricing rules readily distinguished that provision from other hypothesized statutes that involved no similar specialized problem-solving focus at all (p. 15). In light of the distinctive justifications for the congressional scheme, the Solicitor General observed, upholding the minimum coverage provision would not broadly authorize Congress “to compel purchase of an end-product by a stranger to that end-product’s market” (p. 19).

Perhaps because the respondents had so strongly emphasized originalist themes, the federal government’s Reply Brief gave some attention to the Court’s early work by pausing to cite *McCulloch* seven separate times (p. 7–9). The Reply Brief, however, went no further in offering originalism-related reasoning. Instead, the Solicitor General cited the *Legal Tender Cases*³⁴ to attack respondents’ effort to use the word “proper” in a way that would create “a roving judicial commission to nullify economic legislation” (p. 9-10), and otherwise focused on post-New-Deal cases. The government also again faulted the respondents for advocating the “grave step of overturning the judgments of

³³ The Solicitor General did not mention, although he could have, that the respondents’ argument would oddly seem to favor a double mandate (of both insurance purchase and insurance use) to a single mandate (of insurance purchase standing alone).

³⁴ 79 U.S. (12 Wall.) 457 (1870).

the democratically accountable Branches of government about what means would best address the Nation's health-care crisis" (p. 2).

B. The Oral Arguments

Oral argument in the case tracked the pattern of the parties' briefs. Most notably, the opening argument put forward for the federal government made no reference to originalist matters (2-3). To be sure, the Solicitor General had limited control over the direction of his argument because he quickly encountered a torrent of questions from the Justices, many of which raised slippery slope problems concerning such matters as broccoli (13, 17, 18), cars (19), health club memberships (41), and burial insurance (7, 15). Even so, some opportunities to consider framing-era evidence presented themselves. Justice Kennedy, for example, focused attention on what he saw as a departure from "tradition" as reflected by "the law of torts," as well as the "unique way" in which the minimum coverage provision seemed to be "changing the relation of the individual to the government" (pp. 11-12). In response, the Solicitor General returned to the theme that the provision is best seen as a "regulation of people's participation in the health care market," given modern-day conditions under which "83 percent visit a physician every year" (p. 12).

In contrast, the arguments offered by both the state and private respondents were laced with allusions to early materials and those who crafted the Constitution. References were made to *McCulloch* (pp. 61, 63, 64), *Gibbons* (pp. 77, 79), *The Federalist* (pp. 73, 80), the "great Chief Justice" (p. 64), Hamilton (p. 60), Madison (pp. 60, 73), "the framing generation," (p. 60) "the founding" (p. 100) and "the framers." (pp. 60, 64, 73, 79, 89, 107, 108). In addition, counsel for both sets of respondents took care to direct the Justices' attention to the "text of the Constitution" (81, 107), again suggesting that recognition of a congressional "power to compel people to engage in commerce" would be at odds with the wording of the Commerce Clause (p. 71; *see also* pp. 54, 73, 107-08). The respondents' arguments also advanced the idea that the minimum coverage provision was so "unprecedented" that it fell outside "220 years of this Court's jurisprudence" (54; *see also* 69, 79). In short, "the framers consciously gave Congress the ability to regulate commerce," and in so doing they "denied [Congress] the power to compel commerce" (p. 107-08). Moreover, all of this comported with an underlying design to protect "individual freedom," while ensuring that the federal government would not possess "plenary power" (pp. 107-08).

In his rebuttal, the Solicitor General did turn attention to one important originalist consideration. "I think," he said, "this is actually a paradigm example of the kind of situation that Chief Justice Marshall envisioned in *McCulloch* itself, that the provisions of the Constitution needed to be interpreted in a manner that would allow them to be effective in addressing the great crises of human affairs that the framers could not even envision" (p. 110). Full discussion of the commerce power issue on rebuttal, however, lasted only some two minutes, and the focus again was on the functional notion that: "Everyone subject to this regulation is in or will be in the health care market. They are just being regulated in advance." (p. 109).

C. The Originalist Messages of the Parties' Briefs and Arguments

There is much to be said about the treatment of originalist arguments in the briefs and oral arguments of the parties in the health care case. For me, however, the most important observation to be made involves the broad sense of things, the background atmospherics, and the overall shaping of thinking about the case generated by those submissions. As to these matters, the critical point should by now be clear. The initial impression created by the challengers' briefs and arguments, when laid beside those of the federal government, is that an adherence to originalist principles supports invalidation of the minimum coverage provision. This impression arises from the striking contrast between the lines of argument put forward by the parties, and in particular the soft-pedaling of originalist reasoning by the federal government. The message, at least at a subconscious level, is that originalist principles do not provide meaningful support for the government's position in the case.

It remains to be seen how the arguments on the minimum coverage issue will play out within the Court. It may be that the Solicitor General's approach proves to be a wise one, particularly in light of the likely sympathy to it among the Court's four so-called "liberal" members,³⁵ Justice Kennedy's previous endorsement of the Court's post-New Deal Commerce Clause jurisprudence,³⁶ as well as indications of similar leanings in the work of other Justices as well.³⁷ If my assessment of the parties' submissions and their thematic consequences is right, however, the Solicitor General's overarching strategy presents a vulnerability for his position. The reason why is apparent: On its face, the choice of a distinctively non-originalist approach by only one side in the case risks creating the sense among observers that that side holds the much shorter end of the originalist stick. And if the Justices come to perceive things that way, it could well spell the end of the PPACA.

II. THE ORIGINALIST CASE FOR THE "INDIVIDUAL MANDATE"

As the foregoing discussion makes clear, the respondents' strategy involved an effort to induce the Court to conclude that any fair originalist assessment of the minimum coverage provision would dictate its invalidation. Acceding to that strategy, however, would involve a serious misstep – at least without a far more careful examination of the

³⁵ See, Adam Liptak, *Health Care Act Offers Roberts a Signature Case*, N.Y. TIMES, Mar. 11, 2012, at A1 (predicting that Justices Ginsburg, Breyer, Sotomayor and Kagan will vote to uphold the minimum coverage provision).

³⁶ See *United States v. Lopez*, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring) (noting that "[s]tare decisis operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature").

³⁷ See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 34-35 (2005) (Scalia, J., concurring) (noting that the Necessary and Proper Clause can be used to extend the Commerce Clause powers to "regulate even those intrastate activities that do not themselves substantially affect interstate commerce"); *United States v. Comstock*, 130 S. Ct. 1949, 1953, 1956, 1965 (2010) (upholding the invocation of the Necessary and Proper Clause to validate a federal law authorizing the involuntary commitment of persons who had already served their federal sentences by way of a majority opinion joined by Chief Justice Roberts, and concurring opinions filed by Justice Kennedy and Justice Alito).

framing-era materials than either the petitioners or the respondents have offered. In the pages that follow, I seek to show why that is the case, including by putting forward arguments that federal government lawyers might have advanced in an effort to counter their opponents' originalist attack. To be sure, different legal observers will reach different conclusions about the intersection of the minimum coverage provision and originalist principles. The key point, however, is that even the most widely accepted styles of originalist reasoning provide much aid to the federal government's position. In the end, there may be room for disagreement about which side of the debate gathers more strength from a fair-minded application of originalist principles. In my own view, however, those principles cut more for, than they cut against, the constitutionality of minimum coverage provision.

A. The Text and Its Essential History

Any good originalist argument must begin with the constitutional text. Here the decisive constitutional passages are the Commerce Clause of Article I, Section 8, Clause 3, and the Necessary and Proper Clause of Article I, Section 8, Clause 18. The former provides that Congress may “regulate Commerce with foreign Nations, and among the several States.”³⁸ The latter provides that Congress may also “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”³⁹ The point should not be lost that the challenge to the minimum coverage provision now before the Court does not hinge on the power-trumping protections of individual rights embodied in the Bill of Rights or elsewhere in the Constitution. And that is so even though concerns about individual liberty are at the center of critiques of the so-called individual mandate, including (as we have just seen) the critiques put forward by the respondents in this case.⁴⁰ In short, as a textualist matter, the issue presented here concerns how far the granted *powers* of the federal government reach. That issue does not concern the constitutionally defined *rights* of Americans – which were put in place, primarily by way of Bill of Rights, precisely because of fears that the congressional powers established by the original Constitution otherwise would extend much too far.

What is the power to “regulate Commerce . . . among the several states”? From the outset this power has been understood to embrace a “plenary” authority over such commerce – an authority that “may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”⁴¹ This power, moreover, did not come out of thin air. A central reason for calling the Constitutional Convention was

³⁸ U.S. CONST. art. I § 8, cl. 3.

³⁹ U.S. CONST. art. I § 8, cl. 18. For some significant treatments of the Necessary and Proper Clause, see JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT* (1999); Randy E. Barnett, *Necessary and Proper*, 44 *UCLA L. REV.* 745 (1997); David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 *HARV. J.L. & PUB. POL'Y* 107 (1998); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 *TEX. L. REV.* 795 (1996); Eugene Gressman, *RFRA: A Comedy of Necessary and Proper Errors*, 21 *CARDOZO L. REV.* 507 (1999); Gary Lawson & Patricia B. Granger, *The 'Proper' Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 *DUKE L.J.* 267 (1993).

⁴⁰ See, e.g., *supra* note 20 and accompanying text; see generally *supra* Parts I.A.2, I.A.3.

⁴¹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196-97 (1824).

that the national marketplace had fallen into disarray under the Articles of Confederation precisely because oversight of it had been entrusted to 13 separate, non-like-minded states.⁴² In a sea change of government organization, the regulation of our national commerce was entrusted by the new Constitution to a “national controul” to be exercised by the federal Congress.⁴³ The deeper idea was that all the grants of congressional power, including by way of the Commerce Clause, were designed to let federal “action . . . be applied to all the external concerns of the nation *and to those internal concerns which affect the states generally.*”⁴⁴ This broad national-problem-solving view of the Commerce Clause found clear expression in the work of the Philadelphia Convention. Indeed, the Convention initially voted to vest in Congress, with no further elaboration, authority “to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.”⁴⁵ The Committee of Detail later substituted for this language the enumerated powers set forth in Article I, Section 8. There is no indication, however, that the full body of delegates intended by approving this move to retreat from their earlier-professed commitment to permit Congress to deal broadly with matters that raised distinctly national problems.⁴⁶

Nor did the framers create the power to regulate interstate commerce in isolation. That power was supplemented by the separate grant of authority that permits Congress to make “all Laws” that are “necessary and proper for carrying into Execution” its specifically granted powers, including its power over national commerce. Of particular significance, the term “necessary and proper” denotes a far-reaching authority. As Chief Justice John Marshall made clear for a unanimous Court in *McCulloch v. Maryland*, the founders (of which he was one, in that he served as a prominent delegate to the Virginia Ratification Convention)⁴⁷ did not mean to authorize only those laws that were “indispensable” to carrying Congress’s enumerated powers into execution.⁴⁸ Rather, the clause authorized laws that were merely “convenient” or “useful” for that purpose.⁴⁹

⁴² See *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 532-34 (1949).

⁴³ THE FEDERALIST NO. 22, *supra* note 19, at 137 (Alexander Hamilton).

⁴⁴ *Gibbons*, 22 U.S. (9 Wheat.) at 75 (emphasis added); see also THE FEDERALIST NO. 80, *supra* note 19 537 (Alexander Hamilton) (“Whatever practices may have a tendency to disturb the harmony between the states, are proper objects of federal superintendence and control.”); THE FEDERALIST NO. 45, *supra* note 19, at 309 (James Madison) (“[A]s far as the sovereignty of the states cannot be reconciled to the happiness of the people, the voice of every good citizen must be, let the former be sacrificed to the latter.”).

⁴⁵ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21, 131-32 (Max Farrand ed., rev. ed. 1966).

⁴⁶ Others have already demonstrated that the underlying purposes of this initial, broadly phrased and unitary grant of power were carried forward, rather than left behind, when the framers later endorsed the more particularized itemization of powers set forth in Article I, Section 8. See Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 9-11 (2010) (noting, among other things, delegate James Wilson’s post-Convention explanation of this point); Donald H. Regan, *How To Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 556 (1995) (“[T]here is no reason to think the Committee of Detail was rejecting the spirit of the [earlier] Resolution when they replaced it with an enumeration.”).

⁴⁷ HUGH BLAIR GRIGSBY, THE HISTORY OF THE VIRGINIA FEDERAL CONVENTION OF 1788 at 364 (R. A. Brock, ed., 1819) (noting that Marshall was a delegate from Henrico, Va.).

⁴⁸ 17 U.S. (4 Wheat.) 316, 413 (1819).

⁴⁹ *Id.*

Against the backdrop of these originalist principles, the argument for the constitutionality of the minimum coverage provision is straightforward. By enacting the PPACA, Congress supplemented earlier efforts to address a recognized crisis in the national market for health care services and health care insurance. Responding to economic problems that have rendered health insurance unavailable to many, it acted to hold down policy prices, including by creating new risk pools designed to breed efficiencies.⁵⁰ It expanded efforts to ensure the provision of insurance for most workers through a mix of duties and incentives meant to expand the number of plans offered by private employers.⁵¹ And, of particular importance, it imposed what in effect are minimum quality standards for insurance products and services that move in the interstate market – for example, by requiring that employee policies cover children up to the age of 26.⁵² This quality-control aspect of the federal commerce power lies at the core of what Congress can do. Indeed, it underlies much of the most important legislation Congress has ever enacted – such as the laws that prescribe minimum standards for the quality of food, drugs, cosmetics and many other products.⁵³

Among the most important quality-control provisions included in the PPACA are two requirements long deemed by many to be of central importance to a fair, inclusive, and well-functioning health care system: (1) a requirement that insurers make policies available to all individuals at a nondiscriminatory price; and (2) a requirement that those policies cover preexisting conditions.⁵⁴ The respondents do not challenge the constitutionality of these policy requirements – which, among other things, facilitate the free and efficiency-maximizing movement of workers through the national economy by rendering full health-care coverage easy to obtain in all 50 states.⁵⁵ Congress determined, however, that its overarching scheme, including imposition of these minimum policy standards, would not work unless some sort of meaningful purchase incentive was also imposed. One major practical difficulty was that, without such a rule, healthy people might well refuse to buy policies until they became ill, at which point they would demand coverage for preexisting conditions at the one-size-fits-all nondiscriminatory price. This problem of free-riding, in turn, would drive up insurance costs in such a way that an even greater number of Americans would become unable to afford health insurance.⁵⁶

⁵⁰ See 42 U.S.C. § 18091(a)(2) (West 2010) (describing findings of Congress as to the effects on the national economy and interstate commerce); *id.* § 18031 (establishing Health Benefit Exchanges).

⁵¹ See, e.g., 29 U.S.C. § 218a (West 2010) (requiring large employers to offer coverage to full-time employees).

⁵² See 42 U.S.C. §300gg-14 (West 2010).

⁵³ See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (upholding law criminalizing manufacture, distribution, or possession of marijuana as applied to intrastate growers and medical marijuana users); *Hipolite Egg Co. v. United States*, 220 U.S. 45, 57-58 (1911) (upholding law regulating adulterated food or drugs).

⁵⁴ 42 U.S.C. § 18001 (West 2010). With regard to the nondiscrimination requirement, the PPACA establishes limited exceptions based on age, geography and tobacco use.

⁵⁵ See, e.g., David Charny, *The Employee Welfare State in Transition*, 74 TEX. L. REV. 1601, 1623 n.65 (1996) (noting that preexisting conditions restrictions on coverage distort job mobility to the extent that people keep jobs rather than accept other employment for fear of losing insurance).

⁵⁶ See Reply Brief, *supra* note 9, at 13-14 (developing this justification for the minimum coverage provision and discussing experience under earlier state programs to demonstrate the provision's necessity).

It is largely for these reasons that the minimum coverage provision helps to create an enhanced national health services and insurance market that operates in sensible fashion. This is the case, in particular, because the provision discourages people from jumping in and out of the system, so as to get a free ride from others who responsibly fund the system by making regular insurance-premium payments. Thus the minimum coverage provision seems to be the sort of law on which the Court in *McCulloch* placed its stamp of approval. So it is because the provision is “convenient” and “useful” in seeing to it that only policies that meet minimum quality standards at an affordable price move through interstate commerce. In short, the Commerce Clause permits Congress to regulate interstate markets so as to enhance their operation, and the Necessary and Proper Clause enables it to pass “all Laws” that are “necessary and proper” for that purpose. And that is what the minimum coverage provision was meant to do.

How do the challengers of the provision seek to sidestep this analysis? They begin by making two related arguments. The primary claim is that executing the commerce power can be done only by regulating commerce that already exists, as opposed “to compel[ing] people into commerce in the first place.”⁵⁷ The subsidiary claim is that the Necessary and Proper Clause does not permit Congress to “bootstrap” on its own enactment of other laws, even when those other laws are properly adopted pursuant to the commerce power.⁵⁸ I will consider the primary and subsidiary arguments in turn.

The respondents’ primary argument centers on the constitutional text. In their view, when Congress created a congressional power to “regulate ... commerce among the several States,” it meant only to permit regulation of people who “were already in commerce”;⁵⁹ thus, by implication, Congress barred the creation of new commerce through the imposition of contractual mandates. On close examination, however, this argument does not work for three separate reasons.

First, the broad word “regulate” on its face invites all forms of legal intervention, ranging from prohibition to discouragement to encouragement to compulsion.⁶⁰ It seems clear, for example, that a state’s power to “regulate education” includes the power to require children to attend school, even though such a rule involves a mandate that goes beyond simply placing rules on those who already are in the classroom. Thus the essential textual argument of the respondents – that the power to “regulate” a subject is intrinsically inconsistent with the power to impose a mandate related to that subject – is not easy to reconcile with the accepted breadth of this key term.⁶¹

⁵⁷ Oral Argument, *supra* note 9, at 77; *see supra* note 28 and accompanying text.

⁵⁸ *See* Private Respondents’ Brief, *supra* note 9, at 43.

⁵⁹ Oral Argument, *supra* note 9, at 73; *see id.* at 78.

⁶⁰ The petitioner, in effect, made this same point in noting that a leading dictionary of the framing period recognized that the word “regulate” included the power to “direct” and thus to “compel.” *See supra* note 14 and accompanying text.

⁶¹ Because of fundamental differences of linguistic context, the state respondents also falter in relying on supposed differences in the phrasing of the Commerce Clause and provisions dealing with such far-removed subjects as the coinage of money. *See supra* note 21. As an originalist matter, the Coinage Clause sensibly empowered Congress both to coin money and to regulate its value because, without such

Second, the argument proves too much. If, under the Commerce Clause, Congress cannot go beyond dealing with existing commerce so as to generate new commerce, then it logically must lack the power not only to create commerce by way of mandates but also to create commerce through other means. Put another way, the respondents' just-deal-with-what's-already-there theory would logically strip Congress of the power to incentivize through 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 respondents rightly acknowledged, however, the federal government faces no limits when it comes to "encouraging, enticing, and incentivizing individuals to enter into commercial transactions of all stripes."⁶² In sum, there is an internal tension – if not an internal inconsistency – in the basic textual argument against the minimum coverage provision. Because "[t]he stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions,"⁶³ it does not work to say that Congress can regulate only commerce that "already" exists.

Finally, whatever Congress can or cannot do under the Commerce Clause standing alone, it can pass "all Laws" necessary and proper for carrying its enumerated powers into execution, including "all Laws" necessary and proper for effectuating its power to facilitate the stable movement of affordable and high-quality health insurance products through interstate commerce. 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.⁶⁴ And so it follows that, even if Congress for some reason cannot enact a mandate under the Commerce Clause standing alone, it still has 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.⁶⁵

This same point also undermines the respondents' subsidiary argument – namely, that Congress cannot "bootstrap" on its commerce power to exercise additional powers not otherwise granted under it. Indeed, the Court has often recognized that the Constitution permits Congress to use the Necessary and Proper Clause to pass laws that go well beyond the direct regulation of interstate commerce itself. No less important, this judicial approach is entirely consistent with the original plan, given the "all Laws" text of

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 in parallel fashion to set forth specifically a power to "establish" or "constitute" commerce, 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 or 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.

⁶² State Respondents' Brief, *supra* note 9, at 21-22.

⁶³ *Wickard v. Filburn*, 317 U.S. 111, 128 (1942).

⁶⁴ See *supra* note 47-49 and accompanying text.

⁶⁵ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 409 (1819).

the Necessary and Proper Clause and its purpose to ensure the broad availability of incidental powers to Congress.⁶⁶

Consider *Gonzales v. Raich*, which involved a challenge to a federal ban on possessing marijuana, including marijuana intended for personal medical use.⁶⁷ Under the Court’s then-controlling view of the Commerce Clause standing alone, Congress lacked power to promulgate this ban because the Court earlier had indicated that the mere possession of goods did not constitute an “economic activity” properly subject to commerce-power aggregation.⁶⁸ In *Raich*, however, the Court held that the marijuana possession ban was permissible because Congress had coupled it with other laws that regulated the sale and transport of marijuana in interstate commerce.⁶⁹ What is more, the Court held that this regulation was permissible even though the would-be marijuana users who brought the case—just like the non-buyers of health insurance here—consciously chose to remove themselves altogether from interstate commerce.⁷⁰ *Raich* thus stands for the unremarkable (and originalist) proposition that once Congress has created a program of interstate regulation, it can take additional lawmaking steps under the Necessary and Proper Clause, not of the nature permitted by the Commerce Clause without that supplementary power, so as to help its program succeed.⁷¹ In doing so, moreover, Congress can lay its hand not only on persons who are themselves engaged in interstate commerce, but also on persons who have intentionally acted to remove themselves from that commerce.⁷² And it is on this same principle that the minimum coverage provision is founded.

Both the primary argument (you can’t compel now-nonexistent commerce) and the subsidiary argument (you can’t bootstrap necessary and proper laws) also stand at odds with an overarching, originalist consideration. Whatever else one might say about the previously unrecognized limits that the respondents would read into the Commerce and Necessary and Proper Clauses, one can say this for sure: Those purported limits find no meaningful expression in the materials that concern the drafting and ratification of our Constitution. The respondents simply cite nothing from those materials that states, or even comes close to stating, that a law such as the minimum coverage provision lies beyond Congress’s granted powers. There is not one word in *The Federalist Papers*, for example, that indicates that Congress lacks power to impose an “individual mandate,” especially when doing so is critical to the effective regulation of an interstate market.

⁶⁶ See *supra* notes 47-49 and accompanying text; *infra* notes 71, 78, 81-84, 103-110, 143-49, 167 and accompanying text.

⁶⁷ 545 U.S. 1 (2005).

⁶⁸ See *id.* at 24-25 (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

⁶⁹ *Id.*

⁷⁰ See *id.* at 26-29.

⁷¹ As Justice Scalia stated in his concurring opinion: “[T]he Necessary and Proper Clause [empowers] Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation.” *Id.* at 39 (Scalia, J., concurring); see also *id.* at 36 (“[W]here Congress has the authority to enact a regulation of interstate commerce, ‘it possesses every power needed to make that regulation effective.’” (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942))).

⁷² See *id.* at 34-35. For further discussion of this same point, see *infra* notes 93-102 and accompanying text (discussing the *Wickard* case).

Indeed, what the authors of *The Federalist* did say on this subject offers good reason to conclude that such a power exists.

To begin with, everyone who lived through the framing period understood that the new Constitution's expansion of federal power did not involve mere tweaking. The revised system, as Alexander Hamilton explained in *The Federalist No. 84*, reflected "radical alterations," which channeled to Congress "new and extensive powers."⁷³ Among other things, the Constitution abolished the preexisting and woefully unsuccessful governing structure under which the federal Congress could direct legislative commands only at the states themselves.⁷⁴ The framers chose instead an entirely new system under which congressional directives were to be aimed not at the state governments, but (as under already-operating state systems) at individual citizens.⁷⁵ In addition, the Constitution vested Congress with a dramatically expanded range of governing authority, including the new power to regulate foreign and interstate commerce and the supplementary authority to pass "all Laws" necessary and proper for carrying that power into execution. Indeed, it was the creation of these significant new powers 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, unlike the "unsafe depository" of the "single body" that had made all laws under the Articles of Confederation.⁷⁶ It was also this far-reaching expansion of federal power that brought about the many protections of liberty embodied in the Bill of Rights, including a Just Compensation Clause responsive to the reality that the new federal government could and would impose mandates on citizens to transfer property when they wished not to do so.⁷⁷ Perhaps most important, those who ratified our Constitution fully appreciated the broad power the Commerce Clause vested in Congress, especially when coupled with the "necessary and proper" power embodied in what antifederalists fittingly dubbed the "Sweeping Clause."⁷⁸ Indeed, these concerns were sufficiently intense that they led to highly visible, though ultimately rejected, proposals that Congress should be able to regulate commerce only by way of a supermajority vote of both houses of

⁷³ THE FEDERALIST NO. 84, *supra* note 19, at 584 (Alexander Hamilton).

⁷⁴ THE FEDERALIST NO. 15, *supra* note 19, at 93 (Alexander Hamilton) (identifying this form of power as "the great and radical vice in the construction of the existing Confederation").

⁷⁵ See generally *New York v. United States*, 505 U.S. 144, 163-66 (1992) (collecting materials from the framing period that document this shift).

⁷⁶ THE FEDERALIST NO. 84, *supra* note 19, at 584 (Alexander Hamilton). See generally Herbert Storing, *What the Anti-Federalists Were For*, in THE COMPLETE ANTI-FEDERALIST 54 (Herbert J. Storing ed., 1981) (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 putting in place the power of Presidents to veto laws even when passed by both chambers. See COENEN, *supra* note 2, at 118-25, 132-33; see also THE FEDERALIST NO. 51, *supra* note 19, at 347-50.

⁷⁷ U.S. CONST. amend V.

⁷⁸ See THE FEDERALIST NO. 33, *supra* note 20, at 205 (Alexander Hamilton) (noting that antifederalists had "affectedly" employed this label); see, e.g., Cincinnatus II, *To James Wilson, Esquire*, NEW YORK J. (Nov. 8, 1787) (claiming that "this new system, with one sweeping clause, bears down every constitution in the union"), available at <http://teachingamericanhistory.org/library/index.asp?document=1951>.

Congress.⁷⁹ Against this backdrop, for the state respondents to say that the founding generation viewed Congress’s power in the commercial field as so “relatively innocuous” that it could not possibly have supported regulation by way of contractual mandates is to misstate in serious measure the history of the time.⁸⁰

None of this meant to suggest that Congress could not overstep power-limiting constitutional boundaries in ways that the judiciary could control. Indeed, we will soon see that the modern Court has moved to protect the authority of the states by identifying a range of actions that Congress cannot take pursuant to the Commerce Clause.⁸¹ Instead, the key point is that, contrary to the respondents’ arguments, the original plan did not permit the judiciary to cherry pick among the means available to Congress as it directed laws at individual citizens pursuant to its enumerated powers. Rather, as *The Federalist No. 23* made clear, the grant of means made by the Necessary and Proper Clause created “an *unconfined* authority, as to *all* those objects which are intrusted to [Congress’s]

⁷⁹ See, PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788 at 296-297, 307 (2010) (discussing importance of this issue at the Virginia Ratification Convention); The Journal of the Convention of the State of North Carolina, 1788, *reprinted in* 22 State Records of North Carolina 1, 20 (Walter Clark ed., 1907) (setting forth proposal for supermajority-vote-on-commerce amendment approved at first North Carolina Ratification Convention); Journal of the Convention of the State of North Carolina, 1789, *reprinted in* 22 State Records of North Carolina 36, 52 (Walter Clark ed., 1907) (same for the second North Carolina Convention); DAVID O. STEWART, THE SUMMER OF 1787 at 173-74, 183-84, 220, 223, 226 (2007) (detailing importance of this issue to southern delegates at the Philadelphia Convention).

⁸⁰ In making this assertion, the state respondents rely on a passage from THE FEDERALIST NO. 45, in which Madison observed that “[t]he regulation of commerce . . . seems to be an addition which few oppose, and from which no apprehensions are entertained.” THE FEDERALIST NO. 45, *supra* note 19, at 313 (James Madison). Madison was on solid ground in suggesting that there were no “apprehensions” about the basic existence and purpose of the commerce power; after all, the creation of such a power provided a core reason for calling the Constitutional Convention. See *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 533-34 (1949). Both before and during the ratification process, however, devil-in-the-detail concerns about the commerce power arose time and again. Objectors expressed particular alarm about Congress’s capacity to use the clause to grant commercial monopolies. Indeed, that concern was so significant that it stirred calls for remedying constitutional amendments, including formal requests to that effect made by the Massachusetts and Virginia Ratification Conventions. See, e.g., MAIER, *supra*, at 444; see also George Mason, *Objections to This Constitution of Government*, in THE ANTI-FEDERALIST PAPERS 175 (Ralph Ketcham, ed., 2003); Elbridge Gerry, *Opposition to the Constitution*, in THE ANTI-FEDERALIST PAPERS 173 (Ralph Ketcham, ed., 2003) (noting objection that “[u]nder the power over commerce, monopolies may be established”). There were more general concerns, too, particularly about the Constitution’s potential to favor commercial over agrarian interests. See Alan D. Watson, *North Carolina: States’ Rights and Agrarianism Ascendant*, in THE CONSTITUTION AND THE STATES 263 (Conley & Kaminski eds., 1988) (suggesting North Carolinians’ opposition to the Constitution reflected in part on concerns about its treatment of commerce, which small farmers envisioned as “antipathetic to liberty and the common good”). Most important of all, whatever the ratifying community thought of the Commerce Clause standing alone, there was pervasive unease among antifederalists about the Necessary and Proper Clause because, under it, the federal government would “possess absolute and uncontrollable power . . . with respect to every object to which it extends . . .” Essay of Brutus of 18 October 1787, in THE ANTI-FEDERALIST PAPERS 271 (Ralph Ketcham, ed., 2003); see, e.g., *id.* at 274-75 (identifying the power of “regulating trade” as among the “great and uncontrollable powers” given to Congress, which in conjunction with the Necessary and Proper Clause might be used “to annihilate all the state governments,” especially because federal authorities “will be naturally inclined to remove” state power); Storing, *supra* note 76, at 66 (noting antifederalist concerns that the commerce power “could . . . be used to stifle the press,” at least when implemented through use of its “implied powers”).

⁸¹ See *infra* notes 202-207 and accompanying text.

management.”⁸² James Madison trumpeted this same proposition 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.”⁸³ Alexander Hamilton repeated the governing principle yet again in *The Federalist No. 31*, when he wrote 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 the people.”⁸⁴

Of particular significance here, the framers envisioned that the range of means given to Congress for carrying out its enumerated powers would parallel the range of legislative means already placed in the hands of the states.⁸⁵ Hamilton declared the

⁸² THE FEDERALIST No. 23, *supra* note 19, at 150 (Alexander Hamilton) (emphasis added).

⁸³ THE FEDERALIST No. 44, *supra* note 19, at 304-05 (James Madison) (emphasis added).

⁸⁴ THE FEDERALIST No. 31, *supra* note 19, at 195 (Alexander Hamilton) (emphasis added). 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 lightening 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); *see, e.g., An Old Whig, No. 2, in 3 THE FOUNDERS’ CONSTITUTION 239, 239* (Philip B. Kurland & Ralph Lerner eds., 1987) (decrying the “undefined, unbounded and immense power which is comprised in the ... clause”); *Centinel, No.5, in 3 THE FOUNDERS’ CONSTITUTION 239, 239* (Philip B. Kurland & Ralph Lerner eds., 1987) (expressing worry that the clause would be used by Congress to “control and abrogate any and every of the laws of the state governments”); MAIER, *supra* note 79, at 109 (noting challenge of John Smilie at the Pennsylvania Ratifying Convention to powers “so loosely, so inaccurately denied” and “extensive and undefined” as to constitute a “radical vice”); Storing, *supra* note 76, at 66 (quoting argument of Aristocrotis that the Necessary and Proper Clause rendered the Constitution worse than if incidental powers were left to implication because by way of it “every thing is expressly given away to government”); *see also* THE FEDERALIST NO. 33, *supra* note 19, at 204 (Alexander Hamilton) (noting that the clause had inspired “virulent invective and petulant declamation against the proposed Constitution”). Notably, the federalists did very little to allay these antifederalist concerns. Indeed, in responding to antifederalist calls for a remediating Bill of Rights, federalists argued that Article I, Section 9 already included important protections of rights by outlawing, for example, Titles of Nobility and most suspensions of the writ of habeas corpus. As Herbert Storing has written, however: “Why was there any need to restrict the suspension of the writ of habeas corpus or to prohibit granting titles of nobility? Where were such powers granted? The very few Federalists who made any attempt to meet this objection sought to show that these were exceptions to implied powers, but this only reinforced the contention that the ‘powers’ granted are anything but simple and unambiguous—that they are in fact complex and doubtful and capable of great extension.” Storing, *supra* note 76, at 60. In addition, state after state proffered amendments designed to confine Congress’s powers under Necessary and Proper Clause. *See* MAIER, *supra* note 79, at 197 (South Carolina, seeking to require state retention of all powers not “expressly” granted); *id.* at 251 (Massachusetts, “expressly”); *id.* at 450 (New York, “clearly”); *id.* at 425 (North Carolina, “plainly”); *id.* at 450 (New Hampshire, “expressly”). Most proposals in some form suggested a return to the language of the Articles of Incorporation that limited Congress to its “expressly” granted powers. *See id.* at 296 (noting proposal by Patrick Henry at the Virginia Ratifying Convention to this effect). These proposed amendments, however, were rejected by Congress in favor of the more tepid language of the Tenth Amendment, *see id.* at 453, thus highlighting both the pre- and the post-Bill of Rights expansiveness of the Necessary and Proper Clause. *See id.* at 463 (noting that critiques of the Necessary and Proper Clause were unaddressed by the Tenth Amendment because, unlike the Articles, it did not include the word “expressly”).

⁸⁵ For example, George Washington (who would later serve as President of the Constitutional Convention) observed on August 1, 1786: “I do not conceive we can exist long as a nation, without having lodged some where a power, which will pervade the whole Union in as energetic a manner as the authority of the State

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.”⁸⁶ This principle is of telling 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, as Massachusetts in fact has done.⁸⁷ Under the principle of *Federalist No. 16*, however, that acknowledgement puts the minimum coverage provision on firm ground under the Necessary and Proper Clause. After all, analysts who acknowledge (as they must) that (absent some trumping right) a state’s lawmaking authority includes the power to adopt an individual health insurance mandate as a means for pursuing its governmental goals must as a consequence recognize as well that Congress’s lawmaking authority includes that same power. That is the lesson of *No. 16*, a lesson that comports with “the first principles of the system” the framers put in place.⁸⁸

To repeat: The text of *The Federalist No. 16* has much significance here. It signals that the federal government can use “all the means” and “all the methods” for carrying into execution its enumerated powers that the states have at their disposal. Thus, just as surely as states can employ individual mandates to carry into execution their powers, Congress can – absent the application of an overriding claim of right – employ individual mandates to carry into execution its powers, including the power to “regulate Commerce . . . among the several States.”

B. The Long Lineage of Federal Mandates

In the face of these problems posed by the Constitution’s text and enactment history, the respondents urge the Court to invalidate the minimum coverage provision because it is “unprecedented.”⁸⁹ The controlling point, they say, is that neither the early Congresses nor later Congresses ever forced a “stranger” to a market to make a contract with another private party operating in that market.⁹⁰ Thus, so the argument goes, we can infer that the framers never meant to give such a power to the federal legislature.

This argument faces difficulty for two main reasons. The first is that the framers had every intention of permitting Congress to devise highly novel and innovative laws as

governments extends over the several States.” GEORGE WASHINGTON, LETTERS AND ADDRESSES 287 (Jonas Viles ed., 1908).

⁸⁶ THE FEDERALIST No. 16, *supra* note 19, at 102-03 (Alexander Hamilton) (emphasis added). Notably, this principle was recognized not just by the pro-Constitution authors of *The Federalist*, but by fear-stricken antifederalists 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 76, at 66 (quoting from writing of Brutus).

⁸⁷ See Oral Argument, *supra* note 9, at 80 (argument of counsel for the state respondents; acknowledging this state power).

⁸⁸ THE FEDERALIST No. 23, *supra* note 19, at 148 (Alexander Hamilton).

⁸⁹ State Respondents’ Brief, *supra* note 9, at 10; see e.g. *supra* note 23 and accompanying text.

⁹⁰ See *supra* note 29 and accompanying text.

it responded to new conditions in exercising its granted powers. The second is that the minimum coverage provision is not unprecedented. Indeed, Congress has enacted many forms of mandates from the Republic's earliest days, including by forcing individuals to enter into private contracts.

1. The Framers' Vision of the Value of Innovation

The first point finds strong support in the framing history,⁹¹ lies at the heart of *McCulloch*,⁹² and is well-illustrated by *Wickard v. Filburn*.⁹³ That case involved a New-Deal-era federal law that limited the amount of wheat that growers could produce, so as to avoid overproduction and thus buoy up prices in the interstate wheat market. The law was challenged by a small farmer named Roscoe Filburn because he wanted to grow 500 bushels of wheat, but he and others like him were limited to growing 250 bushels by the challenged statute.⁹⁴ Mr. Filburn emphasized that he did not plan to sell any of those 500 bushels to anyone in any market; he simply wanted to put his wheat to work on his own farm, including by using it to feed his family and his livestock. Mr. Filburn was outraged by the intrusive federal command directed at him, especially because he had no involvement whatsoever in the interstate (or, indeed, any) market for wheat. And he certainly confronted an "unprecedented" form of government interference because Congress had never before controlled how much wheat a private citizen could grow for his own family's use on his own land.⁹⁵ The Supreme Court, however, rejected Mr. Filburn's contention in a unanimous ruling. It did so because the restriction placed on farmers like him helped to ensure demand for wheat while holding down supplies in that market, which would rise if "home use" farmers changed their minds and chose to sell when prices rose due to federal controls.⁹⁶

Wickard illustrates the principle that Congress has the power to devise radically new forms of laws, including with respect to highly individual and localized decisions, if doing so is helpful to effectuating a comprehensive market-regulating scheme. And exactly that same principle stands behind the minimum coverage provision.

To be sure, some analysts argue that *Wickard* was wrongly decided.⁹⁷ In *Wickard* itself, however, Justice Jackson and his eight colleagues emphatically expressed just the

⁹¹ See *infra* notes 103-105 and accompanying text.

⁹² See *supra* notes 106-110 and accompanying text.

⁹³ 317 U.S. 111 (1942).

⁹⁴ *Id.* at 114-15.

⁹⁵ See *id.* at 119 (reciting Filburn's argument that the regulations were "beyond the reach of congressional power" because "they are local in character").

⁹⁶ *Id.* at 128-29.

⁹⁷ Those analysts include Gary Lawson and Patricia Granger, on whose 1993 treatment of the Necessary and Proper Clause the private respondents in part rely. Private Respondents' Brief, *supra* note 9, at 42 (citing Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 331 (1993)). As the Solicitor General notes, the position of Professors Lawson and Granger has been "hotly contested" on originalist grounds. See Reply Brief, *supra* note 9, at 7 n.3 (citing J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581 (2002)). Some additional challenges to the Lawson-Granger position appear *infra* notes 161-167 and accompanying text.

opposite view, insisting that their decision was designed “to bring about a return to the principles first enunciated by Chief Justice Marshall.”⁹⁸ It is true, as an originalist matter, that Congress cannot regulate agricultural production for its own sake, and it may well be true too that the framers did not envision federal regulation of local farm production in 1788.⁹⁹ The broad text of the Constitution, however, did not foreclose that result under altered circumstances; instead, it gave Congress a commerce power that, when coupled with the Necessary and Proper Clause, invited “embracing and penetrating” federal action in light of new conditions.¹⁰⁰ And by the 1940s, the world had changed in ways that brought federal regulation of wheat production within the grants of Congress’s enumerated powers. This was the case because “[c]ommerce in wheat among the states” had by then become “large and important” – so much so that recent gluts in production had “caused congestion in a number of markets; tied up railroad cars; and caused elevators in some instances to turn away grains, and railroads to institute embargoes to prevent further congestion.”¹⁰¹ Faced with this disarray in interstate commerce, Congress could control wheat production, in part because the “power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in.”¹⁰² And Congress could extend its controls even to those farmers who grew wheat wholly for home consumption because doing so was useful in ensuring that its regulations of the interstate wheat market would cause that market in fact to operate in the enhanced way that Congress had undertaken to facilitate.

All of this fully comported with originalist principles. 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.”¹⁰³ 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.”¹⁰⁴ At the Massachusetts Ratification Convention, delegate Christopher Gore reiterated that: “[T]he exigencies of government are in their nature illimitable; so then must be the authority which can meet these exigencies.”¹⁰⁵ And Chief Justice Marshall emphatically endorsed this same idea in *McCulloch*. When

⁹⁸ *Wickard*, 317 U.S. at 122.

⁹⁹ See THE FEDERALIST NO. 17, *supra* note 19, at 106 (Alexander Hamilton) (describing the “supervision of agriculture” as among the “things . . . to be provided for by local legislation”).

¹⁰⁰ *Wickard*, 317 U.S. at 120.

¹⁰¹ *Id.* at 125.

¹⁰² *Id.* at 128.

¹⁰³ THE FEDERALIST NO. 34, *supra* note 19, at 211 (Alexander Hamilton) (adding, in discussing the Necessary and Proper Clause, that “we must bear in mind that we are not to confine our view to the present period, but to look forward to remote futurity”).

¹⁰⁴ JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787 at 376 (Ohio Univ. Press rev. ed., 1984) (quoting James Wilson); see also *id.* at 551 (quoting John Rutledge) (“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.”).

¹⁰⁵ 2 DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 66 (Jonathan Elliot ed., 1836) [hereinafter “ELLIOT’S DEBATES”].

he penned the famous line that “we must never forget that it is a *constitution* we are expounding,”¹⁰⁶ he meant in part to say, as he thereafter did, that our founding document was “meant to endure for ages to come.”¹⁰⁷ The designedly enduring character of that document signaled to the Great Chief Justice that Congress was meant by the framers to have “ample means” to implement its “ample powers,”¹⁰⁸ so as to be able to adapt in flexible fashion to the “various crises of human affairs” that would arise in later “ages.”¹⁰⁹ In short, the framers crafted the Necessary and Proper Clause to vest in Congress “a power equal to every possible contingency” that a profoundly uncertain future might present.¹¹⁰

These sources show that originalist principles supported the principle of practical innovation that undergirded the Court’s decision in *Wickard*. And there is no reason, in this regard, to distinguish the national wheat distribution system from our national health care system. In the latter context, no less than in the former, Congress was empowered to put in place highly adaptive forms of law – whether or not “unprecedented” – to foster the success of a broad and corrective restructuring of a vital national market.

2. The Commonality of Mandates

Respondents argue in reply that Congress’s power to adapt to new conditions can go only so far. Otherwise, they say, the line between state and federal authority will vanish. They also claim that the minimum coverage provision differs from the law in *Wickard* because that law imposed a negative, rather than an affirmative, duty. On this view, the law in *Wickard* was permissible because it *prohibited* people from doing something (namely, growing more than a certain amount of wheat), while the individual mandate *requires* people to do something (namely, entering into insurance contracts). That basic dividing line, according to the respondents, is one we can be sure the framers meant to draw.

¹⁰⁶ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original).

¹⁰⁷ *Id.* at 415. Put another way, “[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.” *Id.* at 415; see also Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, YALE L.J. ONLINE, at 24 (April 26, 2011), available at <http://yalelawjournal.org/the-yale-law-journal-pocket-part/constitutional-law/bad-news-for-mail-robbers:-the-obvious-constitutionality-of-health-care-reform/> (emphasizing this purposive reasoning).

¹⁰⁸ *McCulloch*, 17 U.S. (4 Wheat.) at 408.

¹⁰⁹ *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 legislation to circumstances.” *Id.* at 415-16;

¹¹⁰ THE FEDERALIST No. 26, *supra* note 19, at 166 (Alexander Hamilton). It may be true, of course, that health insurance did not broadly move through interstate commerce in the late 1700s. But neither did trains, broadcast transmissions, or airplanes, all of which came, over time, to flow in massive streams of commerce from some regions of the country to others. Congress, nonetheless, can regulate all of these things under its commerce power – just as surely as the Court can protect our right to be free of unreasonable searches by way of electronic surveillance, compulsory stomach pumping, or home-invading heat sensors. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (holding that the use of heat-sensing electronic technology to gather information about the interior of a home constitutes a search within the meaning of the Fourth Amendment).

This argument, however, lacks a solid originalist pedigree, in part because it finds no support in the controlling text of the Constitution.¹¹¹ The Commerce Clause, after all, permits Congress to regulate interstate commerce, and the Necessary and Proper Clause speaks of “all Laws” that are necessary and proper for carrying that power into effect. There is no hint here of a distinction between prohibitions and mandates. The controlling principle is that Congress can make laws to help govern interstate markets—not that Congress can impose only negative duties. Indeed, the PPACA itself creates affirmative duties that the respondents do not question, including by mandating that insurance companies make contracts with high-risk customers.¹¹² These mandates, and others like them, have been enacted pursuant to Congress’s commerce power and its supplementary authority to put in place useful companion measures.¹¹³

The respondents seek to distinguish these laws by saying that the minimum coverage provision places affirmative duties on ordinary people – not merely on organized businesses that have chosen to inject themselves into our national marketplace. But as *Wickard* and *Raich* show, Congress can regulate highly individual choices – even about how to provide for one’s own family or to treat one’s own excruciating pain – if it does so as part of an overarching regulation of an interstate market.¹¹⁴ Indeed, one can view the laws at issue in these very cases as involving forms of individual mandates. Of particular significance, the challenged law in *Raich* required every person who was in possession of marijuana at the time of the law’s enactment to take affirmative steps to get rid of it, and that law even now requires similar affirmative conduct regardless of how innocently one first comes into possession of the proscribed substance.¹¹⁵ In any event (and whatever one might think about this characterization of the particular measure at issue in *Raich*), the federal statute books include many laws enacted under the Necessary and Proper Clause that impose individual mandates. And so it has been for a long, long time.

We will touch on the deep historic roots of individual mandates when we turn in short order to laws concerning eminent domain, the military draft, and the duties of citizens as militia members.¹¹⁶ For now, a familiar example helps to make the basic point: Every individual who takes a commercial airline flight is mandated to move through a weapons detection device; indeed every passenger is now subject to a screening so invasive that it can reveal even images of the passenger’s naked body. Individual passengers have no choice but to submit to this invasion; they are mandated to do so by federal law. Why? Because, in light of new conditions, the law is useful in seeing to it that the interstate travel market operates in a safe and efficient way.

¹¹¹ See *infra* notes 142-49 and accompanying text.

¹¹² See 42 U.S.C. § 300gg-3 (West 2011).

¹¹³ In fact, the federal statute books are full of laws that impose affirmative duties. Examples include laws that mandate the labeling of drugs, Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-399, the distribution of corporate reports, Securities Exchange Act of 1934, 15 U.S.C. § 78q (West 2011), and clear disclosure of key terms in lending documents, Consumer Credit Protection Act, 15 U.S.C. § 1631(a).

¹¹⁴ See *supra* notes 67-72, 93-102 and accompanying text.

¹¹⁵ *Gonzales v. Raich*, 545 U.S. 1, 11 (2005).

¹¹⁶ See *infra* notes 124-167 and accompanying text.

The respondents might say that this observation is beside the point because people do not have to fly. On this view, the mandate to go through detection devices is not really a mandate because it kicks in only if the traveler *chooses* to make a flight, in contrast to being *automatically subject* to the claimed duty to buy health insurance. One problem with this argument is that its underlying premise has a misleading quality. In fact, the so-called individual mandate is not imposed on every citizen regardless of the citizen's own choices. In particular, people can avoid purchasing health insurance by choosing to earn incomes above a certain level, just as people can avoid airport weapon detection devices by choosing not to fly.¹¹⁷

Any effort to distinguish air passenger inspection mandates suffers from another complication as well. Many persons who “choose” to fly do not really have a choice in any meaningful sense. Their employer may require that they fly, or they may have no other way to get somewhere quickly – for example, if the wife of a man in Florida is suddenly near death due to an accident that occurs while she is traveling in Alaska. Could these people who have to fly argue that federal laws cannot require them to go through a weapons detector because that would involve forcing them to submit to a mandate that they cannot meaningfully opt out of? The answer is no because allowing such exceptions would cause the weapons-detector system not to work as well as it otherwise would in facilitating safe and efficient interstate air travel.¹¹⁸

The respondents might also argue that the airport screening mandate differs from the minimum coverage provision because the former rule, but not the latter, targets people who (whether voluntarily or not) already are *in* interstate commerce and subject to congressional regulation for that reason. This suggestion, however, again confronts significant difficulties. Some air travelers, for example, move only within a single state, as when one flies from Los Angeles to San Francisco. And some persons subject to screening are not traveling at all – for example, employees who clean gate area restrooms or non-employees who do nothing more than tour the airport beyond the screening area. Perhaps the respondents would deal with these situations by saying that simply *being* in an airport involves injecting oneself into our national commerce in a meaningful way.

¹¹⁷ See 42 U.S.C. § 18081 (West 2010). There have been some suggestions that low-income individuals not subject to the law's penalties are nonetheless required to purchase insurance because the declarative language of the statute applies to all persons, regardless of income, *see supra* note 10 (noting this feature of the statutory scheme); thus, so the argument goes, they are subject to the “mandate” no less than anyone else. Such an argument misses the inextricable connection between duties and sanctions, which are no less intertwined than rights and remedies. It also runs afoul of the familiar legal norm that courts should consider “the substance rather than the form” of the challenged statute. *See, e.g.*, Gregg Dyeing Co. v. Query, 286 U.S. 472, 476 (1932).

¹¹⁸ Moreover, sometimes there is no choice to opt out of flying, even in the most literal sense. Consider a soldier drafted to serve in the armed forces and then ordered to fly on a plane overseas. Such a person not only lacks a practical choice, but also a legal choice, not to fly. Even so, Congress can most assuredly extend its weapons-detector mandate to the soldier, even though doing so involves imposing a mandate of the purest sort. What is more, some federal weapons-detector mandates extend very broadly, and in inescapable fashion, to the general citizenry. Persons who enter a federal courthouse, for example, are mandated to go through weapons detectors—and that is true even for the many individuals who have no choice but to be there because they have been subpoenaed to serve as prospective jurors or witnesses.

But to say such a thing raises the question why making enough money to cause the minimum coverage provision to take hold does not merit the same description.¹¹⁹ It also raises the question as to why being “in” commerce should expose one to liberty-diminishing mandates not otherwise permissible under the commerce power.

The federal minimum wage law presents additional complexities for any claim that our Constitution embodies a broad anti-mandate principle. Under that law, every employee has to take as pay the minimum wage. In other words, the law does not just mandate payments by employers but also receipt of payments by their employees.¹²⁰ Federal law thus *mandates* that every worker take no less, even if one wishes to do so to the point of desperation. One might try to say that this is a prohibition, not a mandate, or perhaps that – unlike with the minimum coverage provision – it only takes hold for persons who opt into it by engaging in the economic activity of working. But these suggestions raise problems of their own.¹²¹ By exempting low-income earners, after all, the minimum coverage provision also takes aim at those persons who work.¹²² And like the PPACA, the minimum wage mandate law covers “virtually every human being”¹²³ because it covers almost every person who ever works for pay.

In any event, compulsory airport screenings (to whomever they apply) and minimum-wage rules (whether or not they reach most Americans) constitute only the tip of a federal-mandate iceberg. Our history, including our earliest history, reveals that the framers envisioned that individual mandates – including mandates to make contracts – would be permissible tools to implement the federal government’s powers. And there is no apparent reason to conclude that this principle does not extend to the commerce power. Let us say, for example, that an early Congress had decided to build a canal that would facilitate newly expanded state-border-crossing commerce. The path of the proposed canal, however, passed over many parcels of land owned by ordinary citizens. What could the government do? It could impose on those ordinary citizens an individual mandate to enter into contracts to sell their land even though they recoiled at entering into those exchanges. And where would that power come from, given that there is no general eminent domain power set forth in the Constitution? The answer is that the mandates to make those contracts would qualify as a necessary and proper means for carrying into execution the regulation of interstate commerce.¹²⁴ In other words, Congress could regulate interstate commerce by expanding interstate commerce by building a canal. And pursuant to the Necessary and Proper Clause, it could force individual landowners to make contracts they did not want to make because doing so would be useful in carrying Congress’s commerce-enhancing program into execution.

¹¹⁹ See *supra* note 10 and accompanying text.

¹²⁰ See *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 704 (1945).

¹²¹ For example, to couch this rule as a prohibition would be to say that a worker is prohibited from not taking the minimum wage. It seems (at least to me) more sensible to say (more simply) that the worker must take the minimum wage.

¹²² See *supra* note 10.

¹²³ State Respondents’ Brief, *supra* note 9, at 3.

¹²⁴ See, e.g., Mark Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825, 1856-1857 (2011) (detailing this historical understanding); see also Beck, *supra* note 97, at 617 & n.234.

The authors of *The Federalist* specifically recognized the federal government’s power to impose individual mandates on the general citizenry under the Necessary and Proper Clause. In *No. 29*, Hamilton scolded critics of the Constitution who had argued that it would render Congress unable to mandate participation of ordinary citizens in a *posse comitatus* convened by a federal officer to pursue federal lawbreakers. Indeed, Hamilton went so far as to say that “[i]t would be . . . *absurd* to doubt that a right to pass all laws *necessary* and *proper* to execute [Congress’s] declared powers would include that of *requiring* the assistance of the citizens to the officers who may be entrusted with the execution of those laws.”¹²⁵ Hamilton’s treatment suggests that this power was so far-reaching that Congress could pass laws “requiring” citizen assistance even free of charge; and so, *a fortiori*, Congress could at least compel this assistance for a fee, thus mandating “the citizens” to make highly burdensome contracts no matter how much they objected to doing so. There should also be no doubt that Congress could base the creation of such mandates on the commerce power. If, for example, Congress imposed duties on citizens to join posses for reasonable pay to enforce federal laws that criminalized destroying ships or wharfs or harbors, those contractual mandates would be constitutional under the very same clauses of the Constitution said by the respondents here not to embrace a power to impose contractual mandates.¹²⁶

It might be said in response that eminent domain and *posse comitatus* mandates are distinguishable from the health care mandate because they involve forced dealing with the government itself, rather than with private parties. But this would seem to be a distinction without a difference because the text of the Necessary and Proper Clause in no way draws such a dividing line. A mandate is a mandate, and a person forced to deal with the government is no less forced to do something (especially when it involves putting one’s life at risk, as in a *posse comitatus*) than is a person who is forced to deal with a private party.¹²⁷

In any event, the federal government had power from the outset to compel the making of private contracts under the Commerce Clause and the Necessary and Proper Clause. In *Gibbons*, for example, the Court endorsed Congress’s power to “require” American ship operators to employ exclusively American crews.¹²⁸ And this aspect of the commerce power surely reached beyond the placement of mandates on ship operators. What if, for example, the first Congress had passed a law that mandated landowners to provide access to shoreline property, with a right of compensation for that service, when boats in interstate commerce encountered sudden threats to the safety of crew, passengers, or cargo? There is good reason to believe that such an obviously commerce-protecting law would not exceed Congress’s “plenary” powers over commerce.¹²⁹ But

¹²⁵ THE FEDERALIST No. 29, *supra* note 19, at 182-83 (Alexander Hamilton) (some emphasis added).

¹²⁶ See Hall, *supra* note 124, at 1855-58 (reaching the same conclusion).

¹²⁷ Indeed, there may be more reason to worry about mandates to deal with the government than to deal with private parties. This is the case because, as the Supreme Court explained in another setting involving the adjustment of contractual rights and duties, “the State’s self-interest is at stake” in the former, but not the latter, context. *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 26 (1977) (applying Contracts Clause of Article I, Section 10).

¹²⁸ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 72 (1824).

¹²⁹ *Id.* at 196-97.

that is the case even though the law would impose a mandate on individual citizens to trade services for money. That is the case even though the mandate would fall on citizens who were “strangers” to interstate shipping.¹³⁰ That is the case even though these citizens had not undertaken any affirmative “conduct” at all, far less conduct that “obstruct[ed]” interstate commerce.¹³¹ And that is the case even though the mandate would find its origins in the Commerce and Necessary and Proper Clauses.¹³²

Perhaps the respondents believe that this boat-saving mandate would have to be held unconstitutional. Such a position, however, would only highlight how far removed from the purposes of the constitutional grants of power their position seems ready to take them. Perhaps the respondents would argue that the boat-saving mandate presents a distinguishable case because that law is more directly related to the operation and well-being of interstate commerce than is the minimum coverage provision. That suggestion, however, is not self-evidently true, and in any event it conflicts with the Court’s refusal to draw lines of this kind in assessing the validity of laws that genuinely deal with national commercial problems.¹³³

Finally, the respondents might say that there is a difference in kind between the imposition of a one-shot duty to provide shelter in a storm and the ongoing obligation imposed by the minimum coverage provision. The Eleventh Circuit provided inspiration for such an argument when it lamented that a duty to maintain health insurance imposed on citizens by the PPACA would persist “for the entire duration of their lives.”¹³⁴ We are left to wonder, however, why the imposition of a duty for a lifetime somehow causes a violation of the Necessary and Proper Clause. After all, almost every law operates in an ongoing way. In neither *Wickard* nor *Raich* were the challenged laws upheld because they included a sunset provision. Likewise, in *Perez v. United States*, the Court deemed valid under the Commerce Clause a federal prohibition on loansharking, even of a wholly local nature, although it imposed a lifetime ban.¹³⁵ Do we look askance at laws that target carjackers, committers of securities fraud, or doctors performing partial birth abortions because those laws remain in effect for “the entire duration of their lives”? Put

¹³⁰ See *supra* note 29 and accompanying text.

¹³¹ Private Respondents’ Brief, *supra* note 9, at 27 (advocating recognition of an obstructing-commerce limit).

¹³² See also Hall, *supra* note 124, at 1857-58, 1867-68 (identifying other “individual mandates” imposed under the Commerce Clause, including with respect to removing toxic waste from land, as well as the congressional power to “even compel all residents of this country to deliver unto the Government all gold bullion, gold coins, and gold certificates in their possession in exchange for equivalent value in dollars” (quoting *Nortz v. United States*, 294 U.S. 317, 328 (1935))); see also *id.* at 328 (noting the Court’s validation in 1870 of a mandate that paper currency be accepted as legal tender for all debts based in part on Congress’s war powers).

¹³³ See *Wickard v. Filburn*, 317 U.S. 111, 120 (1942) (rejecting effort to sort between laws that genuinely address commercial matters based on “direct” and “indirect” effects).

¹³⁴ *Florida ex rel. Att’y Gen. v. U.S. Dept. of Health & Human Servs.*, 648 F.3d 1235, 1313 (11th Cir. 2011).

¹³⁵ 402 U.S. 146, 156-57 (1971). Not surprisingly, the Supreme Court did not even consider the possibility of striking down the law for that reason. Nor should it have. Indeed, the continuing operation of the law helped make it work better in achieving its purpose of cutting off funds for, and thus holding back the operation and growth of, interstate organized crime rings that dominated markets in narcotics, prostitution, and gambling. *Id.* at 155.

simply, the ongoing operation of the minimum coverage provision in no way reveals that the law is not “useful” or “convenient” to the proper regulation of interstate commerce. In fact, the ongoing duration of the minimum coverage provision renders it more useful, not less useful, to congressional efforts in restructuring interstate market operations so as to make them work better.

There is a broader point, too. In the face of the respondents’ repeated efforts to invoke the value of liberty in assailing the minimum coverage provision, it is worth recognizing that our history confirms Congress’s power under the Necessary and Proper Clause to impose individual mandates that constrain individual liberty in the most profound of ways. We have already seen that compulsory participation in a *posse comitatus*—complete with the physical dangers such work entails—was a mandate that the federal government could impose across the board on ordinary citizens, including under its commerce power.¹³⁶ In similar fashion, the Third Amendment signaled the framers’ understanding that the Necessary and Proper Clause reached so far as to empower Congress, even in peacetime, to mandate American citizens to lodge federal troops in their homes.¹³⁷ Particularly informative on this score is the long line of mandates embodied in federal draft laws.¹³⁸ A draft law, after all, exposes every eligible individual to the most onerous form of government mandate: a mandate to make a contract with the United States military under which the draftee must submit to the most extreme forms of liberty-constraining behavior, to the point of forced separation from one’s family and putting one’s very life at risk for an extended period of time. If the Necessary and Proper Clause goes so far as to permit Congress to force citizens to face the hardships and dangers of compulsory military service, how can it be that the same clause forecloses Congress from forcing citizens to buy health insurance that will provide them with valuable advantages over the long term?

What is more, federal draft laws do not stand alone. Indeed, only four years after ratification of the Constitution, Congress enacted a mandate that reached beyond forced contracting with the government itself. That mandate, which applied in sweeping fashion, was adopted pursuant to Congress’s power “[t]o provide for calling forth the Militia” and “arming . . . such Part of them as may be employed in the Service of the United States.”¹³⁹ According to its terms, “every able-bodied white male,” of the ages of 18 to 45, had 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.”¹⁴⁰ Without question, this law was an individual contractual mandate, because everyone who did not have a firearm or the other statutorily identified items had to go out and get them, as Professor Hall has

¹³⁶ See *supra* notes 125-126 and accompanying text.

¹³⁷ U.S. CONST. amend. III.

¹³⁸ See, e.g., Military Selective Service Act, 50 App. U.S.C. §§ 453, 454 (requiring all males to register for the Selective Service by age eighteen and making all registrants responsible for military service); see also *Selective Draft Law Cases*, 245 U.S. 366 (1918) (holding that the Selective Service Act is a valid exercise of Congress’s power).

¹³⁹ U.S. CONST. art I, § 8, cls. 15, 16.

¹⁴⁰ Act of May 8, 1792, ch. 33, §1, 1 Stat. 271.

observed, “at his own expense.”¹⁴¹ Yet if Congress can mandate the nation’s citizenry to acquire and maintain guns and ammunition, where is the constitutional rule that bars it from mandating that same citizenry to acquire and maintain health insurance?

Critics of the minimum coverage provision argue that there is a basic difference between that provision, on the one hand, and the draft and militia-gun laws, on the other. The suggested difference is that the operation of the armed forces and the militia concern the most foundational of all government functions—namely, providing for the national defense, including by guarding against foreign invasion.¹⁴² This effort to create a special constitutional prohibition on only non-defense-related contractual mandates, however, lacks support in the text and history of the Necessary and Proper Clause. The text simply does not differentiate between more critical and less critical federal powers. Rather, it specifies that Congress can pass “all Laws” that are necessary and proper to carrying *any* of its enumerated powers into execution—whether it is the power to “raise armies and support armies,” or to “organiz[e] . . . the Militia,” or to “regulate commerce . . . among the several states.”

Any doubt on this score is removed by *The Federalist*. In *No. 23*, 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.”¹⁴³ 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 encountered¹⁴⁴ – 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.”¹⁴⁵ 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 fulfilling the objects committed to its charge,”¹⁴⁶ 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.”¹⁴⁷ Most important of all, 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 exactly the same plane. He began the thought by observing that: “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.”¹⁴⁸ 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.*”¹⁴⁹

¹⁴¹ Hall, *supra* note 124, at 1856.

¹⁴² See Private Respondents’ Brief, *supra* note 9, at 58 (distinguishing the draft cases).

¹⁴³ THE FEDERALIST No. 23, *supra* note 19, at 146 (Alexander Hamilton).

¹⁴⁴ See *supra* notes 103-110 and accompanying text.

¹⁴⁵ THE FEDERALIST No. 23, *supra* note 19, at 147 (Alexander Hamilton) (emphasis omitted).

¹⁴⁶ *Id.* at 149.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (emphasis added).

Put simply, the Necessary and Proper Clause is an equal-opportunity grantor of power. If the clause permits Congress to pass individual mandates to help safeguard the national defense – as it most assuredly does – it just as assuredly permits Congress to enact individual mandates to help regulate commerce among the several states. Because that is just what Congress has done with the minimum coverage provision, originalist principles support its constitutionality.¹⁵⁰

C. Of “Proper” Laws and the Parade of Horribles

Both the state and private respondents deal with these difficulties in part by casting their argument to a high level of generality. They contend that state governments may impose contractual mandates because they are governments of general powers.¹⁵¹ On the other hand, the federal government may not impose such mandates because it is a government of limited powers.¹⁵² Without more, this reasoning is question-begging because it fails to inquire *how far* the federal government’s limited powers extend. It also overlooks a key principle encountered earlier – namely, that the framers meant for the state and the federal governments to have equivalent access to the means for carrying vested powers into execution.¹⁵³ Under this principle, if Congress could conclude (as it did) that the minimum coverage provision is genuinely useful in shaping the quality and price of insurance policies in interstate-market-improving ways, the only obstacle to enacting that law would have to be that certain types of laws—for example, laws that mandate the making of private contracts – lie beyond the federal power for some special reason. This might be the case, for example, if such laws are not “proper” under the Necessary and Proper Clause. And that, as it turns out, is just the argument that the respondents fall back on.¹⁵⁴

1. Problems With the It’s-Not-Proper Argument

One problem with the it’s-not-proper argument is that the respondents cite no authority for the proposition that the word “proper” as used in the Necessary and Proper Clause was meant to block Congress from enacting some – though not all – individual mandates.¹⁵⁵ They point to no examples of non-“proper” mandates identified by Madison or Hamilton or anyone else at the Constitutional Convention or during the ratification process. Respondents offer no response to the suggestion that the term “necessary and

¹⁵⁰ The same conclusion follows from Chief Justice Marshall’s undifferentiated treatment of all of Congress’s enumerated powers in *McCulloch*. Of particular importance, he declared in broad and nondiscriminatory terms that the properly sweeping scope of Congress’s implied authority was attributable to the Constitution’s grant to Congress of “great powers” – powers, that is, “to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies” – that concern a “vast Republic” and on “the due execution of which the happiness and prosperity of the nation so vitally depends.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407-08 (1819).

¹⁵¹ See, e.g., *supra* note 19 and accompanying text.

¹⁵² See, e.g., *id.*

¹⁵³ See *supra* notes 85-86 and accompanying text.

¹⁵⁴ See, e.g., *supra* notes 24-25 and accompanying text.

¹⁵⁵ See *supra* notes 124-128 and accompanying text (discussing past mandates); *supra* notes 136-41 and accompanying text (same).

proper” is unitary in nature – like the term “cruel and unusual” or “arbitrary and capricious” – so that the word “proper” was not meant to set forth a significant independent constraint, particularly one that rendered *ultra vires* the entire category of “mandate” laws.¹⁵⁶ Nor do they offer any response to the alternative suggestion that the term “proper” in Article I, Section 3, Clause 18, was meant simply to fence out laws proscribed elsewhere by the terms or the structural dictates of the Constitution.¹⁵⁷

Most important, the respondents offer no response to the originalist case – already made by Professor Beck – that the word “proper” in the Necessary and Proper Clause was not meant to impose a broad, power-trumping “external” restriction founded on the goal of protecting individual liberty.¹⁵⁸ To his credit, Professor Beck recognizes that there are a “handful” of early writings that might support a contrary view.¹⁵⁹ But the striking sparseness of this evidence itself dictates the conclusion that such a far-reaching and transformative textual understanding could not have been shared by the general ratifying community.¹⁶⁰

¹⁵⁶ See Hall, *supra* note 123, at 1854 (discussing the phrase “necessary and proper” as a “single construct”); see also Moskal v. United States, 498 U.S. 103, 120 (1990) (Scalia, J., dissenting) (noting common lawyerly practice of using unitary phrases, such as “give, grant, bargain, sell, and convey” or “rent, residue and remainder” to convey a single idea).

¹⁵⁷ See, e.g., Reid v. Covert, 354 U.S. 1, 22 (1957) (distinguishing *McCulloch* in finding improper use of Necessary and Proper Clause because there “no specific restraints on governmental power stood in the way” of Congress’s action (emphasis added)). For some specific restraints included in the original Constitution, see U.S. CONST. art. I, § 9, cl. 8 (banning titles of nobility); U.S. CONST. art. I, § 9, cl. 4, 5 (prohibiting direct taxes not in proportion to the census and export taxes). There is also the question whether, assuming the word “proper” was somehow meant to give rise to a wide range of freestanding inhibitions on congressional power, it was meant to impose judicially enforceable limits, at least as to legislation directed at individuals as opposed to states themselves. Cf. THE ANTI-FEDERALIST PAPERS, *supra* note 79, at 175 (quoting George Mason at the Constitutional Convention, who suggested that this “general clause” would extend federal legislators’ powers “as far as they shall think proper” (emphasis added)). See also *Nomination of Robert H. Bork to be Associate Justice to the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 224 (1987) (statement of Judge Robert H. Bork; arguing that intrinsic vagueness of the Ninth Amendment makes it akin to an “ink blot” and that, in keeping with the judicial function, courts cannot “make up what might be under the ink blot”).

¹⁵⁸ See Beck, *supra* note 97, at 586.

¹⁵⁹ *Id.* at 638. The leading, if not the only, such writing from the Convention and Ratification materials appears to be an essay written by a federalist in Petersburg, Virginia, under the pen name Impartial Citizen. For further discussion of that tract, see *infra* note 160.

¹⁶⁰ Beck, *supra* note 97, at 586. In a recent pair of articles, Gary Lawson and David B. Kopel argue that, under 18th-century principles of both agency law and administrative law, the minimum coverage provision cannot be “necessary and proper” according to the framers’ understanding of that term. Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: the Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267 (2011) [hereinafter “L&G I”]; Gary Lawson and David B. Kopel, *Bad News for John Marshall*, 121 YALE L.J. ONLINE 529 (2012). Incorporating one distinctive body of non-constitutional rules into a constitutional clause (and then translating its meaning into that different context) is a challenging enterprise, and that is even more true of an effort to simultaneously incorporate two. The effort becomes still more ambitious with the authors’ acknowledgment that there is a dearth of (if any) evidence in the “standard materials of constitutional research – such as the Convention and ratification debates”— that supports thus incorporating either body of law. L&G I at 270. And the embracing all-means-based depiction of the Necessary and Proper Clause in sources like *The Federalist* seems at odds with the authors’ only-some-means argument for narrowing the clause’s scope. See *supra* note 81-84 and accompanying text (discussing *The Federalist*).

In any event, powerful affirmative evidence confirms the same conclusion. Among other things: (1) even though the single greatest antifederalist criticism of the proposed Constitution concerned its failure adequately to protect individual rights, 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-rights protections;¹⁶¹ (2) as a textual matter, finding safeguards of liberty in the word

What is more, the indeterminacy of the agency and administrative rules alluded to by the authors – based on words like “reasonableness,” “subsidiary ... rather than ... independent,” “less worthy,” and “rule of reason” (L&GI at 270, 280, 285) – holds the potential of generating more questions than answers, even if those rules were to apply. And this problem is compounded because the early cases the authors cite do not suggest with any clarity that these tests would condemn the minimum coverage provision or how those tests would apply in other settings. One case, for example, held that the government could not make a single landowner pay in full for a water-control project when that project had benefitted several other landowners, too. Another case found unauthorized an agency’s effort at road-paving that covered up the doors and windows of a house. L&G I at 285-86.

The authors put particular weight on the contention that the minimum coverage provision violates congressional “fiduciary duties” imposed by the Necessary and Proper Clause, because that provision grants health insurance companies a monopoly-like status. L&G I at 288-91. Even assuming Congress somehow has judicially enforceable “fiduciary duties,” the PPACA does not award any insurer a monopoly, and the authors’ monopoly-likeness argument does not consider the complex mix of burdens and benefits directed at insurers by the Act. The monopoly argument is further weakened by the historical fact that constitutional amendments aimed at outlawing monopolies were repeatedly put forward during the ratification process, *see* L&G I at 290 & n.91; *accord supra* note 80 – all of which would have been unnecessary if the words “necessary and proper” in the original constitutional text already banned monopolies. In the end, the authors rely on an essay, published in Petersburg, Virginia, under the pen name Impartial Citizen. L&G I at 291. This writer suggested that laws granting monopolies – as well as laws “inflicting unusual punishments” or “creating new crimes” – would be “*not proper*” under Article I, Section 8, Clause 18. Tellingly, however, Impartial Citizen’s argument took aim at the much broader definition of the Sweeping Clause previously put forward by George Mason, who was a luminary of his day and had served as a leading delegate to the Constitutional Convention. Even more important, Impartial Citizen’s paragraph on the Necessary and Proper Clause was buried in an avalanche of other federalist writings (including *The Federalist*) that did *not* make this argument, despite the most powerful incentives for doing so in the face of rampant antifederalist declamations of the Constitution as insufficiently protective of individual rights. *See supra* note 161 and accompanying text. It is perhaps for these reasons that the respondents, even while greatly emphasizing originalist lines of reasoning, did not profess to rely on an agency-law/administrative-law theory of the Necessary and Proper Clause in presenting their challenge to minimum coverage provision.

¹⁶¹ Beck, *supra* note 97, at 638-39. This omission is particularly significant when one recalls that, in response to antifederalist demands for a Bill of Rights, federalist leaders argued vigorously that the constitutional text already embodied a *de facto* Bill of Rights. *See, e.g.,* THE FEDERALIST NO. 84, *supra* note 19, at 581 (Alexander Hamilton). In making this argument, however, these writers went no further than to point to such protections as the Article I, Section 9 limit on congressional suspension of the writ of habeas corpus. *See id.* Tellingly, they did not argue that protections of rights lodged in the word “proper” negated the no-Bill-of-Rights critique, even though such an argument, if fairly available, would have gone much farther to answer antifederalist concerns. *See* Beck, *supra* note 97, at 638-39. To be sure, the record of the ratification contest contains occasional suggestions of the possibility that Americans might enjoy unenumerated rights that should trump constitutional powers. These expressions, however, were only vaguely developed, and they also were rare, especially to the extent they were associated with the idea of judicial enforcement. *See* COENEN, *supra* note 2, at 181 (noting “still primitive understanding of enforceable rights that marked the time in which Publius wrote”). It is telling, in this regard, that the most well-known articulation of the idea of unenumerated rights came from James Iredell of North Carolina, *see id.* at 180, who later vigorously *rejected* the idea of judicial enforcement of such rights in his role as Justice

“proper” would give rise to the anomalous result that “persons . . . would possess greater rights when Congress acted pursuant to the Necessary and Proper Clause than when it directly exercised its enumerated powers;”¹⁶² and (3) in any event, the “historical evidence” offers “numerous early expositions of the Necessary and Proper Clause that treat the propriety requirement as an ‘internal’ restraint on the means-end relationship,” as opposed to an “external” constraint that in effect established wide-ranging individual liberties.¹⁶³

The argument that the word “proper” is a rightful source of liberty protections also fails to notice the elephant in the room. Whatever else one might say about the ratification process, that process in the end produced adoption of the Bill of Rights. The chain of events that led to that adoption was one that centered on dogged antifederalists over time convincing their federalist rivals that such an enumeration was needed precisely because the Constitution vested Congress with far too expansive powers,

of the Supreme Court. *See infra* note 188. Perhaps most notably, even these few reflections on the notion of unenumerated rights centered (not surprisingly) on *nontextual* rights – as opposed to rights supposedly embodied in the textual term “proper.” *See id.*

¹⁶² Beck, *supra* note 97, at 639. Professor Beck offers the example of a statute promulgated directly under the copyright power that offered protection to only those works of authorship that “did not criticize Congress.” *See id.* at 639 n.382. Such a law, he points out, would today be unconstitutional under the First Amendment. But in the pre-First Amendment world envisioned by critics of the individual mandate, it would appear to be oddly unassailable because of its promulgation directly under the Intellectual Property Clause itself – which speaks of “securing . . . to Authors . . . the exclusive Right to their respective Writings” – rather than under the Necessary and Proper Clause. *Id.*

¹⁶³ *Id.* at 641; *see id.* at 641-48 (associating this view not only with Madison and Hamilton and early legislators in Congress, but also with the leading constitutional commentators Joseph Story and St. George Tucker, as well as *McCulloch v. Maryland* itself); *see also id.* at 634-35 (attributing a similar view to another leading framer, Edmund Randolph). Other potentially problematic features of the Lawson and Granger synthesis include the following: (1) It produces the peculiar result that, in the pre-Bill of Rights world, residents of states possessed a cornucopia of rights against the federal government based on the word “proper,” while residents of territories had no rights at all, *see id.* at 310, 324 & n.233. (2) It likewise supports the peculiar result that, in today’s post-Bill of Rights world, residents of states enjoy significant Ninth Amendment rights, while residents of territories possess no Ninth Amendment rights at all, *see id.* at 329-330 (indicating that “Ninth Amendment does not add new constraints to Congress’s powers, but it preserves those constraints [already in place under] the Sweeping Clause”), and this is so even though residents of both states and territories have equivalent rights under the first eight amendments and even though the first nine amendments were promulgated as a part of unitary whole. (3) Given that the Necessary and Proper Clause was understood merely to carry forward already-existing principles of legislative powers, *e.g.*, *Marbury*, 17 U.S. (4 Wheat.) at 420, the Lawson and Granger thesis logically must posit that individual-rights-based protections existed wholly outside the text of the Constitution, even though recognition of purely nontextual constitutional rights has not been an accepted part of the American legal tradition. (4) While Lawson and Grayson claim to find support for their view in *The Federalist No. 33*, *supra* note 19, at 299 (Alexander Hamilton), the passage on which they rely merely anticipates the “pretext” limit of *McCulloch* by rejecting laws enacted “upon the pretense of” carrying into execution an enumerated power. *Id.* This misstep reflects a broader difficulty. The authors collect many interesting passages that use the word “proper.” But (at least in my view) they read too much into these texts. *See, e.g.*, Beck, *supra* note 97, at 643 (suggesting that authors err in interpreting the commentary of St. George Tucker). In any event, none of the collected passages, according to their own terms, purports to endorse a “jurisdictional interpretation” of the word “proper” that renders it a sweeping “textual guardian of principles of separation of powers, principles of federalism, and unenumerated individual rights.” Lawson & Granger, *supra* note 39, at 272.

especially because of the “sweeping” Necessary and Proper Clause.¹⁶⁴ This history should be dispositive here for a simple reason: it reveals that the Necessary and Proper Clause was seen as a threat, rather than a boon, to American liberties – and that the proper protection of those liberties should and would come from enumerating protected *rights* independently of the Constitution’s listing of granted *powers*.¹⁶⁵ A specific example may help make the point: If the word “proper” in the Necessary and Proper Clause was not understood as adequate to protect even such “great” and “sacred” rights as freedom of the press¹⁶⁶ – as well as other core liberties later set forth in the First Amendment and elsewhere in the Bill of Rights – it surely could not have been understood to foreclose a government regulation that calls upon citizens to acquire cost-controlled health insurance of undeniable value to them, especially over the long run.¹⁶⁷

¹⁶⁴ See, e.g., Herbert J. Storing, *What the Anti-Federalists Were For*, in 1 THE COMPLETE ANTI-FEDERALIST 66 (Herbert J. Storing ed., 1981) (“Who can overrule the pretensions of Congress that any particular law is ‘necessary and proper’? ‘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.’” (quoting Old Whig II)).

¹⁶⁵ See generally COENEN, *supra* note 2, at 176-77 (recounting this history). One might try to respond to this argument by saying that the Bill of Rights was adopted simply to render more specific some or all liberties already safeguarded by the word “proper” or to remove any doubt about their existence, lest they be ignored at a later time. Claims of this kind give rise to several difficulties. The most serious one is that such a purpose was never identified as the ratification process unfolded. Nor should one ascribe such a purpose to the founders because the Court later briefly connected up the principles of *Printz v. United States*, 521 U.S. 898, 923-24 (1997), and *Alden v. Maine*, 527 U.S. 706, 732-33 (1999), with the word “proper” in Article I, Section 8. On the better view, these cases recognized structural principles logically extrapolated from the text, structure, and history of the Constitution, independent of any freestanding limitation imposed by the word “proper.” See *infra* notes 180-182 and accompanying text (discussing this same idea in connection with the “spirit” language of *McCulloch*); see also *infra* note 190 (noting this point with regard to *Printz*). But whether or not that is true, these cases involve constitutional protections of *state* institutions. Thus, they shed no light on the proper inferences to be drawn as to whether the word “proper” operates to safeguard *individuals* from regulation by the federal government, especially in the face of the detailed and far-reaching enumeration of individual liberties in the Bill of Rights.

¹⁶⁶ 5 THE COMPLETE ANTI-FEDERALIST 212 (Herbert J. Storing ed., 1981) (setting forth a June 5, 1788, speech of Patrick Henry in the Virginia Ratification Convention).

¹⁶⁷ It is true, as the respondents have argued, that the Constitution’s limited enumeration of congressional powers is and always has been connected up with the protection of liberty. See, e.g., *supra* note 20 and accompanying text. This is not the case, however, because the word “proper” created a font of judicial power to protect individual rights. Rather, our Constitution’s power-limiting protection of liberty arose from truly limiting powers – that is, by insisting that Congress was limited to pursuing a restricted range of itemized “objects” and doing so solely through the use of means “really adapted” to pursuing those objects. See *supra* notes 222-223 and accompanying text. This mode of limiting federal powers – both in design and in actuality – safeguards individual liberty for two main reasons. First, it simply cabins what laws Congress can impose on individuals, thus creating a zone of personal immunity from federal control. Second, the limitation of federal power necessarily reserves power-occupying space for states to operate, so that they can serve as counterpoising centers of authority through which citizens can channel opposition to federal controls. See, e.g., THE FEDERALIST NO. 17, *supra* note 19, at 106-07 (Alexander Hamilton); THE FEDERALIST NO. 44, *supra* note 19, at 305 (James Madison). To say these things, however, is entirely different from saying that the Court must search for Bill of Rights-like protections in the word “proper” so as to protect individual liberty. And this is all the more the case when one recalls Chief Justice Marshall’s understandable impatience with Maryland’s argument in *McCulloch* 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.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 412 (1819).

So how, if at all, do concerns about individual liberty intersect with the Necessary and Proper Clause? Professor Beck has suggested that at least some interferences with liberty “would serve to ratchet up the level of scrutiny applied, by requiring a closer fit between the means and ends.”¹⁶⁸ Justice Kennedy angled toward this same idea when he asked the Solicitor General at oral argument whether he would “not have a heavy burden of justification” if one assumes that the minimum coverage provision is “unprecedented.”¹⁶⁹

Working through Justice Kennedy’s question requires close attentiveness to the particular type of means-end fit that is required by the Necessary and Proper Clause. The regulation in *Wickard*, for example, was unmistakably “unprecedented” and deeply invasive of individual liberty.¹⁷⁰ The Court upheld the law, however, because the opportunism-thwarting means it put in place demonstrably advanced the relevant congressional end of genuinely regulating interstate commerce by stabilizing interstate wheat prices. Here, in similar fashion, the sweeping character of Congress’s regulatory scheme shows that it is genuinely seeking to enhance the price and quality terms of insurance products that move in interstate commerce, while using the minimum coverage provision as one means for doing so.¹⁷¹ In addition, this is not a case in which Congress has suddenly jumped into a field in which it has historically played no role – as it did, for example, with the Gun Free School Zone Act that the Court invalidated in *Lopez v. United States*.¹⁷² In fact, Congress has long and extensively participated in regulating the health care field, in large part due to the recognition that “[t]he modern insurance business holds a commanding position in the trade and commerce of our Nation.”¹⁷³

¹⁶⁸ Beck, *supra* note 97, at 598; *see also id.* at 642 n.402 (noting that Hamilton had suggested that “[t]he constitutional analysis could be ‘materially assist[ed]’ by considering whether a law ‘abridge[d] a preexisting right of any State, or of any individual,’ but adding that “this inquiry would merely determine the strictness with which one would scrutinize the means-end relationship”); *id.* at 598 (emphasizing that, under this approach, an “intrusion upon state or individual rights would not, by itself, invalidate the legislation”).

¹⁶⁹ Oral Argument, *supra* note 9, at 11.

¹⁷⁰ *See supra* notes 93-102 and accompanying text.

¹⁷¹ Put another way, in neither case could it be said that the subjects of regulation “bear so remotely on the interstate market” that “it is implausible that Congress regulated them *because of* their effect on commerce.” Beck, *supra* note 97, at 624. Indeed, the means embodied in the minimum coverage provision very closely parallels the means used in *Wickard* because both tools of regulation were devised, at least in large, part to negate comparable dangers of free-riding-on-the-program opportunism presented by a new national system of price stabilization. *See infra* notes 274-278 and accompanying text.

¹⁷² 514 U.S. 549 (1995).

¹⁷³ *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 539 (1944); *see also id.* at 540 (also emphasizing that “[p]erhaps no modern commercial enterprise directly affects so many persons in all walks of life”). For examples of federal government’s far-reaching intervention in the national health care and health insurance market, see Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), Pub. L. No. 104-191, 110 Stat. 1936 (1996); Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”), Pub. L. No. 99-272, 100 Stat. 82 (1986); Employee Retirement Income Security Act of 1974 (“ERISA”), Pub. L. No. 93-406, 88 Stat. 829 (1974); Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965) (establishing Medicare and Medicaid); and the Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938)). *Compare* *United States v. Lopez*, 514 U.S. 549, 564 (1995) (reasoning, in invalidating the Gun Free School Zones Act, that it invaded “areas such as criminal law enforcement [and] education where states historically have been sovereign”); *id.* at 568, 577, 580

Finally, this is not a case in which the sort of restriction that Congress has placed on individual rights bears the markings of a machination devised to pursue some non-national “object” not genuinely entrusted to its care.¹⁷⁴ There is no hint, for example, of an effort to invoke an enumerated power merely as a device for trampling on the rights of political enemies, as opposed to genuinely addressing serious problems in the interstate health care and insurance market.¹⁷⁵ Indeed, “it would be absurd to suggest that reforming insurance markets is nothing more than an excuse to mandate coverage.”¹⁷⁶ Thus, while there is reason to doubt that any “heavy burden” applies in this case, such a burden – if applied – would be met. So it is because a close examination of the facts shows that the congressional means embodied in the minimum coverage provision were and are “bona fide, appropriate to the end” of regulating commerce among the states.¹⁷⁷

Again, the respondents seek to avoid these difficulties by moving to a high level of abstraction. They do so by pointing to the suggestion in *McCulloch* that Congress cannot pass laws under the Necessary and Proper Clause if they are inconsistent with the “spirit of the constitution.”¹⁷⁸ Given the Constitution’s core endorsement of republican principles of self-rule,¹⁷⁹ it is not surprising that the respondents point to no past case in which the Court assumed the power to deem an act of Congress directed at individuals unconstitutional based on only this opaque passage. What is more, the context in which Chief Justice Marshall made this observation suggests a purpose that does not reach the situation presented here. In coupling the “letter” of the Constitution with its “spirit” in demarking the limits of federal power, the Chief Justice rightly (but merely) gestured toward the now-familiar idea that our founding charter gives rise not only to express limits, but also to implied limits animated by the Constitution’s construction of

(Kennedy, J., concurring) (agreeing that the Act focused on “areas of traditional state concern,” particularly because “education is a traditional concern of the states”). The Court in *Lopez* also emphasized the wholly noneconomic character of simply possessing guns in school areas, as well as the obvious predominance of student safety as the most salient concern in that context. *See* *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring) (reasoning that “neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus”). As already noted, however, the purpose of PPACA plainly concerns economic matters. In addition, the decision not to acquire insurance and thus direct resources to other purposes – whether characterized as activity or inactivity – has a self-evident “commercial character” and at least far more of one than does simply carrying a gun in a pocket.

¹⁷⁴ *McCulloch*, 17 U.S. (4 Wheat.) at 421.

¹⁷⁵ *See, e.g.*, AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 112-13 (2005) (suggesting that using the taxing power “to single out opposition newspapers” would in reality involve pursuit of the unenumerated “object of censoring [government] critics,” thus making the claimed exercise of the taxing power a “pretext” inconsistent with the “spirit” of ART. I, § 8).

¹⁷⁶ Hall, *supra* note 124, at 1852.

¹⁷⁷ 3 JOSEPH STORY COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 613(1833)

(specifically defining the term “proper” in these terms).

¹⁷⁸ State Respondents’ Brief, *supra* note 8, at 45 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

¹⁷⁹ *See, e.g.* THE FEDERALIST No. 39, *supra* note 19, at 250 (James Madison) (emphasizing “strictly” republican character of American constitutional government).

intersecting governmental structures.¹⁸⁰ Indeed, in *McCulloch* itself the Court suggested one such structural limit – namely, that Congress could not have unlimited ability to tax the operations of states themselves because “the power to tax involves the power to destroy.”¹⁸¹ Likewise, in *Coyle v. Smith*, the Court indicated that Congress could not dictate where a state should locate its capitol because doing so would trample on such “essentially and peculiarly state powers” as to threaten the state’s “separate and independent significance.”¹⁸²

These cases are a far cry from this one. Neither involves an issue akin to the one presented by the minimum coverage provision because in both of them the Court went no further than to recognize structural limits that circumscribed federal power to destroy or disrupt the states’ own essential attributes. Indeed, even in *National League of Cities v. Usery*¹⁸³ – a decision that was later overruled on the rationale that it reached too far in protecting state autonomy¹⁸⁴ – the Court took pains to insist that it was only restricting congressional power to regulate “states qua states.”¹⁸⁵ The law challenged here, however, does not regulate “states qua states.” It regulates private citizens, just as the shift from the Articles of Confederation to the Constitution meant to permit it to do.¹⁸⁶ What is more, the focal point for arguing that this law is not “proper” lies in its claimed affront to individual liberty, even though the founders broadly moved to protect liberty in the Bill of Rights precisely because they perceived the original Constitution to be deficient in that regard.¹⁸⁷ In sum, there is no reason to conclude that either Chief Justice Marshall in *McCulloch* or those who framed our Constitution and Bill of Rights meant to prohibit the enactment of the minimum coverage provision on the theory that it offends our founding charter’s “spirit.”

To be sure, the respondents disagree. In support of their position, however, they marshal no evidence from the framing period.¹⁸⁸ They argue instead that the Court’s

¹⁸⁰ See generally CHARLES L. BLACK, JR., STRUCTURES AND RELATIONSHIPS IN CONSTITUTIONAL LAW 1 (1969).

¹⁸¹ *McCulloch*, 17 U.S. (4 Wheat.) at 327. To finish the thought, constitutional structures that plainly envisioned the existence of states could not logically countenance their destruction. Of course, the holding of *McCulloch* was that a state could not tax the national bank. The Court, however, also left open the possibility that, in similar fashion, Congress could not “tax the State banks.” *Id.* at 436.

¹⁸² 221 U.S. 559, 565, 580 (1911).

¹⁸³ 426 U.S. 833 (1976).

¹⁸⁴ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547 (1985).

¹⁸⁵ *National League of Cities*, 426 U.S. at 847; see also *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 287-88 (1981) (reiterating the regulation-of-states-as-states requirement).

¹⁸⁶ See *supra* notes 74-75 and accompanying text.

¹⁸⁷ See *supra* notes 164-167 and accompanying text.

¹⁸⁸ The private respondents did purport to discover support for their view in *Vanhome’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795) (Patterson, J.) – although in doing so they incorrectly seemed to indicate that the decision had come from the Supreme Court, rather than a circuit court. Private Respondents’ Brief, *supra* note 8, at 13. In fact, that opinion offered only the ruminations of Justice Patterson, while sitting on a circuit court, as to the rules that might govern interference with a “freehold” or “landed interest” under principles that the Pennsylvania Constitution “expressly declares.” *Id.* at 310. In any event, the case had nothing to do with interpreting the word “proper” in the Necessary and Proper Clause. The private respondents also relied on Justice Chase’s seriatim opinion in *Calder v. Bull* for the proposition that “the great first principles of the social compact” would not countenance “a law that takes

modern decision in *New York v. United States* offers analogistic support for their position.¹⁸⁹ This argument, however, is unconvincing. In *New York*, the Supreme Court deemed it unconstitutional for Congress to “commandeer” state legislatures by forcing them to “enact and enforce a federal regulatory program.”¹⁹⁰ This decision was tightly tethered to the framers’ specific plan to shift from a system of federal legislative control over states to a system of federal legislative control over individuals.¹⁹¹ Moreover, because commandeering state legislatures involved federal meddling in the internal operation of state governments themselves, it presented a distinctly serious affront to state autonomy.¹⁹² The Court also worried that federal commandeering of state governments could undercut the framers’ plan of ensuring the accountability of government officials to the electorate, especially because both state authorities and federal authorities might prefer a regime under which each set of authorities could seek to attribute responsibility for an unpopular program to the other.¹⁹³

Not one of these reasons for the ruling in *New York* supports the challenge to the minimum coverage provision. Because that provision involves no commandeering of state institutions, it does not involve the sort of intra-sovereign interference that so concerned the Court in the *New York* case or the risks of confusion that are posed when two separate governments are blended together in the regulation of individuals.¹⁹⁴ Most

property from A. and gives it to B.” 3 U.S. (3 Dall.) 386, 388 (1798) (emphasis in original). But given the value of the insurance policies transferred to persons who pay money pursuant to the minimum coverage provision, this “give it to B” principle seems wholly beside the point here. What is more, Justice Chase’s comments in *Calder* did not involve the Necessary and Proper Clause, but instead targeted the very sort of overreaching *state* regulation that the internal structure of the federal government was viewed as countering at the federal level. See, e.g., THE FEDERALIST NO. 10, *supra* note 19 (James Madison). Perhaps of greatest importance, in a separate and long-celebrated opinion, Justice Iredell vigorously challenged Justice Chase’s analysis on the ground that “[t]he ideas of natural justice” are not properly enforceable by the judiciary because they “are regulated by no fixed standard.” *Id.* at 399 (Iredell, J., concurring). To say the least, this same critique would apply in full measure to an effort to read similarly unenumerated natural-rights “ideas” into the word “proper” in Article I, Section 8, for the first time in 224 years.

¹⁸⁹ *New York*, 505 U.S. 144 (1992).

¹⁹⁰ *Id.* at 176 (quoting *Hodel*, 452 U.S. at 288). In *Printz v. United States*, 521 U.S. 898 (1996), the Court extended the principle of *New York* to the commandeering of state executive officials. Along the way it observed that: “When a ‘La[w] . . . for carrying into Execution,’ the Commerce Clause violates the principle of state sovereignty . . . it is not a ‘La[w] . . . proper for carrying into execution the Commerce Clause’” *Id.* at 293-94 (alterations in the original). This phrasing suggests that the Court in *Printz* was simply stating that an independently unconstitutional law (here, a law that was unconstitutional under a freestanding structural “principle of state sovereignty”) cannot possibly be “proper” by definition. In any event, *Printz* – just like *New York* – involves a very different situation than this one because it involved a mandate imposed on the state itself, rather than on private individuals.

¹⁹¹ See *New York*, 505 U.S. at 163-66 (discussing historical evidence and concluding that the “Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States”); see generally *supra* notes 74-75 and accompanying text.

¹⁹² *New York*, 505 U.S. at 177-78, 188; see *id.* at 180 (emphasizing Madison’s admonition that “a sovereignty over sovereigns, a government over governments, . . . as contradistinguished from individuals” is both “a solecism in theory” and “subversive of the order and ends of civil polity” (quoting THE FEDERALIST NO. 20 (James Madison))).

¹⁹³ *Id.* at 182-83.

¹⁹⁴ In his separate concurrence in *Lopez*, Justice Kennedy relied in part on the idea that the federal guns-in-schools law threatened to cause an analogous form of confusion. See *United States v. Lopez*, 514 U.S. 549, 580-83 (1995) (Kennedy, J., concurring). The difficulty is that education long has been the primary

important from an originalist perspective, precisely because the minimum coverage provision does directly regulate individuals, it fully comports with the framers' embrace of "a Constitution that confers upon Congress the power to regulate individuals, not States."¹⁹⁵ In short, the framing history so painstakingly detailed and relied on in *New York* is unhelpful to the challengers of the minimum coverage provision and, on the sounder view, points to its constitutionality.

Undeterred by these difficulties, the respondents in essence say this: The framers must have believed that at least some laws that regulate individuals would violate the "spirit of the constitution."¹⁹⁶ And, if any law should fall in this category, it is the minimum coverage provision. This is so, according to the argument, for two reasons: first, because mandates are distinctively problematic under power-limiting authorities such as *United States v. Lopez*,¹⁹⁷ and second, because a decision upholding the minimum coverage provision would authorize Congress as a practical matter to enact any mandate at all. We turn now to each of these two contentions.

2. Of Mandates and *Lopez*

Overarching the challenge to the minimum coverage provision is a view of the modern state-federal relationship that is marked by grave concern. The defining metaphor is one of a power-hungry federal government so voraciously gobbling up the powers of the states that before long they will be all but gone. Any such depiction misses much that is important. Eighty years after the inception of the New Deal, there still remain across our land far more state courthouses than federal courthouses in which our laws are administered. And far-reaching governing structures set up by the states—not by the federal government—continue to dominate the core fields of tort, contract, criminal, and property law.¹⁹⁸ At the time of the framing, deeply agitated antifederalist leaders predicted that the Constitution would soon produce such a "consolidation" of powers in

province of state and local governments. Thus, when citizens learn of restrictions on guns near schools, they might incorrectly assume that state authorities – and not federal authorities – imposed that limitation. As Justice Kennedy observed: "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Id.* at 577. Thus, there would be a loss of the critical "means of knowing which of the two governments to hold accountable" and "a resultant inability to hold either branch of the government answerable to the citizens." *Id.* at 577-78. To say the least, Justice Kennedy's concerns about accountability have no relevance here. Indeed, if ever there were a law whose federal origins are well and widely known, it is the so-called "individual mandate." That law has attracted incessant news coverage for years and has been publically challenged by more than 25 states. It has been a centerpiece of two separate sets of presidential debates, in the lead up to the elections of both 2008 and 2012. In fact, the nickname of the law – "Obamacare" – makes its federal character crystal clear. For these reasons, the underlying policy concern that drove Justice Kennedy's opinion in *Lopez* does not apply to the minimum coverage provision case.

¹⁹⁵ *New York*, 505 U.S. at 166. Thus, time and again, the Court distinguished "congressional regulation of individuals" from "congressional requirements that States regulate." *Id.* at 178.

¹⁹⁶ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

¹⁹⁷ 514 U.S. 549 (1995).

¹⁹⁸ At oral argument, Justice Breyer went so far as to claim that 95% of American law is attributable to the states, rather than Congress. Oral Argument, *supra* note 9, at 76.

the federal government that the states would simply wither away.¹⁹⁹ Federalist leaders insisted those predictions were wrong, and those federalist leaders were right.

The respondents nonetheless urge that, if Congress now can impose the minimum coverage provision, it will be empowered to do all sorts of intolerable things.²⁰⁰ According to this argument, because all we do and do not do affects commerce in some way, validation of the provision would permit Congress to impose mandates of every kind, thus undermining the framers' plan that states should retain important areas of exclusive control.²⁰¹ Recognizing that Congress can put in place comprehensive regulatory systems for specific interstate markets, however, does not mean that Congress can regulate anything at all, whether by mandate or otherwise. Indeed, over the past 17 years, the Court has handed down no fewer than six landmark decisions in which it has invoked state-protective principles to strike down federal statutes founded on the commerce power. The cases are *New York v. United States*,²⁰² *Printz v. United States*,²⁰³ *Alden v. Maine*,²⁰⁴ *Federal Maritime Commission v. South Carolina Ports Authority*,²⁰⁵ *United States v. Lopez*,²⁰⁶ and *United States v. Morrison*.²⁰⁷ In each, the Court confined the power of Congress to legislate under the Commerce Clause and the Necessary and Proper Clause in important ways.²⁰⁸

Of particular significance, the Supreme Court in *Lopez* invalidated a federal statute that prohibited gun possession in or near schools on the ground that regulating guns in those areas was the sort of "police power" control that rightly fell within the domain of the states.²⁰⁹ In other words, the problem in *Lopez* was that Congress, from all that appeared, was not genuinely trying to regulate an interstate commercial market. (After all, if Congress was really trying to reshape the interstate gun market, why would it single out for regulation only guns in or near schools?) Notably, the Court in *Lopez* did not merely invalidate a single federal law; rather, it laid down principles that restricted

¹⁹⁹ See, e.g., THE FEDERALIST NO. 39, *supra* note 19, at 253 (James Madison) (noting that antifederalists regarded "the union as a consolidation of the States"); see also MAIER, *supra* note 79, at 83 (noting view of the antifederalist essayist Brutus that Congress's "excessive and dangerous powers ... would destroy the states").

²⁰⁰ See, e.g., *supra* notes 20-21 and accompanying text.

²⁰¹ See *id.*

²⁰² 505 U.S. 144 (1992).

²⁰³ 521 U.S. 898 (1997).

²⁰⁴ 527 U.S. 706 (1999).

²⁰⁵ 535 U.S. 743 (2002).

²⁰⁶ 514 U.S. 549 (1995).

²⁰⁷ 529 U.S. 598 (2000).

²⁰⁸ This list might also include such cases as *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); and *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), each of which was omitted because it involved a ruling under the freestanding Eleventh Amendment to trump a congressional exercise of power. Also omitted are rulings in which the Court has protected state autonomy interests by applying important clear-statement rules of statutory interpretation designed to safeguard state autonomy interests. See, e.g., *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Jones v. United States*, 529 U.S. 848 (2000); see generally Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 SO. CAL. L. REV. 1281, 1295-1303, 1310-1313 (2002).

²⁰⁹ *Lopez*, 514 U.S. at 567-68.

Congress's powers to regulate many things – for example, murder and other forms of violent crime,²¹⁰ violence-based torts,²¹¹ child-rearing,²¹² family law,²¹³ and important components of education policy.²¹⁴ *Lopez*, moreover, lent support to additional limits on Congress's commerce-related powers – including limits as to the control of personal and social relationships,²¹⁵ local land use,²¹⁶ local waters,²¹⁷ the law of inheritance and descent,²¹⁸ arson laws,²¹⁹ and the employment conditions of key local officials.²²⁰ The underlying point of *Lopez* thus was and is clear: There are many laws that Congress cannot enact pursuant to its commerce power even if it can, as here, genuinely act to regulate a national economic market in a way honestly designed to help that market work better.

Indeed, in *Lopez* the Court drew this very distinction. It emphasized that controlling the mere possession of guns near schools—like regulating corporal punishment of one's children—was not connected up with the regulation of an interstate market except insofar as all crimes impose costs that harm the American economy in a general way.²²¹ To put the same point in originalist terms, the Court in *Lopez* concluded that Congress was doing just what Chief Justice Marshall in *McCulloch* had declared to be constitutionally out of bounds. The problem was that the challenged gun possession ban was not “*really calculated* to effect any of the objects intrusted to the [federal] government.”²²² Rather, Congress was using the commerce power as a “pretext” to regulate a matter of local safety that had no meaningful relation to a defined national market and only the most attenuated relationship to the national economy in general.²²³ The Court in *Lopez* drove this point home when it distinguished *Wickard*.²²⁴ That case, the Court explained, fell into a different category because the restriction on growing wheat for home use was “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”²²⁵ As with the wheat market, so with the health-services market. In either

²¹⁰ *Id.* at 564-65; *United States v. Morrison*, 529 U.S. 598, 615 (2000).

²¹¹ *Morrison*, 529 U.S. at 613.

²¹² *Id.* at 616.

²¹³ *Id.*

²¹⁴ In *Lopez* itself, after all, the Court invalidated a federal control of what students could bring to school.

²¹⁵ See GERALD GUNTHER, *CONSTITUTIONAL LAW* 160 (11th ed. 1985) (reprinting Senate hearings in which Attorney General Robert F. Kennedy stated that applying the proposed Civil Rights Act to “personal or social relationships” would exceed the reach of the Commerce Clause).

²¹⁶ See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Cf. Joseph Biancalana, *Originalism and the Commerce Clause*, 71 U. CIN. L. REV. 383, 402 (2002) (arguing that limits on congressional zoning laws exist); Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925, 952 (2000) (same).

²¹⁷ See *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

²¹⁸ See THE FEDERALIST NO. 33, *supra* note 19, at 206 (Alexander Hamilton); see also Beck, *supra* note 97, at 615.

²¹⁹ See *Jones v. United States*, 529 U.S. 848 (2000).

²²⁰ See *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

²²¹ *Lopez v. United States*, 514 U.S. 549, 561-63 (1995).

²²² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (emphasis added).

²²³ *Id.*; see generally *Lopez*, 514 U.S. at 561-63.

²²⁴ See *supra* notes 93-102 and accompanying text.

²²⁵ *Lopez*, 514 U.S. at 560-61.

setting, under the reasoning of *Lopez*, Congress can enact a comprehensive program of “larger regulation” that reaches highly individualized and localized behavior when that behavior threatens the effective functioning of thus-regulated market operations.²²⁶

Critics of the minimum coverage provision seek to capitalize on *Lopez*. They argue that the Court in that case drew a strong line between “economic activity” (which Congress has broad power to regulate) and things other than economic activity (as to which, they say, congressional regulatory authority is essentially non-existent).²²⁷ They build on this thought by claiming that the health care mandate does not target “activity,” far less “economic activity.” Instead it regulates “inactivity” – that is, the failure to secure health insurance. Therefore, they say, a proper understanding of *Lopez*, and the underlying principles on which it rests, helps along the case for invalidating the minimum coverage provision.²²⁸

The originalist problem with this line of analysis has already been laid bare. Time after time, it has been recognized that Congress can regulate what might be characterized as inactivity by mandating individual conduct, such as by use of *posse comitatus* laws, including under the Commerce Clause and the Necessary and Proper Clause.²²⁹ Another problem with the *Lopez*-based effort to distinguish “activity” from “inactivity” is that it may well support, rather than undermine, the minimum coverage provision; indeed, this idea has driven the Solicitor General’s core argument that the provision responds to the economic reality that everyone (or at least essentially everyone) does engage in the “activity” of securing health care services.²³⁰ Most important, any effort to exploit the “economic activity” language of *Lopez* ignores the real point that the Court was making in that case. The point was that merely carrying a gun near a school does not involve an economic choice at all—in contrast, for example, to the decision whether or not to buy a gun.²³¹ It was the noneconomic character of the regulated action in *Lopez* that raised insuperable suspicions about whether Congress was permissibly trying to regulate commerce, as opposed to impermissibly injecting itself into a police-power matter properly lodged with the states.²³² Deciding whether or not to buy health insurance, however, *is* an economic matter, and therefore not the sort of thing that the Court in *Lopez* undertook to deal with, far less fence off from congressional control. Again, the cardinal principle is that Congress can regulate truly national commercial markets to

²²⁶ *Id.*

²²⁷ See Private Respondents’ Brief, *supra* note 8, at 23-24 (discussing the distinction between economic and non-economic activity in *Lopez*).

²²⁸ See *id.* at 32-33 (asserting that “being uninsured, like all other ‘inactivity,’ is not an ‘economic endeavor’ or an ‘activit[y] that arise[s] out of or [is] connected with a commercial transaction’”) (citations omitted); see also Ilya Somin, *A Mandate for Mandates: Is the Individual Health Insurance Mandate Case a Slippery Slope*, 75 LAW & CONTEMP. PROBS. 75, 100 (2012) (asserting that “[i]f the Supreme Court strikes down the mandate, it will most likely do so because the mandate is a regulation of ‘inactivity,’ forcing people to purchase products based merely on the fact of their presence within the United States”).

²²⁹ See *supra* notes 125-126 and accompanying text.

²³⁰ See, e.g., Oral Argument, *supra* note 9, at 17.

²³¹ *Lopez*, 514 U.S. at 559.

²³² See *supra* note 227 and accompanying text.

address truly national commercial problems.²³³ And, in this regard, the controlling text of the Necessary and Proper Clause does not draw any distinction between laws that target the buying of a product and laws that target the failure to buy a product. It instead says that Congress can pass “all Laws” that are necessary and proper to carrying the regulation of interstate commerce into execution.

It merits emphasis that this analysis, including the distinction it identifies between *Lopez* and the health care suit, has its roots in originalist principles. The Court in *Lopez* said in effect that Congress could not regulate guns near schools because, in contravention of the early teaching of *McCulloch*, it was “really” just trying to constrain dangerous behavior and not “really” trying to make a national commercial market work well.²³⁴ Discouraging dangerous behavior is the business of the states, and therefore not within the reach of the federal commerce power. But imposing the health care mandate is not about discouraging dangerous behavior or even about compelling the purchase of insurance for its own sake.²³⁵ It is about regulating commerce among the states in the critically relevant sense that it is one part of an expansive scheme designed to improve the operation of an entire interstate market.

3. The Parade of Horribles That Wasn’t and Isn’t

The respondents put forward a final argument. They say that, unless the minimum coverage law is invalidated, Congress will be empowered to impose any mandate of any kind.²³⁶ Thus phrased, the respondents’ slippery-slope reasoning involves an overstatement, because the noneconomic-activity rule of *Lopez* logically extends to all forms of regulations, including mandates no less than prohibitions. Thus, just as surely as that limit bars Congress from prohibiting people near schools from possessing guns, it also would bar Congress from compelling those people to carry guns.²³⁷ And for the same reason, the state respondents go a bridge too far when they claim that validation of the minimum coverage provision would justify mandates even as to “marriage, divorce and childrearing.”²³⁸ The respondents nonetheless insist that upholding the minimum coverage provision would at least permit Congress to force any private person to buy any product or service that Congress might choose to favor.²³⁹ This

²³³ See *United States v. Lopez*, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring) (observing that “Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy”).

²³⁴ *Lopez*, 514 U.S. at 565; accord, Beck, *supra* note 97, at 616, 621.

²³⁵ See *supra* notes 170-177 and accompanying text.

²³⁶ See also Somin, *supra* note 228, at 105-06 (2012) (asserting that “[i]f the Supreme Court upholds the mandate, it is likely to give Congress a near blank check for future mandates”).

²³⁷ Accord Hall, *supra* note 124, at 1865 (arguing that mandating firearm possession would remain beyond the scope of the congressional commerce power even if the minimum coverage provision were upheld); Neil S. Siegel, *Four Constitutional Limits That the Minimum Coverage Provision Respects*, 27 CONST. COMMENT. 591, 598 (2011) (same).

²³⁸ See State Respondents’ Brief, *supra* note 9, at 25; see also Siegel, *supra* note 232, at 618 (further observing that the federal government also could not, for example, “force people to render aid to stop the commission of ordinary crimes like assault”).

²³⁹ See Private Respondents’ Brief, *supra* note 9, at 30, 33, 46.

prospect, it is claimed, puts us on the brink of entering a “brave new world” in which the federal government will force Americans to buy new cars or maintain burial insurance.²⁴⁰

This parade-of-horribles argument, however, encounters many problems if fair attention is paid to originalist principles. Support for this conclusion begins with the realization that Congress can always overreach in exercising its powers. Acting pursuant to Article I, Section 8, Clause 11, Congress could declare war on Canada tomorrow. Acting pursuant to Article I, Section 8, Clause 5, it could make tin cans the only legal tender in the United States. People might respond: “But Congress wouldn’t do such a thing!” To which I would reply: “But it wouldn’t force people to buy cars or burial insurance either!” The critical point is one that was made by the framers themselves in response to fears expressed by antifederalists that parallel exactly the fears expressed by the respondents here. 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.”²⁴¹ John Rutledge, who had served as a key delegate at the Philadelphia Convention, likewise insisted at the South Carolina Ratification Convention that “the 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.”²⁴² The historian Herbert Storing rightly noted that federalist proponents of the Constitution made this same point “[a]gain and again.”²⁴³ And so, as Justice Joseph Story declared in 1816, “[i]t is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse.”²⁴⁴

What is more, there are special reasons for the judiciary to act with caution when asked to invalidate congressional enactments on federalism grounds. This is so because the framers designedly structured the Constitution to ensure that a sensitivity to state autonomy interests would be built into the federal legislative process.²⁴⁵ Under the Constitution, for example, Senators and Representatives are chosen from within states;²⁴⁶ state legislators determine the districts out of which federal representatives are elected;²⁴⁷ and the qualifications of voters for federal offices are determined by state authorities.²⁴⁸

²⁴⁰ *Id.* at 30.

²⁴¹ THE FEDERALIST NO. 41, *supra* note 19, at 269 (James Madison).

²⁴² Storing, *supra* note 76, at 30 & n.36 (quoting statement).

²⁴³ *Id.* at 30.

²⁴⁴ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 344 (1816).

²⁴⁵ MAIER, *supra* note 79, at 444 (noting Madison’s views, as expressed to Jefferson); Storing, *supra* note 76, at 12 (noting James Wilson’s emphasis that empowerment of the federal government would be “strictly limited” by “the essential part to be played in it by the states”); *see generally* JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 1 (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

²⁴⁶ U.S. CONST. art. I, § 2, cl. 1; amend. XVII, cl. 1.

²⁴⁷ U.S. CONST. art. I, § 4.

²⁴⁸ *See* U.S. CONST. art. I, §2, cl. 1. Of particular importance, under the original Constitution, federal Senators were elected by state legislatures. *See* U.S. CONST. art. I § 3, cl. 1. Although this rule was altered by the Seventeenth Amendment, that Amendment was itself approved by an overwhelming majority of state legislatures and was not understood to alter otherwise applicable standards of judicial review of federal legislation.

As Madison explained in *The Federalist No. 46*, all of this had the effect of ensuring that the federal government would “partake sufficiently of the spirit” of “the State Legislatures” that it would be structurally “disinclined to invade the rights of individual States, or the prerogatives of their governments” in the absence of powerful justifications for national action.²⁴⁹ It was for this reason that Chief Justice Marshall in *Gibbons* could suggest that the primary check on overextension of the federal commerce power should not come from judicial intervention, but instead from “the wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections.”²⁵⁰ Nor is this principle of judicial hesitancy simply a sound reflection of the original design. If the history of the Commerce Clause teaches us anything, it is that Congress has *not* enacted laws forcing the purchase of cars, condoms, and other items that stir in the respondents such gloom-and-doom worries about a federal-mandate-filled future.

Other aspects of our Constitution provide even more reason to question the respondents’ parade-of-horribles concerns. So it is because Congress’s powers to pass laws under the Commerce Clause and the Necessary and Proper Clause are crowded around by rights-based restrictions. The Takings Clause of the Fifth Amendment,²⁵¹ for example, directly addresses risks posed by government mandates, including by pointing the way to why Congress cannot, as the respondents fear it will, simply “take[] property from A. and give[] it to B.”²⁵² Equal protection principles likewise restrict Congress’s ability to single out a particular industry or firm for especially favored treatment.²⁵³ And the Fifth Amendment’s Due Process Clause safeguards citizens from undue affronts to individual autonomy, including with respect to economic liberties.²⁵⁴ This principle,

²⁴⁹ THE FEDERALIST NO. 46, *supra* note 19, at 319 (James Madison). Hamilton found these considerations so weighty as to suggest that “all observations founded upon the danger of usurpation, ought to be referred to the composition and structure of the government, not the nature or extent of its powers.” THE FEDERALIST NO. 31, *supra* note 19, at 197 (Alexander Hamilton). As Justice Kennedy observed in *Lopez*, “one conclusion that could be drawn from The Federalist Papers is that the balance between national and state power is entrusted in its entirety to the political process.” *Lopez*, 514 U.S. at 577 (concurring opinion). To be sure, the Court has rejected the conclusion that the judiciary should have “no role at all in determining the meaning of the Commerce Clause.” *Id.* at 579. But in keeping with the structural reasoning of Madison and Hamilton, it also has honored the idea that “[t]he substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights.” *Id.* To be sure, while the Court offered a strong endorsement of this idea in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985), it has not accepted invitations to apply the *Garcia* principle in later cases, including *Lopez*. This modern history, however, does not support the conclusion that the state-protective structural features of the Constitution should have no impact in any case. Any such approach would improperly ignore what was in fact a key aspect of the Framers’ carefully fabricated constitutional structure.

²⁵⁰ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 75 (1824).

²⁵¹ U.S. CONST. amend. V.

²⁵² *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (emphasis added); *see supra* note 30 and accompanying text (noting private respondents’ argument to this effect); *see also* *Eastern Enters. v. Apfel*, 524 U.S. 498, 522 (1998) (plurality opinion) (indicating that economic regulation can effect a taking, including when it involves a mandate to pay out money to or for the benefit of other private parties).

²⁵³ *See generally* ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 684 (4th ed. 2011) (noting full application of general equal protection limits to the federal government).

²⁵⁴ *See, e.g.*, *BMW of N. Am. v. Gore*, 517 U.S. 559, 596-97 (holding that excessive punitive damages awards violate the Due Process Clause); *Eastern Enters. v. Apfel*, 524 U.S. 498, 547 (1998) (Kennedy, J.,

though constrained, would provide a basis for invalidating many government mandates, and it has been invoked to challenge the minimum coverage provision itself.²⁵⁵ We will not soon know how such a challenge would fare in the Supreme Court, however, because no such a challenge has been presented in the pending case. A rights-based mode of analysis, however, would at least carry the benefit of focusing attention squarely on the value of liberty the respondents so ardently extol, rather than on constitutional provisions crafted to facilitate the adaptive exercise of federal legislative powers.²⁵⁶

As we have seen, the respondents nonetheless insist that there must be some distinctive prohibition on individual mandates embedded in the Necessary and Proper Clause. They also say that, once that principle is acknowledged, there is no way to uphold the minimum coverage provision without authorizing the enactment of every conceivable form of forced-private-contracting law. Even accepting the basic premise of this argument – namely, that the Necessary and Proper Clause somehow distinctively inhibits the power of Congress to enact “individual mandates” – the conclusion that respondents draw from that premise does not properly follow. This is so because a variety of limiting principles are available for constraining the legal implications of any ruling that upholds the minimum coverage provision. I pause to note five such limiting principles, each of which has a discernible tie to the original plan.

First, as we have seen, the minimum coverage provision is embedded in a highly comprehensive, multi-pronged federal regulatory program designed to address widely recognized problems in the national health services and insurance market.²⁵⁷ Among other things, these features of the program make it clear that the minimum coverage law reflected a part of a serious effort to deal with matters that concerned commerce among the states. In other words, the minimum coverage provision does not afford anything akin to the naked, highly specialized preference embodied, for example, in the much-feared (though entirely hypothetical) law that would mandate our citizenry to buy broccoli. By in effect granting “most favored nation” status to one much-benefited group of sellers, such a law would raise immediate concerns based on originalist principles. In crafting the Commerce Clause, after all, the framers focused their efforts on permitting Congress to “legislate in all Cases for the *general Interests* of the Union”²⁵⁸ – not for the *special interests* of broccoli growers. And this same limiting principle would imperil any federal legislation that, in stand-alone fashion, simply compelled the purchase of any other distinctively advantaged product or service, even if it moved in the national marketplace.²⁵⁹

concurring) (reasoning that retrospective realignment of coal company’s duties to miners violated the Due Process Clause).

²⁵⁵ With respect to other mandates, this principle would pose plain and major obstacles to the enactment of some mandates that critics of the PPACA have previously stressed in their parade-of-horribles arguments. Hypothesized laws that force individuals to eat broccoli or to undergo compulsory dental care, for example, would run up directly against the aspect of this doctrine that concerns individual control over one’s own body.

²⁵⁶ See Hall, *supra* note 124, at 1838, 1859-61.

²⁵⁷ See *supra* notes 9-10 and accompanying text.

²⁵⁸ See *supra* note 45 and accompanying text (noting Philadelphia convention’s endorsement of this idea).

²⁵⁹ For a similar line of analysis, see Hall, *supra* note 124, at 1866.

A second limiting principle rests on the framers' recognition that a core purpose of shifting powers from the states to the federal government was to empower a single lawmaking authority to address problems that the individual states were "incompetent" to solve because of those problems' cross-border characteristics.²⁶⁰ The entire PPACA, including the minimum coverage provision, responds to just such problems of structural state shortcomings with regard to a national market in a variety of ways. In particular:

- The minimum coverage provision addresses a race-to-the-bottom problem. Due to the structure of our federal system, individual states have incentives not to adopt broad-based insurance protections, such as those provided by the PPACA, even if they are highly desirable. The reason why is that, if a state does so, it risks becoming a "magnet" for otherwise-uninsurable persons who then will unfairly impose costs on that state's, and only that state's, citizens.²⁶¹ The point is the same one embraced by the Court in *Helvering v. Davis*, when it upheld the federal Social Security retirement program against a federalism-based challenge.²⁶² As explained by Justice Cardozo, Congress could act to put that program in place because any analogous state program would provide "a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose."²⁶³ In short, here, as there, Congress had reason to conclude that "laws of

²⁶⁰ See *supra* note 45 and accompanying text (noting Philadelphia Convention's endorsement of this principle); see, e.g., James Madison, *Vices of the Political System of the United States*, in 9 THE PAPERS OF MADISON 348-50 (Robert A. Rutland et al. eds., 1975) (noting that a key "defect" of the Confederation Congress was its failure to move in "concert in matters where common interest requires it," particularly with regard to "our commercial affairs"). This view of things was widespread. As one antifederalist writer observed, "[A]ll that portion of a sovereignty which involves the common interest of all the confederating states, and which cannot be exercised by the states in their individual capacity without endangering the liberty and welfare of the whole, ought to be vested in the general government, reserving such a proportion of sovereignty in the states governments as would enable them to exist alone." Storing, *supra* note 76, at 36 (quoting the essay of "A [Pennsylvania] Farmer"); see generally Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 FLA. L. REV. 1, 6 (2011) ("The most compelling argument in American history for empowering our national government has been the need to overcome collective action problems."). This principle was recognized by Justice Kennedy in *Lopez* when he observed that the ban on guns in or near schools was not a proper exercise of federal power in part because "the reserved powers of the States are sufficient to enact those measures" and "[i]ndeed, over 40 States already have" already done so. *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

²⁶¹ Akhil Reed Amar, *How to Defend Obamacare*, Slate, (Mar. 29, 2012), available at http://www.slate.com/articles/news_and_politics/jurisprudence/2012/03/supreme_court_and_obamacare_what_donald_verrilli_should_have_said_to_the_court_s_conservative_justices_.html; see Koppelman, *supra* note 107, at 16 ("For example, the heavy burdens borne by Tennessee's health care system may be related to the fact that its most populous city, Memphis, is bordered by Mississippi and Arkansas, which offer much lower benefits. TennCare insurers are also concerned that patients from other states may be establishing residency in Tennessee in order to obtain coverage for organ transplants. There is no data available on this question, but it is hard to believe that no one responds to incentives when failure to do so is literally suicidal."). There are other problems of this nature, too. For example, "insurers will prefer to do business in states where they can avoid more expensive patients with pre-existing conditions." Balkin, *supra* note 46, at 46.

²⁶² 301 U.S. 619, 640-41 (1937).

²⁶³ *Id.* at 644.

the separate states cannot deal with [the problem] effectively” and “[o]nly a power that is national [can] serve the interests of all.”²⁶⁴

- The PPACA’s must-insure and price-nondiscrimination provisions, which the minimum coverage rule makes possible, facilitate the relocation of citizens across state lines, so as to maximize both individual liberty and resulting workplace efficiencies that boost national productivity. And in so doing, it addresses a serious economic problem created by our federal system. The problem is that, without the portability of coverage that the PPACA now ensures – a matter of uniquely salient concern to most citizens because of the “potentially ruinous cost” of medical care – many citizens may elect to stay in their current insurance-providing jobs, thus inhibiting national economic growth by failing to put their talents to their most productive uses.²⁶⁵ In *Katzenbach v. McClung* the Court relied in part on the fact that “discrimination deterred professional, as well as skilled, people from moving” in finding that the public accommodations provisions of the Civil Rights Act of 1964 were sustainable under the commerce power.²⁶⁶ The same consideration has application here.²⁶⁷
- Distinctive characteristics of the health care market create dangers of cost shifting from some states to other states, which thus face an unfair risk of becoming economic losers the absence of the sort of distortion-countering federal controls put in place by the PPACA. For example, some states host many nonresident students; some states are major travel destinations; some states are homes to major hospitals that service neighboring out-of-state areas; some states simply have good health-care delivery systems that draw outsiders to them; and some states have invested heavily in medical training, thus providing more services within their borders than other jurisdictions offer. All of these states, because of these characteristics, bear a disproportionate amount of cost-shifting from the uninsured.²⁶⁸ Moreover this result stems largely from an on-the-ground condition that is distinctive to the health care market – namely, the reality that uninsured

²⁶⁴ *Id.*; see also *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 588 (1937) (sustaining federal unemployment-benefits legislation in light of each state’s disincentive to enact similar legislation “lest in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors”).

²⁶⁵ Siegel, *supra* note 237, at 616; see *id.* at 606.

²⁶⁶ 379 U.S. 294, 382 (1964).

²⁶⁷ See, e.g., Brigitte C. Madrian, *Employment-Based Health Insurance and Job Mobility: Is There Evidence of Job-Lock?*, 109 Q.J. ECON. 27, 43 (1994) (focusing on “job lock” resulting from health-insurance-related concerns); Kevin T. Stroupe et al., *Chronic Illness and Health Insurance Related-Job Lock*, 20 J. POL’Y ANALYSIS & MGMT. 525, 525 (2001) (same); cf. THE FEDERALIST NO. 42, *supra* note 19, at 287 (James Madison) (“Nothing which tends to facilitate the intercourse between the States can be deemed unworthy of the public care.”).

²⁶⁸ See, e.g., Siegel, *supra* note 237, at 617 (concluding that “[w]ith mobile participants in the health insurance and health care markets, and with state health care regimes of differing quality and generosity, states end up imposing significant costs on one another without paying for them”); *id.* at 606 (emphasizing “the phenomenon of cross-state hospital use, and the interstate migration (or immobility) of insurance companies, providers, and individuals in partial response to the existence of different state health care regimes”).

persons can shift costs to others due to deeply entrenched cultural and legal norms that operate to channel care (and often the most expensive forms of care) to those uninsured even when they cannot pay their bills. These circumstances bring into play the founding-era idea that “whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States.”²⁶⁹

In short, the problems addressed by the minimum coverage provision present distinctive national problems presented by a distinctive national market that individual states are poorly situated to address by way of individual state regulatory programs.²⁷⁰ This set of facts, moreover, serves to distinguish each of the slippery-slope cases on which the respondents rely. A federal mandate to buy broccoli, for instance, would not respond to the sort of interstate mobility-constraining and cost-shifting problems that mark the real world of health insurance.²⁷¹ The same is true of a mandate to buy exercise equipment, even if we conclude that it would hold down health care costs as a general matter.²⁷² And burial insurance mandates are distinguishable as well, because there simply is not “an interstate problem of indigent interstate burials” or a likely risk of dying people strategically relocating to other states to take advantage of burial at a low cost.²⁷³ In short, this structural-state-inadequacy limiting principle both is closely tied to the framers’ purposes and would greatly constrain the consequences of validating the minimum coverage provision.

A third limiting principle, which builds on the second, lies at the heart of *Wickard*.²⁷⁴ On this view, Congress can, at the very least, regulate under the Necessary and Proper Clause those persons who “overhang” an interstate market in such a way that their future opportunistic actions made possible by a program of federal control threatens to render that very program ineffectual.²⁷⁵ This principle, as we have seen, empowered Congress to keep all persons like Mr. Filburn from growing large quantities of wheat, lest they abandon earlier home-use plans by selling at favorable price levels, thereby undercutting the entire price-stabilization program.²⁷⁶ Here, Congress determined that

²⁶⁹ 1 ELLIOT’S DEBATES, *supra* note 109, at 537 (statement of James Wilson); *see also* THE FEDERALIST PAPERS NO. 80, *supra* note 19, at 476 (Alexander Hamilton) (“Whatever practices may have a tendency to disturb the harmony between the States, are proper objects of federal superintendence and control.”).

²⁷⁰ *See* Somin, *supra* note 228, at 90-91 (arguing against minimum coverage provision on the theory that it is not “proper,” but recognizing that “the collective action rationale . . . is surely at least plausible”).

²⁷¹ Koppelman, *supra* note 107, at 19 (reasoning that “[t]here are manifest differences between broccoli and health insurance,” in part because “broccoli is not expensive . . . and there is no significant cost-shifting in the way it is provided”).

²⁷² *See infra* note 292 and accompanying text.

²⁷³ Amar, *supra* note 261. Among other things, the price of burial is largely knowable and limited, and the economic and other costs of a late-in-life relocation would itself tend to offset any costs saved by free-riding on a state’s generous burial-insurance program.

²⁷⁴ *See supra* notes 93-102 and accompanying text.

²⁷⁵ *Wickard v. Filburn*, 317 U.S. 111, 128 (1942).

²⁷⁶ *See supra* note 96 and accompanying text; *see also* *Gonzales v. Raich*, 545 U.S. 1, 18 (2005) (recognizing that Congress’s power to regulate even “purely intrastate activity that is not itself ‘commercial’ . . . if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity”); *id.* at 38 (Scalia, J., concurring) (reasoning that Congress may regulate noneconomic intrastate activities when the failure to do so “could . . . undercut” its regulation of

uninsured persons overhang the health insurance market in much the same way. These persons sit at the edge of that market, positioned to disrupt the congressional program by jumping into it at a propitious moment to take advantage of the very must-sell and price-nondiscrimination provisions that such behavior threatens to render unworkable.²⁷⁷ As a result, just as Congress could control the potentially opportunistic behavior of farmers in the position of Mr. Filburn, it likewise should be able to cut off the risk to the PPACA's must-insure and price-nondiscrimination provisions posed by problematic chance for opportunistic behavior otherwise afforded to the uninsured.²⁷⁸ To decide the health care case, the Court need go no further than to recognize this limiting principle. And all the slippery slope problems put forward by the respondents – concerning condoms, cars, exercise equipment, and the like – are distinguishable on this ground.

A fourth limiting principle harkens back to the first: It draws on the originalism-based teaching of *Lopez* to posit that some subjects of regulation are “truly national,” while others simply are not.²⁷⁹ One important theme of the framing period was that America had to take steps to compete on a global stage through the development of a broad-based and vibrant national economy.²⁸⁰ This vision was not one of unregulated markets in which the invisible hand alone would point the way to success. Instead it was one of a federal government marked by “energy” and “vigour,”²⁸¹ intervening in markets through (for example) creation of an entirely new banking system,²⁸² subsidization of American manufacturers,²⁸³ and even establishment of a mandated-contribution health insurance program for private sailors.²⁸⁴ During the last century, this theme has been

interstate commerce; quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)); *see also* *United States v. Darby*, 312 U.S. 100, 121 (1941).

²⁷⁷ *See supra* note 56 and accompanying text; *see also* Petitioners' Brief, *supra* note 8, at 18.

²⁷⁸ Notably, the Solicitor General advanced this same line of reasoning at oral argument. Oral Argument, *supra* note 8, at 44; *see also* Petitioners' Brief, *supra* note 8, at 26, 50.

²⁷⁹ *Lopez*, 514 U.S. at 567.

²⁸⁰ Storing, *supra* note 76, at 45 (noting that, in contrast to antifederalists, federalists focused on the goal of creating an “extended commercial republic”).

²⁸¹ THE FEDERALIST NO. 1, *supra* note 19, at 5 (Alexander Hamilton); *accord, e.g.*, THE FEDERALIST NO. 23, *supra* note 19, at 148-49 (Alexander Hamilton) (advocating the creation of “an energetic government,” particularly in light of “the extent of the country” and the need to “preserve the Union of so large an empire”).

²⁸² *See McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 424 (1819) (upholding creation of the Bank of the United States).

²⁸³ *See, e.g.*, 2 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 78 (W.W. Abbot et al. eds., 1987) (emphasizing the importance of federal subsidization of domestic manufacturers).

²⁸⁴ An Act For the Relief of Sick and Disabled Seamen, 1 Stat. 605 (1798). This law in effect required sailors to pay money (by way of wage reductions) to ship owners who in turn were required to pay over those monies to fund a government system for ensuring that sailors would receive thus-paid-for medical care. In the view of Professor Elhauge, this law “requir[ed] seamen to buy hospital insurance” and thus constituted “an individual mandate requiring the purchase of health insurance” enacted pursuant to the Commerce Clause. Einer Elhauge, *If Health Insurance Mandates Are Unconstitutional, Why Did the Founding Fathers Back Them?*, NEW REPUBLIC, Apr. 13, 2012. Professor Hamburger has responded by arguing that the law was promulgated pursuant to the Navy Clause, because its “goal was to aid seamen and thereby attract men to the sort of life that qualify them for the navy.” Philip Hamburger, *Hamburger Responds to Elhauge*, VOLOKH CONSPIRACY, Apr. 22, 2010. Others have suggested that the law was instead an exercise of the taxing and spending powers, in effect imposing an early version of a payroll tax to fund government-provided medical care. I leave the details of this debate to others, but emphasize the

pursued in part by recognizing that long-term prosperity depends on providing basic economic safeguards to ordinary Americans as they operate in the national marketplace, so as to minimize extreme economic dislocation, foster broad-based participation in commerce, remove barriers to the interstate movement of labor, and provide a platform for upward mobility.²⁸⁵ The result is a familiar body of laws – ranging from bank deposit insurance, to Social Security disability and retirement programs, to Medicare and Medicaid, to minimum wage laws (including for workers far removed from interstate transactions, such as municipal employees), to prohibitions on discrimination extended by the Civil Rights Act of 1964 even to the smallest mom-and-pop businesses.²⁸⁶ The PPACA is of a piece with these federal programs because all of them, much like the PPACA, addressed perceived market failures of enormous economic importance to citizens and because several of those programs, just like the PPACA, required the making of compelled risk-spreading payments to secure insurance-type protections. The PPACA also responds to mounting indications that, under the modern conditions, overarching health care regulation at the national level makes good economic sense.²⁸⁷ There is, and always will be, deep disagreement about whether programs of this kind on balance have improved or worsened our economic lot. But the critical point is that, in either event, they have responded to what Congress has seen as pressing national commerce-related challenges in ways that have no practical relation to wholly imaginary mandates to buy broccoli or burial insurance.²⁸⁸ In short, the distinction suggested here responds to

importance of not losing the forest for the trees. The important point is that the law evidenced the early Congress's willingness to intervene aggressively in a private market, even to the point of compelling private workers to pay in advance for health insurance protections.

²⁸⁵ See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964) (pointing to the “depressant effect on general business conditions” caused by race discrimination in upholding the public accommodation provisions of the Civil Rights Act of 1964).

²⁸⁶ See *id.* at 295 (applying the Act to a family-owned restaurant); *Daniel v. Paul*, 395 U.S. 298, 301-02 (1969) (upholding application of the Act to a localized recreational facility). Indeed, a core concern of federalist thinkers was that in the pre-constitutional period, “[t]he zeal for liberty” had become “predominant and excessive,” at least as to matters marked by a strong public interest. Storing, *supra* note 76, at 71. See generally THE FEDERALIST NO. 1, *supra* note 19 (Alexander Hamilton).

²⁸⁷ See, e.g., Abigail R. Moncrief & Eric Lee, *The Positive Case for Centralization in Health Care Regulation: The Federalism Failures of the ACA*, 20 KAN. J. L. & PUB. POL. 266, 268-69, 278-79 (2011) (focusing on information-age focus in health care on collecting and using data across large populations and high value of fostering economies of scale for this purpose). Notably, in many ways the PPACA reflects restraint in this regard, because it in fact “entrusts large swaths of its implementation to the states.” *Id.* at 266.

²⁸⁸ See *Katzenbach*, 379 U.S. at 299 (deeming the Civil Rights Act constitutional, even in its application to highly localized activity, because it addressed a problem of “nationwide scope,” *id.* at 301, “burdens of national magnitude upon interstate commerce,” *id.* at 299, and a “national commercial problem of the first magnitude,” *id.* at 305); see also *id.* at 300 (noting the “depressant effect” of unchecked discrimination “on general business conditions”); J. Harvie Wilkinson III, Op-Ed, *Cry, the Beloved Constitution*, N.Y. TIMES, Mar. 12, 2012, at A21 (suggesting that the invalidation of the PPACA would “risk lessening our national economic strength” in part because “[a] vibrant economic order requires some political predictability, and the prospect of judges’ striking down commercial regulation on ill-defined and subjective bases is a prescription for economic chaos”; concluding that: “[I]f courts read the Constitution ... to promote 50 state regulatory regimes in an era of rapidly mounting global challenges, the risk should escape no one. Making our charter more parochial while other nations flex their economic muscle seems like poor timing.”).

Justice Holmes’s famous admonition that “commerce among the States is not a technical legal conception but a practical one, drawn from the course of business.”²⁸⁹

There is a final limiting principle, too. Even if we assume that special dangers to liberty cause some (or even many) contractual mandates not to qualify as “proper” for purposes of the Necessary and Proper Clause, it would not follow that *all* purchase mandates automatically fall into the “improper” category.²⁹⁰ In part, this is the case because, even when the Court applies provisions of the Constitution that pointedly undertake to protect specific individual rights – such as the First Amendment’s guarantee of freedom of speech or the Fourteenth Amendment’s guarantee of “equal protection” – it does not act in a take-no-prisoners fashion. Rather it thoughtfully evaluates the particular features of the challenged law by asking such questions as whether its goal is “compelling” or “important” or “legitimate” and whether the law operates in a way that is “narrowly tailored” or “substantially related” or “rationally related” to achieving that goal,²⁹¹ or if it is “reasonable” in light of government interests and countervailing constitutional concerns.²⁹²

Applying this sort of means-ends analysis would clear away many would-be slippery-slope problems that the respondents and others have put forward.²⁹³ By way of example, this style of review reveals why validation of the minimum coverage provision

²⁸⁹ *Swift & Co. v. United States*, 190 U. 375, 398 (1905); *see also Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U.S. 217, 225 (1908) (“Regulation and commerce among the states both are practical rather than technical conceptions, and ... their limits must be fixed by practical lines.”).

²⁹⁰ *See, e.g., Siegel, supra* note 237, at 611 (cautioning that “a court should hesitate before holding broadly that Congress may never impose an economic mandate no matter how grave the interstate economic problem and no matter how much less effective or more coercive other forms of federal regulation may be”); *Hall, supra* note 124, at 1862-63 (making much the same point).

²⁹¹ *CHEMERINSKY, supra* note 253, at 687-89.

²⁹² *E.g., Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). As we have seen, in *McCulloch* itself, Chief Justice Marshall offered rhetoric along these lines by declaring that any “means” chosen by Congress must be “really adapted” to carrying into execution the “objects” entrusted to it by the Constitution. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 419-20 (1819). The idea here, assuming the Court finds a need to apply it, is somewhat different. According to it, the judiciary must do more than find a logical connection between the regulated behavior and Congress’s relied-upon power, because the case also involves a freestanding “proper”-based claim of economic liberty. For this reason (so the argument goes), a reviewing court should examine each step in the chain of causation as to how the regulated behavior achieves Congress’s posited goal. Consider the hypothesized mandate that all Americans must join health clubs so as to drive down health care costs because all Americans are in the health care market. One potential difficulty with this mandate is that it rests on a chain of reasoning that may well include a weak link. This is so because it may be simply too optimistic to believe that those who have health club memberships will in general use them or use them enough to significantly improve their health. It is not too optimistic to believe, however, that those who secure health insurance pursuant to the minimum coverage provision will in fact use that insurance (as opposed to, for example, stubbornly refusing to do so as a matter of principle) when health care costs come their way.

²⁹³ *See Siegel, supra* note 237, at 612 (explaining why the distinctive features of health insurance supported Congress’s conclusion that “regulatory alternatives to the minimum coverage provision would be less effective or more coercive” even though alternatives to mandate-type laws “often” will be available in other regulatory contexts); *id.* at 614 (adding that, accordingly, “the Court could uphold the minimum coverage provision while leaving itself principled room to invalidate future economic mandates where it is evident that there were equally effective, less coercive alternatives available to Congress”).

would not support recognition of a congressional power to force all Americans to buy home-mortgage insurance.²⁹⁴ This is so because a universal mortgage-insurance-purchase mandate would be drastically overinclusive with regard to the congressional goal of countering national economic disruption attributable to home-loan defaults. Chief Justice Roberts made this very point during oral argument. Responding to the private respondents' efforts to assimilate health-care and home-mortgage insurance, he insisted: "No, no, that's not ... fair, because not everybody is going to enter the mortgage market," whereas "almost everybody is going to enter the health care market."²⁹⁵

These five limiting principles reveal that there are meaningful differences between the minimum coverage provision and the hypothesized mix of mandates on which the respondents build their argument. The respondents, however, do have one last arrow in their quiver. They argue that applying such limiting principles cannot solve the parade-of-horribles problem they pose because taking that approach will simply enmesh the courts in an ill-advised and unmanageable case-by-case sorting process.²⁹⁶ Put another way, the respondents prefer "rules" over "standards" and that preference dictates that the Court should impose a categorical ban on federal mandates put in place under the commerce power, at least with respect to interactions between private parties.²⁹⁷

One difficulty with this approach is that the Court traditionally has rejected categorical rules in this field.²⁹⁸ Another difficulty is that the supposedly bright line the respondents would draw may well not be very bright at all. We have seen, for example, that under the Constitution, Congress can force citizens to sell property and (at least probably) help out private ship owners; yet these results of themselves significantly complicate the anti-mandate principle the respondents would have the Court embrace.²⁹⁹

²⁹⁴ See Private Respondents' Brief, *supra* notes 9, at 52.

²⁹⁵ Oral Argument, *supra* note 9, at 93.

²⁹⁶ See, e.g., Randy Barnett, *If Obamacare's Mandate Is Approved, Congress Can Require Anything*, WASH. EXAMINER (June 6, 2011, 8:05 PM), available at <http://washingtonexaminer.com/opinion/oped/2011/06/if-obamacares-mandate-approved-congress-can-require-anything> ("Today, only a categorical principle will preserve the protection of liberty afforded by the scheme of limited and enumerated federal power: Congress may not use its 'power to regulate commerce . . . among the several states' to conscript the American people to do business with private companies.").

²⁹⁷ For some discussions of the competing claims of rules and standards, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Kathleen Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Cass R. Sunstein, *Problem with Rules*, 83 CAL. L. REV. 953 (1995).

²⁹⁸ See *supra* notes 15, 36 and accompanying text. Indeed, this tendency toward caution in forging hard-edged commerce power rules seems even to fit the "noneconomic activity" rule of *Lopez*. See *United States v. Morrison*, 529 U.S. 598, 613 (2000) ("[W]e need not adopt a categorical rule against aggregating the effects of any noneconomic activity . . ."); *Gonzales v. Raich*, 545 U.S. 1, 38-39 (2005) ("[*Lopez* and *Morrison*] do not declare noneconomic intrastate activities to be categorically beyond the reach of the Federal Government."); see also *United States v. Lopez*, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring) (echoing the Court's longstanding concern about "the imprecision of content-based boundaries" – such as those based on manufacture or production – "used without more to define the limits of the Commerce Clause").

²⁹⁹ See *supra* notes 124, 129-31 and accompanying text. A related problem is that a categorical anti-mandate rule would foreclose the federal government from acting with dispatch – or even at all – to deal with profound national emergencies, such as by isolating infected patients or mandating vaccinations to deal with a deadly, fast-spreading epidemic. See, e.g., Oral Argument, *supra* note 9, at 85 (indicating the

An additional set of line-drawing problems (as airport search mandates reveal) concerns what actions of citizens warrant concluding that they have done enough to opt into the operation of a mandate.³⁰⁰ Yet another difficulty (as the “must take” minimum-wage requirement illustrates) involves judicial determination of whether the “mandate” label applies at all.³⁰¹ And still another difficulty concerns when we can say that mandates are permissible because citizens are “in” interstate commerce, regardless of consent, or because their future involvement in such commerce has reached the point of near or inevitable certainty.³⁰²

There is another problem, too. If the respondents’ concerns about unmanageable decisionmaking are sound, there is more than one corrective. Rather than embracing a special rule that raises distinctive problems for federal mandates when challenged as not being “proper,” the Court could simply refuse to enter this thicket, focusing constitutional assessments of these laws on the rights-protecting provisions of the Constitution.³⁰³ At the heart of this case is the effort of the respondents to launch a new doctrine that turns on whether federal laws that regulate individual citizens fail to qualify as “proper” under Article I. But the respondents do not stop there. Seeking in effect to have their cake and eat it too, they go on to advocate application of this new doctrine in the broadest possible way. They call on the Court to throw out the minimum coverage provision – a key component of landmark legislation directed at a distinctive risk-spreading industry that now is in recognized crisis – on the theory that the provision is functionally indistinguishable from random, weird, and wholly nonexistent laws that would force citizens to buy broccoli, bicycles, or burial insurance.

This form of reasoning would throw out the baby with the bathwater even before any bathwater exists. And it would do so based on a principle that encounters much resistance from the text of the Constitution, the history of its adoption, and its implementation in the early Republic.

CONCLUSION

In this article, I have put forward originalist arguments in support of the constitutionality of the minimum coverage provision. My basic purpose is modest. I hope I have written enough at least to raise doubts about any suggestion that the originalist case against the provision is overwhelmingly powerful. Central to my argument are principles that find expression in *The Federalist* and similar writings of the framing period. Among other things, these materials indicate that the ratifiers of our Constitution meant for Congress to have access to the same range of means to implement its powers that the states possess; thus, just as surely as a state may promulgate a health-

private respondents’ view that federal authorities could not act under its commerce-related powers in these circumstances).

³⁰⁰ See *supra* notes 116-119 and accompanying text.

³⁰¹ See *supra* notes 120-122 and accompanying text.

³⁰² See *supra* note 119 and accompanying text.

³⁰³ See *supra* notes 251-256 and accompanying text. I use the word “focusing” because, as with all other federal laws, some mandates would still fall outside Congress’s Article I powers under internal-constraint rules imposed by cases such as *Lopez* and *McCulloch*. See *supra* notes 202-223 and accompanying text.

insurance “mandate” as a means of executing its powers, it should follow that so, too, may the federal Congress.³⁰⁴ In addition, these materials indicate that Congress must have no less access to every permissible means for executing any one of its powers as it has for executing its other powers; thus, just as surely as Congress can mandate individual action pursuant to its military powers, it should follow that so, too, it may mandate individual action under its commerce powers as well.³⁰⁵ To be sure, any law that compels individuals to act might run afoul of the rights-granting provisions set forth in the Bill of Rights or elsewhere in the Constitution. But in this case the respondents have placed no reliance on protections of that kind.

In part my argument rests on the idea that the minimum coverage provision, even if it qualifies as a mandate, is akin to other mandate-based laws that our constitutional traditions have long accepted. The respondents’ counterargument centers on suggesting that draft laws, eminent domain laws, *posse comitatus* mandates, the federal firearm acquisition mandate of 1792 and other comparable provisions are not analogous to the minimum coverage provision. At bottom, this is an argument based on levels of generality. The respondents argue in effect that all of these would-be analogies are too loose; thus the argument for the constitutionality of the minimum coverage provision fails for want of a historical precedent that matches that provision in a highly direct and specific way.

There is, however, a more significant level-of-generality problem presented by this case. That problem concerns the nature of the evidence relied on by respondents in an effort to establish the invalidity of the minimum coverage provision. In particular, the respondents do not cite any statements in any notes of the Constitutional Convention or from the vast record of the ratification debates that states, or even nearly states, that the sort of rule set forth in the minimum coverage provision somehow was outlawed by Article I, section 8. In other words, the respondents do not offer specific evidence – as opposed to highly general and abstract evidence – to support their legal claim.

This fact alone suggests that the respondents’ originalist claims stand on shaky ground. And if more is needed to undercut those claims it is provided in what the framers *did* say about the designedly comprehensive and adaptive power granted to the federal Congress by the Necessary and Proper Clause.³⁰⁶ There is a reason why the Solicitor General focused attention on the modern commerce cases in defending the minimum coverage provision. Those cases in fact support the constitutionality of that provision because of its central role in Congress’s comprehensive effort to deal with recognized market failures in a vital field of interstate commerce. But those modern cases do not stand alone. The lessons they offer find support in another source. They are built on and reinforced by the words and deeds of the founders themselves.

³⁰⁴ See *supra* notes 82-88 and accompanying text.

³⁰⁵ See *supra* notes 142-150 and accompanying text.

³⁰⁶ See *supra* notes 103-110 and accompanying text.

