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## Brief Observations: A Review of Obamacare Briefs and the Original Meaning of the Constitution

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**Abstract**

*The heart of the Patient Protection and Affordable Care Act, popularly known as "Obamacare," is an unprecedented mandate that individuals purchase health insurance. The briefs of the parties challenging Obamacare and their supporting* amici *argue persuasively that, if the Supreme Court hews to the original understanding of the Constitution, it will have no choice but to strike down the mandate. The Commerce Clause empowers Congress only to "regulate" commercial activity, not to coerce it into existence. And the mandate is by no means a "Law ... for carrying into execution" the Commerce Clause power, and so finds no support in the Necessary and Proper Clause. The Framers would have considered the individual mandate far beyond the powers accorded to Congress. On that basis, it must be rejected.*

This paper, in its entirety, can be found at **http://report.heritage.org/lm79**

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The Supreme Court will soon hear a historic series of oral arguments in the litigation challenging the constitutionality of the Patient Protection and Affordable Care Act ("ACA" or "the Act").[1] Soon after the Act was passed, 26 states and the National Federation of Independent Business ("NFIB") challenged its constitutionality in federal court and the courts of appeals ultimately disagreed on the Act's lawfulness. Thus, to no one's surprise, the Supreme Court will enter the fray.

The ACA—often referred to as "Obamacare"—is a deeply flawed statute hundreds of pages long that even its most ardent advocates in Congress failed to read or fully comprehend. The Act is vulnerable on any number of constitutional grounds, but as the Heritage Foundation and others have explained in a brief filed with the Court, "[t]he heart of the [Act] is its minimum coverage provision—an unprecedented and oppressive mandate that, with limited exceptions, compels all Americans to enter into and maintain expensive health insurance contracts throughout their lives to obtain 'minimum essential coverage,' regardless of the individual's health, desires, or economic interests."[2] Thus, the

### Talking Points

- At the heart of Obamacare is an unprecedented mandate that compels healthy Americans to enter into above-cost health insurance contracts, regardless of the individual's desires or economic interests, to subsidize others' insurance purchases.
- Neither the Constitution nor its original meaning support the government's claim that the Commerce Clause authorizes Congress to compel individuals to purchase a government-approved health insurance plan.
- Nor does the Necessary and Proper Clause authorize the mandate. It is not, as required, "a Law ... for carrying into execution" the power to regulate interstate commerce, and it is not proper because it violates the precepts of federalism embodied in the Constitution.
- The sweeping federal power required to sustain the individual mandate is without logical limit and, if upheld, will fundamentally alter the balance of power and dual sovereignty envisioned by our Founders.

driving question presented in the case remains whether Obamacare's mandate exceeds Congress's powers under Article I of the Constitution.[3] Helping to answer that question, the States, NFIB, and their supporting *amici* have provided the Court with a thorough and convincing tutorial in the Constitution's first principles and the original meaning of the constitutional clauses at issue.

This paper highlights several of the key arguments offered by the challengers and several supporting *amici* exploring the original, Founding-era understanding of the Commerce Clause and the Necessary and Proper Clause—the two constitutional provisions that the government contends authorize the Affordable Care Act and its mandate. Taken together, these briefs provide the Court with a succinct lesson on these constitutional clauses and demonstrate that no sensible reading of the Constitution, or the powers that it was originally understood to convey, can uphold the unprecedented legislative hubris of the individual "minimum coverage" mandate.

## Original Meaning Matters

A common theme among many of the briefs opposing the mandate is the unique nature of the Act's "minimum coverage" requirement. The federal government has never required Americans to buy any good or service, making the mandate truly unprecedented.[4] Before the Act was passed, the nonpartisan Congressional Research Service observed that "it is a novel issue whether Congress may use [the Commerce Clause] to require an individual to purchase a good or a service."[5] As a Heritage Foundation *Legal Memorandum* explained in 2009, "[t]here is simply no legislative or judicial precedent for this claim of congressional power."[6]

This is significant. In cases in which there is no judicial or legislative precedent for an act of Congress, the Supreme Court will look even closer to the original understanding of the constitutional provision believed to authorize Congress's legislation.[7] With no controlling or analogous precedent, the Court will examine whether the original understanding of the Commerce Clause or the Necessary and Proper Clause, for example, supports the power exerted in the individual mandate. The Constitution and its original meaning, the Supreme Court has acknowledged, hold the fundamental keys to constitutional analysis. "In assessing the breadth of [a constitutional] power, we begin with its text," the Court has stated.[8] Moreover, "[i]n interpreting this text, [the Court is] guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'"[9]

Accordingly, the briefs in this case provide a detailed and convincing analysis of the original meaning and understanding of the powers granted to Congress by Article I.

## The Commerce Clause

Article I, Section 8, Clause 3 of the Constitution, commonly called the "Commerce Clause," grants Congress the power "to regulate Commerce with foreign Nations, and among the

1. Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).
2. Brief of Ctr. for Constitutional Jurisprudence, Heritage Foundation et al. at 2, U.S. Dep't of Health and Human Serv. v. Florida, No. 11-398 (Feb. 13, 2012) (citing 26 U.S.C. § 5000A and arguing that when Congress fails to consider and address constitutional concerns the presumption that a law is constitutional is weakened).
3. Although this paper does not address the issue, the State challengers have also brought a substantial claim arguing that Congress may not use its spending power to commandeer the states' legislative processes and that the ACA's expansion of Medicaid does just that. Brief of State Petitioners on Medicaid, Florida Brief of State Petitioners on Medicaid, Florida et al. v. U.S. Dep't of Health and Human Serv., No. 11-400 (Jan. 10, 2012).
4. *See* Congressional Budget Office, The Budgetary Treatment of an Individual Mandate to Buy Health Insurance (1994) ("A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States."). *See also* Randy Barnett, Nathaniel Stewart, and Todd Gaziano, *Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional*, Heritage Foundation Legal Memorandum No. 49 (Dec. 9, 2009), *available at* http://www.heritage.org/research/reports/2009/12/why-the-personal-mandate-to-buy-health-insurance-is-unprecedented-and-unconstitutional.
5. Jennifer Staman & Cynthia Brougher, Cong. Research Serv., R40725, Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis (2009). *See also* Barnett, *supra* note 4, at 4.
6. Barnett, *supra* note 4, at 4.
7. *See e.g.* District of Columbia v. Heller, 554 U.S. 570, 625 (2008) (following the text and original meaning of a constitutional provision when "nothing in our precedents forecloses ... adoption of the original understanding.").
8. City of Boerne v. Flores, 521 U.S. 507, 519 (1997).
9. *Heller*, 554 U.S. at 576 (2008) (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)).

several States, and with the Indian Tribes." Proponents of the ACA generally assumed, and have since maintained, that the Act is authorized by the Commerce Clause insofar as the Act merely regulates commercial markets for health insurance and health care. But as a number of briefs make perfectly clear, that claim is supported by neither the text of the Commerce Clause nor the original understanding of those who drafted and ratified it.[10]

Three briefs, in particular, are especially thorough and salient in arguing that neither the Constitution, nor its original meaning, support the government's claim that the Commerce Clause authorizes Congress to *compel* individuals to purchase a government-approved health insurance plan. These are the State challengers' brief, written by former U.S. Solicitor General Paul Clement; an *amicus* brief of Former U.S. Department of Justice Officials writing in support of the challengers, penned by another former Solicitor General, Ted Olson; and an *amicus* brief filed by the Texas Public Policy Foundation, authored by Richard Epstein and Mario Loyola.

The States' brief makes the case that the text of the Constitution does not sustain the government's "implausibly boundless interpretation" of the Commerce Clause because the constitutional provisions immediately surrounding it "confirm that the power to regulate does not encompass the power to create the thing to be regulated."[11] As the State challengers explain, it must be the case that "the power to 'regulate commerce' presupposes the existence of commerce to be regulated. It is not the power to compel individuals to engage in commerce so that Congress then has something to regulate."[12]

The State challengers direct the Court's attention to the two other provisions in Article I, Section 8 that grant Congress the power "to regulate." In both provisions, "the Constitution first grants Congress the *separate* power to bring into existence the object of regulation."[13] Thus, the Constitution authorizes Congress "to coin Money" before granting the power "to regulate the Value thereof." Likewise, Congress enjoys "the powers to 'raise and support Armies' and 'provide and maintain a Navy' before the power 'to make Rules for the Government and Regulation of the land and naval Forces.'"[14] From this it logically follows that, "[h]ad the power 'to regulate' been commonly understood as sufficient to call into existence the thing to be regulated, those separate, anterior, and far more controversial powers would have been redundant."[15]

Moreover, "when the Constitution does grant Congress the power to bring something into existence, it does so in language that is unmistakably clear."[16] The Constitution empowers Congress "to *establish* Post Offices and post Roads," as well as "to *constitute* Tribunals inferior to the Supreme Court." The State challengers note that "[t]he Constitution does not grant Congress a separate and anterior power to 'establish' or 'constitute' interstate commerce because the Commerce Clause quite logically presupposes the existence of the commerce to be regulated, and empowers Congress to do nothing more (and nothing more apprehensive) than to prescribe the rule by which *that* commerce will be governed."[17] This is axiomatic.[18]

Looking beyond the Constitution's plain text, the State challengers also argue that the government's incredibly broad reading of the Commerce Clause power is not supported by the contemporaneous, historical meaning of the clause—that is, what its drafters understood it to mean. According to James Madison, chief architect and draftsman of the Constitution, the power to regulate interstate commerce was

10. *See e.g.* Brief for Private Respondents on the Individual Mandate at 15-19, U.S. Dep't of Health and Human Serv. v. Florida, No. 11-398 (Feb. 6, 2012) [hereinafter NFIB Br.].
11. Brief for State Respondents on the Minimum Coverage Provision at 19, U.S. Dep't of Health and Human Serv. v. Florida, No. 11-398 (Feb. 6, 2012) [hereinafter States' Br.].
12. *Id.* at 16.
13. *Id.* at 19.
14. *Id.*
15. *Id.*
16. States' Br. at 20.
17. *Id.*
18. *Id.* at 16.

"an addition which few oppose[d], and from which no apprehensions [were] entertained."[19] Thus, as the State challengers observe, "[t]he commerce power was viewed as a relatively innocuous power designed to give the new federal government the power to regulate ongoing commercial intercourse between States and to remedy a glaring inadequacy in the Articles of Confederation."[20] From this, the States are quite right to conclude that the government's reading of the Commerce Clause creates the implausible position that the power to *compel* commerce, "a power so invasive and so antithetical to the core values of our Nation[,] was smuggled into the Constitution through the seemingly innocuous power 'to regulate ... commerce'—a power that, at the time, 'few opposed, and from which no apprehensions [we]re entertained ... .'"[21]

Complementing the State challengers' argument, the NFIB brief observes that the Founding-era Court "thought it 'against all reason and justice'" to presume that governments could compel one citizen to turn over his property to another, "thus usurping the power of individuals to preserve their property and to choose with whom they financially associate."[22] As NFIB notes, the Court viewed "such mandates not only as 'contrary both to the letter and spirit of the Constitution,' but as 'monster[s] in legislation [that] shock all mankind.'"[23]

The *amicus* brief of Former DOJ Officials (Attorneys General Edwin Meese III, William Barr, John Ashcroft, and Michael Mukasey) bolsters this conclusion. Noting that "[t]he text, history, and purpose of the Commerce Clause make clear that Congress lacks such far-reaching authority" to compel Americans into the health insurance market, they argue that "to regulate" does not mean "to compel," and that neither the Constitution's text, nor its authors were confused on this point.[24]

The Former DOJ Officials' brief explains that, "[a]s understood at the time of the Framing, the power to 'regulate' commerce did not encompass the authority to 'compel' or 'mandate' commerce that was not already taking place."[25] The brief cites contemporaneous dictionaries, legal commentaries, the records of the Constitution's ratification debates, and even "the pages of the most popular eighteenth-century newspaper," in making the case that "'[r]egulations' govern entities and activities already in existence, but they cannot 'compel' something into existence or mandate an activity that otherwise would not occur."[26] These contemporaneous texts and usages, the brief explains, demonstrate that the Founding generation would have understood "the plain language of the Commerce Clause [to] empower Congress to 'adjust' commerce 'by rule or method,' 'put[ting] [commerce] in order' by 'settl[ing] [it] in the right form.'"[27]

But with the individual mandate, Congress has not "adjust[ed] commerce by rule or method," nor does it attempt to "put[ ] [commerce] in order," or "settl[e] it in the right form."[28] Instead, it has *compelled* those who would not otherwise choose to purchase health insurance to do so, in a divine-like attempt to call new commerce into being for the purpose of then regulating it.

19. The Federalist No. 45, at 292-293 (James Madison) (Clinton Rossiter ed., 1961).
20. States' Br. at 16-17.
21. States' Br. at 18 (quoting The Federalist No. 45).
22. NFIB Br. at 13 (quoting Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798)).
23. *Id.* (quoting Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (1795)).
24. Brief of Former U.S. Dep't of Justice Officials at 4-6, U.S. Dep't of Health and Human Serv. v. Florida, No. 11-398 (Feb. 13, 2012) [hereinafter Former DOJ Officials Br.].
25. *Id.* at 5. The NFIB brief similarly notes the limits of regulating commerce:

    The interstate "commerce" that Congress may regulate is "commercial intercourse." That "include[s] . . . business[es] in which persons b[uy] and s[ell], [or] bargain[] and contract[]," such as "insurance." And Congress "regulate[s]" that "commercial intercourse" by "prescribing rules for carrying [it] on." Thus, at the core of Congress's commerce power is the authority to set rules for use of the "channel" and "instrumentalities" of commercial intercourse, "since they are the ingredients of interstate commerce itself." (internal citations omitted).

    NFIB Br. at 15-16.
26. Former DOJ Officials Br. at 2.
27. *Id.* at 6.
28. *Id.*

But such compulsion is not regulation, a point emphasized by the States and NFIB, as well.[29] The Founders knew precisely what it means "to compel," and it does not mean "to regulate." "'To compel,'" the Former DOJ Officials' brief explains, "meant 'to force to some act; to oblige; to constrain; to necessitate; to urge irresistibly.' And 'to mandate' meant to 'command.' Thus, unlike with 'regulate,' it would have made perfect sense to 'compel' or 'mandate' a person to engage in an activity"—such as purchasing health insurance—"that the person would not have undertaken."[30]

Turning to the constitutional text, the Former DOJ Officials' brief persuasively demonstrates that the text itself distinguishes between the powers of regulation and compulsion and that the two concepts are not synonymous.

> Outside the Commerce Clause, the body of the Constitution uses the verb "regulate" one other time, giving Congress the power "To coin Money, [and] regulate the Value thereof." U.S. Const. art. I., § 8, cl. 5. As that provision makes clear, Congress can only "regulate" the value of money after the money has been "coined"—i.e., after it has come into existence. In fact, if the power to "regulate" money encompassed the authority to create money in the first place, the separate power to "coin" money would be rendered mere surplusage.[31]

By contrast, the Constitution also uses the word "compel"—once in Article I and once in the Bill of Rights. Article I, Section 5, Clause 1 provides, "Each House ... may be authorized to compel the Attendance of absent Members ... ," and the Fifth Amendment states, "No person shall be . . . compelled in any criminal case to be a witness against himself ... ."[32] As the Former DOJ Officials' brief explains, "[i]n both instances, the word describes forcing someone to take action he otherwise would not take, whether attending a session of Congress or testifying against himself."[33] Thus, the brief concludes, "[t]he drafters of the Constitution knew how to 'compel' something into existence, they knew how to 'regulate' something already in existence, and they recognized the important distinction between the two."[34]

In a similar vein, the Texas Public Policy Foundation's *amicus* brief provides additional support for the State challengers' interpretation of the constitutional text. It examines two limitations inherent in the text of the Commerce Clause.

First, "those economic activities that were not commerce were not subject to any regulation by Congress at all."[35] The individual mandate forces those individuals who are outside of the health insurance market to enter the insurance market. These individuals most directly affected by the mandate are not engaged in the "regulated commercial activity" at all, because they are in fact *abstaining* from the very commercial activity that Congress ostensibly seeks to regulate.

Second, the Commerce Clause power is limited to the regulation of commercial transactions taking place across state lines, leaving *intrastate* transactions for the several States to police and control. Such a narrow and limited federal role was essential for gaining the votes needed to ratify the Constitution. Ratification "was predicated on the acceptance of this limited vision of federal power—enough power to overcome the limitations of the Articles of Confederation, but limited enough to secure the States' highly evolved democratic institutions, indispensable to both

29. NFIB emphasizes the difference between compulsion and regulation:

> *Compelling* commerce is not *regulating* commerce. . . . For example, although Congress may regulate the terms of voluntary contracts between General Motors and its customers, it may not compel individuals to enter into contracts with GM, because there is no pre-existing "commerce" to regulate. Otherwise, Congress could force individuals to purchase literally *any* product: factual distinctions among products would be irrelevant, because Congress, "[w]hatever [its] motive and purpose," has "plenary power" over "regulations of commerce."

NFIB Br. at 17 (quoting United States v. Darby, 312 U.S. 100, 115 (1941)).

30. Former DOJ Officials Br. at 5-6.

31. *Id.* at 7.

32. U.S. Const., art. I, § 5, cl. 1; U.S. Const., amend. 5.

33. Former DOJ Officials Br. at 8.

34. *Id.*

35. Brief of Texas Pub. Policy Foundation at 6, U.S. Dep't of Health and Human Serv. v. Florida, No. 11-398 (Feb. 13, 2012).

liberty and self-government, from federal control."[36] Had the ratifying State conventions supposed that the Commerce Clause would extend federal power beyond the limited authority granted by the Constitution, there is every reason to believe that ratification would have failed. Quoting James Madison's assurances in *Federalist* No. 45, the brief explains that "[n]either the federalists nor anti-federalists ever imagined that the federal government would be other than one of limited powers … . 'The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite.'"[37]

Taken together, these briefs dismantle the government's reliance on the Commerce Clause as the constitutional basis for the mandate. The Constitution prescribes a federal government of limited, enumerated powers, and the Commerce Clause does not circumvent those constitutional limits or provide Congress with plenary authority over all activity it may care to regulate or compel. The text and its original meaning make clear that Congress may *regulate* existing commercial activity among the States, not *compel* new commerce between a citizen and his insurance agent.

## The Necessary and Proper Clause

Recognizing that the Commerce Clause may not provide the support for the individual mandate that the Act's proponents had initially assumed, the government also asserts Congress's authority under the Constitution's "Necessary and Proper Clause"—or, as the Supreme Court once called it, the "last, best hope of those who defend *ultra vires* congressional action … ."[38]

Article I, Section 8, clause 18, grants Congress the authority to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[39] The government's primary argument thus proceeds in two steps: "(1) that the failure to purchase insurance shifts costs to other private participants in the insurance market, and hence the mandate regulates behavior having a substantial effect on interstate commerce; and (2) that the mandate is required to avoid the destructive effects of the new federal insurance rules imposed by the Act, and hence the mandate is necessary and proper to effectuate those rules."[40] Looking to the text and history of this clause, the State challengers' brief and *amicus* briefs filed by the Independence Institute and the Washington Legal Foundation resoundingly refute the government's "necessary and proper" claim.

The States mount two challenges to the government's reliance on the Necessary and Proper Clause. First, the mandate is not, as required, a "Law … for carrying into execution" the power to regulate interstate commerce. The government contends that "the mandate is not an end in itself, but merely a means of 'mak[ing] effective the Act's core reforms of the insurance market,' namely, the guaranteed issue and community ratings provisions."[41] But this cannot be the case, the State challengers reply, because the mandate itself does not reform or regulate *existing* commerce, but compels individuals to *enter into commerce*.[42] "The power to compel individuals into commerce," the States argue, "is exercised not to effectuate regulation or existing commerce, but rather to *create* commerce so that Congress may regulate it."[43] This is an important distinction, 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."[44]

36. *Id.* at 8.
37. *Id.* at 9.
38. Printz v. United States, 521 U.S. 898, 923 (1997).
39. U.S. Const., art. I, § 8, cl. 18.
40. Brief for DOCS4Patientcare et al. at 5-6, Dep't of Health & Human Serv. v. Florida, No. 11-398 (Feb. 13, 2012) (citing Brief for Petitioners (Minimum Coverage Provision) at 18-19, U.S. Dep't of Health and Human Serv. v. Florida, No. 11-398 (Jan. 2012) [hereinafter Pet. Br.]).
41. States' Br. at 33-34.
42. *Id.* at 33-34.
43. *Id.* at 34.
44. *Id.* at 35. *Accord* Brief of Speaker of the House John Boehner, U.S. Dep't of Health & Human Serv. v. Florida, No. 11-398 (Feb. 13, 2012).

Second, the mandate is not a *proper* means for carrying out the commerce power because it is inconsistent with "the letter and spirit of the Constitution."[45] Here, the State challengers invoke the "precepts of federalism embodied in the Constitution," which limit federal power and "inform which powers are properly exercised by the National Government in the first place."[46] Of course, those precepts include the bedrock principle "that 'the Constitution created a Federal Government of limited powers,' and 'withhold[s] from Congress a plenary policy power that would authorize enactment of every type of legislation.'"[47] Accordingly, "any theory of Congress's power that obliterates any meaningful boundaries on Congress's limited and enumerated powers cannot be squared with the Constitution."[48]

The brief of the Washington Legal Foundation (WLF) addresses the original meaning of the Necessary and Proper Clause, arguing that the mandate is simply not a *proper* exercise of federal authority. The federal government, it explains, "is not granted 'an indefinite supremacy over all persons and things,'"[49] but that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined."[50] To that end, "legislation authorized by the Necessary and Proper Clause must meet the requirements of both necessity *and* propriety," a rule that is "deeply rooted in the text and original meaning of the Constitution, as well as [the Supreme] Court's precedents going back to *McCulloch v. Maryland*" in 1819.[51]

The mandate "violates the requirements of propriety" for several reasons, first among them being that it grants Congress effectively unlimited and unchecked power.[52] As the WLF brief contends, "a statute is 'improper' it if can only be supported by a logic that would give Congress virtually unlimited power."[53] Quoting James Madison, the WLF brief emphasizes that, "'whatever meaning [the Necessary and Proper Clause] may have, none can be admitted that would give an unlimited discretion to Congress.'"[54]

Of course, this is precisely the problem with the government's rationale for upholding the mandate, namely, that there is no principled or logical reason why the power asserted to compel the purchase of health insurance could not also be exercised to force individuals to buy organic vegetables, Reese's Peanut Butter Cups, or fuel-efficient, hybrid cars from a certain automobile manufacturer that has borrowed billions of dollars from the federal government—and the government has tacitly admitted as much.[55] Such federal omnipotence is antithetical to the constitutional structure and is not "proper" as that concept was understood by Madison and his colleagues.[56]

Tellingly, the government has ignored the question of propriety, suggesting instead that a statute is permissible under the Necessary and Proper Clause provided it is "useful" or "convenient."[57] But this only highlights the absurdity of the government's position, for "virtually *any* imaginable regulatory measure is useful or convenient for implementing some enumerated power in some way."[58] Adopting the government's view of the Necessary and Proper

45. States' Br. at 35. (quoting McCullough v. Maryland, 17 U.S. 316, 421 (1819)).

46. *Id.* at 36 (quoting United States v. Comstock, 130 S. Ct. 1949, 1967 (2011) (Kennedy, J., concurring).

47. *Id.* at 36 (quoting Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) and United States v. Lopez, 514 U.S. 549, 566 (1995)).

48. *Id.* at 36.

49. Brief of the Washington Legal Foundation at 3, Dep't of Health & Human Serv. v. Florida, No. 11-398 (Feb. 13, 2012) (quoting The Federalist No. 39) [hereinafter Wash. Legal Br.].

50. *Id.* (quoting The Federalist No. 45).

51. *Id.* at 4.

52. *Id.* at 5-6.

53. *Id.* at 5.

54. *Id.* (citing James Madison, Speech on the Bank Bill, House of Representatives (Feb. 2, 1791) in James Madison, Writings 480, 484 (Jack N. Rakove, ed. 1999)).

55. *See* Seven-Sky v. Holder, 661 F.3d 1, 14-15 (D.C. Cir. 2011) (noting that "at oral argument, the Government could not identify any mandate to purchase a product or service in interstate commerce that would be unconstitutional ... under the Commerce Clause.").

56. *See e.g.*, Brief on Behalf of the 1851 Ctr. for Constitutional Law, Dep't of Health & Human Serv. v. Florida, No. 11-398 (Feb. 13, 2012) (arguing that the mandate is improper because it violates state sovereignty and the "spirit and letter" of the Constitution).

57. Pet. Br. at 22-23.

58. Wash. Leg. Br. at 19.

Clause "reads the word 'proper' out of the Constitution ... [and] would transform the Necessary and Proper Clause into simply the 'Necessary Clause' ... ."[59] Ironically, "[a]t the 1787 Constitutional Convention, the Committee of Detail deliberately inserted the word 'proper' into a previous draft of the Clause that included only the word 'necessary.' This suggests a deliberate effort on the part of the Framers to insert the term 'proper' in order to change the meaning the Clause would otherwise have had."[60]

Finally, adding greater depth to the historical meaning and purpose of the Necessary and Proper Clause for the Court's consideration, David Kopel of the Independence Institute filed an important brief augmenting the State challengers' interpretation of the clause. As Kopel explains, "[t]he Necessary and Proper Clause authorizes regulation of economic activities outside the core meaning of 'commerce' when such regulation is *incidental* to the regulation of commerce."[61] Consequently, the mandate's constitutionality "depends on whether the mandate is incidental to Congress's power to regulate interstate commerce, as contemplated by the Necessary and Proper Clause."[62]

Delving into the history of how "necessary and proper" clauses in other documents were used and understood during the Founding-era, Kopel informs the Court that, "[u]nder founding-era law and practice, when an instrument granted enumerated powers and then followed the enumeration with a clause authorizing 'necessary' actions in furtherance thereof, the clause was a mere recital that the doctrine of incidental powers applied to the instrument."[63]

> In this context, the word "necessary" did not always exclusively coincide with factual necessity. Rather, it was a term of art meaning *incidental*. When a legal instrument conveying express authority also authorized actions "necessary" to effectuate that authority, it was referring to the prevailing common law *doctrine of incidental powers*. That doctrine altered the maxim that delegated powers are strictly construed, by widening construction of the instrument.[64]

The doctrine of incidental powers expanded a more stringent rule of interpretation that would strictly construe delegated powers in a legal document in the narrowest fashion. As Kopel illustrates, "if construed strictly, a grant of authority to 'manage my farm' might be limited to on-site activities, thereby excluding crop sales. The doctrine of incidental powers widened that grant to include crop sales, if the parties so intended."[65] By the time of America's founding, the doctrine of incidental powers was "the legal default rule," but a recital of the "necessary and proper" or incidental powers doctrine was commonly included for clarity.[66]

Under that doctrine, for an unstated power to qualify as "necessary" or "incidental" to an expressly stated power, "the unstated power had to be both (1) inferior to the express power, and (2) so connected to it by the custom or need as to justify inferring that the parties intended the inferior power to accompany the express power."[67]

Historical research has shown that, in order to qualify as an "incident," the unnamed power "had to be less important or less valuable than its principal.... An incident was always subordinated to or dependent on the principal."[68] In addition, "an incident could not comprise a subject matter independent of its principal nor could it change the nature of the grant [of authority]."[69] Moreover, being inferior to the principal power was only "a *precondition* to qualifying as 'necessary,' but was not sufficient." This is because, "[i]f the power was

59. *Id.* at 21.

60. *Id.* at 8-9.

61. Brief of Authors of *The Origins of the Necessary and Proper Clause* et al. at 7, U.S. Dep't of Health and Human Serv. v. Florida, No. 11-398 (Feb. 13, 2012) [hereinafter Necessary and Proper Br.].

62. *Id.* at 7.

63. *Id.* at 9.

64. *Id.* at 11.

65. *Id.*

66. *Id.*

67. Necessary and Proper Br. at 19.

68. *Id.* at 21 (quoting Gary Lawson et al., The Origins of the Necessary and Proper Clause 61-62 (Cambridge University Press 2010).

69. *Id.* at 21.

inferior, but the power was neither indispensable, nor required to avoid 'great prejudice,' nor customary, then the interpreter could infer that the parties did not intend that power to accompany" the principal power.[70] Thus, an incidental or "necessary" power must be both inferior and indispensable to the express, enumerated authority.

In light of this history, Kopel concludes that "[t]he individual mandate is not authorized by the Necessary and Proper Clause because under the meaning of that Clause, the mandate does not qualify as 'incidental' to the regulation of commerce."[71] As Kopel explains:

> The authority claimed by the government in this case—to compel private citizens to purchase approved products from other, designated private persons—is certainly not inferior to garden-variety regulations of commerce. It is a power truly awesome in scope, and one that, if granted to Congress, the Constitution surely would have enumerated separately .... Forcing people to perform a particular activity is not subsidiary to mere regulation. On the contrary, it is greater, more sweeping. It cannot, therefore, be incidental to the power to regulate.[72]

Taken together, these briefs leave the government with no tenable argument that the Necessary and Proper Clause authorizes the individual mandate.

## Conclusion

In considering the constitutionality of the individual mandate, the Supreme Court should begin with the text of the Constitution and find that Congress is nowhere empowered to compel private individuals to purchase any particular type of good or service.

But if, upon examining the Constitution's enumeration of limited powers, the Court has any doubt regarding Congress's authority, it should then ask whether those who wrote, ratified, and first interpreted the Constitution would have understood Congress's powers to include such a mandate. The overwhelming historical and legal evidence presented by the State challengers, NFIB, and their supporting *amici* demonstrates that they would have considered such a mandate far beyond the powers accorded to Congress. Neither the Commerce Clause nor the supporting Necessary and Proper Clause can be read to sustain the mandate, and the history and logic of those clauses make it abundantly clear that neither was understood as providing such power.

The sweeping federal power required to sustain the individual mandate is without logical limit and, if upheld, will fundamentally alter the balance of power and dual sovereignty envisioned by our Founders. To preserve our federalism and maintain a federal government of limited powers consistent with the Constitution's original meaning, the individual mandate must be rejected.

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70. *Id.* at 25.
71. *Id.* at 29.
72. *Id.* at 30.