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# Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate

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## **BAD NEWS FOR PROFESSOR KOPPELMAN: THE INCIDENTAL UNCONSTITUTIONALITY OF THE INDIVIDUAL MANDATE**

In *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*,<sup>1</sup> Professor Andrew Koppelman concludes that the individual mandate in the Patient Protection and Affordable Care Act (PPACA)<sup>2</sup> is constitutionally authorized as a law “necessary and proper for carrying into Execution”<sup>3</sup> other aspects of the PPACA. Indeed, he is so convinced that he characterizes constitutional objections to the law as “silly,”<sup>4</sup> “urban legends,”<sup>5</sup> “radical and destructive,”<sup>6</sup> and “undertaken in the spirit of a saboteur in wartime.”<sup>7</sup>

To the contrary, the Necessary and Proper Clause does not authorize the individual mandate.<sup>8</sup> That conclusion straightforwardly emerges from careful study of the Clause’s origin,

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<sup>1</sup> 121 YALE L.J. ONLINE 1 (2011), <http://yalelawjournal.org/2011/04/26/koppelman.html>.

<sup>2</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (to be codified primarily in scattered sections of 42 U.S.C.). Section 1501(b) of the PPACA mandates that “[a]n applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential [health insurance] coverage for such month” or else face a monetary “penalty.” 124 Stat. at 244 (to be codified at 26 U.S.C. § 5000A(a)-(b)(1)). The criteria for “minimum essential coverage” are defined in section 1501(b), 124 Stat. at 248 (to be codified at 26 U.S.C. § 5000A(f)), and the Act provides exceptions for prisoners and some members of narrowly-defined religious communities. § 1501(b), 124 Stat. at 246 (to be codified at 26 U.S.C. §§ 5000A(d)(2)-(4)).

<sup>3</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>4</sup> Koppelman, *supra* note 1, at 2.

<sup>5</sup> *Id.* at 23.

<sup>6</sup> *Id.* at 19 n.86.

<sup>7</sup> *Id.* at 11.

<sup>8</sup> For lack of space, we do not address in depth whether the mandate can be justified as a regulation of “Commerce . . . among the several States,” U.S. CONST. art. I, § 8, cl. 3, or as some species of tax. With respect to the Commerce Clause, we observe only that Professor Koppelman’s argument relies on a peculiar understanding of commerce (drawn from Jack Balkin) as encompassing “all interaction between people.” Koppelman, *supra* note 1, at 13. See Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 5 (2010). This is an implausible understanding of the word “commerce” as it appears in the Commerce Clause, even if it might be a plausible understanding of the word in certain religious or literary contexts. See Robert G. Natelson & David B. Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICH. L. REV. FIRST IMPRESSIONS 55 (2010), <http://www.michiganlawreview.org/articles/commerce-in-the-commerce-clause-a-response-to-jack-balkin>.

With respect to treating the individual mandate as a tax, Professor Koppelman refuses to accept the clear distinction drawn within the PPACA between taxes and penalties. The mandate provision prescribes a “penalty,”

purpose, and meaning. The results of several such studies are collected in a recent book on the clause's intellectual antecedents.<sup>9</sup> We draw heavily on that book in this Essay, though we do not claim that all of the book's authors would necessarily endorse all of the modern uses that we make of their purely originalist research.

The Necessary and Proper Clause incorporates basic norms drawn from eighteenth-century agency law, administrative law, and corporate law. From agency law, the Clause embodies the venerable doctrine of principals and incidents: a law enacted under the clause must

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Pub. L. No. 111-148, § 1501(b), 124 Stat. 119, 244 (to be codified at 26 U.S.C. § 5000A(b)(1)), for failing to maintain health insurance, while other provisions in the bill (some of which have since been modified or repealed) had no trouble at all using the word "tax." *See, e.g.*, PPACA, § 9001, 9015, 9017, 10906, 10907, 124 Stat. at 847, 870, 872, 1020, 1020. Perhaps that is why no federal court has yet accepted the suggestion that the mandate's "penalty" provision be treated as a tax under the Constitution. *See, e.g.*, *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 786-87 (E.D. Va. 2010). *But cf. Liberty Univ. v. Geithner*, 2011 WL 3962915, at \*5-6 (4<sup>th</sup> Cir. 2011) (finding the individual mandate's penalty provision to be a tax for purposes of the Anti-Injunction Act but specifically noting that the word "tax" can have a broader meaning under federal statutes than under the Constitution). And if one can (as Professor Koppelman urges) simply re-characterize the penalty provision in the PPACA as a tax, one can presumably re-characterize any federal fine as a tax—which is a result that would no doubt surprise the drafters and ratifiers of the Eighth Amendment. *See* U.S. CONST. amend. VIII (prohibiting, inter alia, "excessive fines").

Nor do we address here Professor Koppelman's odd suggestion, also drawn from Jack Balkin, that the Constitution (no doubt to Justice Holmes's dismay) enacts Mr. Mancur Olson's *The Logic of Collective Action* by providing a general authorization to Congress to fix any national problems. *See* Koppelman, *supra* note 1, at 12-13. Such a notion was presented as Resolution VI of the Virginia Plan but was not adopted by the Convention. For a detailed critique of the modern attempt to read Resolution VI into the Constitution, see Kurt T. Lash, "Resolution VI": *The Virginia Plan and Authority to Resolve "Collective Action Problems" Under Article I, Section 8* (Ill. Pub. Law & Legal Theory Research Paper Series, Paper No. 10-40, 2011), available at <http://ssrn.com/abstract=1894737>. Lash points out that the Philadelphia Convention did *not* read the enumerated powers of Article I, Section 8 as adopting Resolution VI; to the contrary, after the Committee of Detail had presented the draft Constitution, the Convention considered and rejected a proposal by James Madison to create a federal power to charter corporations for internal improvements. *Id.* at 26-28. If the Convention had read Article I the way that Balkin does, Madison would not have needed to offer such an amendment to expand federal powers in a particular way he thought desirable, since the subject of his amendment would have been within the scope of Resolution VI. *Id.* at 28. So Resolution VI is not part of the original intent of the drafters.

Nor is it part of the original public meaning. As Lash explains, Resolution VI formed *no* part of public discussion during the ratification period. *Id.* at 33-35. Balkin attempts to point to a single mention of Resolution VI by James Wilson. Balkin, *supra*, at 11 (quoting James Wilson in the Philadelphia Ratifying Convention, 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 424-25 (2d ed. 1876) [hereinafter ELLIOT'S DEBATES]). But Lash shows that Balkin is mistaken. Wilson never mentioned Resolution VI; Wilson was discussing a different (and never-adopted) resolution by Connecticut's Roger Sherman. Lash, *supra*, at 33-35. Thus, Resolution VI was not part of the original public meaning or the original intent of the Constitution.

<sup>9</sup> GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE (2010) [hereinafter ORIGINS]. The book collects and integrates three independent lines of research concerning the legal and intellectual origins of the Necessary and Proper Clause. All of those lines converge on some common themes that form the foundation for this Article.

exercise a subsidiary rather than an independent power, must be important or customary to achievement of a principal end, and must conform to standard fiduciary obligations. Importantly, that first requirement of subsidiarity must be satisfied *before* one inquires whether a law is important or customary (“necessary”) or within fiduciary boundaries (“proper”).

From administrative law, the Necessary and Proper Clause embodies the principle of reasonableness in the exercise of delegated power. This requires conformance with a set of fiduciary norms similar to those drawn from agency law, including the norms of acting only within delegated jurisdiction and of treating all persons subject to a public agent’s power impartially. Evidence from eighteenth-century corporate law—and the Constitution was widely recognized in the Founding era as a type of corporate charter—confirms these conclusions about the meaning of the phrase “necessary and proper for carrying into Execution,” though for lack of space we do not pursue that aspect of the Clause’s provenance here.<sup>10</sup>

These principles, while perhaps strange-sounding to modern ears, were perfectly obvious to the Founding generation, which is why the standard materials of constitutional research—such as the Convention and ratification debates—seem to say relatively little about them.<sup>11</sup> Moreover, they are consistent with Supreme Court decisions relevant to the application of the Necessary and Proper Clause to the individual mandate. Those principles drove Chief Justice Marshall’s

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<sup>10</sup> For a discussion of the historical corporate law context of the Necessary and Proper Clause, see Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, in ORIGINS, *supra* note 9, at 144.

<sup>11</sup> A phalanx of scholars, from across a spectrum of political beliefs, has lamented the apparent absence in the drafting and ratifying history of relevant materials on the Necessary and Proper Clause. *See, e.g.*, JOSEPH M. LYNCH, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT 4 (1999) (suggesting that the Necessary and Proper Clause is “a masterpiece of enigmatic formulation”); Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 185 (2003) (“The Necessary and Proper Clause was added to the Constitution by the Committee of Detail without any previous discussion by the Constitutional Convention. Nor was it the subject of any debate from its initial proposal to the Convention’s final adoption of the Constitution.”); Mark A. Graber, *Unnecessary and Unintelligible*, 12 CONST. COMMENT. 167, 168 (1995) (suggesting that the Committee of Detail “gave no hint why it chose the language it did”). There are, in fact, plenty of materials available on the origins and purposes of the clause; they are just found in places where constitutional scholars do not usually look.

opinion in *McCulloch v. Maryland*<sup>12</sup> to the point that the opinion is close to incomprehensible without a firm grounding in them. They further explain why the individual mandate is not a law “necessary and proper for carrying into Execution” federal powers,<sup>13</sup> even under post-New Deal case law, for two reasons.

First, the power to order someone to purchase a product is not a power subordinate or inferior to other powers. It is a power at least as significant—or, in eighteenth-century language, as “worthy” or of the same “dignity”—as the power to regulate insurance pricing and rating practices.<sup>14</sup> It is therefore not incidental to other powers exercised by Congress in the PPACA and must be separately enumerated if it is to exist.

Second, the doctrine of principals and incidents and the principle of reasonableness both embody the fiduciary norm that agents exercising delegated power must treat multiple principals subject to those agents’ power impartially. Interpreting the Necessary and Proper Clause to allow Congress to force private dealings with preferred sellers of products fails that basic fiduciary norm, as illustrated by founding-era concerns about Congress invalidly using the Necessary and Proper Clause power to create monopolies. Therefore, if the individual mandate is constitutional, it is *not* by virtue of the Necessary and Proper Clause.

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<sup>12</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>13</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>14</sup> We are assuming for purposes of this Essay that Congress has power under the Commerce Clause to regulate health insurance pricing and rating practices. See *United States v. Se. Underwriters Ass’n*, 322 U.S. 533 (1944). As a matter of original meaning, that proposition is dubious at best. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824) (noting that among the powers “not surrendered to the general government” are “health laws of every description”); Robert G. Natelson & David B. Kopel, “*Health Laws of Every Description*”: *John Marshall’s Ruling on a Federal Health Care Law*, 12 ENGAGE 49, 50-51 (2011), available at [http://www.fed-soc.org/doclib/20110603\\_NatelsonKopelEngage12.1.pdf](http://www.fed-soc.org/doclib/20110603_NatelsonKopelEngage12.1.pdf). For most of America’s history the Supreme Court adhered to the original understanding that “commerce” encompassed only the buying and selling of goods among merchants, together with certain tightly related activities: transportation, international brokerage, consignment, commercial paper, and cargo insurance. See, e.g., *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1868) (holding unanimously that insurance contracts “are not articles of commerce in any proper meaning of the word”). The recognition that insurance, and specifically the formation of insurance contracts, is not “commerce” in the constitutional sense, was abandoned (with precious little originalist analysis) in *South-Eastern Underwriters*. See Rob Natelson & David Kopel, *Health Insurance Is Not “Commerce”*, NAT’L L.J., Mar. 28, 2011, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202487886015>.

## I. Agency Law and the Necessary and Proper Clause

To understand why the Necessary and Proper Clause does not validate the individual mandate, it is necessary to understand the Clause's origins in agency law. Those origins demonstrate that the first question to ask is not whether the mandate is "necessary and proper" to the accomplishment of some permissible governmental end (though it may well be neither of those things) but rather whether the mandate is an exercise of power *inferior or subordinate* to the federal government's enumerated *principal* powers.

### A. Agency Law Fundamentals: Principals, Incidents, and Necessity

The law of agency was central to legal and economic life in the founding era. Ordinary citizens often employed agents such as managers and brokers in their business affairs, and citizens frequently themselves acted as agents, such as executors or guardians.<sup>15</sup> Accordingly, the general contours of agency law were familiar to a wide range of eighteenth-century Americans.

The bedrock obligation of the eighteenth-century agent<sup>16</sup> was to act only within granted authority. The express terms of an agency instrument could, of course, be the *sole* source of the agent's granted authority if the instrument so specified.<sup>17</sup> But in the absence of such a clear specification, the background assumption was that grants of authority carried with them certain

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<sup>15</sup> See Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in ORIGINS, *supra* note 9, at 52, 56.

<sup>16</sup> Much of agency law today remains essentially as it was centuries ago. Because the Necessary and Proper Clause was drafted and ratified in the late eighteenth century, we discuss here only the agency principles that were known to and held by members of the founding generation.

<sup>17</sup> Article II of the Articles of Confederation, for example, directly specified that express terms fully defined the scope of powers granted to Congress by providing that "[e]ach state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation *expressly* delegated to the United States, in Congress assembled." ARTICLES OF CONFEDERATION OF 1781, art. II (emphasis added).

incidental or implied powers for executing the express powers.<sup>18</sup> As William Blackstone put it, “A subject’s grant shall be construed to include many things, besides what are expressed, if necessary for the operation of the grant.”<sup>19</sup>

To determine the scope of an agent’s implied powers, the law employed the doctrine of *principals and incidents*. An incident, to persons in the founding era, was “a thing necessarily depending upon, appertaining to, or following another thing that is more worthy or principal.”<sup>20</sup>

To be an incident,

an interest had to be less important or less valuable than its principal. The term “merely” was often applied to incidents, as was the word “only.” An incident was always subordinate to or dependent on the principal. The courts sometimes phrased the latter requirement by stating that an incident could not comprise a subject matter independent of its principal nor could it change the nature of the grant.<sup>21</sup>

For example, a power to manage lands might carry as an incident a power to make short-term leases but would not carry as an incident a power to sell a portion of the property.<sup>22</sup> The power to sell was independent of, or as “worthy” as, the power to manage.

Being dependent upon or inferior to a principal right or power was a precondition to being an incident but was not itself sufficient. As is illustrated by the above-quoted passages from Blackstone’s *Commentaries* and Giles Jacobs’s widely-used *A New Law-Dictionary*, an additional touchstone for determining the existence of incidents, or incidental powers, was *necessity*.<sup>23</sup>

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<sup>18</sup> See Natelson, *supra* note 15, at 60.

<sup>19</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES \*347.

<sup>20</sup> GILES JACOB, A NEW LAW-DICTIONARY (London, Strahan et al., 10th ed. 1782).

<sup>21</sup> Natelson, *supra* note 15, at 61-62 (footnotes omitted).

<sup>22</sup> See 3 CHARLES VINER, A GENERAL ABRIDGEMENT OF LAW AND EQUITY 538-40 (London, Charles Viner 1742) (noting that the bailiff of a manor “cannot *exchange the lord’s land*,” but that if he “*leased the land* . . . he has thereof authority”).

<sup>23</sup> It was commonplace in eighteenth-century legal sources to describe incidents as “necessarily” following or depending upon principals. For many additional examples, see Natelson, *supra* note 15, at 61 n.26.

The term “necessity,” in this context, had a conventional and well-understood meaning, encompassing three circumstances that could establish that a right or power was potentially (assuming appropriate inferiority to a principal) an incident. First, a right or power was necessary, and therefore potentially an incident, if it was indispensable to the use of the principal; for example, a power to remove corporate officers is incidental to a corporation because it is “as necessary for the well governing [of] a corporation as an incidental power to make by-laws.”<sup>24</sup> Second, a right or power was necessary if its absence would seriously impair the value of the principal; for example, fish (personal property) are incident to the pond containing them (real property) because “they are so annexed to and so necessary to the well-being of the [real-property] inheritance, that they shall accompany the land wherever it vests.”<sup>25</sup> Third, a right or power was necessary if it customarily accompanied the principal; for example, a factor (a person selling goods as an agent for someone else) could have the incidental power to extend credit to the customer if offering credit was customarily a power held by factors for the particular type of goods.<sup>26</sup> The doctrine of necessity made good sense, as these three circumstances reasonably approximated the situations in which parties would likely have intended the incidental right or power to accompany the principal grant. An agency instrument, against the backdrop of the law governing incidental powers, could limit the agent’s powers to those expressly granted (thereby precluding exercise of incidental powers), could confer incidental powers that confirmed or duplicated what the law would have implied as incidental, or

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<sup>24</sup> *The King v. Richardson*, (1757) 96 Eng. Rep. 1115 (K.B.) 1127; 2 Keny. 85, 119

<sup>25</sup> 2 BLACKSTONE, *supra* note 19, at \*427-28.

<sup>26</sup> *See Anonymous*, (1701) 88 Eng. Rep. 1486 (K.B.); 12 Mod. 514-15 (“Every factor of common right is to sell for ready money. But if he be a factor in a sort of dealing or trade where the usage is for factors to sell on trust, there, if he sell to a person of good credit at that time, and he afterwards becomes insolvent, the factor is discharged”).

could confer specific incidental powers that were either narrower or broader in scope than the common law baseline of incidents.<sup>27</sup>

By the eighteenth century, there was a wide array of adjectives available to drafters of agency instruments to describe an agent's incidental power. "Some documents relied only on a single standard, such as 'necessary,' 'needful,' 'proper,' and 'fit.' Others employed 'necessary and proper,' 'necessary or proper,' 'needful and necessary,' 'necessary or useful,' 'necessary and convenient,' 'necessary and expedient'—and so on."<sup>28</sup> Obviously, of most interest here are grants of "necessary and proper" powers to agents—which is grammatically the *most* restrictive formula readily available to a drafter in the late eighteenth century because it conjoins ("and") the separate requirements of necessity and propriety and does not expressly make the agent the judge of either necessity or propriety (by, for instance, allowing the agent to act in such ways as the agent "shall think fit" or "shall judge it necessary and proper"). In that context, *necessity* described the requisite attachment of the incidental power to its principal end, while *propriety* described conformance with other fiduciary norms, such as the duty of impartiality, the duty of good faith, and the primary duty to stay within the scope of granted authority.<sup>29</sup>

It is true that both necessity and propriety, in these senses, would generally be implied as part of the agency relationship even in the absence of such clauses. But, as Lord Coke explained in the sixteenth century, including such language defining the agent's incidental powers would "declare and express to laymen . . . what the law requires in such cases."<sup>30</sup> As Chief Justice Marshall affirmed, "the insertion of the words *necessary and proper* in the last part of the 8th

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<sup>27</sup> See Natelson, *supra* note 15, at 72-78 (describing five broad categories of power-granting clauses, some of which expressly permitted agents to subjectively determine if the stated conditions had been satisfied).

<sup>28</sup> *Id.* at 70.

<sup>29</sup> See Natelson, *supra* note 15, at 79-80.

<sup>30</sup> *Boroughe's Case*, (1596) 76 Eng. Rep. 1043 (K.B.) 1044-45; 4 Co. Rep. 72 b, 73 b (reporter's commentary).

section of the 1st article, did not enlarge powers previously given but were inserted only through abundant caution.”<sup>31</sup>

This common law background of the law of agency informed—and indeed drove—the drafting and ratification of the Necessary and Proper Clause. The clause was drafted by a five-person Committee of Detail; four members (Oliver Ellsworth, Edmund Randolph, John Rutledge, and James Wilson) were private-law lawyers with extensive practices and the fifth (Nathaniel Gorham) was a businessman and former president of Congress whose experience included serving as a business agent.<sup>32</sup> An early draft from the Committee of Detail, in Randolph’s handwriting, included a supremacy clause that expressly invoked the doctrine of principals and incidents as a tool of judicial interpretation.<sup>33</sup> The provision was crossed out and replaced by one, in Rutledge’s handwriting, that contained a vicinage and jury trial provision and also the grant of “a right to make all Laws necessary to carry the foregoing Powers into Execution.”<sup>34</sup> This was the obvious precursor to the Necessary and Proper Clause, and—as written—it was a familiar agency law provision codifying the incidental powers doctrine. The Committee later added the also-familiar words “and proper,” and the final result was the Necessary and Proper

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<sup>31</sup> John Marshall, *A Friend of the Constitution* No. 3, ALEXANDRIA GAZETTE, July 2, 1819, reprinted in JOHN MARSHALL’S DEFENSE OF *MCCULLOCH V. MARYLAND* 167, 176 (Gerald Gunther ed., 1969) [hereinafter MARSHALL’S DEFENSE]. This newspaper essay by Marshall quoted and agreed with a point made by another writer with whom Marshall disagreed on other grounds.

<sup>32</sup> Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, in ORIGINS, *supra* note 9, at 84, 85-86. For Gorham’s service as an agent, *see, e.g.*, “Resolve Empowering Nathaniel Gorham, Esq., Agent, To Lease Dr. Sylvester Gardiner’s Estate By Private Contract For Short Terms Only,” in 21 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 17 (1867) (ch. 25; enacted June 2, 1779) (also noting the state’s previous appointment of Gorham as an agent in the same matter). In 1779, as today, the title “Esquire” did not necessarily mean that the person was a lawyer.

<sup>33</sup> *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 144 (Max Farrand, ed., rev. ed. 1937) (“All laws of a particular state, repugnant hereto, shall be void, and in the decision thereon . . . all incidents without which the general principles [sic] cannot be satisfied shall be considered, as involved in the general principle.”).

<sup>34</sup> *Id.*

Clause, which was approved by both the Committee and the Convention without significant controversy.<sup>35</sup>

With this background, it is easy to see how a Committee filled with agency lawyers, and a Convention filled with lawyers and citizens who dealt regularly with agency law,<sup>36</sup> would draft and ratify the Necessary and Proper Clause with little fanfare. The provision would have been recognizable to anyone familiar with agency law as a clause incorporating the principle of incidental powers, subject to the full range of fiduciary duties with respect to those powers. Importantly, there is nothing in the language, origin, or purpose of the Necessary and Proper Clause suggesting that its embodiment of the incidental powers principle was intended to be *broad*er than the common law baseline of incidents. Quite to the contrary, the choice of the relatively restrictive “necessary and proper” language indicates that the common law represents the upper rather than the lower boundary of the range of incidental powers conferred by the clause.

This analysis explains, and justifies, the Federalists’ repeated claims that the Necessary and Proper Clause added no new powers to the federal government but was simply “declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government.”<sup>37</sup> In other words, the Necessary and Proper Clause is a rule of construction indicating that the federal government’s implied powers are limited to a relatively strict common law baseline, including the requirement that any powers implied for executing enumerated powers must be incidental. That latter requirement, in particular, is

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<sup>35</sup> See Natelson, *supra* note 32, at 89-93. A modest amendment to make explicit that the clause included the power to create offices was rejected as unnecessary. *See id.* at 91-92.

<sup>36</sup> It was also a country whose people tended to view government through a fiduciary lens; the people were the principal, and the government was their agent. The Convention, the ratification debates, and the political theory of the time were all infused with fiduciary language and metaphors to describe governmental powers and responsibilities. *See* Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004); Natelson, *supra* note 15, at 52-57.

<sup>37</sup> THE FEDERALIST NO. 33, at 170 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

indispensable to an understanding of the Supreme Court's most important decision construing the Necessary and Proper Clause.

*B. Agency Law Applications: McCulloch v. Maryland and the Doctrine of Principals and Incidents*

Professor Koppelman evidently believes that the constitutionality of the individual mandate begins and ends with *McCulloch v. Maryland*.<sup>38</sup> He is absolutely right about that. He simply has the wrong beginning and ending.<sup>39</sup>

Professor Koppelman gets the beginning wrong because he starts his analysis in the middle of the *McCulloch* opinion instead of where John Marshall began. Chief Justice Marshall's famous discussion in *McCulloch* of the causal connection required by the word "necessary" was *preceded* by a seven-page analysis of the constitutionality of a federal corporation under the Necessary and Proper Clause.<sup>40</sup> Those seven pages dealt with an issue that Marshall recognized had to be addressed *before* he decided whether a corporation was a causally "necessary" (or

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<sup>38</sup> 17 U.S. (4 Wheat.) 316 (1819); see Koppelman, *supra* note 1, at 4-5, 8.

<sup>39</sup> He is also wrong about the origins of the *McCulloch* case. He writes that Maryland's tax was intended to drive the bank out of the state. See *id.* at 4. This is incorrect. Taxes in Kentucky and Ohio aimed to eliminate Bank of the United States branches, but Maryland's tax was recognized by all, including the Bank of the United States, as a revenue measure fairly apportioned to the size of the bank's profits. See RICHARD E. ELLIS, *AGGRESSIVE NATIONALISM: MCCULLOCH V. MARYLAND AND THE FOUNDATION OF FEDERAL AUTHORITY IN THE YOUNG REPUBLIC* 68 (2007).

Koppelman's misunderstanding of the Maryland tax is a common one. He does, however, make another historical mistake which seems original: "modern medicine comes with a new kind of moral horror: the patient with a treatable disease who cannot afford to pay for the treatment." Koppelman, *supra* note 1, at 14. Actually, the problem of people with treatable illnesses who cannot afford medical treatment is nothing new. That is why the first hospital in the thirteen colonies, Philadelphia's Pennsylvania Hospital, was founded in 1751 by Dr. Thomas Bond and Benjamin Franklin, providing free medical care to persons who had curable diseases but could not afford to pay for treatment. See WILLIAM H. WILLIAMS, *AMERICA'S FIRST HOSPITAL: THE PENNSYLVANIA HOSPITAL, 1751-1841*, at 3-16, 148-49 (1976). The Founders were aware of poor people. During the ratification debates, both sides agreed that the poor would remain a state responsibility. See Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469, 477, 486 (2003).

<sup>40</sup> See 17 U.S. at 413-21.

otherwise “proper”) means for implementing federal powers. The threshold question was whether the power to incorporate was incidental or principal.

In *McCulloch*, the Court held that incorporation of a bank was a “necessary and proper” means for executing the principal powers to tax, borrow, regulate commerce, and maintain a military.<sup>41</sup> The Court was careful to explain, following an argument laid out by William Pinkney on behalf of the Second Bank of the United States,<sup>42</sup> that incorporation was “not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers.”<sup>43</sup> Instead, incorporation “must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means.”<sup>44</sup> Accordingly, “[n]o sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.”<sup>45</sup> Chief Justice Marshall straightforwardly applied basic agency principles: if the power to incorporate could not be an incident, then it could not be implied under the Necessary and Proper Clause. But because corporations are always means to ends rather than ends in themselves, the power to incorporate does not have the high dignity or superior status of the powers enumerated in Article I, Section 8; therefore, incorporation can be an incident. If there were any doubt about the criteria for incidence employed in *McCulloch*,

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<sup>41</sup> *Id.* at 369-72.

<sup>42</sup> *See id.* at 386 (suggesting that the power to establish a corporation is “assumed as an incident to the principal power” of territorial governance); *id.* at 388 (arguing that the “power of incorporation is incidental”). Pinkney also provided Chief Justice Marshall with the “mail robber[]” example of which Professor Koppelman is so fond. *See id.* at 385. Actually, it is not clear that the Necessary and Proper Clause had to be invoked for the federal punishment of mail robbery. Article I grants Congress the power “[t]o establish Post Offices and post Roads,” U.S. CONST. art. I, § 8, cl. 7, and—under the legal understandings of the Founding era—the power to “establish” a post office seems directly to have included the power to define and punish crimes against the post office. *See A COLLECTION OF THE STATUTES NOW IN FORCE RELATING TO THE POST OFFICE* 5, 11-13, 46-55, 69-75 (London, Mark Baskett 1767) (including a 1711 Great Britain statute titled, “An Act for establishing a General Post Office,” which defines offenses against the post office and punishments therefor).

<sup>43</sup> 17 U.S. at 411.

<sup>44</sup> *Id.* at 421.

<sup>45</sup> *Id.*

Marshall himself resolved it later the same year, when explaining *McCulloch* to the general public. He specifically affirmed, as a test of incidence, the requirement that an incident be less “worthy” than the enumerated powers it supported.<sup>46</sup>

The fact that incorporation was lesser to the commerce or borrowing power was, as Chief Justice Marshall recognized, a *threshold* requirement before inquiry could proceed on questions of necessity and propriety. If the power to incorporate were as dignified as the principal powers, it would not matter how helpful or customary for executing those powers the bank might be. By the same token, it was not sufficient to uphold the constitutionality of the Bank simply to demonstrate that the power to incorporate was of this lesser dignity. As Chief Justice Marshall wrote, “It can never be pretended that those vast [enumerated] powers draw after them others of inferior importance, merely because they are inferior.”<sup>47</sup> Rather, incorporation of a bank also had to be “necessary and proper” for executing federal power.

None of this is to say that *McCulloch* was not a “nationalizing” decision that was perceived to, and did in fact, offer a relatively expansive reading of national powers. In particular, its holding that state taxation of the national bank was preempted even in the absence of a preemptive congressional statute was a major expansion of the Supremacy Clause.<sup>48</sup> Our point is simply that *McCulloch*’s treatment of the Necessary and Proper Clause understood the Clause to incorporate the doctrine of principals and incidents and recognized that the causal efficacy of proposed means was the second rather than the first inquiry called for by the clause. The first inquiry is whether the proposed means can even be an incident.

### *C. Agency Law Conclusions: The Individual Mandate Is Not an Incident*

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<sup>46</sup> See Marshall, *supra* note 31, at 171.

<sup>47</sup> 17 U.S. at 407-08.

<sup>48</sup> See U.S. CONST. art. VI, cl. 2.

The Necessary and Proper Clause grants Congress incidental powers for executing the principal powers granted elsewhere in the Constitution. As *McCulloch* illustrates, for a power to fall under the Necessary and Proper Clause, it must truly be incidental. However, the power to compel the purchase of a product from another private party is not a “less worthy” or less substantial power than the power to regulate commerce—just as the power to sell real estate is not “less worthy” or less substantial than the power to manage the property. The power to compel commerce will not follow, as a mere incident, the principal power to regulate commerce. Accordingly, it is unnecessary to analyze whether the individual mandate is an important or customary (“necessary”) and fiducially sound (“proper”) means for implementing federal powers (though we will address the latter point in a different context in the next Part<sup>49</sup>). Such analysis is only required when one is dealing with an incidental power.

The power to compel the purchase of a commercial product is fundamentally different than the power to create a corporation. It is an extraordinary power of independent significance, or “high[] dignity,”<sup>50</sup> that would be enumerated as a principal power if it were granted at all to the federal government. If the point is not obvious, one need only compare it to the one limited circumstance in which the Necessary and Proper Clause does, in fact, authorize Congress to force people to engage in “commercial” transactions<sup>51</sup>: exercises of the power of eminent domain.

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<sup>49</sup> See discussion *infra* Part II.

<sup>50</sup> 17 U.S. at 421.

<sup>51</sup> We place “commercial” in quotation marks because eminent domain involves a forced transfer between private persons and the government, not between or among private persons. Such a transaction—as with jury service or the military draft—is “commercial” only in a metaphorical sense. One other clause of the Constitution specifically authorizes Congress to compel “commercial” transactions in a limited setting: the Militia Clause gives Congress authority “[t]o provide for organizing, *arming*, and disciplining, the Militia.” U.S. CONST. art. I, § 8, cl. 16 (emphasis added). The Militia Act of May 8, 1792 accordingly required every member of the militia to “provide himself” with appropriate arms and ammunition. Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271. There is no “health insurance clause” comparable to the Arming Clause.

During the Founding era—and for nearly a century afterwards—there was substantial doubt whether the federal government had an independent power of eminent domain at all.<sup>52</sup> The Constitution does not contain an express eminent domain clause. Indeed, President James Monroe said in 1822 that “very few would concur in the opinion that such a power exists.”<sup>53</sup> The rationale for the position of Monroe and almost everyone else is easy to discern: the power to condemn property is a very substantial, significant power; it is certainly plausible that eminent domain power is too substantial and significant to be considered an incidental rather than principal power.<sup>54</sup>

The Supreme Court did not acknowledge a federal eminent domain power until 1876.<sup>55</sup> When the Court finally recognized a federal power of eminent domain, it initially justified the power in terms of the inherent rights of sovereignty, suggesting that the power did not need to be traced to any particular constitutional source.<sup>56</sup> That is inconsistent with first principles of the federal Constitution; *all* federal power must be traced to some enumerated grant. Accordingly, beginning in 1896, the Court made clear that the federal eminent domain power was located in

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<sup>52</sup> If the federal government had no such power but needed land, it would have to ask the relevant state to exercise the state’s unquestioned eminent domain power and then would acquire the land from the condemning state—which is precisely how the federal government acquired land for nearly a century. *See Kohl v. United States*, 91 U.S. 367, 372-73 (1876).

<sup>53</sup> James Monroe, *Views of the President of the United States on the Subject of Internal Improvements* (1822), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1787-1897, at 144, 156 (James D. Richardson ed., 1898).

<sup>54</sup> How would someone like Monroe explain the Takings Clause of the Fifth Amendment, which—by providing that private property shall not “be taken for public use, without just compensation,” U.S. CONST. amend. V—seems clearly to presuppose that the federal government can take property? There are two answers. First, if the federal government indirectly takes property through the use of state eminent domain processes, the Clause mandates compensation even if the state does not itself provide for it (which some states did not at the time of the founding). Second, the federal government’s general power over the District of Columbia and federal territories, *see id.* art. I, § 8, cl. 17; *id.* art. IV, § 3, cl. 2, unquestionably includes a power of eminent domain in those locations, and the Takings Clause mandates compensation for any such takings.

We are not saying that Monroe was necessarily right. *See Adam S. Grace, From the Lighthouses: How the First Federal Internal Improvement Projects Created Precedent that Broadened the Commerce Clause, Shrank the Takings Clause, and Affected Early Nineteenth Century Constitutional Debate*, 68 ALB. L. REV. 97, 141-43 (2004). We are saying only that he represented a prominent and serious position about the scope of federal power.

<sup>55</sup> *See Kohl*, 91 U.S. at 371-74.

<sup>56</sup> *See United States v. Jones*, 109 U.S. 513, 518 (1883); *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878).

the Necessary and Proper Clause, so that Congress can condemn land when it is necessary and proper for executing federal power.<sup>57</sup>

The 1876-1883 cases suggesting an inherent federal power of eminent domain were, however, correct in one limited respect that is vital to the individual mandate: eminent domain has always been a traditional aspect of sovereign power. Indeed, one might fairly say that, as “a right belonging to a sovereignty,”<sup>58</sup> eminent domain has been an *incident* of sovereign power by custom. That alone would not necessarily confer it on a government of limited and enumerated powers (since agency instruments, such as constitutions, can always exclude incidental powers altogether or limit them more strictly than the common-law baseline), but it does provide good reason to construe the Necessary and Proper Clause to include a power so closely and intimately tied to the very nature of sovereignty.

There is no such historical or conceptual warrant for “liberally” construing the Necessary and Proper Clause to include a *general* power to compel commercial transactions among private parties, such as the purchase of health insurance (or broccoli), as opposed to the limited, circumscribed, historically grounded power of eminent domain.<sup>59</sup> But what about a kind of “reverse eminent domain,” in which the government compels private persons to purchase products from the government itself? It is in fact quite commonplace for the government to force people to pay money to the government in exchange for some set of goods and services selected by the government. It is called *taxation*, and it is specifically enumerated as a *principal* power of

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<sup>57</sup> See *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 679 (1896).

<sup>58</sup> *Kohl*, 91 U.S. at 373-74.

<sup>59</sup> Cf. John Marshall, *A Friend of the Union No. 2*, *UNION* (Phila.), Apr. 28, 1819, reprinted in *MARSHALL’S DEFENSE*, *supra* note 31, at 92 (“[T]he Supreme Court has not said that this grant [the Necessary and Proper Clause] ought to be construed in a ‘liberal sense’ although it has certainly denied that it ought to be construed in that ‘restricted sense’ for which Amphictyon contends. . . . There is a fair construction which gives to language the sense in which it is used, and interprets an instrument according to its true intention. It is this medium, this fair construction that the Supreme Court has taken for its guide.”).

the federal government.<sup>60</sup> Indeed, the specification of such a power as a principal power counsels very strongly against inferring any other power to compel transactions as an incident under the Necessary and Proper Clause.

Put simply, because there was an open question for a century whether the federal government had a power of eminent domain, and because the power to, in a sense, force transactions through taxation is specifically enumerated as a principal power, there cannot plausibly be an open question whether the federal government has a general incidental power to force purchases of commercial products by one private citizen from another. Eminent domain represents the outer reaches of the power to coerce transactions under the Necessary and Proper Clause—and the Clause reaches that far only because of the unique role of eminent domain as a customary incident of sovereignty.

More recent cases no longer use the language of principals and incidents to describe analysis under the Necessary and Proper Clause, but their holdings are broadly consistent with that framework. For example, in the line of cases permitting Congress to use the Necessary and Proper Clause to regulate intrastate conduct as part of a comprehensive scheme of regulating interstate commerce,<sup>61</sup> the “necessary and proper” power in those cases—the power to regulate production of items for which there is a commercial market—is not qualitatively different or substantively more significant than the underlying power to regulate commerce. To be sure, one could fairly argue that those decisions misapplied the original meaning of the Necessary and Proper Clause,<sup>62</sup> but those arguments would involve issues not raised here. If there was a

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<sup>60</sup> See U.S. CONST. art. I, § 8, cl. 1 (granting Congress power “to lay and collect Taxes”). The taxing power is also hemmed in by various procedural and substantive limitations that we do not address here.

<sup>61</sup> See, e.g., *Gonzalez v. Raich*, 545 U.S. 1 (2005); *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>62</sup> A quick glance at how agency lawyers in the late eighteenth century would have understood the term “necessary,” see *supra* text accompanying notes 23-30, illustrates how modern law has sometimes strayed from that understanding. The modern misunderstanding is sometimes wrongly traced to *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), because that decision stated that subsidiary means may be upheld under the Necessary and

problem with those decisions, it was *not* that the exercised powers could not, in their very nature, be incidents. That is precisely the problem with the individual mandate.

The Court's most recent case on the Necessary and Proper Clause, *United States v. Comstock*,<sup>63</sup> points to five "considerations" as justification for its decision: "(1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment . . . , (4) the statute's accommodation of state interests, and (5) the statute's narrow scope."<sup>64</sup> In other words: (1) What does the meaning of the words of the Clause indicate? (2) Is the statute a long-understood traditional incident of an enumerated power? (3) Is the statute a reasoned exercise of public fiduciary authority? (4) Does the statute adhere to the state-federal balance created by Article I's system of enumerated, limited powers? (5) Is the statute of the magnitude of an incidental power, or of a greater power? Properly framed,<sup>65</sup> all of those factors point in the same direction as does this Essay.<sup>66</sup>

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Proper Clause if they are "convenient," *id.* at 413, or "appropriate," *id.* at 421, for executing express powers. However, both adjectives had distinctly narrower meanings when Marshall wrote than they have today. "Convenient" meant only "Fit; suitable; proper; well-adapted," SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (multiple editions, unpaginated); *see also* THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, Charles Dilly, 2d ed. 1789) (defining "convenient" as "[f]it, suitable, proper"). As Chief Justice Marshall himself noted, *see* Marshall, *supra* note 59, at 101, *reprinted in* MARSHALL'S DEFENSE, *supra* note 31, "appropriate" signified "'peculiar,' 'consigned to some particular use or person'—'belonging peculiarly.'" *See also* JOHNSON, *supra* (defining "peculiar" as "appropriate; belonging to anyone with exclusion of others" and "[n]ot common to other things" and "[p]articular, single"); *cf.* SHERIDAN, *supra* (defining "appropriate" as "[p]eculiar, consigned to some particular").

<sup>63</sup> 130 S. Ct. 1949 (2010).

<sup>64</sup> *Id.* at 1965.

<sup>65</sup> We are not claiming that Justice Breyer had in mind our precise framing of these five considerations. We frankly have no idea what Justice Breyer had in mind when he wrote the *Comstock* opinion. We are claiming only that our originalist analysis of the individual mandate is *consistent* with modern case law. Thus, reaching the correct decision regarding the Necessary and Proper Clause and the individual mandate does not require overruling any decision. *Cf.* *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) ("Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms.").

<sup>66</sup> The fact that for the first time in history, a majority (twenty seven) of state attorneys general have gone into court to have the mandate declared unconstitutional, *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F.Supp.2d 1256 (N.D. Fla. 2011), *aff'd in part, rev'd in part*, 648 F.3d 1245 (11<sup>th</sup> Cir. 2011) demonstrates that the mandate hugely fails *Comstock*'s fourth factor. The existence of the anti-mandate state majority also suggests that Koppelman is wrong in his assertion that the mandate must be upheld even under his theory that the Congress can legislate on anything where the states are "incompetent." Koppelman, *supra* note 1, at 12. The states certainly do not consider themselves incompetent to legislate on health insurance; instead, these twenty-seven states at least consider the Massachusetts model, which the PPACA imposed on them, to be a bad idea.

## II. Administrative Law and the Necessary and Proper Clause

### *A. Administrative Law Fundamentals: The Principle of Reasonableness*

The private-law background that informs the Necessary and Proper Clause elegantly dovetails with a distinct but related public-law background that reinforces the fiduciary understanding of the clause. The fiduciary norms embodied in the clause foreclose the individual mandate, even if one somehow can classify the mandate as an exercise of an incidental power.

The Constitution is a delegation of powers to various governmental actors. By the time of the framing, there was a substantial body of English administrative law governing delegations of power. One of the most basic principles underlying this law was that grants of discretionary authority had to be exercised reasonably, even when a reasonableness requirement was not spelled out in the grant.

This principle regarding the exercise of delegated power is typically traced to the 1598 decision in *Rooke's Case*.<sup>67</sup> A statute gave sewer commissioners the power to assess landowners for the costs of repairing water-control projects as the commissioners “shall deem most convenient to be ordained.”<sup>68</sup> The commissioner used this statute to assess the full costs of a repair on a single landowner, even though other landowners were also benefited by the project. The court ruled for the assessed landowner because,

notwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law. For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between

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<sup>67</sup> (1598) 77 Eng. Rep. 209 (C.P.); 5 Co. Rep. 99 b (Eng. 8 Wales). On *Rooke's Case* as the foundational authority for the interpretation of delegated powers, see WILLIAM WADE & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW 293-94 (10th ed. 2009).

<sup>68</sup> 1531, 23 Hen. 8, c. V, § 1 (Eng.).

equity and colourable glosses and pretences, and not to do according to their wills and private affections.<sup>69</sup>

Discretion, even when textually unlimited, had to be exercised reasonably and in a disinterested and impartial fashion.

Other decisions applied a similar principle regarding exercise of even very broadly worded grants of discretion. For example, in *Keighley's Case*,<sup>70</sup> a statute authorizing a sewer commissioner to make rules “after your own wisdoms and discretions” was held to require the agent to exercise discretion “according to law and justice.”<sup>71</sup> Other cases extended the principle beyond sewer commissions to include other delegations of power.<sup>72</sup> This constraint on the exercise of delegated power, which in England has come to be called the *principle of reasonableness*, was firmly established as a general norm by the end of the seventeenth century.<sup>73</sup>

The principle of reasonableness in the exercise of delegated power was reiterated on the eve of the Framing in 1773 in *Leader v. Moxon*.<sup>74</sup> Paving commissioners, under a statute giving them power to pave or repair streets “in such manner as the commissioners shall think fit,” ordered a road repair that effectively buried the doors and windows of plaintiff’s house. In awarding damages to the homeowner, the court wrote that the agents “had grossly exceeded their powers, which must have a reasonable construction. Their discretion is not arbitrary, but must be limited by reason and law.”<sup>75</sup> The court explained:

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<sup>69</sup> 77 Eng. Rep. at 210; 5 Co. Rep. at 99 b.

<sup>70</sup> (1609) 77 Eng. Rep. 1136, 10 Co. Rep. 139 a.

<sup>71</sup> 77 Eng. Rep. at 1138; 10 Co. Rep. at 140 a.

<sup>72</sup> See *Estwick v. City of London*, (1647) 82 Eng. Rep. 515 (K.B.) 516; Style 42, 43 (“[W]heresoever a commissioner or other person has power given to do a thing at his discretion, it is to be understood of sound discretion, and according to law.” (emphasis added)).

<sup>73</sup> See STANLEY DE SMITH ET AL., JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 297-98 (5th ed. 1995).

<sup>74</sup> (1781) 96 Eng. Rep. 546; 2 W. Bl. 924.

<sup>75</sup> 96 Eng. Rep. at 546; 2 W. Bl. at 925-26.

[T]he Act could never intend that any of the householders should pay a rate of 1s. 6d. in the pound in order to have their houses buried under ground, and their windows and doors obstructed. . . . [H]ad Parliament intended to demolish or render useless some houses for the benefit or ornament of the rest, it would have given express powers for the purpose, and given an equivalent for the loss that individuals might have sustained thereby.<sup>76</sup>

The constraints on government discretion were simply part of what it meant to exercise delegated public power. Accordingly, when the Federal Constitution vested “executive Power” in the President<sup>77</sup> and “judicial Power” in the federal courts,<sup>78</sup> those grants of power carried with them the principle of reasonableness as an implication.<sup>79</sup>

The Necessary and Proper Clause is, inter alia, a textual vehicle for making clear that the principle of reasonableness also applies to Congress’s powers. While it is possible that such a conclusion would follow even in the absence of clause,<sup>80</sup> the text of the Necessary and Proper Clause removes all doubt. It was not open to a drafter in the late eighteenth century simply to say that “the principle of reasonableness shall apply to Congress,” because the label “the principle of reasonableness” did not then exist; the use of the term “reasonableness” did not become prominent until relatively recently.<sup>81</sup> Nor was the doctrine generally described by any other readily identifiable label. The contours of the doctrine, however, were very well described by the

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<sup>76</sup> 96 Eng. Rep. at 546-47; 2 W. Bl. at 926.

<sup>77</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>78</sup> *Id.* art. III, § 1.

<sup>79</sup> For a detailed discussion of this point, see Gary Lawson & Guy I. Seidman, *Necessity, Propriety, and Reasonableness*, in ORIGINS, *supra* note 9, at 120, 129-33.

<sup>80</sup> Because the principle of reasonableness in England was an assumption (though possibly a fictitious one) about the intentions of Parliament in granting power to executive and judicial agents, the principle did not apply to Parliament. One could account for Parliament’s exemption from the principle of reasonableness in either of two conceptually different ways: (1) because Parliament did not exercise delegated power, or (2) because Parliament exercised *legislative* power and the principle of reasonableness applied only to executive and judicial power. If the reason for not applying the principle to Parliament was that Parliament did not exercise delegated power, then the principle of reasonableness would apply of its own force to Congress, because Congress under the Constitution, unlike Parliament, does in fact exercise only delegated power. But if the reason for non-application was that the principle did not reach legislative power as such, then the principle of reasonableness might only apply to Congress if there was some specific textual indication that it did so.

<sup>81</sup> See WADE & FORSYTH, *supra* note 67, at 295.

phrase “necessary and proper for carrying into Execution.”<sup>82</sup> The case law through the eighteenth century applying what later came to be called the principle of reasonableness established that discretion in governmental actors must be exercised impartially (*Rooke’s Case*; *Keighley’s Case*), with attention to causal efficacy (*Keighley’s Case*), in a measured and proportionate fashion (*Leader v. Moxon*), and with regard for the rights of affected subjects (*Leader v. Moxon*).<sup>83</sup> Those requirements for governmental action are well encapsulated by a provision stating that laws for executing powers must be “necessary and proper.” In particular, the word “necessary” is a good way to describe fiduciary norms of efficacy and proportionality, while the word “proper” is a good way to describe fiduciary norms of impartiality, regard for rights, and adherence to jurisdictional limits.<sup>84</sup>

### *B. Administrative Law Applications: Mandates and Monopolies*

One of the most basic fiduciary norms is the obligation to treat all principals with presumptive equality when there is more than one principal.<sup>85</sup> In pre-founding times, the principle had full application to public as well as private fiduciaries. In *Keighley’s Case*, for instance, the sewer commissioners could not impose the full costs of projects or repairs on only some of the affected landowners, even when the governing statutes seemed to provide that discretion. Nor under *Leader v. Moxon* could the paving commissioners repair a road by burying

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<sup>82</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>83</sup> See Lawson & Seidman, *supra* note 79, at 137-41 (elaborating the substantive requirements of reasonableness contained in these cases).

<sup>84</sup> See *id.* at 142-43.

<sup>85</sup> See Natelson, *supra* note 14, at 59-60; e.g., *id.* at 59 (“In the absence of a specific rule to the contrary . . . the common law courts favored impartiality among members of the same class. The bias of the High Court of Chancery—the source of most fiduciary law—toward impartiality was even stronger. In the absence of institutions to the contrary, the chancellor required fiduciaries who represented more than one beneficiary to treat them all fairly.”).

one person's house. Discretionary authority had to be exercised with an eye towards the interests of *all* affected persons.

The individual mandate is precisely what the principle of reasonableness was designed to prevent. The purpose of the individual mandate is to force people who choose not to buy a particular type of insurance from government-favored oligopolists to buy the unwanted product in order to subsidize other people.<sup>86</sup> It is analogous to, for example, compelling physicians,

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<sup>86</sup> Notwithstanding the theatrical invective regarding large health insurance companies, the PPACA's individual mandate was supported by those companies, who understandably relished the prospect of millions of additional customers forced to buy expensive versions of their products. *See, e.g.*, Brief for America's Health Insurance Plans as Amicus Curiae in Support of Neither Party, *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010) (defending the individual mandate); *Insurance Industry Weighs In on Debate About Health Insurance Mandate*, INSIDE CMS (Nov. 27, 2008), 2008 WLNR 22809243 (noting that America's Health Insurance Plans and Blue Cross Blue Shield Association endorsed federal health care legislation to provide universal coverage, provided that the government mandated that all Americans acquire health insurance); Janet Adamy, *Despite Making Concessions, Insurers Face Renewed Attacks*, WALL ST. J., July 30, 2009, <http://online.wsj.com/article/SB124891353497192109.html> ("Health insurers are facing renewed fire from President Barack Obama and Democrats, but are still mostly on board with the president's effort to overhaul the U.S. health-care system. . . . [I]nsurers still have much to gain from an overhaul because they could get millions of new customers."); John Stossel, *Big Business Goes Big for Health Care Reform: Why Drug Companies and Insurance Providers Are Backing ObamaCare*, REASON.COM, Aug. 13, 2009, <http://reason.com/archives/2009/08/13/big-business-goes-big-for-heal>; *cf.* Sherry A. Glied, *Universal Coverage One Head at a Time: The Risks and Benefits of Individual Health Insurance Mandates*, 358 NEW ENG. J. MED. 1540, 1542 (2008) ("The relative invisibility of the mandate 'tax' may make it easier for special interests to achieve their goals. The mandate, then, would become a means through which special interests use government to force transfers of funds from consumers to the health care sector.").

Koppelman characterizes all persons who do not wish to spend their own money on unwanted expensive products from the Big Insurance oligopoly as "free riders." Koppelman, *supra* note 1, at 6. Not so. Many persons who reject the Big Insurance mandate pay for their own medical expenses out of pocket. *Cf.* Jonathan Gruber & David Rodriguez, *How Much Uncompensated Care Do Doctors Provide?* 26 J. HEALTH ECON. 1151, 1164 tbl.5 (2007) (reporting that 46% to 64% of uninsured patients who visited doctors in dataset paid *more* than insured patients paid for similar services). Others choose alternative therapies not included in the medical-industrial complex services covered by the oligopolists. *See* Curt Levey & Jim Turner, *Reform Threatens Alternative Medicine*, REAL CLEAR POLITICS, Mar. 17, 2010, [http://www.realclearpolitics.com/articles/2010/03/17/reform\\_threatens\\_alternative\\_medicine\\_104797.html](http://www.realclearpolitics.com/articles/2010/03/17/reform_threatens_alternative_medicine_104797.html). Still others decline medical treatment for religious reasons, but they do not belong to the religious cooperative health associations to which the PPACA grants an exemption. *See* Brief of Appellants at 10-11, *Liberty Univ. v. Geithner*, No. 10-2347 (4th Cir. filed Jan. 14, 2011), *available at* [http://www.liberty.edu/media/9980/attachments/brief\\_healthcare\\_%20opening\\_appeal\\_addendum\\_011411.pdf](http://www.liberty.edu/media/9980/attachments/brief_healthcare_%20opening_appeal_addendum_011411.pdf).

Koppelman also asserts that "unless the free riders are brought into the system, there is no way to insure everyone else." Koppelman, *supra* note 1, at 6. To the contrary, federal programs such as Medicare and Medicaid provide medical treatment to all eligible persons who want it, without mandating participation by eligible people who do not. As long as *Helvering v. Davis*, 301 U.S. 619 (1937), remains good law, those programs can be expanded to cover anyone else Congress wants to cover.

Despite a common myth, non-indigent "free riders" cannot avail themselves to free emergency room treatment. Federal law does require immediate emergency room treatment of uninsured people with actual emergencies, Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd (2006), but if such persons have the means to pay, hospitals can and do bill them for services. Indeed, such persons end up paying

under penalty of fine, to devote fifteen hours per week to providing health care to favored individuals. It is also analogous to relieving distress in the automobile industry by compelling citizens to buy cars. Congress cannot use the Necessary and Proper Clause to force one class of citizens to buy a product to help others.

Although the individual mandate is unprecedented, the Founders were familiar with a related, although less intrusive, commercial regulation: the government-chartered monopoly. When the government chartered a monopoly, it limited the market to one provider—although unlike under the individual mandate, citizens remained free to choose not to purchase goods or services from the monopolist. Grants of monopolies were unpopular, since by erecting a system of commercial favoritism they violated the government’s fiduciary obligation to treat citizens impartially, and they were held to violate common law.<sup>87</sup>

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more than the discounted prices negotiated by insurance companies, so the premium emergency room prices paid by most uninsured patients more than cover the cost of treating uninsured people who cannot pay. *See* Gruber & Rodriguez, *supra*, at 1159 (“45-59% of physicians . . . collect more, on average, from their uninsured patients than from their insured patients. Indeed, 12-14% of physicians found their uninsured patients more than twice as profitable as their insured patients . . .”). The persons who are unable to pay remain free riders with or without the PPACA; someone else pays for their medical treatment.

The PPACA provides its free (or nearly free) rides by forcing other people to buy oligopoly health insurance at prices higher than would be charged in a competitive market in which people buy insurance based on their own preferences and personal conditions. *See An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act*, CONGRESSIONAL BUDGET OFFICE (Nov. 30, 2009), *available at* <http://www.cbo.gov/ftpdocs/107xx/doc10781/11-30-Premiums.pdf> (suggesting that PPACA will cause a rise of 10 to 13 percent in non-group health insurance premiums for persons who are not subsidized). It is often claimed that non-emergency visits to emergency rooms by the uninsured are a major problem driving up health care costs. For example, on June 11, 2009, President Obama stated that “the average family pays a thousand dollars in extra premiums to pay for people going to the emergency room who don't have health insurance.” Remarks at a Townhall Meeting and a Question-and-Answer Session in Green Bay, Wisconsin, DAILY COMP. PRES. DOC. (June 11, 2009), 2009 WLNR 12408951. If so, the PPACA is not the solution. The Massachusetts system on which the PPACA is based caused a decline of less than two percent in low-severity visits to emergency rooms by publicly subsidized or uninsured patients. Peter B. Smulowitz et al., *Emergency Department Utilization After the Implementation of Massachusetts Health Care Reform*, 58 ANNALS EMERGENCY MED. 225, 229 (2011), *available at* <http://download.journals.elsevierhealth.com/pdfs/journals/0196-0644/PIIS0196064411001338.pdf>.

<sup>87</sup> Case of Monopolies, (1603) 77 Eng. Rep. (Q.B.) 1260; 11 Co. Rep. 84 b. As Madison put it, “[w]ith regard to monopolies they are justly classified among the greatest nuisances in Government.” Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14 THE PAPERS OF THOMAS JEFFERSON 21 (Julian P. Boyd ed., 1958). Jefferson agreed. *See* Letter from Thomas Jefferson to James Madison (July 31, 1788), in 7 THE WRITINGS OF THOMAS JEFFERSON 98 (Albert Ellery Bergh ed., 1907). Several state ratifying conventions proposed that the Constitution be amended to prohibit the grant of a commercial monopoly. HERMAN V. AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY 255

During the ratification debates, there were many Anti-Federalists who warned that the new government would be able to create monopolies.<sup>88</sup> Not one Federalist claimed that Congress would have such a power, except for the textual, and obviously limited, examples of patents and copyrights. Instead, the Constitution’s advocates asserted that any law creating a monopoly would be invalid as “improper” under the Necessary and Proper Clause. As a Federalist writer calling himself the “Impartial Citizen” pointed out:

In this case, the laws which Congress can make . . . must not only be *necessary*, but *proper*—So that if those powers cannot be executed without the aid of a law[] granting commercial monopolies . . . such a law would be manifestly *not proper*, it would not be warranted by this clause, without absolutely departing from the usual acceptance of words.<sup>89</sup>

The conclusion is clear: if a commercial monopoly—which citizens may avoid by not purchasing the product monopolized—is constitutionally void as “improper,” then far more “improper” is a mandate for the benefit of political favorites, which none but other political favorites may avoid.<sup>90</sup>

## Conclusion

In sum, the individual mandate of the PPACA cannot be justified under the Necessary and Proper Clause. The original meaning of the Clause shows that it can, at most, be used to recognize an “incidental” power—that is, a power which is “less worthy” than the expressly

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(1897); 2 ELLIOT’S DEBATES, *supra* note 8, at 177; *see also* Brandon Grzandziel, *A New Argument for Fair Use Under the Digital Millennium Copyright Act*, 16 U. MIAMI BUS. L. REV. 171, 177-81 (2008) (discussing early American copyright law).

<sup>88</sup> *See, e.g.*, ELLIOT’S DEBATES, *supra* note 8, at 177 (proposing an amendment that “Congress erect no company with exclusive advantages of commerce”).

<sup>89</sup> *An Impartial Citizen V*, PETERSBURG VA. GAZETTE, Feb. 28, 1788, *reprinted in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 428, 431 (John P. Kaminski & Gaspare J. Saladino eds., 1988).

<sup>90</sup> This immediately raises the question how far this principle of public impartiality extends. Does the principle of reasonableness impose on Congress—and on the President and the federal courts as well—something resembling a general federal “equal protection” doctrine that extends far beyond the specific case of the individual mandate? Professor Lawson thinks that the answer is yes and is currently working on a project developing that answer.

granted, enumerated powers that it purportedly implements. The power to compel a private individual to engage in commerce with a private corporation is not lesser than the power to regulate voluntary commerce; it is a far greater power. Chief Justice Marshall's analysis in *McCulloch v. Maryland* confirms that the Necessary and Proper Clause includes only incidental powers; if the power is not incidental, then the constitutional inquiry ends there, and it does not matter whether the asserted power may be useful.

Further, the legal understanding of how "proper" was used at the time of ratification includes the principle of reasonableness as a limitation on all congressional actions. The paradigm example of an *unreasonable* action was the creation of a monopoly. *A fortiori*, coerced commerce with congressionally-favored oligopolists is constitutionally improper and void. Again, if the individual mandate is constitutional, it is *not* by virtue of the Necessary and Proper Clause.

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