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Baffled By Inactivity: the Individual Mandate and the Commerce Power

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I. INTRODUCTION

American constitutional law and American constitutional lawyers, like most institutions and most people, prefer to have situations fall into and be resolved by customary and familiar categories and classifications, lest confusion and uncertainty otherwise result. Unfortunately, both law and lawyers have been put into a state of vertigo by the recent litigation concerning the constitutionality of the Patient Protection and Affordable Care Act in which an unprecedented “Individual Responsibility Requirement” (commonly referred to as the individual mandate) requiring many Americans to purchase health insurance is being challenged by opponents putting forward a novel activity/inactivity distinction to argue that the mandate is beyond Congress’ commerce power. While some profess certainty regarding the constitutionality or unconstitutionality of the individual mandate, others (including, most importantly, some judges) have been baffled by

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2 26 U.S.C. § 5000A.
3 Due to the ubiquity of this name for the provision, it shall be so called hereafter in this Article.
4 Florida ex rel Bondi v. U.S. Dept of Health & Human Services, --- F.Supp. 2d ---, 2011WL 285683 at *29 (N.D. Fla. 2011) (“…the individual mandate seeks to regulate economic inactivity, which is the very opposite of economic activity. And because activity is required under the Commerce Clause, the individual mandate exceeds Congress’ commerce power, as it is understood, defined, and applied in the existing Supreme Court case law.”).
5 This article will limit itself to commerce power arguments against the individual mandate. These are the most important arguments in the challenge and the only ones that have, so far, succeeded in court.
6 See Mark A. Hall, Commerce Clause Challenges to Health Care Reform, 159 U. PA. L. REV. 1825-26 (2011) (“When Congress enacted the Patient Protection and Affordable Care Act (PPACA), Democratic lawmakers and most legal scholars had good reason to be confident of its constitutionality.”); see also Andrew Koppelman, Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform, 121 YALE L. J. ONLINE 1,4 (2011) (“Congress is entitled to decide that a government monopoly of health provision
the inactivity argument against it. In turn, proponents of the activity/inactivity distinction profess consternation at the bafflement of the distinction’s opponents. Now, contending parties and commentators in constitutional disputes will by definition disagree with the other side’s arguments, but rarely do they claim not to understand those arguments.

One aim of this article is to help dispel this confusion by going beyond the novelty of the law and arguments, and instead, connecting the issues in conflict here to customary and familiar classifications and categories in constitutional law and theory. Now, the most significant difference between the two sides in this dispute is that opponents of the mandate (i.e., proponents of the activity/inactivity distinction) are driven here by a desire to place structural and judicially enforceable limits on congressional power, while the mandate’s defenders are not. As a result, although they interpret the same Constitution, seek to uphold the much same precedent, and accept the same basic defining test for the commerce

would be inefficient and that insurance is best provided by the private sector. In that case, the only way to guarantee health insurance for everyone is to require the healthy to purchase private insurance. The remedy tightly fits this problem.”).

7 See Randy E. Barnett, Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional, 5 N.Y.U.J.L. & LIBERTY 581, 637 (2010) (“If, however, Congress is allowed to regulate any decision that has an economic effect, or that Congress deems essential to its regulatory ambitions, then the scheme of limited and enumerated powers would be at an end. Because it is both unnecessary under existing doctrine and also improper, the individual health insurance mandate is unconstitutional.”).

8 See, e.g., Orin Kerr, Fourth Circuit Judges Baffled by the Proposed Activity/Inactivity Distinction, THE VOLOKH CONSPIRACY (May 10, 2011, 10:45 PM), (describing the bafflement of both the judges and Professor Kerr, but not apparently of Professor Randy Barnett, the originator of the distinction).


10 Randy E. Barnett, supra note 7 at 600, (“By limiting the substantial effects doctrine to economic intrastate activity, the Supreme Court provided the modern legal ‘test’ or ‘criterion of constitutionality’ for whether a regulation of intrastate activity is what ‘may truly be said’ to be necessary under the Necessary and Proper Clause. By this doctrine Congress is held within its enumerated powers and denied the ‘right to do merely what it pleases.’”).

11 Mark A. Hall, supra note 6, at 1834 (“Commerce clearly includes both the purchase of products as well as their manufacture and sale. Because regulation includes mandating as well as prohibiting behavior related to products, it follows logically that ‘regulation commerce’ can include mandating a purchase.”).
power,\textsuperscript{12} they see things differently and, so, come out differently here and in other commerce power cases. The disagreement over the constitutionality of the individual mandate is a function of conflicting and competing visions of the scope of congressional power that the participants bring to the conflict.

This is not merely an exercise in clarification, though—however necessary that may be. Clarity here is in service of a reformulation of the constitutional challenge to the individual mandate in terms of theory, text, precedent and doctrine that both sides accept, the better to adjudicate among the more general views concerning the scope of congressional power that are the cause of the confusion and division here and thereby to resolve the mandate challenge.

The plan of this article is to first give a brief description of three general views of the scope and bases of congressional power—I call them states’ rights/libertarian, federalist, and progressive—which divide the participants in the debate and litigation over the individual mandate and cause the mutual bafflement earlier mentioned. These three approaches respectively see federal power as narrow, broad but limited, and essentially without structural limits. Then the article proceeds to consideration of some issues relating to the Commerce Clause and the Necessary and Proper Clause, which arise regarding the individual mandate in order to examine the ability of the three views of congressional power to resolve these issues consonant with generally accepted constitutional theory, text, precedent and doctrine. One by-product of this will be an argument for unified theory of the commerce power.

\textsuperscript{12} Arthur B. Mark, III, "Currents in Commerce Clause Scholarship Since Lopez: A Survey," 32 CAP. U. L. REV. 671, 675 (2002). ("Comparing analytical modes used after the New Deal, cases interpreting the scope of the Commerce Clause allow federal control over: (1) channels of interstate commerce; (2) things moving in interstate commerce; and (3) commercial activities substantially affecting interstate commerce.").
II. THREE VIEWS OF THE SCOPE OF CONGRESSIONAL POWER

How one judges the constitutionality of an exercise of congressional power is largely a function of how broadly one conceives the scope of that power. Since the ratification of the Constitution there have been three main views of the breadth of congressional legislative power.\(^{13}\) One view, which I call the states’ rights/libertarian view, defines congressional power narrowly. It sees Congress as permitted to exercise enumerated powers and that which is essential to carrying out those powers. A notable example of this view is Maryland’s argument in defense of state power in *McCulloch v. Maryland* that the Necessary and Proper Clause only permits Congress to do that which is absolutely necessary to carry into execution its enumerated powers.\(^{14}\) In the days of *McCulloch*, the narrow view of the scope of federal power was mainly taken up by states rights’ advocates. Today, however, one more frequently finds the narrow view presented by libertarians and classical liberals,\(^{15}\) who otherwise may have little in common with champions of states’ rights. What joins them here is distrust of and opposition to federal power.

At the other extreme, one finds the progressive view of congressional power. It sees congressional power as essentially without fixed structural limits. I call this view “progressive” because it first came to legal and political prominence with the rise of the Progressive movement a century ago in this country. The view was then voiced by political

\(^{13}\) In theory, of course, there are many more, but I limit myself to those that have had a large following and a major impact.

\(^{14}\) Maryland argued that Congress is limited to means “such as are indispensable, and without which the power would be nugatory.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819).

\(^{15}\) For a brief description of these two approaches and their philosophical affinities, see RICHARD A. EPSTEIN, HOW PROGRESSIVES REWRITING THE CONSTITUTION 14-19 (2006).
leaders such as Woodrow Wilson,\textsuperscript{16} who gave his general view of the Constitution and the
determination of its meaning in saying, “The Constitution cannot be regarded as a mere
legal document, to be read as a will or a contract would be. It must, of the necessity of the
case, be a vehicle of life.”\textsuperscript{17} A generation later, this view was restated with more specificity
by New Deal constitutional theorist Robert Stern, who, speaking of the commerce power
and the national economy, asked this rhetorical question,

If business in the United States has become a single integrated whole, if the states can
no longer effectively regulate those acts formerly regarded as purely local, if the welfare
of the nation depends on the treatment of national problems on a national scale, if
almost all business substantially affects business in other states, why should not
Congress possess whatever power is necessary to assume some social control of the
national economy?\textsuperscript{18}

The progressive and states’ rights/libertarian views of congressional power underlie
“two conceptions of the commerce power, plenary and categorically limited, [which] are in
fact old rivals.”\textsuperscript{19} These two views are commonly seen as exhausting the constitutional
options, so that we are left with a choice between a return of the “constitution in exile”\textsuperscript{20}
and a plenary congressional police power (to phrase the choice in terms of epithets the sides hurl
at each other\textsuperscript{21}). But there is a third, intermediate position here, which I call the federalist

\textsuperscript{16} Speaking of the federal government, Wilson writes that, “Its power is ‘to regulate commerce between
the States,’ and attempts now made during every session of Congress to carry the implications of that power
beyond the boundaries of reasonable and honest inference show that the only limits likely to be observed by
politicians are those set by the good sense and conservative temper of the country.” WOODROW WILSON,
CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES178-79 (1911).

\textsuperscript{17} Id. at 192.

\textsuperscript{18} Robert L. Stern, That Commerce Which Concerns More States Than One, 47 HARV. L. REV. 1335,
1365 (1934). There are few arguments made by present holders of the progressive view of congressional
power that cannot be found in Stern’s article.


\textsuperscript{20} I.e., the pre-1937 constitutional view of the scope of federal power favored, for example, by Richard
Epstein. See RICHARD EPSTEIN, supra note 15.

\textsuperscript{21} Justice Souter, for example, a few pages after setting out the opposition quoted, accuses the Morrison
majority of going back to the bad old pre-1937 days, saying, “[T]he enquiry into commercial purpose, first
intimated by the Lopez concurrence, is cousin to the intent-based analysis employed in Hammer, but rejected
position. This view sees congressional power as neither plenary nor categorically limited, but somewhere in between. This was the view set out by Alexander Hamilton in arguing for the establishment of the first national bank and the view that John Marshall set out in upholding the power of Congress to establish a national bank in McCulloch v. Maryland, where he broadly, but not limitlessly, described the scope of congressional power.

Justice Souter’s dichotomy does not recognize this intermediate federalist position. Neither did Marshall’s critics in 1819. Marshall responded to his critics by stating that there were three readings of the phrase “necessary and proper.” One is a restricted sense which his foes (Maryland and his 1819 critics) favored; this is the view that Justice Souter calls “categorically limited.” The second, the liberal sense, is the view his critics accused him of; this is the view that Justice Souter calls “plenary.” Neither of these was the view that Marshall himself held of the scope of congressional power, though. He instead held an intermediate view which he called the fair sense and which I call the federalist view. As was evident in 1819 and as is evident today, this federalist view of the scope of congressional cannot be clearly and fully explained in a few sentences. It has been and will continue to be open to misconstrual, deliberate and otherwise. The reader will be the judge of how clear and convincing I can make it in the remainder of this article. Clear in the sense of being

for Commerce clause purposes in Heart of Atlanta and Darby.” Morrison, 529 at 643 (Souter, J., dissenting) (citations omitted).


23 Most famously saying, “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” 17 U.S. (4Wheat.) 316, 421 (1819).

24 See supra note 19 and accompanying text.

25 Marshall was assailed in print in his home state of Virginia for his McCulloch opinion by several pseudonymous critics. One, who called himself Amphictyon, says “[a]lthough every one admits that the government of the Unites States is one of limited powers . . . yet so wide is the latitude given to the . . . word ‘necessary’ . . . that it will . . . really become a government of almost unlimited powers.” JOHN MARSHALL’S DEFENSE OF McCULLOCH V. MARYLAND 52, 64-65 (Gerald Gunther ed. 1969).

26 See id. at 91-105.
distinct from the two views of congressional power it sits between and convincing in the sense of its fit with the constitutional text and the important modern precedent, which here includes commerce power precedent from both the New Deal\textsuperscript{27} and New Federalism\textsuperscript{28} periods.\textsuperscript{29}

\section*{III. COMMERCE}

The meaning of ‘commerce” and of the Commerce Clause is a primary question in my inquiry because the answers to all subsequent question turn on the answer to this question. The meaning of “commerce” is key to understanding the Commerce Clause and the understanding of both is crucial for understanding the Necessary and Proper Clause (which together with the Commerce Clause make up the commerce power). The three part commerce power test, set out by Chief Justice Rehnquist in \textit{United States v. Lopez}\textsuperscript{30} and

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\item \textsuperscript{27} \textit{See generally} NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37-43 (1937) (holding that intrastate activities such as union-organizing and striking have a “close and substantial relation to interstate commerce”); United States v. Darby, 312 U.S. 100, 118 (1941) (stating that congressional power “extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.”).
\item \textsuperscript{28} \textit{See} United States v. Lopez, 514 U.S. 549 (1995) (holding that an act of Congress, which made it illegal to possess a gun within a school zone, is beyond the powers of Congress because it is not commercial activity); United States v. Morrison, 529 U.S. 598, 618 (2000) (holding a federal violence against women statute to be beyond the Commerce Clause powers of Congress because “the regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”).
\item \textsuperscript{29} Jack Balkin begins a recent article on the constitutional meaning of “commerce” by saying, “A good test for the plausibility of any theory of constitutional interpretation is how well it handles the doctrinal transformation of the New Deal period.” Jack Balkin, \textit{Commerce}, 109 MICH. L. REV. 1, 1 (2010). I agree with this statement as far as it goes, but would also assert that a theory of constitutional interpretation ought also to explain the New Federalism cases and their relation to the New Deal cases. A great strength of the federalist view of congressional power is that it can explain and reconcile these cases far better than the states’ rights/libertarian and progressive views can.
\item \textsuperscript{30} 514 U.S. 549, 558-59 (1995) (“Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.
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generally accepted and used by the disputants here,\textsuperscript{31} draws its channels and instrumentalities parts from the Commerce Clause, while it takes its substantial effects part from the Necessary and Proper Clause. Although the three parts of the Court’s commerce power test lack the same provenance, the commerce power is, nevertheless, a doctrinal and theoretical unity. Each of the three views of congressional power discussed above has its own account of the nature and scope of the commerce power.

This portion of the article looks at activity/inactivity issues related to the Commerce Clause itself. One problem that opponents of the individual mandate must face is the fact that neither the word “activity” nor the word “inactivity” actually appears in the Commerce Clause, nor has the distinction between them arisen in constitutional litigation or theory before the enactment of the individual mandate.\textsuperscript{32} However, the words “commerce” and “regulate” do appear in that clause.\textsuperscript{33} So, I will examine the relation between the two words that are in the clause and the two words that are not in the clause. This will be done in four areas. The first is the meaning of “commerce” and, in particular, the debate over Jack Balkin’s definition of commerce as intercourse.\textsuperscript{34} The second is in the relation of regulation and activity. The third is the question of what activities the individual mandate regulates.

Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.”).

\textsuperscript{31} See, e.g., Hall, supra note 6, at 1842; see also Patrick McKinley Brennan, 159 U. PA. L. REV. 1623, 1626 (2011) (“Plainly, if the individual mandate is sustainable under the Commerce Clause, it would be thanks to the third prong of the Lopez test - regulation of activity that has a ‘substantial effect’ on interstate commerce.”).

\textsuperscript{32} Even the libertarian Cato Institute, in an amicus brief challenging the constitutionality of the individual mandate, has to concede that, “[A] doctrinal line between activity and inactivity…has heretofore escaped articulation because no precedent has presented the distinction as sharply as this case.” Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882 (2010), Amicus Brief of the Cato Institute at 11.

\textsuperscript{33} U.S. Const. art I, § 8, cl. 3 (“The Congress shall have the power…To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

And fourth is a consideration of the notion of *per se* instrumentalities of interstate commerce.

**A. Commerce as Intercourse**

The progressive view of congressional power is broader than that of its two competitors in all the categories that are discussed in this article. A recent example of this in the area of commerce is Jack Balkin’s recent definition of commerce as intercourse or interaction. His aim in this endeavor is to harmonize the modern administrative state with the original meaning of the Constitution. He asserts that at the founding “commerce” had the broad meaning of social intercourse or interaction. Balkin’s proffered definition is meant to be broader than two other competing narrower originalist definitions of “commerce” as trade and gainful economic activity. I say “other originalist” because this definitional dispute is an intramural contest among competing schools of originalism which differ over the content of and mode of discovery of original meaning, but are united in seeking the original meaning of the constitutional text. This diversity has doubtless made of originalism a very big tent indeed.

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35 He seeks to answer the question, “‘How is the administrative state consistent with the original meaning of the constitutional text?’” Jack Balkin, *supra* note 29 at 5. In answering this question, he thereby also seeks to pass the plausibility test for theories of constitutional interpretation he set earlier. See *supra* note 29.

36 *Id.* (“‘Commerce’ was interaction and exchange between persons or peoples. To have commerce with someone meant to converse with them, meet with them, or interact with them.”)

37 *Id.* (“Originalists defending narrow readings of federal power have identified ‘commerce’ with the trade of commodities; originalists defending broad readings of federal power have identified ‘commerce’ with all gainful economic activity.”) (citations omitted).

38 For an argument that the inclusion of theories like Balkin’s and Barnett’s in the category of originalism has stretched the concept beyond recognition and created a crisis of indeterminacy thereby, see Jose Joel Alicea, *Originalism in Crisis: The Movement Toward Indeterminate Originalism* (May 22, 2010) Available at SSRN: http://ssrn.com/abstract=1613065.
Balkin’s expansive definition of commerce has been attacked as being overly broad. Because the critics are also originalists, the contest is one of dueling dictionary entries and legal references from the founding era. Balkin supports his definition of “commerce” by turning to a definition from Samuel Johnson’s dictionary roughly contemporaneous with the founding, “Intercourse; exchange of one thing for another; interchange of anything; trade; traffick.” His critics agree with Balkin that the constitutional meaning “commerce” in the founding era included mercantile trade, but disagree that it went beyond this to also include other forms of intercourse. The critics contend that his broad definition is based on narrow and selectively drawn evidence. Randy Barnett, for example, says that he “surveyed every use of the term ‘commerce’ in the Philadelphia convention, The Federalist, and the surviving records of the ratifying conventions.” The result: “In no case did I find an ambiguous use that connected all social interaction.”

In strictly numerical terms, the critics of the “commerce” as intercourse doctrine have the stronger hand, so Balkin’s reply move is one of avoidance without confession. He appeals beyond these specialized and specific facts to a more general, more amorphous public meaning, thereby making this more a theoretical than a factual dispute. Balkin’s

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41 See, e.g., Robert G. Natelson and David Kopel, supra note 39 at 56 (“The foundation of Balkin’s thesis is that during the Founding Era, the word ‘commerce’ sometimes included not only mercantile trade and certain incidents, but other social relationships as well. We agree. However, we dispute Balkin’s claim that ‘commerce’ in the Commerce Clause also includes those other relationships.) (emphasis in original).


43 Id. (“Even if the Framers used the term in its narrowest possible sense (which they did not), the public meanings of the words to a general audience was much wider, and surely it is the general publicly understood
brand of text and principles or originalism distinguishes the original expected applications of text and principle from text and its underlying principles.45 He is thus able to dismiss his critics as proponents of an alternate and inferior form of originalism.46

Fortunately, this article need resolve neither Balkin’s theoretical nor his factual differences with his critics here. For what has emerged in the debate over the original public meaning of the word “commerce” in the founding era is the fact that all of the serious definitional candidates of “commerce” require at least some sort of interaction, although they disagree about what sorts of interaction might suffice. Phrasing it a little differently—they all rule out inactivity as commerce. They thus seem to provide some support for the constitutional attack on the individual mandate based upon the activity/inactivity distinction.47 Let us turn then to the question of whether Congress can regulate inactivity.

B. Can Congress Regulate Inactivity?

The activity/inactivity distinction is something of a mixed blessing for the constitutional opponents of the individual mandate. While it has been the main basis for the
only two district rulings against the constitutionality of the mandate as of this writing,\textsuperscript{48} it has also been baffling,\textsuperscript{49} if not unconvincing, to other judges. After listening to the oral argument of the appeal of \textit{Virginia v. Sebelius}\textsuperscript{50} in the Fourth Circuit of Appeals, Supreme Court reporter Lyle Denniston began his story with this analysis,

One thing about the fate of the new health care law emerged vividly in its first challenge Tuesday in a federal appeals court: the challengers cannot defeat the law in court unless they sharpen their argument that Congress has set out in a revolutionary new direction to control Americans’ personal lives. They have built their challenge almost entirely on the premise that Congress can regulate “activity,” but cannot regulate “inactivity.” But that attempted distinction, so clear in the eye of the challengers, seemed fundamentally baffling—and thus probably unconvincing—to the three judges who heard just over two hours of oral argument in the Fourth Circuit Court in Richmond.\textsuperscript{51}

Denniston’s analysis is correct here; one cannot carry the day in constitutional litigation by preaching only to the already converted.\textsuperscript{52} For that reason, this article will go beyond the (literally and figuratively) unprecedented activity/inactivity distinction advanced by individual mandate opponents to determine whether there are any compelling arguments

\textsuperscript{48} \textit{Sebelius}, 728 F. Supp. 2d at 788 (E.D. Va. 2010) (“On careful review, this Court must conclude that Section 1501 of the Patient Protection and Affordable Care Act—specifically the Minimum Essential Coverage Provision—exceeds the constitutional boundaries of congressional power:); Florida v. HHS, --- F. Supp. 2d ---, available at 2011 WL 285683 at *29 (Jan. 31, 2011 N.D. Fla.) (“...the individual mandate seeks to regulate economic inactivity, which is the very opposite of economic activity. And because activity is required under the Commerce Clause, the individual mandate exceeds Congress’ commerce power, as it is understood, defined, and applied in the existing Supreme Court case law.”).

\textsuperscript{49} See \textit{supra} notes 8 and 9 and accompanying text; \textit{See also} Florida v. United States Dept. of Health and Human Servs., slip op. at 110-11 (11th Cir. August 12, 2011) (“On one hand, a decision not to purchase insurance and to self-insure for health care is a financial decision that has more of an economic patina than the gun possession in Lopez or the gender-motivated violence in Morrison. But whether such an economic decision constitutes economic activity as previously conceptualized by the Supreme Court is not so clear, nor do we find this sort of categorical thinking particularly helpful in assessing the constitutionality of such an unprecedented congressional action.”).

\textsuperscript{50} 728 F. Supp. 2d 768 (E.D. Va. 2010).


\textsuperscript{52} To date (July 23, 2011), with only one exception, all the judges who have held the individual mandate unconstitutional have been appointed by Republican presidents, while all those who have found the mandate to be constitutional have been appointed by Democratic presidents. The only exception has been Judge Jeffrey S. Sutton, a Republican appointment, who voted to uphold the mandate in the Sixth Circuit. \textit{See} Thomas More Law Center v. Obama,--F. 3d--, 2011 WL 2556039 (6th Cir. 2011).
against the mandate which are grounded on less novel, more widely accepted constitutional bases.

We will start with the question that first provoked the activity/inactivity distinction. That question is, “Can Congress regulate inactivity?” This seemingly straightforward question hides a troublesome ambiguity. This question may mean, “Is it constitutionally permissible for Congress to regulate inactivity?” But it may also mean, “Is it possible, i.e., within the meaning of the word, for Congress to regulate inactivity?” Now, this confusion has not stopped some from expressing a simple and certain answer to the question.\(^53\) And the permissibility question may be on more minds today than the possibility question. However, the permissibility question cannot even arise without an (at least implicit) affirmative answer to the possibility question, so that questioned will be explored first. It will, in any event, lead us quickly to the second question, too.

The issue here has perhaps been most forcefully raised in the oral argument of the \textit{Sebelius} case in the Fourth Circuit Court of Appeals in a series of questions asked by Judge Diana Gribbon Motz of Acting Solicitor General Neal Kumar Kaytal. In that argument, Judge Motz said to General Kaytal, “[T]he power that Congress has is ‘to regulate,’ and that’s right \textit{in} the Constitution. That is a constitutional provision. The ‘activity’ isn’t to be sure, but regulation would seem to think by John Marshall and others to imply a predicate to be regulated. If you don’t have this predicate activity, what do you do?”\(^54\) Referring to \textit{Gonzales v. Raich},\(^55\) General Kaytal replied that that case “went so far as to say that


\(^{54}\) Randy Barnett, \textit{supra} note 9 (The quotations in this note and the next two were transcribed by Professor Barnett from a recording on the Fourth Circuit website. For this reason, I assume that the emphasis is in the original).

\(^{55}\) Randy Barnett, \textit{supra} note 9.
Congress can regulate almost the textual opposite of what’s in the text of the Constitution: commerce in a single state as opposed to among states, that Congress is permitted to regulate intrastate activity so long as…” Judge Motz interrupted at this point, eventually to ask, “[C]an you regulate something that is not an activity?”

The basic point that Judge Motz is pressing in this interchange is that regulation is of activity, semantically and, therefore, constitutionally. Is this true? Jack Balkin does not think so. He says, “The power to regulate, as Chief Justice John Marshall said in *Gibbons v. Ogden*, is ‘to prescribe the rule by which commerce is to be governed.’” From this he concludes, “Thus, when it ‘regulates,’ Congress can prescribe rules that require people to do things as well as rules that require people not to do things.” There is nothing in Marshall’s definition of “regulate,” as Balkin sees it, which excludes the power to mandate activity as the individual mandate does.

Balkin’s confident assertion is, however, not convincing. In the very words of Marshall’s which he quotes, the rule presumes already existing commerce to be regulated and does not seem to include commerce that is only brought into being by congressional mandate. This voluntary, preexisting activity is the sort of “predicate” about which Judge Motz interrogated General Kaytal in the *Sebelius* oral argument just discussed. If this point is not sufficiently clear from Marshall’s definition of “regulate” in *Gibbons* (that case, after all, is not concerned with the question of whether or not the power of Congress to regulate commerce encompasses a power to mandate or compel commercial activity), the point is made clearly in Justice Johnson’s opinion in the same case. Johnson’s points note that

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58 *Id.; but see* Florida at 107 (“The plaintiffs stress that Congress’s authority is to ‘regulate’ commerce, not to compel individuals to enter into commerce so that the federal government may regulate them.”).
Congress’ commerce power is the same power that the states once had. He defines that power in this way, “The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure.” This “limit and restrain” definition of the power to regulate commerce even more clearly refers to and assumes already existing commercial activity and not a power to mandate that activity into existence. In sum, Justice Johnson tells us that regulation is of activity.

Justice Johnson’s definition of congressional power is confirmed by the use of the word “activity” and its cognates in all definition and discussion of the subject matter of Congress’ commerce power prior to the enactment of the individual mandate and the litigation concerning it. I will not again rehearse the evidence for this assertion here simply because other opponents of the mandate have already performed the demonstration and the defenders of the mandate do not argue the point (but, instead, defend the mandate in other ways).

Randy Barnett, a leading opponent of the mandate, after reviewing post-1937 commerce power cases and doctrine concludes, “All these cases involve activity, not inactivity. In none of these cases did the government mandate that citizens engage in economic activity by entering into a contract with a contract with a private company.” The best that the defenders of the mandate can do here is to say that because this has not been done before does not necessarily mean that it cannot be done now (this argument is made, for example,

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59 Gibbons, 22 U.S. (9 Wheat.) at 227 (Johnson, J., concurring) (“The ‘power to regulate commerce,’ here meant to be granted, was that power to regulate commerce which previously existed in the States. But what is that power?”).

60 Id.

61 See Florida at 108 (“[T]he Supreme Court has always described the commerce power as operating on already existing or ongoing activity.”).

62 Randy E. Barnett, supra note 7, at 605 (emphasis in original). This point is also made in some individual mandate cases. See, e.g., Florida at 109 (“As our extensive discussion of the Supreme Court’s precedent reveals, Commerce Clause cases run the gamut of possible regulation. But the diverse fact patterns of Wickard, South-Eastern Underwriters, Heart of Atlanta Motel, Lopez, Morrison, and Raich share at least one commonality: they all involve attempts by Congress to regulate preexisting, freely chosen classes of activities.”).
by Mark Hall, quoting Justice Story’s famed constitutional law treatise\(^63\)). The force of this contention is, however, undercut on several grounds. First, the authority Hall cites is readily distinguishable—Justice Story is referring to specific means utilized in particular cases rather than the general powers and definitions in question in the passage quoted. Second, the conclusion of the argument conflicts with the definitions of Congress’ power to regulate commerce given by Chief Justice Marshall and Justice Johnson in *Gibbons*. Lastly, its main contention, that past constitutional practice does not reflect and determine constitutional meaning (i.e., that use does not create meaning) has more recently, in fact, been denied in this very commerce power area by the Supreme Court itself, most notably in the *Morrison* case, where the Court says, in support of its distinction between economic and noneconomic activity as the jurisdictional line for Congress’ commerce power, “While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where the activity is economic in nature.”\(^64\) This sort of “thus far” method and justification of constitution line drawing employed by the Court in *Morrison* is precisely the sort of move made by advocates of the activity/inactivity line in the individual mandate debate.\(^65\) What renders it any less compelling in this context?

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\(^63\) See Mark A. Hall, *supra* note 6, at 1855 (“The strongest argument for a categorical exclusion of mandatory purchase is simply that Congress has never before regulated inactivity in its purest form under the Commerce Clause. But, as Justice Story explained in his seminal treatise,

This is clearly what lawyers call a *non sequitur*. It might with just as much propriety be urged, that, because Congress has not hitherto used a particular means to execute any other given power, therefore it could not now do it. If, for instance, Congress had never provided a ship for the navy except by purchase, they could not authorize ships to be built for a navy, or *a converso*...If they had never erected a custom house, or court-house, they could not now do it. Such a mode of reasoning would be deemed by all persons wholly indefensible.) (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1132 (Boston, Hilliard, Gray, & Co. 1833).

\(^64\) United States v. Morrison, 529 U.S. 598, 613 (2000).

\(^65\) See, e.g., Randy E. Barnett, *supra* note 62 and accompanying text.
Another related appeal to the semantically symmetrical powers of Congress to regulate commerce is made by Mark Hall in his defense of the individual mandate against Commerce Clause attacks. Hall’s argument focuses on the symmetrical relation the power to prohibit and the power to mandate bear to the power to regulate commerce. This argument also deftly turns the research into the original meaning of the Commerce Clause by Randy Barnett and others back upon its advocates. Hall’s argument is straightforward. He grants Barnett’s point that the original meaning of the Commerce Clause was narrower than current usage, including neither the power to prohibit nor the power to mandate. But he then notes that, “Such anachronistic arguments have not prevailed, however, nor has modern constitutional jurisprudence taken them seriously. Instead, countless federal laws prohibit rather than simply regulate harmful commerce or mandate measures that improve human welfare related to commerce.” Then after discussing Wickard v. Filburn, he concludes that, “Based on plausible meanings of ‘regulate,’ there is no reason why a mandate to engage in commerce could not be considered the regulation of commerce just as much as a prohibition of commerce. A mandate may be a strong form of regulation, but it is no stronger, in the abstract, than a prohibition.”

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66 Mark A. Hall, supra note 6, at 1833 (“Some have argued that the meaning of regulate was historically far more limited than now, signifying to modulate or ‘make regular’ but not the power to ban or mandate commerce.”) (Hall then cites to a page of Randy Barnett’s article on this subject which includes this statement, “To regulate’ might be limited to ‘make regular,’ which would subject a particular type of commerce to a rule and would exclude, for example, any prohibition on trade as an end in itself [.]” Randy E. Barnett, The Original Meaning of the Commerce Clause, 68 U. CHI. L. REV. 101, 112 (2001) (emphasis in original) Nothing in the page of Barnett’s that Hall cites here mentions mandates one way or the other. This is unsurprising given that it was published almost a decade before the individual mandate was enacted.).

67 Id. Please note that Hall makes the very distinction that he argues against here, unless he maintains some unexplained distinction between simple regulations and complex regulations such as prohibitions—although it is difficult to see how a ban can be complex.

68 Id. Hall directs our attention to this passage from the Wickard case, “The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon.” Wickard v. Filburn, 317 U.S. 111, 128 (1942).

69 Mark A. Hall, supra note 11, at 1834.
Ah, but we are not considering meaning in the abstract here. Proceeding from Barnett to Hall, we have gone from original meaning, which is rejected as being outdated, to plausible meaning. From this frame of reference, mandate is argued to be as permissible as prohibition. To evaluate the cogency of Professor Hall’s claim as a determinant of constitutional meaning here, let us look at the case in which the Court held that Congress’ power to regulate commerce also included the power to prohibit commerce, *The Lottery Case*.\(^1\) In that case, the Court asked, “Are we prepared to say that a provision which is, in effect, a prohibition of the carriage of such articles from state to state is not a fit or appropriate mode for the regulation of that particular kind of commerce?”\(^2\) The Court gets to an affirmative answer to this question by analogizing it to state police power to regulate public morals, conditioning congressional power on the fact that the transportation of the tickets is interstate commerce,\(^3\) and noting that *Gibbons* declared the power to be plenary.\(^4\)

Hall’s argument assumes that the power to mandate commerce falls within the plenary congressional power to regulate interstate commerce, but it does not. The interstate carriage of lottery tickets is itself interstate commerce. So, a prohibition that carriage is a regulation of interstate commerce and may be carried out for any constitutional purpose, including the public morals purpose the Court describes in the *Lottery Case*. This is the plenary power that Chief Justice Marshall describes in *Gibbons*.\(^5\) But a congressional mandate is not a regulation of trafficking or even of social interaction, but is rather an order

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\(^{1}\) I88 U.S. 321 (1903) (holding that Congress’ commerce power included the power to prohibit the interstate transportation of lottery tickets).

\(^{2}\) *Id.* at 326 (emphasis in original).

\(^{3}\) *Id.* at 327 (“If the carrying of lottery tickets from one state to another be interstate commerce…”).

\(^{4}\) *Id.* at 328 (quoting Addyston Pipe and Steel Co. v. United States, 175 U.S. 211 (1899)).

\(^{5}\) *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824) (“It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”).
that people who were not otherwise doing so enter into activity. For this reason, it does not fall within Congress’ plenary enumerated powers. It may fall within Congress’ implied incidental powers, but those are not plenary and so are limited by what Justice Souter calls “the inquiry into commercial purpose.” The Court in *The Lottery Case* makes this point clearly when it says, “[T]he sovereignty of Congress, though limited to specific objects, is plenary as to those objects[.]”

C. Virtues and Vices of the Activity/Inactivity Line

Just because the question, “Can Congress regulate inactivity?” cannot be answered affirmatively, in either of the two senses discussed so far, this does not mean that the activity/inactivity dichotomy provides the Holy Grail of constitutional theory—the line drawing the limits of congressional legislative power in general and in the case of the individual mandate. Such a determination will be an on balance decision and we have not yet looked at the shortcomings of the distinction, both rhetorical and theoretical.

An excellent way into the discussion of the cogency and utility of the activity/inactivity distinction is found in Judge Sutton’s discussion of the distinction in the 6th Circuit’s decision in *Thomas More Center v. Obama*. Judge Sutton says of the distinction, “Of all the arguments auditioning to invalidate the individual mandate, this is the most compelling.” Nevertheless, he is ultimately unconvinced and upholds the constitutionality

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75 This possibility will be discussed later in this article. See, infra note 123 and accompanying text.
76 *Supra* note 21.
77 188 U.S. 321, 323 (1903).
78 --F. 3d--., 2011 WL 2556039 at *25-37 (6th Cir. 2011) (Sutton, J., concurring in part and delivering the opinion of the court in part).
79 *Id.* at *25.
of the mandate;\textsuperscript{80} Let us look at his reasons for doing so. He does give the distinction its due. It has not been crossed “thus far.”\textsuperscript{81} Moreover, “Legislative novelty typically is not a constitutional virtue.”\textsuperscript{82} But there is more for Judge Sutton on the other side of the ledger. What is novel may just be inventive.\textsuperscript{83} Moreover, there is a novelty that cuts against the distinction—it is not in the constitution.\textsuperscript{84}

There are even bigger problems for the distinction, though. It lacks clarity and specificity and, therefore workability.\textsuperscript{85} The subjects of the individual mandate are not inert; like everyone else living, they are active in some ways or senses and inactive in others. The distinction should, but does not, say what sorts of inactivity render a person inactive for congressional commerce power purposes, which do not, and why. There are also unresolved time frame issues involved in the application of the distinction.\textsuperscript{86} How long and over what period must someone be inactive in order to fall outside congressional regulatory power? Considerations of this sort make Judge Sutton doubt that the activity/inactivity dichotomy can clearly and effectively separate who falls within Congress’ regulatory power here and who does not. What sort or level or degree of inactivity draws the line here and how is this

\textsuperscript{80} Id. at *14 (“Congress rationally found that the minimum coverage provision ‘is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.’ Therefore, the minimum coverage provision is a valid exercise of the Commerce Clause power.”).

\textsuperscript{81} Id. at *26 (“Not only has the Court never crossed this line, neither has Congress[.]”).

\textsuperscript{82} Id.

\textsuperscript{83} Id. at *27 (“The novelty of the individual mandate may indeed suggest it is a bridge too far, but it also may offer one more example of a policy necessity giving birth to an inventive (and constitutional) congressional solution.”).

\textsuperscript{84} Id. (“[T]he relevant text of the Constitution does not contain such a limitation.”); see also Florida at 116 (“The fact that Congress has never before exercised this supposed authority is telling. As the Supreme Court has noted, ‘the utter lack of statutes imposing obligations on the States’ executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed absence of such power.”).

\textsuperscript{85} Id. (“Level of generality is destiny in interpretive disputes, and it remains unclear at what level plaintiffs mean to pitch their action/inaction line of constitutional authority or indeed whether a workable level exists.”).

\textsuperscript{86} Id. (“Does the test apply to individuals who have purchased medical insurance before?”).
to be determined? These questions get us to abstract, if not metaphysical, levels of discourse unlikely to produce clear, workable legal tests.

There is another important, though less abstract, problem for the advocates of the activity/inactivity dichotomy, especially for facial challenges as in the *Thomas More* case.\(^{87}\) To succeed, a facial constitution challenge must demonstrate that there can be no constitutional applications of the statute in question.\(^{88}\) But some, if not many, of those covered by the mandate already have health insurance, either because they live in an individual mandate state like Massachusetts\(^{89}\) or because they have voluntarily purchased health insurance (as is true of plaintiffs in the *Thomas More* case itself\(^{90}\)). These individuals clearly have entered into the health insurance/health care market and are hardly inactive.

These difficulties threaten to defeat the challenge to the mandate posed by the activity/inactivity distinction, despite the points it otherwise scores, unless some other, less problematic way of expressing the worry and insight that the activity/inactivity dichotomy expresses can be found. In fact, it already has been found and has been suggested even in this article. Randy Barnett, borrowing the notion of commandeering from Tenth Amendment cases involving congressional legislative violation of state sovereignty,\(^{91}\) argues that the

\(^{87}\) *Id.* at *23 (“Facial challenges . . . seek ‘to leave nothing standing’ - to prevent any application of the law no matter the setting, ‘no matter the circumstances.’”) (quoting Warshak v. United States, 532 F.3d 521, 528 (6th Cir. 2008)).

\(^{88}\) United States v. Salerno, 481 U.S. 739, 745 (1987) (“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”).

\(^{89}\) 2006 Mass. Acts. Ch. 58, sec. 12 (Anyone who does not qualify for an exemption under the law must obtain a minimum level of health care coverage.).

\(^{90}\) *Thomas More Law Center*, 2011 WL 2556039 at *28 (“One of the plaintiffs in this case, Jann DeMars, now has insurance, yet she claims Congress has no right to require her to maintain that coverage.”).

\(^{91}\) See *New York v. United States*, 505 U.S. 144, 149 (1992) (holding that “while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so.”); *Printz v. United States*, 521 U.S. 898, 935 (1998) (holding that “the Federal Government may neither issue directives requiring the States to address particular problems, nor command the
individual mandate amounts to a “commandeering of the people.” He notes that the Tenth Amendment protects the reserved powers, and hence the sovereignty, of the people as well as the states. Barnett excuses the novelty of this argument by pointing to the novelty of the mandate to which it responds.

But a challenge to the individual mandate need not go so far to argue against commandeering the people, let alone against regulating inactivity. The challenge can be made, as it has here been made here, without novelty and within the parameters of established doctrine and the meaning of basic terms such as “commerce” and “regulate.” All that need be said is that the mandate falls outside of Congress’ power to regulate interstate commerce, that Congress lacks such a general mandate power as is required to justify the individual mandate. This is not to deny that as citizens we owe certain civic duties to government—state, federal and local. It is only to deny that the duty to buy health insurance from a private company is, or ever has been, one of those duties or that the commerce power contains or supports any such duty.

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92 See supra note 7 at 583 (“A newfound congressional power to impose economic mandates to facilitate the regulation of interstate commerce would fundamentally alter the relationship of citizen and state by unconstitutionally commandeering the people.”).

93 See supra note 7 at 626-27 (“The anti-commandeering cases that limit the commerce power of Congress were ultimately grounded by the Supreme Court in the text of the Tenth Amendment. Yet the letter of the Tenth Amendment is not limited to the states. It says that the ‘powers not delegated by the Constitution to the United States… are reserved to the states respectively, or to the people.’ …In this way, the text of the Tenth Amendment recognizes popular as well as state sovereignty.”) (quoting U.S. CONST. amend. X) (emphasis added by Professor Barnett).

94 Randy A. Barnett, supra note 7, at 636 (“True, extending its anti-commandeering doctrine from the states to the people would be novel, but this is due entirely to the novelty of the individual mandate itself. But before Congress attempted to commandeering the American people, the Court never needed to explain why such a thing was improper.”).

95 I will not treat this issue further as Barnett has already covered it. See id. at 41 (“Ordinarily, persons are responsible for their failure to act—or omissions—when they have a preexisting duty to act. A mandate to act, therefore, presupposes the existence of a duty. But with the individual mandate there is no preexisting duty.”).
D. What activities does the individual mandate regulate?

All the arguments that I have made so far will be of no avail if the individual mandate in fact regulates some sort of commercial activity because it will then have met the constitutional requirements for which I have been contending. The defenders of the individual mandate (and the PPACA itself) have not overlooked this line of argument. They start by rejecting their opponents’ description of what constitutes inactivity.\textsuperscript{96} They point out that certain forms of “inactivity,” such as strikes and boycotts, have long been subject to federal regulation pursuant to the commerce power.\textsuperscript{97} Based on these points, they then argue that individuals subject to the mandate are, in fact, participants in the health care market\textsuperscript{98} and that “they cannot opt out of this market.”\textsuperscript{99} And far from regulating inactivity, they argue that the individual mandate regulates commercial activities, such as mental decisions\textsuperscript{100} and acts of self-insurance.\textsuperscript{101}

The sorts of mental activities mandate defenders proffer clearly differ from the physical activities “thus far” recognized as regulable by Congress under its commerce power. This

\textsuperscript{96} See, e.g., Mead v. Holder, 766 F.Supp 2d 16, 36 (D.D.C., 2011) (“It is pure semantics to argue that an individual who makes a choice to forego health insurance is not ‘acting,’ especially given the severe economic and health-related consequences to every individual of that choice. Making a choice is an affirmative action, whether one decides to do something or not do something. They are two sides of the same coin. To pretend otherwise is to ignore reality.”).


\textsuperscript{98} See, e.g., Mead, 766 F.Supp. at 36 (“[I]ndividuals subject to §1501’s mandate provision are either present or future participants in the national health care market.”)


\textsuperscript{100} Liberty Univ., Inc. v. Geithner, 753 F.Supp. 2d 611, 633 (W.D. Va. 2010) (“Far from ‘inactivity,’ by choosing to forgo insurance, Plaintiffs are making an economic decision to try to pay for health care services later, out of pocket, rather than now, through the purchase of insurance.”).

\textsuperscript{101} Thomas More Center, 2011 WL 2556039 at *10 (“Thus, set against the Act's broader statutory scheme, the minimum coverage provision reveals itself as a regulation on the activity of participating in the national market for health care delivery, and specifically the activity of self-insuring for the cost of these services.”).
inclusion has been attacked by mandate critics as beyond federal power and the novelty of this difference has been conceded by the mandate’s defenders. The crucial issue in cases like *Lopez* and *Morrison* is whether or not the activities in question are economic activities. In this situation, in contrast, the issue is whether or not these are economic activities or activities at all, so it may seem that the earlier cases are of little help in deciding the question. But while the substantive doctrine of those cases may not be very relevant here, their methodology is quite germane. If the doctrinal rule here is to be set by what the Court has said and done “thus far,” as it is in the *Lopez* and *Morrison* cases, then by the mandate defenders’ own admission mental activities lie beyond Congress’ commerce power.

There is, however, a simpler, yet bigger, problem for the mental activity argument whether the jurisdictional hook here is described as mental activity or self-insurance and whether or not these are classified as activities. The problem is that the PPACA’s individual mandate does not actually regulate, but merely assumes the existence of, these activities, if indeed they are activities. The defenses of the mandate speak in terms of deliberation and

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102 See e.g., Editorial, *Regulating 'Mental Activity,'* WALL ST. J., Feb. 28, 2011, at A18 (Concluding that after *Mead*, “The real debate is between a government of limited and enumerated powers as understood by the Founders and a government whose reach includes ‘mental activity.’”).


105 See Florida at 253 (Marcus, J., concurring in part and dissenting in part) (“Lopez and Morrison each involved an effort to regulate noneconomic activity (criminal conduct); in neither instance did Congress seek to broadly regulate an entire industry; and, unlike in this case, the criminal conduct regulated in those cases was only linked to interstate commerce in a highly attenuated fashion that required piling inference upon inference.”).

106 See supra note 64 and accompanying text.

107 See supra note 103 and accompanying text.

108 These are not, I believe, two different thing, but different ways of describing the same thing. The problem I discuss here arises for the argument here under both descriptions.
action regarding the purchase of health insurance, but the statute only talks of failure to purchase insurance.

There is, then, an important gap in this argument, one that is inadequately filled by proponents of the mandate with the assumption that all failures to purchase health insurance are the result of conscious deliberation and decisions to self-insure. This may be true in economic theory which treats individuals as rational agents. It may even be generally true of corporate decisions to “go bare” concerning insurable risks. But these assumptions are not true of all individuals in everyday life situations.

Let me give an analogy based upon a personal example. My wife and I have never made a will. It is not the case that we have deliberated and decided not to make a will. If you asked us, we would probably say that we ought to have a will, perhaps even that we have discussed it, but it would be too much to say that we had deliberated about it, let alone decided not to make a will. It is one of many things that we, like others, have just not gotten around to. Many of the things people have not gotten around to deciding about are things that are bought and sold. If such a possibility gives rise to congressional commerce power, then there is almost nothing that Congress cannot make us buy. Nor is there clear reason, under these assumptions, where congressional power would end with purchase mandates.

Under this definition of the scope of congressional commerce power the people will have

109 Thomas More Law Center, 2011 WL 2556039 at *17 (“Individuals cannot disclaim the need to obtain health care and to pay for it, as virtually everyone at some point will consume healthcare services. In this sense, it is hard to characterize self-insurance as non-action, as opposed to one of many possible actions an individual may take in determining how to pay for health care.”).

110 Patient Protection and Affordable Care Act, §§ 1501, 10106 (as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1002, 124 Stat. 1029, 1032) (“Unless expressly exempt, those individuals who do not maintain such ‘minimum essential coverage’ of health insurance will be subject to a penalty.”).

111 See Mark A. Hall, supra note 6, at 1842 (“Three years prior to the individual mandate, early regulations required insurers to accept all children under age nineteen regardless of preexisting conditions. Fearing adverse selection, most major insurers immediately stopped selling child-only coverage.”).
become subjects of Congress rather than sovereigns, thus exactly reversing the theory of the Founders.\textsuperscript{112} And the line between action and inaction will have been destroyed.\textsuperscript{113}

Why have the defenders of the mandate left this gap and collapsed this distinction? They otherwise have left few stones unturned in their search for support for the mandate. It is possible that, as Barnett asserts, they seek to collapse the action/inaction distinction because they find it to be an inconvenient truth. But it may not be that simple. They may, instead, simply be postulating a longer time frame to comprise the actions they seek to regulate than are their opponents. So, as a result, they may not feel that they have to show a current act in order to meet constitutional requirements.\textsuperscript{114} They may see the subjects of the mandate, in effect, as \textit{per se} instrumentalities of interstate commerce.

The notion of \textit{per se} instrumentalities of interstate commerce is a development of the second part of \textit{Lopez’} three part commerce power test—the congressional power to regulate the instrumentalities of interstate commerce.\textsuperscript{115} The question here is whether instrumentalities must actually be in interstate commerce to fall within congressional regulatory power. The doctrine of \textit{per se} instrumentalities answers this question in the negative and holds that some things are inherently regulable by Congress without proof that they have in the case in question themselves traveled in interstate commerce. This avoids the

\textsuperscript{112} This point was forcefully made by Randy Barnett in the title of his congressional testimony/remarks of the PPACA before the Senate Judiciary Committee. Randy Barnett, Turning Citizens into Subjects: Why the Health Insurance Mandate Is Unconstitutional (Feb. 2, 2011), http://judiciary.senate.gov/pdf/11-02-02%20Barnett%20Testimony.pdf.

\textsuperscript{113} See id. (The statute itself speaks of regulating ‘decisions’ as though a decision is an action is an action. But expanding the meaning of ‘activity’ to include ‘decisions’ not to act erases the distinction between acting and not acting.”) (citation omitted).

\textsuperscript{114} Recall that the Mead court thought it sufficient that the subjects of the mandate be “present or future participants in the national health care market.” \textit{Supra} note 98.

\textsuperscript{115} See id. (“The statute itself speaks of regulating ‘decisions’ as though a decision is an action. But expanding the meaning of ‘activity’ to include ‘decisions’ not to act erases the distinction between acting and not acting.”) (citation omitted); \textit{see also} Florida at 109 (quoting 42 U.S.C. § 18091(a)(2)(A) (“Congress described ‘the activity’ it sought to regulate as ‘economic and financial decisions about how and when health care is paid for and when health insurance is purchased.’”)).
perhaps difficult question of proof with regard to the interstate transport of a particular item when it is clear that items of this type typically travel in interstate commerce, but it not at all clear (or demonstrable) this particular item has done so. The per se instrumentalities doctrine would also avoid the odd result that otherwise identical items may or may not fall within congressional power to regulate interstate commerce based solely on whether or not they had been transported interstate. Easier to say that they might have traveled interstate or could clearly do so in the future.

The Supreme Court has never directly decided this issue\textsuperscript{116} and there is no consensus among the Circuit Courts. Let us at look at one of the Circuit Court cases on the issue, \textit{Garcia v. Vanguard Car Rental USA, Inc.},\textsuperscript{117} which involves a wrongful death claim against a car rental company under the Graves Amendment,\textsuperscript{118} a federal tort statute protecting rental companies from vicarious liability. The issue in the case which concerns us here is whether the Graves Amendment is within Congress’ commerce power. The instrumentalities part of the commerce power is most relevant to the determination of the constitutionality of the statute here. The question of whether or not cars are per se instrumentalities of interstate commerce directly affects this determination.\textsuperscript{119} The \textit{Garcia} court notes that some courts have adopted the per se instrumentalities doctrine,\textsuperscript{120} but declines to follow those cases because where they lead, saying, “But the implications of the argument give us reason to

\begin{footnotes}
\item[116]The Supreme Court’s \textit{Lopez} decision, however, does begin by noting that, “[T]he Gun-Free School Zones Act of 1990…neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce.” United Sates v. Lopez, 514 U.S. 551, 551 (1995).
\item[117]540 F.3d 1242 (11th Cir., 2008).
\item[118]49 U.S.C § 30106.
\item[119]See \textit{Garcia}, 540 F.3d, at 1249 (“If cars are per se instrumentalities of commerce, even when not employed in interstate commerce, this is an easy case. Congress may protect instrumentalities of commerce from purely intrastate threats and burdens[,]”) (citing United States v. Lopez, 514 U.S. 549, 558 (1995)).
\item[120]\textit{Id.} (“But there is also some authority for the proposition that methods of interstate transportation and communication are per se instrumentalities of commerce, regardless of whether the car (or the like) at issue in a particular case has crossed has crossed state boundaries or is otherwise engaged in interstate commerce.”) (citations omitted).
\end{footnotes}
doubt its premise. If cars are always instrumentalities of commerce…Congress would have plenary power not only over the commercial car market, but over many aspects of automobile use.”¹²¹

The arguments of the mandate supporters discussed here would treat individuals as per se instrumentalities of interstate commerce with all the incursions upon individual liberty which that would entail. If this is a step too far for congressional power over cars, it is all the more so for congressional power over individuals. There is a fallback position for the mandate, though, one that the Garcia court mentions—the Necessary and Proper Clause.¹²² So, to the Necessary and Proper Clause, we now turn.

IV. NECESSARY AND PROPER

A. Enumerated Powers and Limited Government

The doctrine of enumerated powers and limited government, a traditional doctrine in American constitutional law, is a running theme and background assumption of this article, as it is of most challenges to the individual mandate. It comes to the fore in this section on the Necessary and Proper Clause and incidental congressional power because the “Sweeping Clause,” one of several nicknames by which it has been called since the Founding Era,¹²³ presents special dangers of general government power (as the nicknames

¹²¹ Id. at 1250.
¹²² Id. (“Congress has very broad power to regulate wholly intrastate uses of the means of interstate transportation and communication. But it appears more likely that such authority derives not from their status as instrumentalities, but from the Necessary and Proper Clause.”) (citations omitted).
¹²³ It has also been nicknamed the basket clause, the coefficient clause, and the elastic clause. See Popular Names of Constitutional Provisions, http://lib.law.washington.edu/ref/consticlases. html.
indicate). The danger is that the limitation of federal power intended by enumeration of express powers elsewhere in Article I, section 8 will be undone by an overbroad interpretation of Congress’ implied or incidental powers under the Necessary and Proper Clause.

One greatly complicating factor here is that, despite the frequent assertion that federal powers are limited and enumerated and that Congress does not possess a general police power, no one has a clear idea of what those limits might be. As it is, the same *Lopez* opinion that makes the assertions just mentioned also notes that modern commerce power precedent rejects the formal limits earlier cases placed upon that power. And in his concurrence, Justice Kennedy notes that the Court has treated commerce as a practical legal conception for over a century. And still the *Lopez* Court claims, “But even these modern-era precedents which have expanded congressional power under the Commerce clause

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124 See, e.g., United States v. Lopez, 514 U.S. 548, 551 (“We start with first principles. The Constitution creates a federal government. See Art, I § 8. As James Madison wrote, ‘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.’ The Federalist No. 45, pp292-293 (C. Rossiter ed. 1961).”); see also McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) (“This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it….is now universally admitted.”); Florida ex rel. Bondi v. U.S. Dept of Health & Human Servs.,--F. Supp. 2d--, 2011 WL 285683 at *1 (N.D. Fla. 2011) (“When the Bill of Rights was later added to the Constitution in 1791, the Tenth Amendment reaffirmed that relationship” ‘The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

125 See *Lopez*, at 564 (“Although Justice Breyer argues that acceptance of the Government’s rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not.”); see also Virginia v. Sebelius, 728 F.Supp.2d 768, 788 (E.D. Va. 2010) (The unchecked expansion of congressional power to the limits suggested by the Minimum Essential Coverage Provision would invite unbridled exercise of federal police powers.”).

126 See *Lopez*, at 556 (“But the doctrinal change also reflected a view that earlier that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.”).

127 See id. at 572 (quoting Swift & Co. v. United States, 196 U.S. 375, 398 (1905) (“the Court explained that ‘commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business.’”).
confirm that this power is subject to outer limits.”

In these circumstances, one has some sympathy for defenders of expansive federal power such as Acting Solicitor General Kaytal when they are confronted with the question of whether the notion of regulation presumes some preexisting predicate activity. He was a victim of the same sort of “gotcha” question about the limits of federal power that caught Solicitor General Days in the Lopez Supreme Court oral argument. In the sixteen years between the two events, the Solicitor General was unable to come up with an explanation of the limits on congressional legislative power. This may be because he does not believe in any such limits but, unlike academics who share this belief, feels it impolitic to say so.

Lopez’ first principles are not, it seems, shared by all, at least not in the same way.

It should not be surprising that, in this situation, even longstanding nominal limitations on federal power are more rhetorical than real. Take, for example, the national/local line, which stretches back at least to John Marshall, who in parsing the phrase “among the several states” in the Commerce Clause, excludes it from local commerce internal to a

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128 Id. at 556-57; see also Florida ex rel. Bondi v. U.S. Dept of Health & Human Services, --- F.Supp. 2d --, 2011WL 285683 at *17 (N.D. Fla. 2011) (“Then, after detailing the history and transformation of Commerce Clause jurisprudence—from Gibbons, to A.L.A. Schechter Poultry, and up through Wickard—the Court observed that even in cases which had interpreted the Commerce Clause more expansively, every decision to date had recognized that the power granted by the Clause is necessarily ‘subject to outer limits’ which, if not recognized and respected, could lead to federal action that would ‘effectually obliterate the distinction between what is national and what is local and create a completely centralized government.’”).

129 See supra notes 54-56 and accompanying text.

130 See Adam Winkler, Gotcha, SCOTUSBLOG (Aug. 5, 2011,9:16 AM), (“Several Justices pushed Days to identify something Congress couldn’t regulate. Days replied that there certainly were limits to Congress’ power but couldn’t point to what they were.”).

131 See, e.g., H. Jefferson Powell, Enumerated Means and Unlimited Ends, 94 MICH. L. REV. 651, 653 (1995) (“Chief Justice Rehnquist, like virtually everyone who has sat on the Supreme Court since the 1930’s, believes that the range of Congress’ legitimate concerns is as broad as ‘the common Defense and general Welfare[.]’”) (citations omitted).

132 U.S. CONST. art. I, § 8, cl. 3 (“To regulate commerce with the foreign nations, and among the several States, and with the Indian Tribes.”).
state.\textsuperscript{133} But this line has been eroded, if not erased, as the \textit{Lopez} Court notes, both by increasing growth and integration of the American economy\textsuperscript{134} and by post-1937 precedent and doctrine.\textsuperscript{135} Yet, immediately after making these points, the Court turns about and asserts that, “But even these modern-era precedents which have extended congressional power under the Commerce Clause confirm that this power is subject to outer limits.”\textsuperscript{136}

There have been three main reactions to these seemingly contradictory descriptions of the scope of and limitations upon Congress’ commerce power. One is contained in Justice Souter’s \textit{Lopez} dissent, where he expresses the hope/prediction that “today’s decision may be seen as only a misstep, its reasoning and its suggestions not quite in gear with the prevailing standard, but hardly an epochal case.”\textsuperscript{137} Justice Souter’s prediction has not yet been confirmed or proven false, but a Supreme Court ruling on the individual mandate will

\textsuperscript{133} Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194-95 (1824) (“It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient and unnecessary...The enumeration presupposes something not enumerated; and that something, if we regard the language of the subject of the sentence, must be the exclusively internal commerce of a State.”). These passages are both also quoted in \textit{Lopez}, 514 U.S. at 555.

\textsuperscript{134} See United States v. Lopez, 514 U.S. 549, 556 (1995) (“\textit{Jones & Laughlin Steel, Darby,} and \textit{Wickard} ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope.”).

\textsuperscript{135} See id. (“But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.”).

\textsuperscript{136} Id. at 556-57 The Court proceeds to quote \textit{Jones & Laughlin Steel}’s assertion that Congress’ commerce power “must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government.” (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 37 (1937)); see also Florida at 104 (quoting United States v. Lopez, 514 U.S. 549, 567-68 (1995)) (“The Supreme Court has placed two broad limitations on congressional power under the Commerce Clause. First, Congress’s regulation must accommodate the Constitution’s federalist structure and preserve ‘a distinction between what is truly national and what is truly local.’”).

\textsuperscript{137} See id. (“But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.”); see also Florida at 68-69 (citations omitted) (“Ultimately, in recognition of a modern and integrated national economy and society, the New Deal decisions of the Supreme Court charted an expansive doctrinal path. These Supreme Court decisions adopted a broad view of the Commerce Clause, in tandem with the Necessary and Proper Clause, and permitted Congress to regulate purely local, intrastate economic activities that substantially affect interstate commerce.”).
be weighty enough, standing alone, to do the job. The second reaction is the belief that, although it may not have clearly set out commerce power limits, the Court stands ready to strike down federal statutes that imply a limitless federal power. The third reaction, one of justified impatience, is that “the Court should either stop saying that a meaningful limit on Congress’s commerce power exists or prove that it is so.”

All three reactions revolve around the need for, but absence of, a “meaningful limit” on Congress’ commerce power. With that in mind, this article is directed towards articulating such a limit and applying it to the individual mandate, while at the same time keeping in mind the difficulties which have frustrated that search so far. Those difficulties are especially significant regarding the Necessary and Proper Clause both because it is an implied rather than an express power and because of the deferential standard of review its exercise has sometimes been accorded. In search of a meaningful limit, we will next explore the original meaning of the clause, the commerce power’s substantial effects test, and the notion of propriety, as distinct from necessity, embodied in the clause.

B. The Original Meaning of the Necessary and Proper Clause

In all the areas of contest relating to the commerce power there is a debate between a structural, judicially enforceable limit to federal power and a broader, deferential definition of the scope of federal power (sometimes accompanied by the assertion that there is or

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138 As H. Jefferson Powell puts is, “[I]f the argument that must be made to justify a particular statute leaves one unable to hypothesize any piece of legislation that Congress could not lawfully enact under the same reasoning, the argument and the statute stand self-condemned as invalid attempts to ignore the principle of enumerated and limited federal power.” H. Jefferson Powell, supra note 129, at 655 (citations omitted).

139 Thomas More Law Center v. Obama, --F.3d--, 2011 WL 2556039 at *22 (6th Cir. 2011) (Sutton, J., concurring in part and delivering the opinion of the court in part).
should be no judicially enforceable power at all,\textsuperscript{140} which is effectively the same thing). In recent Necessary and Proper Clause doctrine, the Court is in danger of slipping away entirely from traditional, limited views of congressional power in favor of a very deferential interpretation which imposes no real, clear limits on Congress. For that reason, I wish to remind the reader of the original public meaning and early judicial interpretation of the clause, the better to steer us back to an understanding of the clause more consonant with a government of limited and enumerated powers.

Mr. Justice Breyer has given perhaps the greatest judicial boost to a latitudinarian interpretation of the Necessary and Proper Clause through his opinions in several important Supreme Court cases in recent years. He is, for example, the author of the Court’s opinion in \textit{United States v. Comstock},\textsuperscript{141} a case that is a rarity in that the Necessary and Proper Clause issue in it is not incident to a discussion of an enumerated congressional power such as the Commerce Clause, but is, instead, the sole substantive constitutional issue in the case. In \textit{Comstock}, after noting that the federal government is one of enumerated powers\textsuperscript{142} and quoting John Marshall’s famous definition of the scope of the clause,\textsuperscript{143} he goes on to announce that, “We have since made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the

\textsuperscript{140} See, e.g., Jesse H. Choper, \textit{The Scope of National Power Vis-à-vis the States: The Dispensability of Judicial Review} 1552, 1552 (1997) (Urging that “the Court forthrightly abandon judicial review of one set of federalism questions.”).
\textsuperscript{141} ___U.S.__, 130 S. Ct. 1949 (2010).
\textsuperscript{142} \textit{Id.} at 1956 (“Nearly 200 years ago, the Court stated that the Federal ‘[G]overnment is acknowledged by all to be one of enumerated powers.’”) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).
\textsuperscript{143} \textit{Id.} (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”) (quoting McCulloch, 17 U.S. (4 Wheat.), at 421).
implementation of a constitutionally enumerated power.”¹⁴⁴ One of the cases he cites as authority for this proposition is Sabri v. United States¹⁴⁵ and the parenthetical he gives for that case is “using term ‘means-ends’ rationality to describe the necessary relationship.”¹⁴⁶

This rational relationship test is also the same standard that Justice Breyer uses in his Lopez dissent to describe the substantial effects test.¹⁴⁷

The main problem with Justice Breyer’s assertion of a “rationally related” Necessary and Proper Clause test is that none of the arguments and authority mentioned above, which he cites in Comstock in support of the “rationally related” test, actually supports it. In fact, they do the opposite. The “rationally related” test undermines the notion of limited and enumerated federal powers. It is precisely the understanding of the Necessary and Proper Clause that Marshall’s opponents accused him of having, but which he himself denied and argued against. The “‘means-ends’ rationality” understanding is a narrower alternative to, not a restatement of, the “rationally related” Necessary and Proper Clause test.

Justice Breyer’s trip from his mention of John Marshall and McCulloch v. Maryland to his conclusion that the “rationally related” test is the test to use in applying the Necessary and Proper Clause is swiftly completed in but one page of his opinion.¹⁴⁸ But this is enough to spark doubt even in other Justices concurring in his judgment, not to mention the dissenters. Justice Kennedy, for example, cautions that, “This court has not held that the Lee Optical test, asking if ‘it might be thought that the particular legislative measure was a rational way to correct’ an evil, is the proper test in this context. Rather, under the

¹⁴⁴ Id. (citations omitted).
¹⁴⁵ 541 U.S. 600 (2004) (rejecting a constitutional challenge brought under the Spending and Necessary and Proper Clauses to a federal bribery statute).
¹⁴⁶ Comstock, __U.S.__, 130 S. Ct, at 1956-57 (quoting Sabri, 541 U.S. at 605).
¹⁴⁷ See United States v. Lopez, 514 U.S. 549, 617 (1995) (“Thus, the specific question before us, as the Court recognizes, is not whether the ‘regulated activity sufficiently affected interstate commerce,’ but, rather, whether Congress could have ‘a rational basis’ for so concluding.”) (citation omitted) (emphasis in original).
Necessary and Proper Clause, application of a ‘rational basis’ test should be as least as exacting as it has been in the Commerce Clause cases, if not more so.”\(^{149}\) And in his dissent, Justice Thomas explains the means-end fit and its relation to Chief Justice Marshall’s *McCulloch* opinion in this way, “[T]here must be a necessary and proper fit between the ‘means’ (the federal law) and the ‘end’ (the enumerated power or powers) it is designed to serve…The means Congress selects will be deemed ‘necessary’ if they are ‘appropriate’ and ‘plainly adapted’ to the exercise of an enumerated power, and ‘proper’ if they are not otherwise ‘prohibited’ by the Constitution and not ‘[in]consistent’ with its ‘letter and spirit.’”\(^{150}\)

In order to explain why Justice Kennedy’s *Comstock* concurrence and Justice Thomas’ dissent is to be preferred over Justice Breyer’s opinion of the Court on this issue, we turn next to the original public meaning of, and Marshall Court opinions regarding, the Necessary and Proper Clause. This is done in order to show how the meaning of the Necessary and Proper Clause in Justice Breyer’s “rationally related” test has been stretched to the point where it undermines the notion of limited and enumerated powers by conveying practically unlimited power upon Congress. This will involve doing more than consulting dictionaries from the eighteenth century or today, for words have multiple meanings, some broad and some narrow.\(^{151}\) Understanding of the original meaning of constitutional provisions involves both the letter and the spirit of those provisions. So, when defenders of the mandate criticize opponents of the mandate\(^ {152}\) for going beyond Chief Justice

\(^{149}\) *Id.* at 1966 (Kennedy, J., concurring).

\(^{150}\) *Id.* at 1971-72 (Thomas, J., dissenting).

\(^{151}\) This was discussed above with respect to the word “commerce.” See supra notes 35-47 and accompanying text.

\(^{152}\) Criticizing the Eleventh Circuit for imposing additional Necessary and Proper requirements for the mandate to meet, Mark Hall says, “HOWEVER (sic), the court was well aware that, ‘The Supreme Court’s most definitive statement of the Necessary and Proper Clause’s function remains Chief Justice Marshall’s
Marshall’s famous description of the scope of the Necessary and Proper Clause,¹⁵³ and seek to apply broad, modern definitions of “appropriate” and “plainly adapted” (and the like) to the clause here, they overlook the end of Marshall’s sentence which also requires consistency with the spirit of the clause. That spirit is one of limited and enumerated powers.

Both the Founders¹⁵⁴ and the Marshall Court¹⁵⁵ realized that the squaring of the Necessary and Proper Clause with the doctrine of limited and enumerated powers would never be definitively resolved. The reason for this worry about limits is as James Madison puts it, “In the great system of political economy, having for its general object the general welfare, everything is related immediately or remotely to every other thing, and, consequently, a power over any one thing, if not limited by some obvious and precise affinity, may amount to a power over every other.”¹⁵⁶

Madison’s worry was maintained by the opponents of the Constitution, the Anti-Federalists, who argued that the Sweeping Clause, as the Necessary and Proper Clause was often pejoratively called, gave Congress virtually unlimited powers.¹⁵⁷ These arguments articulation in McCulloch v. Maryland: 17 U.S. (4 Wheat.) 316, 421 (1819).” Mark Hall, Why the 11th Circuit’s Opinion Self-Destructs, BALKINIZATION, (August 13, 2011, 12:05 PM), (quoting Florida v. United States Dept. of Health and Human Servs., slip op. at 93 (11th Cir. Aug. 12, 2011)
¹⁵² See supra note 143.
¹⁵³ See, e.g., Opinion of Edmund Randolph, Attorney General of the United States, to President Washington (Feb. 12, 1791), reprinted in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES, at 86, 89 (M. St. Clair Clarke & D.A.Hall eds., Augustus M. Kelley 1967) (1832) (“[L]et it be propounded as an eternal question to those who build new powers on this clause, whether the latitude of construction, which they arrogate will not terminate in an unlimited power in Congress.”).
¹⁵⁴ See McCulloch, 17 U.S. at 405 (“But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist.”).
¹⁵⁵ See, e.g., An Old Whig No. 2, in 3 THE FOUNDERS CONSTITUTION 239, 239 (Philip B. Kurland & Ralph Lerner eds., 1987) (“My object is to consider that undefined, unbounded and immense power which is comprised in the… clause… Under such a clause as this can any thing be said to be reserved and kept back from Congress?”) (emphasis in original).
were answered by way of denial. First, as George Nicholas stated in the Virginia Convention, they maintained that, “This clause only enables them to carry into execution the powers given to them, but gives them no additional power.”\textsuperscript{158} Then, as Randy Barnett puts it, “Federalist supporters of the Constitution repeatedly denied the charge had discretion in defining the scope of its own powers. They insisted that the Necessary and Proper was not an additional freestanding grant of power, but merely made explicit what was already implicit in the grant of each enumerated power.”\textsuperscript{159}

This argument was reenacted a generation later in debate surrounding \textit{McCulloch v. Maryland}. Chief Justice Marshall’s opinion in the case may be universally looked to today as the touchstone of Necessary and Proper clause doctrine,\textsuperscript{160} but at the time it was attacked by champions of states’ rights (especially in his home state of Virginia\textsuperscript{161}) in the same terms used against the Necessary and Proper Clause by Anti-Federalists and others during the Founding era. Marshall responded to the attack on his \textit{McCulloch} opinion in the same way the Federalists did at the time of the ratification of the Constitution, through denial and explanation. In response to his Virginia critic Amphictyon, he asserts that, “It is a palpable misrepresentation of the opinion of the court to say, or to insinuate that it considers the grant of power ‘to pass all laws necessary and proper for carrying into execution’ the powers vested in government, as augmenting those powers, and as one which is to be

\textsuperscript{158} 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, 1787, at 246 (Jonathan Elliot ed., rev. 2d ed. 1941) (1836).


\textsuperscript{160} See, e.g., Stephen Gardbaum, \textit{Rethinking Constitutional Federalism}, 74 TEX. L. REV. 795, 814 (1996) (“Analysis of the Necessary and Proper Clause has historically begun and ended with \textit{McCulloch[.]}").

\textsuperscript{161} For a collection of these attacks and of Marshall’s defense (all pseudonymous), see JOHN MARSHALL’S DEFENSE OF \textit{MCCULLOCH V. MARYLAND} (Gerald Gunther ed., Stanford University Press 1969). One of Marshall’s Virginia critics, using the pseudonym Amphictyon, says, “Although every one admits that the government of the United States is one of limited powers….yet so wide is the latitude given to the….word ‘necessary’….that it will….really become a government of almost unlimited powers.” \textit{Id.} at 64, 65 (emphasis in original).
construed ‘latitudinously,’ or even ‘liberally.’”\textsuperscript{162} In comparing the verbal formulas which he and Amphictyon employ regarding the clause, he says, “[W]hat essential difference is there between ‘means which directly and necessarily tend to produce the desired effect,’ and means which ‘belong peculiarly’ to the production of that effect. I acknowledge that I perceive none. Means which are ‘appropriate,’ which are ‘plainly adapted’ to the end, must ‘directly and necessarily tend to produce’ it.”\textsuperscript{163}

At this point, the reader may wonder why Marshall so forcefully maintains that his formulation of the Necessary and Proper is not latitudinous. After all, his critics at the time and progressives today both take his \textit{McCulloch} opinion to give the clause just that sort of broad reading.\textsuperscript{164} The answer lies, I think, in a background understanding of the phrase “necessary and proper” which Marshall and others in the early days of the Republic possessed and which we do not. That background lies in the law of principals and incidents of the time.\textsuperscript{165} It is one which sees the phrase as conveying power which is incidental rather than unlimited. This historical background of both the phrase and the clause gives the lie to the current historical consensus that “no one, including the constitutional framers, knows the point of the phrase ‘necessary and proper.’”\textsuperscript{166}

One finds the word “incidental” in Founding Era statements among other terms which progressives today give a broad meaning in support of a “practical conception” of the commerce power. In defending the constitutionality of the first national bank, for example,

\textsuperscript{162} \textit{Id.} at 97.
\textsuperscript{163} \textit{Id.} at 102.
\textsuperscript{164} The irony of this juxtaposition itself undercuts the progressive reading of the clause.
\textsuperscript{166} Mark A. Graber, \textit{Unnecessary and Unintelligible}, 12 CONST. COMMENT. 167, 168 (1995).
Alexander Hamilton says regarding the meaning of “necessary” in the clause, “necessary often means no more than needful, requisite, incidental, useful or conducive to.”\(^{167}\) To modern eyes these are very expansive terms conveying sweeping power, so it is a helpful corrective to remember that at that time, an incident was “a thing necessarily depending upon, appertaining to, or following another thing that is more worthy or principal.”\(^{168}\) All Hamilton’s words here have a similar limited application. An incidental power is not restricted to those things which are absolutely necessary, but neither is it unlimited.\(^{169}\) It is, instead, somewhere in between. According to Gary Lawson and David Kopel, a right or power might be necessary and, so, possibly incidental, if it is indispensable to, valuable for, or customarily accompanies the principal.\(^{170}\) In agency instruments\(^{171}\) a grant of necessary and proper powers is “grammatically the most restrictive formula readily available to a drafter in the late eighteenth century.”\(^{172}\) This law of agents and principals is not merely contemporaneous with the adoption and ratification of the Constitution and with \textit{McCulloch}; it is also essential in understanding what “necessary and proper” means in the two documents because it provides the legal concepts which underlie the phrase and without which it may seem “unnecessary and unintelligible.”\(^{173}\)


\(^{168}\) \textit{GILES JACOB, A NEW LAW DICTIONARY} (10\textsuperscript{th} ed., 1782).

\(^{169}\) As Randy Barnett explains near the beginning of an article on the original meaning of the Necessary and Proper Clause, “I will show that the choice between the meanings of ‘necessary’ inherited from John Marshall’s discussion in \textit{McCulloch v. Maryland}—that of ‘indispensably requisite’ on the one hand and merely ‘convenient’ on the other—is undercut by the available evidence. Rather, the truth lies somewhere in between.” Randy E. Barnett, \textit{supra} note 159, at 184 (citations omitted).

\(^{170}\) See Gary Lawson and David B. Kopel, \textit{supra} note 165, at 6.

\(^{171}\) Of which the Constitution is one, the federal government being the agent of the people.

\(^{172}\) Gary Lawson and David B. Kopel, \textit{supra} note 165, at 7 (emphasis in original). They add that, “In that context, \textit{necessity} described the requisite attachment of the incidental power to its principal end, while \textit{propriety} described conformance with other fiduciary norms[.]” \textit{Id.} (emphasis in original).

\(^{173}\) See \textit{supra} notes 164-66 and accompanying text.
In the specific context of the individual mandate, the crucial point is that this sort of purchase mandate cannot be an incident to Congress’ power to regulate interstate commerce because it is not a subordinate power, but, if anything, a greater, broader power.\textsuperscript{174} For this reason, it cannot fall under Congress’ necessary and proper power incidental to its power to regulate interstate commerce. As Lawson and Kopel assert, “The power to compel commerce will not follow as a mere incident of the principal power to regulate commerce.”\textsuperscript{175} This power can only flow from a specific enumerated power, as it does, for example, where the Militia Clause\textsuperscript{176} authorizes Congress to order militia members to “provide themselves” with arms and ammunition.\textsuperscript{177}

Moreover, the determination of the incidental character of a power is not a demonstration that a particular exercise of that power is, \textit{ipso facto}, necessary and proper, but only a necessary precondition of that demonstration. As Chief Justice Marshall says of enumerated powers in \textit{McCulloch}, “It can never be pretended, that those vast powers draw after them others of inferior importance merely because they are inferior.”\textsuperscript{178} So, let us turn now from the concept of incidental powers to the notions of “necessary and proper” themselves, which further qualify and specify Congress’ implied powers. I say “notions” rather than “notion” because I will argue that they are separate and independent notions and constitutional requirements. This may be a minority belief as some writers may feel that “necessary and proper” is just another instance of lawyers using two words when one will

\textsuperscript{174} See Gary Lawson and David B. Kopel, \textit{supra} note 165, at 3 (“[T]he 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.”) (citation omitted).
\textsuperscript{175} Gary Lawson and David B. Kopel, \textit{supra} note 165, at 12.
\textsuperscript{176} U.S. CONST. art. I, § 8, cl. 1, 16 (“The Congress shall have Power...To provide for organizing, arming, and disciplining the Militia[.]”).
\textsuperscript{177} Act of May 8, 1792, ch. 33, § 1, 1 Stat., 271.
\textsuperscript{178} \textit{McCulloch}, 17 U.S. (4 Wheat.) at 407-08.
So, we will look first at the “necessary” component in its commerce power guise—the substantial effects test and then at the notion of constitutional propriety.

C. The Substantial Effects Test

Of the three parts of the commerce power test set out in the *Lopez* case, the first two, which relate to the channels and instrumentalities of interstate commerce, derive from the Commerce Clause itself and are, for this reason, plenary in their scope. This is the power of which Chief Justice Marshall famously said, “This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.” The third and last of the three parts of the commerce power set out by *Lopez*, the substantial effects test, because it is over those activities which substantially affect interstate commerce, but are not themselves interstate commerce, derives not from the Commerce Clause itself, but instead from the Necessary and Proper Clause.

The difference between these two powers and their derivations from two different constitutional clauses is well illustrated in Justice Stone’s opinion for a unanimous court in *United States v. Darby*. That case dealt with the constitutionality of two provisions of the Fair Labor Standards Act, one (prohibiting shipments in interstate commerce) touching upon Congress’ power under the Commerce Clause and the other (dealing with the wages

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179 See, e.g., Patrick McKinley Brennan, *supra* note 31, at 1626 (“According to Barnett, a regulation of economic activity is constitutionally permissible provided that it is *both* necessary and proper. If one were to treat “necessary” and “proper” either as a unit or as an instance of pleonasm, what is necessary would also necessarily be proper.”).

180 See *supra* note 30.


182 312 U.S. 100 (1941) (upholding the constitutionality of the Fair Labor Standards Act under the commerce power, i.e., under both the Commerce and Necessary and Proper clauses).
and hours of workers producing goods for shipment in interstate commerce) upon its Necessary and Proper Clause power.\textsuperscript{183} The Court upheld the first provision, citing \textit{Gibbons},\textsuperscript{184} asserting the plenary scope of congressional power under the Commerce Clause\textsuperscript{185} and noting the irrelevance of congressional purpose to the judicial determination of the constitutionality of exercises of that power.\textsuperscript{186} In contrast, the second provision of the act, the provision regarding the wages and hours of workers, is treated and upheld under the Necessary and Proper Clause. Citing \textit{McCulloch} here, rather than \textit{Gibbons}, the Court asserts congressional commerce power to regulate activities affecting interstate commerce.\textsuperscript{187} However, this power is not plenary; it is confined to the appropriate means and legitimate ends Marshall prescribes under the Necessary and Proper Clause.

For these reasons, the congressional “power to regulate those activities having a substantial relation to interstate commerce”\textsuperscript{188} is not plenary, but rather purpose limited. Unfortunately, this distinction in the origin and scope of the three parts of the commerce power is not always clearly noted in the cases and is sometimes completely ignored (especially for result-oriented reasons). Those seeking to narrow federal power sometimes

\textsuperscript{183} Justice Stone begins his opinion by saying, “The two principal questions raised by the record in this case are, first, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and, second, whether it has the power to prohibit the employment of workmen in the production of goods ‘for interstate commerce’ at other than prescribed wages and hours.” \textit{Id.} at 108.

\textsuperscript{184} \textit{See id.} at 113, 114.

\textsuperscript{185} \textit{See id.} at 116 (“[T]he power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.”).

\textsuperscript{186} \textit{See id.} at 115 (“The motive and purpose of a regulation of interstate commerce are matters for legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.”).

\textsuperscript{187} \textit{See id.} at 118 (“The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make the regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.”).

seek to place a purpose limitation on even the first two parts of the commerce power,\textsuperscript{189} while those who wish to free Congress of traditional structural constitutional restraints here cast even the substantial effects power as virtually plenary.\textsuperscript{190} These are the views which Justice Souter describes as “two conceptions of the commerce power, plenary and categorically limited[.]”\textsuperscript{191}

These two conceptions of congressional power take opposing branches of a dilemma in commerce power doctrine—that we must either draw an unprincipled line limiting Congress to what has been allowed or done “thus far”\textsuperscript{192} or else allow Congress essentially unlimited power (for, as Madison notes,\textsuperscript{193} everything is related to everything else and, so, without some formal limit to the power, it will become all-encompassing). The current state of commerce power doctrine, sadly, is revealed in Acting Solicitor General Kaytal’s Kinsley gaffe\textsuperscript{194} that “Congress can regulate almost the textual opposite of what’s in the text of the Constitution.”

A solution to this dilemma would be a justified, principled limit on congressional power in this area. This sort of solution would avoid the shortcomings of both horns of the current dilemma. It would look to the text, the original meaning of the relevant terms and the

\textsuperscript{189} See \textit{e.g.}, Hammer v. Dagenhart, 247 U.S. 251, 273-74 (1918) (In striking down a federal statute prohibiting the interstate transport of the products of child labor, the Court says, “The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.”).

\textsuperscript{190} See, \textit{e.g.}, \textit{Lopez} 514 U.S. at 603 (Souter, J., dissenting) (“In reviewing congressional legislation under the Commerce Clause, we defer to what is often a merely implicit congressional judgment that its regulation addresses a subject substantially affecting interstate commerce ‘if there is any rational basis for such a finding.’…If that congressional determination is within the realm of reason, ‘the only remaining question for judicial inquiry is whether the means chosen by Congress [are] reasonably adapted to the end permitted by the Constitution.’”) (citations omitted).


\textsuperscript{192} See \textit{supra} note 64 and accompanying text.

\textsuperscript{193} See \textit{supra} note 156 and accompanying text.

background understandings which give them significance as well as at the development of these terms and understandings in subsequent precedent. Surprisingly, however, very little effort has been expended on exploring a theoretical underpinning of this sort in order to determine a limit to the scope of the substantial effects test and the Necessary and Proper Clause here. Stepping into this breach, then, I suggest a theory, or at least a controlling metaphor, for the substantial effects test that is both principled and limited.

One puzzling assertion made by the Founders and other later glossers about the Necessary and Proper Clause is that it adds nothing to the enumerated powers it supplements, but merely makes explicit the power given.\(^{195}\) Certainly, the use of the clause in recent commerce power cases gives a contrary impression.\(^{196}\) But that is under the assumption that all that is required is a rational basis for the congressional finding involved. There is an alternative way of looking at this question which helps explain these puzzling assertions and gives us an expansive, but limited commerce power. Let us examine now the relationship between interstate commerce and activities which substantially affect interstate commerce is verbally expressed in the Constitution and two important commerce power cases. The words used to express the notion connote physical proximity, activity, and interrelation.

The first is the word “among” in the Commerce Clause itself.\(^ {197}\) The second is the word “intermingled,” which Chief Justice Marshall uses in *Gibbons* to explain the meaning of “among” in the Commerce Clause.\(^ {198}\) The third word is “commingled;” it is used by Justice

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\(^{195}\) See *supra* notes 158 and 159 and accompanying text.

\(^ {196}\) Most notably in Justice Breyer’s *Comstock* opinion of the Court. See *supra* notes 141-146 and accompanying text.

\(^ {197}\) U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power…To regulate Commerce…among the several States[.]”)

\(^ {198}\) *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824) (“The subject to which the power is next applied, is to commerce ‘among the several States.’ The word ‘among’ means intermingled with. A thing which is
Stone to explain the substantial effects test in his *Darby* opinion.\footnote{United States v. Darby, 312 U.S. 100, 121 (1941) (“A familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled.”) (citations omitted).} The second and third words are used by the justices to explain their understanding of the meaning of the word “among” in the Commerce Clause, but in two different ways and contexts. They set out a practical conception of the commerce power without turning that phrase into code for unlimited congressional power.

In explaining what interstate commerce is and the power that Congress has over it in *Gibbons*, Chief Justice Marshall makes the practical, common sense observation that the congressional power to regulate interstate cannot be confined to its literal meaning—the point where merchandise crosses a state line, but must, to be effective, also include the intrastate portions of the transit. Both portions of the transportation, the intrastate and the interstate, must be connected to formulate a meaningful definition of interstate commerce and Congress’ power over it. They are, in that sense, inseparable. It so happens that Congress’ power over interstate commerce itself is plenary, but that is a fact unrelated to Marshall’s point here.

Justice Stone’s use of the word “commingled” in explaining the substantial effects test under the commerce power also has a practical purpose—to show that interstate commerce cannot be adequately regulated without a concomitant congressional power over those intrastate activities which substantially affect interstate commerce. It so happens that the congressional power under the substantial effects test is not plenary, but instead telic or purpose-limited, because the substantial effects test derives from Congress’ incidental
power and the Necessary and Proper Clause, rather than the Commerce Clause itself, but once again that is a fact unrelated to Justice Stone’s point here.

In addition to their use of similar words to metaphorically illuminate aspects of congressional commerce power, the explanations offered by Chief Justice Marshall and Justice Stone have other important similarities. Their metaphors together provide us with a unified account of that power which is practical, flexible and also limited in a principled way. These are several very important and desirable qualities in an account of the commerce power. Compare them to their alternatives. Marshall’s metaphor fought a theory of the commerce power which would deny Congress the essential ability to regulate the intrastate portion of interstate shipment, a power necessary for Congress’ effective regulation of interstate commerce. Stone’s metaphor helps explain the sense in which Congress’ incidental Necessary and Proper Clause power is necessary for carrying into execution Congress’ power to regulate commerce among the states without making that power unlimited.

Both metaphors emphasize the importance of temporal and physical proximity of the events and activities they describe to interstate commerce. This is true even of borderline cases like Raich, where the activity regulated is both local and private.200 In contrast, the individual mandate does not share these properties. There are two reasons for this. The first is that it does not regulate an activity. The second reason, even if the first fails, is that it does not regulate an activity commingled with interstate commerce, but rather one which is as separate from interstate commerce as can be. The activity regulated by the individual mandate, if any activity is regulated at all, is neither proximate to nor intermingled with

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200 See Gonzales v. Raich, 545 U.S. 1 (2005) (upholding under the commerce power federal regulation of marijuana grow for personal use pursuant to the Controlled Substances Act).
interstate commerce, either physically or temporally. It is not physical because it is described as a mental decision\textsuperscript{201} and it is not fixed in time because it is an omission or failure to do something rather than a positive action.\textsuperscript{202} In addition, unless an effect under the substantial effects test can precede its cause or be merely potential, the activity that the individual mandate regulates does not have, in aggregate, a substantial effect upon interstate commerce.

D. …and Proper

The requirement of constitutional propriety is the often overlooked element of incidental congressional powers under the Necessary and Proper Clause. This is the case, in part, because “necessary and proper” is sometimes seen as a unitary requirement.\textsuperscript{203} One finds this argument in the debate over the constitutionality of the individual mandate, especially among defenders of the mandate,\textsuperscript{204} perhaps because it reduces the number of arguments to which they must respond by one. Not surprisingly, critics of the broad vision of the commerce power in general\textsuperscript{205} and opponents of the individual mandate in particular\textsuperscript{206} more often see the Necessary and Proper Clause as raising two separate and

\textsuperscript{201} See supra notes 100-103 and accompanying text.
\textsuperscript{202} See supra notes 111-13 and accompanying text.
\textsuperscript{203} See, e.g., Patrick McKinley Brennan, supra note 31 and accompanying text.
\textsuperscript{204} See, e.g., Mark A. Hall, supra note 6, at 1854 (“Absent overt tension with independent constitutional norms, the Supreme Court has regarded ‘necessary and proper’ as a single construct—similar to other compound legal constructs such as ‘clear and convincing,’ ‘cruel and unusual,’ and ‘case or controversy.’”).
\textsuperscript{205} See, e.g., Gary Lawson & Patricia B. Granger, The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause 267, 271(1993) (“We submit that the word ‘proper’ serves a critical, although previously largely unacknowledged, constitutional purpose by requiring executory laws to be peculiarly within Congress’s domain or jurisdiction—that is, by requiring that such laws not usurp or expand the constitutional powers of any federal institutions or infringe the retained rights of the states or of individuals.”) (citation omitted).
\textsuperscript{206} See, e.g., Randy E. Barnett, supra note 7, at 621 (“The Necessary and Proper Clause requires that laws be ‘proper’ as well. Assuming the individual mandate is deemed essential to a broader regulation of interstate
independent questions—one of the necessity and the other of the propriety of the regulation in question.

The major factor which makes even the joining of issue here between the two sides in the individual mandate debate so difficult is the other areas of disagreement which divide them, most importantly the scope of congressional power, both express and implied, and the scope and nature of the rights retained by the states and the people. So, in a sense, any *ultra vires* exercise of congressional authority can also be called improper, but the existence of an impropriety is impossible to determine absent agreement on the scope of the underlying congressional power in question. Likewise, the impropriety of an alleged infringement of retained individual rights is impossible to establish absent some consensus on the scope and nature of those rights.

We can, at least, localize the disagreement here somewhat by marking off some areas where there is agreement. No participant in the individual mandate debate, for example, argues that Congress’ enumerated powers authorize it to infringe specific, express constitutional rights of individuals, such as freedom of speech or association. In addition, most of the debate assumes, rather than contests, the constitutional validity of existing judicial interpretations of the scope of those rights.207 On the other hand, as Mark Hall notes, “Generic concerns about expansive federal authority do not suffice to declare measures ‘improper.’”208 What these areas of agreement still leave in dispute is primarily the nature and scope of the rights reserved or retained by the states and the people under the commerce and therefore is ‘necessary,’ is it also a ‘proper’ means to the end of regulating interstate commerce?”

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207 So, no court has revived the economic substantive due process rights of a century ago to strike down the mandate. These notions are associated with the case of *Lochner v. New York*. 198 U.S. 45 (1905) (utilizing a liberty of contract right said to be implied by the Due Process Clause of the Fourteenth Amendment to strike down a state statute regulating bakers’ hours of work). *Lochner* and its like are now part of the judicial anticanon, not the canon.

208 Mark A. Hall, *supra* note 6, at 1854.
Tenth Amendment.\textsuperscript{209} They remain in dispute because, as I have been arguing, the two sides have a basic disagreement about the relation of the federal government to the states and the people and because there are senses in which the Tenth Amendment is both an express constitutional provision which protects individual rights and also a “generic concern” (it is, after all, a catchall provision which does not specify the rights it reserves). This comes down, then, to a classification disagreement concerning the Tenth Amendment.

In this context, there are three main ways to argue for the constitutional impropriety of a congressional regulation of interstate commerce—

1) By arguing the regulation is beyond the scope of Congress’ enumerated Commerce Clause power

2) By arguing that the regulation is beyond the scope of Congress’ implied or incidental powers

3) By arguing that the regulation violates a specific constitutional provision (here—the Tenth Amendment)

The first two of these three topics have already been covered in this article, although not under the rubric of constitutional propriety. The argument that the individual mandate exceeds Congress’ enumerated power to regulate interstate commerce is discussed in the third part of this article on commerce, while the argument that the mandate falls outside of Congress’ implied or incidental powers is the subject of the previous sections of this part of the article on Congress’ necessary and proper power. So, the remainder of this section will discuss only the propriety argument as it concerns the Tenth Amendment and individual rights.

\textsuperscript{209} U.S. CONST. Amend X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).
Progressives see no basis for a Tenth Amendment-based propriety argument because they take the amendment to be nothing more than a truism\textsuperscript{210} rather than an independent source of or protection for state or individual rights. For them, the amendment is merely declaratory, adding or creating nothing new. And if, as John Marshall assures us, enumerated powers are plenary,\textsuperscript{211} then there is nothing, as they conceive of it, to be reserved for or retained by the states and the people. But this view falls on two accounts. First, Marshall’s broad declaration applies only to Congress’ enumerated powers rather than its implicit powers. Second, under the eighteenth century notions of the law of principals and agents which inspires and informs the Necessary and Proper Clause, the relationship between agent and principal is governed by implied fiduciary norms, whereby the agent (in this case, the federal government) owes standard duties to the principal (in this case, the people), who retains certain unenumerated rights.\textsuperscript{212}

In \textit{Printz v. United States},\textsuperscript{213} the Supreme Court holds a congressional mandate that local law enforcement officers run background checks on gun buyers to be an unconstitutional commandeering of state executive officials violative of state sovereignty. The Tenth Amendment is not a truism in \textit{Printz}. Writing for the Court, Justice Scalia explains the reason for the case holding in this way, “When a ‘Law…for carrying into Execution,’ the Commerce Clause violates the principle of state sovereignty….it is not a

\textsuperscript{210} See, \textit{e.g.}, United States \textit{v.} Darby, 312 U.S. 100, 124 (1941) (After quoting the Tenth Amendment, Justice Stone says, “The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.”).

\textsuperscript{211} See \textit{Gibbons v. Ogden}, 22 U.S. (9 Wheat.) 1, 196 (1824) (“This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”).

\textsuperscript{212} See Gary Lawson \& David B. Kopel, supra note , at 7 (“[N]ecessity described the requisite attachment of the incidental power to the principal end, while propriety described conformance with other fiduciary norms[,]” (emphasis in original).

\textsuperscript{213} 521 U.S. 898 (1996)
‘Law….proper for carrying into execution the Commerce Clause.’”214 Randy Barnett analogizes from the Printz reasoning to “the proposition that commandeering the people as a means of regulating commerce violates popular sovereignty[.]”215 On this reading, the Tenth Amendment does not bar congressional regulation of states and individuals altogether; it only prohibits commandeering them to carry out congressional policy.

V. CONCLUSION

In the debate over the constitutionality of the individual mandate, the disputants appeal to the same texts and ultimately the same words, whether they are in constitutional provisions, statutes or cases. Where the disputants differ is in the meanings they attach to these crucial words, words such as “commerce,” “regulation,” “necessary and proper” and even “among.” They differ in these word meanings because they have different, conflicting background understandings of the powers of the federal government, the states, and the American people and of the relation among them. In this article, I have not relied mainly in my argument on the word “inactivity,” a word which is not in the Constitution or federal statutes and cases and which many courts and commentators find baffling. Instead, I have examined important common terms related to the commerce power in the constitution and the cases in order to appeal to and argue for meanings of these words which present a unified, consistent account of the Constitution and commerce power Supreme Court decisions from the Marshall Court and since 1937.

214 Id. at 923-24.
215 Randy E. Barnett, supra note 7, at 632.
The individual mandate falls outside the constitutional commerce power of Congress under this account. For in this account, commerce does not include all social intercourse, regulation is of a preexisting predicate activity, a mandate is not a type of regulation, thoughts are not regulable economic activity, “necessary and proper” does not mean “might be thought to be rational,” the commerce power is categorically limited and the retained rights and powers of the states and the people are structurally protected from federal infringement.