THE INDIVIDUAL MANDATE AND THE PROPER MEANING OF “PROPER”

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Introduction

The Necessary and Proper Clause of the Constitution has often been at the center of debates over the limits of federal power. But in the first 220 years of its history, the Supreme Court never gave us anything approaching a comprehensive analysis of what it means for a law to be “proper.” The Court’s recent decision on the constitutionality of the Affordable Care Act individual health insurance mandate in *NFIB v. Sebelius*1 helps fill this gap. In doing so, it moved our jurisprudence closer to the proper meaning of proper.

The individual mandate at issue in *Sebelius* requires most Americans to purchase government-approved health insurance by 2014 or pay a monetary fine of $695 or up to 2.5% of an individual’s annual income.2 Defenders of the law argue that the mandate is needed to force people to purchase health insurance before they become sick, since another provision of the ACA forbids insurers from rejecting customers with preexisting conditions.

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* Professor of Law, George Mason University School of Law. Author of an amicus brief on behalf the Washington Legal Foundation and a group of constitutional law scholars in *NFIB v. Sebelius*, arguing that the mandate exceeded the scope of Congress’ powers under the Necessary and Proper Clause because it was not “proper.” The argument developed in this article is in part adapted from that which I presented in the amicus brief. See *NFIB v. Sebelius*, Amicus Br. of Washington Legal Foundation & Constitutional Law Scholars, 2012 WL 1680857 (Feb. 13, 2012). However, the views expressed here do not necessarily represent those of the WLF and my other amicus clients. For helpful comments and criticisms, I would like to thank Randy Barnett, David Kopel, Gary Lawson, Andrew Koppelman, Trevor Morrison, and Nathaniel Persily.


2 Id. at 2580.
In this article, I explain why Chief Justice John Roberts’ key swing-vote opinion was right to conclude that the individual health insurance mandate is outside the scope of Congress’ power under the Necessary and Proper Clause. As Roberts put it, “[e]ven if the individual mandate is ‘necessary’ to the Act's insurance reforms, such an expansion of federal power is not a ‘proper’ means for making those reforms effective.”³ Although Roberts ultimately cast the key vote for upholding the mandate as a tax authorized by the Constitution’s Tax Clause,⁴ he also concluded that it was not authorized by either the Necessary and Proper Clause or Congress’ power to regulate interstate commerce.

The text of the Necessary and Proper Clause gives Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁵ In Part I, I explain why it makes sense to read this language as requiring laws authorized by the Clause to meet two separate requirements: necessity and propriety. Both the original meaning of the Clause and Supreme Court precedent support this interpretation.

Part II argues that the individual health insurance mandate is improper because upholding it under the Clause would have given Congress virtually unlimited power to impose other mandates, and also render large parts of the rest of Article I redundant. This is consistent with a relatively minimalistic reading of the word “proper.”

I also briefly discuss a broader interpretation of the Clause that leads to the same result: that the power to impose mandates on the general population is not a power “incidental” to

³ Id. at 2592 (Roberts, C.J.).
⁴ Id. at 2593-2600.
⁵ U.S. CONST. Art. I § 8, cl. 13.
Congress’ other enumerated powers, but rather a major independent power of its own. The minimalist interpretation of the Clause is consistent with the broader version, but does not require it.

Finally, Part III briefly discusses the possible future implications of Roberts’ interpretation of propriety. Here, much depends on the future composition of the Supreme Court and other contingent factors. But it is possible that the ruling will have a noteworthy impact in curtailing future federal mandates. Future courts might also build on the NFIB’s interpretation of “proper” as a tool for incrementally strengthening limits on federal power.

In this chapter, I do not consider two other important issues addressed by the Court in NFIB: whether the mandate is permissible under the Commerce Clause or the Tax Clause. But some of my analysis has implications for the former issue. If I am right that the argument in favor of the mandate fails the test of propriety because it would give Congress virtually unlimited power to enact other mandates, that conclusion also weakens the government’s case under the Commerce Clause.

I. WHY A “NECESSARY” LAW ISN’T NECESSARILY PROPER.

The Necessary and Proper Clause imposes a requirement of propriety that is distinct from necessity. This conclusion follows from the text and original meaning of the Constitution, and is

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6 This argument was presented in an important amicus brief by constitutional law scholars Gary Lawson, Robert G. Natelson & Guy Seidman. See NFIB v. Sebelius, Amicus Br. of Authors of The Origins of the Necessary and Proper Clause (Gary Lawson, Robert G. Natelson & Guy Seidman), 2012 WL 484061 (Feb. 13, 2012). See also Gary Lawson & David Kopel, Bad News For Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate, 121 YALE L.J. ONLINE 267 (2011).

7 I have briefly addressed these other issues in previous writings. See, e.g., Ilya Somin, Why the Individual Health Care Mandate is Unconstitutional, THE JURIST, May 4, 2011.

8 Chief Justice Roberts reached this same conclusion in his opinion. NFIB, 132 S.Ct. at 2587-91 (Roberts, C.J.).
also consistent with the Court’s precedents going all the way back to *M’Culloch v. Maryland*.

There is no good reason to transform the Necessary and Proper Clause into a mere “Necessary Clause.”

In his Supreme Court brief defending the individual mandate on behalf of the federal government, Solicitor General Donald Verrilli did not even consider the possibility that the mandate might be improper even if it is necessary. Several leading academic defenses of the constitutionality of the mandate that rely on the Necessary and Proper Clause also neglect the distinction between necessity and propriety. Conflating the two is a common but unfortunate error.

A. The Text.

The text of the Necessary and Proper Clause authorizes only laws that are both “necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” If the Clause was intended to simply authorize any laws that might be “necessary” for implementing the federal government’s other powers, the framers could have omitted the word “proper.” Instead of a Necessary and Proper Clause, we would have a “Necessary Clause.” To reduce the language of the Clause to a requirement of necessity would

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10 See NFIB v. Sebelius, Br. of Petitioners, 2012 WL 37168 (hereafter “pet. br.”).
12 U.S. Const. art. I, § 8, cl. 18 (emphasis added).
be to read the word “proper” out of the Constitution.\textsuperscript{13}

That conflicts with both an ordinary language reading of the text and with the Supreme Court’s longstanding insistence that “[i]n expounding the Constitution of the United States, every word must have its due force, and appropriate meaning” and that “[n]o word in the instrument . . . can be rejected as superfluous or unmeaning.”\textsuperscript{14} This idea has long been considered an “elementary canon of construction which requires that effect be given to each word of the Constitution.”\textsuperscript{15} It is also a standard rule of statutory interpretation.\textsuperscript{16}

In this case, refusing to give “proper” any distinct meaning seems especially strange, given that there is no grammatical or linguistic necessity for including it in the Clause otherwise. The word “proper” is not mere filler or a useful conjunction such as “and” or “the.” The Clause would be perfectly comprehensible without it: it would then give Congress the power to “make all Laws which shall be necessary for carrying into Execution the foregoing Powers…”

B. The Original Meaning.

The textual case for giving “proper” a distinct meaning from “necessary” is reinforced by what we know about the word’s original meaning. There seems to have been a fairly broad consensus on this point at the time of the Founding, even though there was great disagreement on other aspects of the Necessary and Proper Clause.

\textsuperscript{13} Two prominent academic defenders of a unitary approach to the Clause conclude that their theory requires us to read “necessary and proper” as “an internally redundant phrase.” Eric Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. CHI. L. REV. 1721, 1728 n.20 (2002).

\textsuperscript{14} Holmes v. Jennison, 39 U.S. 540, 570-71 (1840).

\textsuperscript{15} Knowlton v. Moore, 178 U.S. 41, 87 (1900); see also Dept’ of Revenue v. Ass’n of Wash. Stevedoring Companies, 435 U.S. 734, 759 (1978) (rejecting the claim that “‘Imposts or Duties’ encompasses all taxes [because it] makes superfluous several of the terms of Art. I, § 8, cl. 1 of the Constitution, which grants Congress the ‘Power To lay and collect Taxes, Duties, Imposts and Excises’”); Powell v. Alabama, 287 U.S. 45, 66 (1932) (holding that “no part of this important amendment [the Fifth Amendment] could be regarded as superfluous”).

At the 1787 Constitutional Convention, the Committee of Detail deliberately inserted the word “proper” into a previous draft of the Clause that included only the word “necessary.”\textsuperscript{17} This suggests a conscious effort on the part of the Framers to insert the term “proper” in order to change the meaning the Clause would otherwise have had. To be sure, this evidence from the secret proceedings of the Convention is only indirectly relevant for originalists who emphasize the “original public meaning” of the Constitution rather than the original intent of the framers.\textsuperscript{18} But it is noteworthy that the drafters on the Committee of Detail apparently believed that the insertion of “proper” would make a difference to the interpretation of the Clause by readers and courts. These knowledgeable insiders’ expectations are at least relevant evidence of original meaning.

In \textit{Federalist} 33, Alexander Hamilton, one of the strongest supporters of federal power among the Framers, insisted that we “judge of the necessity and propriety of the laws to be passed for executing the powers of the Union.”\textsuperscript{19} This clearly implies that “necessity” and “propriety” are two separate requirements. Hamilton goes on to state that “[t]he propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded,” and then gives several examples of improper federal legislation, including an “attempt to vary the law of descent in any State” and a statute that “undertake[s] to abrogate a land tax imposed by the authority of a State.”\textsuperscript{20}

\textsuperscript{17} See Robert G. Natelson, \textit{The Framing and Adoption of the Necessary and Proper Clause, in} GARY LAWSON, ET AL., THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE, 84, 88-90 (2010); cf. Randy E. Barnett, \textit{The Original Meaning of the Necessary and Proper Clause}, 6 U. PA. J. CONST. L. 183, 215 (2003) (“One thing that stands out from the records of the Constitutional Convention is how frequently the term ‘necessary’ was paired with ‘proper’ (or ‘unnecessary’ with ‘improper’) in contexts suggesting that each term has a distinct meaning.”).
\textsuperscript{18} Original public meaning originalism is now the dominant version of the theory. For leading defenses of the theory, see, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); and JACK M. BALKIN, LIVING ORIGINALISM (2011). For other citations to the relevant literature, see Ilya Somin, \textit{Originalism and Political Ignorance}, MINN. L. REV. (forthcoming).
\textsuperscript{19} \textit{THE FEDERALIST} 33.
\textsuperscript{20} Id.
Obviously, federal laws that alter state inheritance laws or abrogate state land taxes may be necessary in the broad sense of “useful” or “convenient” for the execution of other enumerated powers. That, of course, is the broad definition of “necessary” long advocated by Hamilton and eventually adopted by the Supreme Court in *M’Culloch v. Maryland.*  

For example, both inheritance laws and state land taxes surely have an impact on interstate commerce. A federal law overriding or altering them therefore could be a “useful” or “convenient” means for changing patterns of interstate commerce, just as the federal government claimed that the individual mandate is a useful or convenient means for regulating the health insurance market. But such a law, Hamilton explained, would be *improper.*

Many other Framers, political leaders, and legal commentators of the Founding era also recognized that propriety and necessity are separate and distinct requirements. For example, the first U.S. Attorney General, Edmund Randolph, argued that “‘no power is to be assumed under the [Necessary and Proper] clause, but such as is not only necessary, but proper, or perhaps expedient also.” Others held similar views.

**C. Precedent.**

As Chief Justice Roberts notes in his *NFIB* opinion, the Court’s “jurisprudence under the Necessary and Proper Clause has… been very deferential to Congress's determination that a regulation is ‘necessary.’” By contrast, the Court has been far less clear on the meaning of

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21 See *M’Culloch*, 17 U.S. at 413-15. Alexander Hamilton was probably the originator of this broad interpretation of necessity. See Alexander Hamilton, *Opinion on the Constitutionality of the Bank*, Feb. 23, 1791, in 3 THE FOUNDER'S CONSTITUTION 247-49 (Philip B. Kurland & Ralph Lerner, eds.) (1987) (arguing that “necessary” should be interpreted to mean “no more than needful, requisite, incidental, useful, or conducive to”).


23 See id. at 290-308 (citing many examples).

“proper.” But what it has said clearly shows that it imposes a limit on federal power distinct from that of necessity.

This is most clearly evident in two federalism cases decided in the 1990s: Printz v. United States, and Alden v. Maine. In Printz, the Court held that “[w]hen a ‘La [w] . . . for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty reflected in . . . various constitutional provisions . . .[,] it is not a ‘La[w] . . . proper for carrying into Execution the Commerce Clause,’ and is thus, in the words of The Federalist, ‘merely [an] ac[t] of usurpation’ which ‘deserve[s] to be treated as such.’”

The law invalidated in Printz required “state and local law enforcement officers to conduct background checks on prospective handgun purchasers.” It was clearly “useful” or “convenient” to carrying into execution Congress’s authority to regulate commerce in handguns. Yet the Court concluded that it exceeded the bounds of congressional power because it was improper. Printz’s holding relied in part on the concept of “state sovereignty” embedded in the Tenth Amendment. But Justice Antonin Scalia’s opinion for the Court emphasized that “[w]hat destroys the dissent’s Necessary and Proper Clause argument . . . is not the Tenth Amendment but the Necessary and Proper Clause itself.” Nothing in the Court’s analysis suggests that a law is only improper if it somehow threatens state sovereignty.

The Court relied on Printz’s approach to propriety in Alden v. Maine. In Alden, the Court concluded that states enjoy a constitutionally protected immunity from suit that is not limited by the express terms of the Eleventh Amendment, but applies in state court as well as federal court. Alden held that the Necessary and Proper Clause does not give Congress “the

26 Printz, 521 U.S. at 902.
27 Id. at 923-24.
28 Id. at 923.
incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers,” because such authority is not “proper.”

*Printz* and *Alden* are relatively recent decisions that were part of the Rehnquist Court’s controversial “federalism revolution.” But their separation of necessity and propriety was prefigured in the Court’s most famous early Necessary and Proper Clause decision: *M’Culloch v. Maryland* (1819).

In *M’Culloch*, Chief Justice Marshall famously adopted a broad definition of “necessary,” as anything that might be “useful or “convenient” to the execution of an enumerated power. But the Court also outlined several limitations on Congress’s power under the Necessary and Proper Clause: “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.”

This passage lists four constraints on the range of statutes authorized by the Necessary and Proper Clause: (1) the “end” pursued must be “legitimate” and “within the scope of the constitution”; (2) the means must be “appropriate” and “plainly adapted to that end”; (3) the means must “not [be] prohibited” elsewhere in the Constitution; and, finally (4) the means must be “consist[ent] with the letter and spirit of the Constitution.”

While the first and second of these requirements might potentially be considered elements of necessity, the third and fourth clearly cannot. A statute “prohibited” elsewhere in the Constitution, or one that is inconsistent “with the letter and spirit of the Constitution,” might still be a “useful” or “convenient” means of enforcing one of Congress’s enumerated powers. If a

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30 Id. At least one federal circuit court also concluded that “proper” and “necessary” are separate requirements prior to NFIB. See United States v. Sabri 326 F.3d 937, 949n. 6 (2003), aff’d 541 U.S. 600 (2004) (holding that a statute is “proper” for reasons independent of its necessity).
31 *M’Culloch*, 17 U.S. at 413, 415.
32 Id. at 421.
statute exceeds the scope of the Necessary and Proper Clause for either of these reasons, it must be because it is not “proper,” not because it fails the test of necessity.

Arguably, the same point applies to *M’Culloch’s* stricture that “should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.” A law adopted for the purpose of pursuing “objects not intrusted to the government” might still be useful or convenient for executing some enumerated power as well. For example, almost any regulation that affects commerce in some way would still fit the broad definition of “necessary.” If such a law is inherently beyond the scope of the Clause, it must be because it is improper.

*United States v. Comstock*, the Court’s most recent Necessary and Proper Clause case before *NFIB*, is also consistent with the notion that propriety and necessity are separate standards, though it did not clearly distinguish between the two. *Comstock* reiterated the rule that Congress has broad discretion in determining necessity. But it also based its decision on five other considerations, most of which are best understood as interpretations of “proper” rather than “necessary.” At least three of the five conditions – the broad “scope” of the statute, the history of federal involvement in the area, and the statute’s lack of accommodation of state interests,

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33 Id. at 423.
36 See id. at 1956 (holding that necessity is satisfied if Congress adopts “a means that is rationally related to the implementation of a constitutionally enumerated power”).
37 For my pre-*NFIB* assessment of *Comstock’s* potential significance for the individual mandate case, see Ilya Somin, *Taking Stock of Comstock: The Necessary and Proper Clause and the Limits of Federal Power*, 2009-10 CATO SUP. CT. REV. 239, 260-67. In that article, I first explained why the *Comstock* five part test was likely to cut against the government’s position in the mandate case.
count against the mandate, while a fourth is ambiguous.\(^{38}\)

Finally, it is worth noting that the distinction between necessity and propriety is emphasized in Justice Antonin Scalia’s 2005 concurring opinion in *Gonzales v. Raich*,\(^ {39}\) which some commentators cited as committing him to vote to uphold the individual mandate.\(^ {40}\) In that concurrence, Scalia defended a broad interpretation of “necessary.”\(^ {41}\) But he also noted that “there are other restraints upon the Necessary and Proper Clause authority,” besides merely the requirement of a necessary connection to an enumerated power. As an example of these additional “restraints,” Scalia cited “cases such as *Printz v. United States* . . ., [which] affirm that a law is not ‘proper’ for carrying into Execution the Commerce Clause’ ‘[w]hen [it] violates [a constitutional] principle of state sovereignty.’”\(^ {42}\)

At the individual mandate oral argument, Scalia pointedly emphasized that “in addition to being necessary, [the mandate] has to be proper,” explaining that a law backed by a rationale that implies unlimited federal power is not “proper.”\(^ {43}\) As he recognized, the distinction between necessity and propriety provides a justification for invalidating the mandate while still endorsing a broad interpretation of “necessary.”

**II. Why the Mandate Is Not Proper: A Minimalistic Approach.**

\(^{38}\) For a more detailed discussion of *Comstock*’s applicability to the mandate, see id. and *NFIB v. Sebelius*, Amicus Br. of Washington Legal Foundation & Constitutional Law Scholars, 2012 WL 1680857 (Feb. 13, 2012), at 32-35.

\(^{39}\) 545 U.S. 1 (2005).


\(^{41}\) Raich, 545 U.S. at 34-38 (Scalia, J., concurring).

\(^{42}\) Id. at 39 (quoting *Printz*, 517 U.S. at 923-924) (emphasis in the original).

\(^{43}\) As Scalia put it, “[t]he argument here is that this… may be necessary, but it’s not proper, because it violates an equally evident principle in the Constitution, which is that the Federal Government is not supposed to be a government that has all powers; that it’s supposed to be a government of limited powers.” Quoted in Ilya Somin, *Thoughts on the Individual Mandate Oral Argument*, VOLOKH CONSPIRACY, Mar. 27, 2012, available at http://www.volokh.com/2012/03/27/thoughts-on-the-individual-mandate-oral-argument/. 
Merely concluding that propriety is a distinct requirement from necessity does not tell us either what that requirement means or whether it renders the mandate unconstitutional. I contend that the mandate violates a relatively minimalistic definition of proper: one which excludes legislation that can only be justified by a line of reasoning that would give Congress unlimited power to impose other mandates, or render large parts of the rest of the Constitution redundant.

This minimalistic interpretation of does not necessarily foreclose the possibility that propriety also imposes other restrictions on the scope of congressional power under the Clause. But it is enough to justify concluding that the individual mandate is improper without attempting a comprehensive definition of the term. As such, this approach might appeal to advocates of “judicial minimalism” who urge courts to decide cases on narrow grounds, where this is feasible. But even defenders of a broader interpretation of “proper” are likely to agree that the requirement goes at least this far.

A. Why an Unlimited Power to Impose Mandates is Improper.

Text, original meaning and precedent all support the notion that a “proper” law cannot be justified by a rationale that would give Congress unconstrained authority to impose other mandates. The textual argument is very simple: If unconstrained federal power is “proper,” there would be no point to the careful enumeration of numerous other powers in Article I of the Constitution. As Chief Justice John Marshall put it in the famous 1824 case of Gibbons v. Ogden, “enumeration presupposes something not enumerated.”

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45 22 U.S. (9 Wheat.) 1, 195 (1824).
Evidence of original meaning from the Founding era strongly supports the same conclusion.\textsuperscript{46} As James Madison emphasized in a 1791 speech on the Necessary and Proper Clause, “[w]hatever meaning this clause may have, none can be admitted that would give an unlimited discretion to Congress.”\textsuperscript{47} Akhil Reed Amar, a leading legal historian who forcefully defended the constitutionality of the mandate,\textsuperscript{48} notes that “Federalist” defenders of the Constitution “repeatedly explained that these words [of the Clause] did not constitute some free-floating grant of near-plenary power.”\textsuperscript{49}

Founding-era jurists and other commentators in the nineteenth century concluded that the word “proper” prevented the federal government from using the Necessary and Proper Clause from intruding on the powers of the states. Chief Justice John Marshall, St. George Tucker, and Andrew Jackson were all among those who interpreted the term in that way.\textsuperscript{50} As we have seen, Alexander Hamilton wrote that the propriety restriction would serve to protect such state prerogatives as the power to establish inheritance laws and taxes on land from federal interference, a clear indication that the term “proper” was intended to protect the states.\textsuperscript{51}

While the Court has never expounded on the exact scope of the reserved state authority that is protected from federal interference by the requirement of propriety, it is safe to say that a

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\item \textsuperscript{48} See, e.g., Akhil Reed Amar, \textit{Constitutional Showdown: A Florida Judge Distorted the Law in Striking Down Healthcare Reform}, L.A. Times, Feb. 6, 2011 (comparing a district court ruling striking down the mandate to \textit{Dred Scott v. Sanford}, arguably the most reviled decision in Supreme Court history).
\item \textsuperscript{49} AKHIL REED AMAR, \textit{AMERICA’S CONSTITUTION: A BIOGRAPHY} 110 (2005).
\item \textsuperscript{50} Lawson & Granger, \textit{supra} note 22 at 301-08
\item \textsuperscript{51} THE FEDERALIST No. 33; \textit{see also} § I.A, \textit{infra} (discussing Hamilton’s argument).
\end{itemize}
virtually unlimited federal power to impose a mandate goes beyond what is permissible.

Much modern precedent also supports the conclusion that there must be limits to congressional power under the Clause. The Court has often emphasized that “[t]he Constitution requires a distinction between what is truly national and what is truly local.”  

All of this precedent cuts against claims that “[a]bsent overt tension with independent constitutional norms, the Supreme Court has regarded ‘necessary and proper’ as a single construct,” thereby requiring the Court to uphold the mandate. Alternatively, the requirement that a law cannot be justified by a rationale that leads to unlimited power might itself be seen as an “independent constitutional norm” that qualifies as an element of propriety.

The same point applies to claims that propriety forbids only laws that violate some other part of the Constitution, such as the Bill of Rights or the Tenth Amendment. No precedent limits propriety in this way. If it did, the term “proper” would become redundant, since a law that violates another part of the Constitution would be invalid even if “proper” were not included in the Necessary and Proper Clause.

Some scholars have argued that the word “proper” merely requires an “appropriate relationship between congressional ends and means” under the Necessary and Proper Clause.

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52 United States v. Morrison, 529 U.S. 598, 617-18 (2000); See also United States v. Lopez, 514 U.S. 549, 566 (1995) (emphasizing that Congress does not have “a plenary police power that would authorize enactment of every type of legislation”); NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1, 29 (1937) (noting “[t]hat the distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system”).

53 Hall, supra note 11 at 1854. Justice Ginsburg’s concurring opinion advances a similar argument. See NFIB, 132 S.Ct. at 2626-27 (Ginsburg, J., concurring in part and dissenting in part) (claiming that previous cases asserting a separate requirement of propriety apply only to situations where the federal governments commandeers state officials in violation of the Tenth Amendment).

54 See, e.g. Charles Fried, The June Surprises: Balls, Strikes, and the Fog of War, at 11 (forthcoming, this volume) (claiming that “since the New Deal…. the conception has been that propriety is a matter of not contravening some distinct constitutional prohibition or principle” and that a law is only improper if it “bumps up against some distinct constitutional command”).

55 See §1A, infra (explaining why it is incorrect to interpret “proper” in a way that makes it redundant).

But this approach would interpret “proper” as serving much the same purpose as “necessary.” If necessity means anything, it is some reasonable connection between ends and means. Such a definition of proper would also require the Supreme Court to overrule its interpretation of the meaning of the term in cases such as Printz and Alden.57

Chief Justice Roberts’ interpretation of “proper” in NFIB is consistent with the view that it excludes interpretations that would give Congress unconstrained power. He emphasizes that “[e]ach of our prior cases upholding laws under th[e Necessary and Proper] Clause involved exercises of authority derivative of, and in service to, a granted power.”58 On the other hand, “[t]he individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.”59 It does so by allowing Congress to go beyond regulation of people who fall within the scope of federal regulation because of “some preexisting activity” they have engaged in, and instead giving it the authority to regulate anyone it wants so long as doing so is in some way “useful” or “convenient” for regulating commerce, which in practice creates a power to “regulate an individual from cradle to grave.”60

The four conservative dissenters who would have invalidated the mandate entirely also endorsed this interpretation of propriety, concluding that “the scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power.”61

If unlimited congressional power is improper, it is important to consider what it means for power to be unlimited. It may be impossible to literally prove that the rationale justifying any

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57 See id. (claiming that these cases interpreted the Necessary and Proper Clause incorrectly).
58 NFIB, 132 S.Ct. at 2592.
59 Id.
60 Id. at 2590-91, 2592.
61 Id. at 2646 (joint dissent).
law is literally unlimited, in the sense that there is no conceivable law that wouldn’t be authorized by it. Since the range of theoretically conceivable federal laws is infinite, it is impossible to consider all of them and show that each one would be authorized under the constitutional theory put forward to justify either the individual mandate or any other law.

Ironically, therefore, requiring those challenging a law to prove that its rationale is literally infinite would itself be a road to literally infinite federal power. Since no challenger could ever analyze the full range of conceivable laws, none could prove that the government’s assertion of power was completely unlimited.

Moreover, the mere possibility that there is some conceivable law that the government’s position would not authorize should not be enough to show that it is “proper.” After all, there is no practical point to carefully enumerating a list of federal powers if the only power excluded from the list is that of enacting some conceivable hypothetical law that has no practical significance. Enumeration does not simply “presuppose” that “something [is] not enumerated,” but that the something must be significant.62

In practice, therefore, it should be sufficient if the plaintiffs prove that the government’s rationale for the law in question does not exclude anything with any practical significance, and that they refute the possible limiting principles put forward by the law’s defenders. In the case of the individual health insurance mandate, these standards were met. Requiring plaintiffs to prove that the government’s theory is literally unlimited would only ensure that federal power really would become literally unlimited; such a burden of proof can never be met, and every challenged law would always be “proper.”

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B. Why the Case for the Mandate Has No Structural Limit.

In previous work, I have explained in detail why the constitutional rationales offered in defense of the individual mandate amount to rationales for unconstrained congressional power. Here, I briefly cover some of the most commonly advanced rationales, especially those that claim that the health insurance mandate is a special case that would not require the Court to uphold other kinds of mandates.

Some defenses of the mandate assert that Congress has the power to regulate any “economic decision,” including any decision not to engage in economic activity. It is easy to see why this logic has no limit. Any decision to do or not do anything is inevitably an “economic decision” because the person in question could have chosen to spend the same time and effort doing something that affects the economy, such as working or purchasing a product. The same point applies to arguments that Congress has the power to regulate any inactivity that has an economic effect. Any kind of inactivity qualifies on that basis, since the inactive person could always have chosen to engage in some kind of economic activity instead. For example, a person who spends an hour lying in bed could instead have used that time in productive labor or going to the supermarket and buy some broccoli.

The most widely asserted argument for the supposed uniqueness of the individual mandate is the claim that everyone eventually uses health care in some form. This point has been made in virtually every lower court decision upholding the mandate, and also in Justice Ginsburg’s concurring opinion on behalf of the four liberal justices in the Supreme Court.

63 See Somin, A Mandate for Mandates, supra note 34 at 84-93.
64 See id. at 82-83 (citing lower court decisions adopting this rationale).
65 For a more detailed critique of the “economic decisions” rationale, see id. at 83-84.
66 See id. at 80-81 (citing examples).
67 See Seven-Sky v. Holder, 661 F.3d 1, 18 (D.C. Cir. 2011) (emphasizing that “the health insurance market is a rather unique one, both because virtually everyone will enter or affect it, and because the uninsured inflict a
Yet the fact that nearly everyone uses health care does nothing to differentiate health insurance from any other market. If we define the relevant “market” broadly enough, it is easy to characterize any decision not to purchase a good or service exactly the same way. Tellingly, the mandates’ defenders do not argue that everyone will inevitably use health insurance. Instead, they define the relevant market as “health care.” The same frame-shifting works for any other mandate.

Consider the much-discussed example of the broccoli purchase requirement raised by Judge Fred Vinson in the district court decision striking down the health insurance mandate.69 Not everyone eats broccoli. But everyone inevitably participates in the market for food. Therefore, a mandate requiring everyone to purchase and eat broccoli would be permissible under the federal government's argument. The same holds true for a mandate requiring everyone to purchase General Motors cars in order to help the auto industry. There are many people who do not participate in the market for cars. But everyone does participate in the market for “transportation.” As Chief Justice Roberts put it, “[e]veryone will likely participate in the disproportionate harm on the rest of the market as a result of their later consumption of health care services”); Thomas More Law Ctr. v. Obama, 651 F.3d 529, 544 (6th Cir. 2011) (emphasizing that “[v]irtually everyone requires health care services at some point”); Mead v. Holder, 766 F. Supp. 2d 16, 37 (D.D.C. 2011), aff’d Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011) (emphasizing “the inevitability of individuals’ entrance into th[e health care] market”); Liberty Univ. v. Geithner, 753 F. Supp. 2d 611, 633-34 (W.D. Va., 2010), vacated ___ F.3d ___, 2011 WL 3962915 (4th Cir. Sep. 8, 2011) (“Nearly everyone will require health care services at some point in their lifetimes, and it is not always possible to predict when one will be afflicted by illness or injury and require care.”); Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882, 94 (E.D. Mich. 2010), aff’d 651 F.3d 529 (6th Cir. 2011) (“The health care market is unlike other markets. No one can guarantee his or her health, or ensure that he or she will never participate in the health care market . . . . The plaintiffs have not opted out of the health care services market because, as living, breathing beings . . . . they cannot opt out of this market.”)

68 See NFIB, 132 S.Ct. at 2619-20 (Ginsburg, J., concurring in part and dissenting in part).
markets for food, clothing, transportation, shelter, or energy; that does not authorize Congress to
direct them to purchase particular products in those or other markets today.”

Justice Ruth Bader Ginsburg misses the point when she responds to this argument by
asserting that “[a]lthough an individual might buy a car or a crown of broccoli one day, there is
no certainty she will ever do so,” whereas everyone will eventually use health care at some point
in their lives. There is no “certainty” that the individual will ever use health insurance either,
which is the product the mandate actually requires her to buy. But if health insurance can be
viewed as just one of several ways of participating in the broader market for health care, then
buying broccoli is just one of many ways of participating in the market for food, and buying a
car is just one of many ways of participating in the market for transportation. And both food and
transportation are practically unavoidable aspects of life.

The reasoning is broad enough to cover virtually any noneconomic mandate, as well. For
example, a mandate requiring people to exercise regularly might be justified on the grounds that
everyone benefits from physical exertion at some point in their lives. A mandate requiring
everyone to read my posts at the Volokh Conspiracy legal blog could be justified on the grounds
that virtually everyone seeks out information at some point.

Many also argue that the mandate case is special because medical providers are required
to render emergency services to the uninsured, which is not true of most other markets. But it

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70 NFIB, 132 S.Ct. at 2590-91 (Roberts, C.J.). Other judges made similar points previously. See Virginia v. Sebelius, 728 F.Supp.2d 768, 781 (E.D. Va. 2010), vacated on other grounds, 656 F.3d 253 (4th Cir. 2011) (“the same reasoning could apply to transportation, housing, or nutritional decisions”); see also Florida ex rel. Bondi, 780 F.Supp.2d at 1289 (noting that “there are lots of markets—especially if defined broadly enough—that people cannot ‘opt out’ of. For example, everyone must participate in the food market.”); Seven-Sky, 661 F.3d at 51-52 (Kavanaugh, J., dissenting) (noting that this theory “extend[s] as well to mandatory purchases of retirement accounts, housing accounts, college savings accounts, disaster insurance, disability insurance, and life insurance, for example”).

71 NFIB, 132 S.Ct. at 2619-20 (Ginsburg, J., concurring in part and dissenting in part).
72 See, eg., NFIB, 132 S.Ct. at 2619-20 (Ginsburg, J., concurring in part and dissenting in part); Pet. Br., supra note 10 at 40; see also Mead, 766 F. Supp. 2d at 36-37 (emphasizing this point).
is difficult to see why this distinction is constitutionally relevant. The answer advanced by the mandate’s defenders seems to be that failure to purchase a given good or service thereby has an adverse economic effect on the producers, who end up having to provide free services.\textsuperscript{73} In that respect, however, failure to purchase health insurance turns out to be no different from failure to purchase any other product. Every time someone fails to purchase a product, the producers of these goods and services are made economically worse off than they would be if the potential buyer had made a different decision. This is true regardless whether the producers must provide goods and services to some consumers for free. At most, the latter condition exacerbates the negative impact on producers. Numerous other market conditions and government regulations can negatively affect producers as well. But it is not clear why a free service mandate has a special constitutional status denied to other conditions that also reduce producer profits.

Mandate defenders’ other reasons for claiming that this is a special case have similar flaws. For example, the federal government’s brief emphasized that health care is a large part of the American economy, that the need for health care is difficult to predict in advance, and that the use of health care by the uninsured imposes costs on others.\textsuperscript{74} But almost any product can be described as part of a larger market that constitutes a major sector of the economy. For example, a broccoli-purchase mandate could be defended on the basis that broccoli is part of the food market and food is a major part of the economy.

Unpredictability of need is also ubiquitous. It applies, for example, to virtually every other type of insurance, including homeowners’ insurance, life insurance, property insurance, and auto insurance. Even with respect to most ordinary consumer products, there are occasional needs that arise suddenly. For example, an individual’s car might break down unexpectedly,

\textsuperscript{73} Pet. Br. at 40; Mead, 766 F. Supp. 2d at 36-37.
\textsuperscript{74} See Pet. Br., supra note 10 at 34-36. Unpredictability is also noted as a distinguishing factor by Justice Ginsburg. NFIB, 132 S.Ct. at 2619-20 (Ginsburg, J., concurring in part and dissenting in part)
necessitating an unforeseen purchase of a new car. The same goes for most noncommercial needs. People cannot always predict when they will want rest, companionship, or entertainment, for example.

Health care needs may be unpredictable more often than some of these other examples. But courts cannot base constitutional distinctions on such matters of degree, because there is no non-arbitrary way to determine how much unpredictability is enough to make any given market a special case.

Likewise, in an interdependent economy, failure to purchase almost any product has economic ripple effects that impact other sectors. For example, failure to purchase healthy foods such as broccoli might reduce the health of the work force, thereby reducing overall economic productivity.\(^75\)

Finally, some defenders of the mandate argue that it is a special case because it addresses a “national problem” that the states cannot solve due to collective action constraints.\(^76\) Elsewhere, I have explained why this rationale for the law can only work if the concept of collective action problem is expanded broadly enough to justify almost any other mandate, including even one requiring people to purchase healthy food, such as broccoli.\(^77\) If, on the other hand, Congress is required to prove that there really is collective action problem that states are genuinely incapable of solving, the federal mandate would have to be invalidated because state governments are perfectly capable of enacting mandates of their own if such laws actually increase access to health care and decrease costs, as their defenders claim.\(^78\)

\(^{75}\) Studies show that broccoli has significant health benefits. See Somin, Mandate for Mandates, supra note 34 at 82 n.27 (citing several studies).


\(^{77}\) See Somin, supra note 34 at 90-94.

\(^{78}\) Id. at 93-94.
If the requirement of propriety bars laws that can only be justified by a rationale that
gives Congress unlimited power, then the case for the individual mandate fails.

C. Propriety and Redundancy.

A decision upholding the individual mandate under the Necessary and Proper Clause
would have also run afoul of propriety because it would make many of Congress’ other
enumerated powers completely redundant. This is improper because of the long-standing
principle proper statute must “consist with the letter and spirit of the constitution.”79 The “letter
and spirit of the Constitution” surely include respect for the Constitution’s “careful enumeration
of federal powers,” which would be undermined by a decision rendering many of them
superfluous.80

As discussed above,81 the various rationales for the Clause would give Congress the
power to impose virtually any regulation that has an economic effect or might useful or
convenient for executing some enumerated power. The sweeping scope of this authority is
accentuated by the Supreme Court’s relatively broad interpretation of the Commerce Clause.
The Court has held that the Commerce Clause gives Congress nearly unlimited power to regulate
“economic activity,” defined as any activity that involves “‘the production, distribution, and
consumption of commodities.’”82 Virtually any mandate might be useful, convenient, or
rationally related to a regulation of economic activity defined in this way. Any purchase mandate
would obviously qualify, since it can be seen as a way of regulating the market in whatever

79 M’Culloch, 17 U.S. at 421.
80 Morrison, 529 U.S. at 618 n.8. For a more detailed argument as to why a law whose rationale would make other
parts of Article I redundant is “improper,” see Gary Lawson, Discretion As Delegation: The ‘Proper’
81 See § II.C, infra.
82 Raich, 545 U.S. at 25-26 (quoting Webster’s Third New International Dictionary 720 (1966)).
commodity it requires people to buy. Almost any other regulation could potentially qualify as well. Forcing people to do anything ensures that at least some of them will forego economic activity or other kinds of activity that have an effect on markets might be a useful or convenient way to regulate those markets. Obviously, some mandates might not be very effective regulatory mechanisms. But at least under current precedent, courts are not allowed to question Congress’ judgment about the effectiveness of the regulatory measures it adopts under the Necessary and Proper Clause.83

The result of this kind of reasoning would render many of Congress’s other powers completely superfluous. The very same Clause that gives Congress the authority to regulate interstate commerce also gives it the power to regulate commerce with “Foreign nations” and “with the Indian Tribes.” U.S. Const. Art. I, § 8, cl. 3. But foreign and Indian commerce clearly have effects on interstate commerce and the overall economy more generally. Regulating these forms of commerce is surely a useful or convenient way to affect interstate commerce.

Similarly, Congress would no longer need its powers to organize and regulate the state Militia, nor to “make rules for the Government and regulation of the land and naval Forces.”84 After all, the militia and the armed forces clearly affect economic activity in numerous ways, and virtually any regulations imposed on them would have at least some impact on the economy. The same reasoning applies even to the power to declare war, since a state of war inevitably has a substantial effect on economic activity.

83 See, e.g., Comstock, 130 S. Ct. at 1956-57 (holding that the requirement of necessity is satisfied so long as there is a “rational relationship” between Congress’ ends and the means it chooses to adopt).
Some overlap between powers is inevitable and even desirable. 85 But such an enormous degree of it makes a hash of Article I’s scheme of enumerated powers, and seems clearly at odds with the “letter and spirit” of the Constitution. It is therefore improper.

D. The Individual Mandate as a Non-Incidental Power.

My analysis so far has relied on a minimalistic definition of propriety that only bars statutes whose rationale leads to unlimited congressional power or renders large parts of the rest of Article I redundant. But this approach does not preclude a more stringent definition of propriety that would bar any new claims of authority that are major independent powers as opposed to mere “incidents” of one of the other enumerated powers. 86 The more confining definition would inevitably bar any regulation that would be forbidden by the narrower one.

Interestingly, Chief Justice Roberts’ reasoning appears to adopt the broader reading of propriety. He writes that the Clause “vests Congress with authority to enact provisions ‘incidental to the [enumerated] power, and conducive to its beneficial exercise,’” and concludes that the mandate is improper in part because it is not “‘incidental’ to the exercise of the commerce power,” and “would work a substantial expansion of federal authority.” 87 This language is, of course borrowed from M’Culloch v. Maryland, which famously distinguished between “incidental” powers that the Clause gives to Congress, and “great substantive and independent power[s],” which it does not. 88

86 For arguments that this is the correct definition of “proper” and that the mandate fails it, see works cited in notes 6 and 17. For the originalist case that propriety bars non-incidental powers, see Robert Natelson, The Legal Origins of the Necessary and Proper Clause, in LAWSON, ET AL., supra note 17 at 52-83.
87 NFIB, 132 S.Ct. at 2591-92 (quoting M’Culloch, 17 U.S. (4 Wheat.) at 418)).
The core argument here is that the power to impose mandates on general population unconnected to any preexisting activity is a broad independent power that is not merely incidental. As discussed above, it could potentially justify imposing an extraordinarily wide range of mandates and regulations – broad enough to compel almost anyone to do almost anything not specifically forbidden by a constitutional individual right.89

Due to space considerations, I do not attempt a full evaluation of the incidental powers argument here, especially since it has already been effectively developed by other scholars.90 I will, however, note two relevant points.

First, if this interpretation of propriety is correct, it is difficult to save the mandate by arguing that it qualifies as merely “incidental.” If the power to impose mandates is not a “great substantive and independent power,” it is difficult to see what is. Second, the incidental powers analysis might invalidate the health insurance mandate even if its defenders could find some example of a mandate that would not be justified by its logic. So long as the argument for the health insurance mandate still justifies an extremely broad range of other possible mandates, it would still give congress a “great substantive and independent power,” even if there were a few types of mandates excluded from the scope of its authority.

89 For example, Congress could not force people to give up their First Amendment rights to freedom of speech or freedom of religion because legislation that violates constitutional rights is barred even if it falls within the scope of Congress’ enumerated powers.
90 See works cited in notes 6 and 17.
III. IMPLICATIONS FOR THE FUTURE.

The future effects of NFIB’s Necessary and Proper holding are difficult to predict. It is possible that it will have a significant impact, but also possible that its effects will be extremely limited.

Some contend that Chief Justice Roberts’ conclusion that the mandate exceeds Congress’ powers under the Commerce Clause and Necessary and Proper Clause is mere dictum because it was not necessary to decide the case.91 After all, he did ultimately uphold the mandate under the Tax Clause.92 If so, lower courts will not be bound by Roberts’ necessary and proper analysis.

Such claims are undercut by Part III-C of Roberts’ opinion, which was joined by the four liberal justices who voted to uphold the mandate. It unequivocally states that “[t]he Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity.”93 Presumably, this applies to the Commerce Clause as augmented by the Necessary and Proper Clause as well.

Moreover, Chief Justice Roberts’ key swing-vote opinion only concludes that mandate is a tax because he adopts a “saving” construction that rejects the unconstitutional “more natural” reading of the provision, which would require it to be invalidated as a regulatory penalty.94 He would not have rejected the “natural” reading if that reading were constitutionally permissible under the Commerce or Necessary and Proper Clauses.95 Therefore, the necessary and proper analysis was essential to the result he ultimately reached. Finally, lower courts might well be

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92 NFIB, 132 S.Ct. at 2593-2600.
93 Id. at 2599. I have elaborated on the importance of this part of the opinion in Ilya Somin, A Simple Solution to the Holding vs. Dictum Mess, Volokh Conspiracy, July 2, 2012, available at http://www.volokh.com/2012/07/02/a-simple-solution-to-the-holding-vs-dictum-mess/
94 NFIB, 132 S.Ct. at 2601-02 (Roberts, C.J.).
95 Id.
influenced by the fact that a total of five justices concluded that the mandate is improper: Roberts and the four conservative dissenters who would have invalidated the mandate entirely.\footnote{NFIB, 132 S.Ct at 2644-47 (joint dissent)}

That said, there is enough uncertainty here that some lower courts could potentially refuse to apply \textit{NFIB’s} commerce and necessary and proper rulings on the grounds that they are dicta. And a future Supreme Court majority could even more easily choose to reject it for that reason.

A recent Ninth Circuit Court of Appeals opinion has treated \textit{NFIB’s} Necessary and Proper Clause reasoning as binding.\footnote{See \textit{United States v. Elk Shoulder}, 2012 WL 4748439 at *6-7 (9th Cir. Oct. 5, 2012) (applying \textit{NFIB’s} rulings that the Necessary and Proper authority extends “only ‘those who by some preexisting activity bring themselves within the sphere of federal regulation’” and that “the Necessary and Proper Clause provides no justification for laws effecting ‘a substantial expansion of federal authority’”) (quoting id. at 2592) (Roberts, C.J.). Two district courts have also applied Roberts’ position on the Commerce Clause as binding precedent. See \textit{United States v. Williams}, 2012 WL 3242043, at *3 (S.D.Fla. Aug.7, 2012) (stating that Chief Justice Roberts was “writing for the Court” when discussing Congress’s commerce power) ; \textit{United States v. Moore}, 2012 WL 3780343, at *3 (E.D.Wash. Aug.31, 2012) (treating it as a binding concurring opinion under Marks v. United States, 430 U.S. 188 (1977)). One has gone the other way. See \textit{United States v. Spann}, 2012 WL 4341799 at*3 (N.D. Tex. Sept. 24, 2012).} Whether other judges follow suit remains to be seen.

Assuming that future courts do follow Roberts’ Necessary and Proper Clause reasoning, Congress would not have the power, under the Clause, to “regulate individuals precisely \textit{because} they are doing nothing.”\footnote{NFIB, 132 S.Ct. at 2587 (Roberts, C.J.); Id. at 2590-91.} That would prevent future mandates that are not predicated on some form of preexisting activity that brings individuals within the scope of federal authority.\footnote{Somin, \textit{Mandate for Mandates}, supra note 34 at 96-98.} Elsewhere, I have argued that mandates of this type are a genuine political danger, since industry interest groups have incentives to lobby for laws requiring people to buy their products, and Congress sometimes has incentives to cater to their demands.\footnote{Somin, \textit{Mandate for Mandates}, supra note 34 at 96-98.} However, it is possible that future mandates could be structured as taxes in order to fall within the scope of Roberts’ ruling.
upholding the mandate as a tax.\textsuperscript{101} These mandates would, however, have to meet Roberts’
requirements that the only penalty be a monetary fine that is not so high as to be coercive, that
the fine be collected by the IRS, and that violation of the mandate should not be considered
lawbreaking if the fine is paid.\textsuperscript{102}

Roberts’ endorsement of the “incidental powers” theory of propriety could have
significant impact in the future, depending on the definition of what counts as an independent
power that cannot be considered incidental. Unfortunately, Roberts offers little precise guidance
on this question. As Justice Ginsburg asks in her concurring opinion, “[h]ow is a judge to decide,
when ruling on the constitutionality of a federal statute, whether Congress employed an
‘independent power…’, or merely a ‘derivative’ one…?”\textsuperscript{103} Her question may well need to be
answered in some future decision.

Ultimately, much will depend on who gets appointed to the Supreme Court in the next
few years. \textit{NFIB} shows that the justices remain deeply divided over federalism issues. The five
conservatives are willing to countenance judicial enforcement of at least some substantial
constraints on federal power. With rare exceptions,\textsuperscript{104} the four liberal justices remain dead set
against it. Much could change if either side achieves a firm 6-3 or 7-2 majority on the Court. If
the liberals achieve such a majority, they are likely to overrule or confine to their facts recent
precedents enforcing limits on federal power. By contrast, a firm conservative majority would no
longer be at the mercy of any one swing voter such as Chief Justice Roberts in \textit{NFIB}. It might
therefore take a more aggressive posture in limiting congressional authority. The future of the

\textsuperscript{101} I describe this possibility in greater detail in Ilya Somin, “A Taxing, But Potentially Hopeful Decision,”
decision.
\textsuperscript{102} NFIB, 132 S.Ct. 2593-99.
\textsuperscript{103} NFIB, 132 S.Ct. at 2627 (Ginsburg, J., concurring in part and dissenting in part).
\textsuperscript{104} One such is \textit{NFIB}'s invalidation of part of the ACA’s expansion of the Medicaid health care program as beyond
Congress’ powers under the Spending Clause. Two liberal justices, Stephen Breyer and Elena Kagan, joined this
part of Chief Justice Roberts opinion. See id. at 2601-07 (Roberts, C.J.).
Necessary and Proper Clause – like that of constitutional federalism generally – remains very much in doubt.\textsuperscript{105}

\textbf{CONCLUSION}

\textit{NFIB} is the Court’s most important decision expounding on the definition of “proper” in the Necessary and Proper Clause. Chief Justice Roberts’ opinion has much to commend it, especially in so far as it bars interpretations of the Clause that would give Congress unlimited power to impose other mandates. But the long-term impact of this case remains to be seen.