No. 11-398

In The
Supreme Court of the United States

DEPT. OF HEALTH AND HUMAN SERVICES, et al.,

Petitioners,

v.

STATE OF FLORIDA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AUTHORS OF *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (GARY LAWSON, ROBERT G. NATELSON & GUY SEIDMAN) AND THE INDEPENDENCE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

(MINIMUM COVERAGE PROVISION)

DAVID B. KOPEL
Counsel of Record
INDEPENDENCE INSTITUTE
727 East 16th Avenue
Denver, Colo. 80203
(303) 279-6536
david@i2i.org
Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Independence Institute states that it is a non-profit corporation, incorporated in Colorado.

Independence Institute has no parent corporations, nor is there any publicly held corporation that owns more than 10% of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

STATEMENT OF AMICI INTERESTS[1]

Amici are experienced constitutional scholars and recognized authorities on the Necessary and Proper Clause. They are coauthors of the only book devoted entirely to the subject, *The Origins of the Necessary and Proper Clause*, published by Cambridge University Press in 2010. Some of their other scholarship on the Clause is cited in the brief.

Gary Lawson is Professor of Law at Boston University. Robert Natelson is retired from his position as Professor of Law at the University of Montana, and is Senior Fellow in Constitutional Studies at the Independence Institute. Guy Seidman is Professor of Law at the Interdisciplinary Center, Herzliya, Israel.

The Independence Institute is a public policy research organization founded in 1984.

SUMMARY OF ARGUMENT

As this Court's precedents demonstrate, the claim that the congressional commerce power authorizes the individual mandate in the Affordable Care Act (ACA) is really a claim that the Necessary

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of *amicus* briefs.

and Proper Clause, rather than the Commerce Clause as such, supports the mandate.

In fact, however, that mandate is outside the scope of the Necessary and Proper Clause.

This brief summarizes the findings of new legal history scholarship on the meaning of the Necessary and Proper Clause. The Clause was one of a family of similar provisions very common in founding-era legal documents, particularly in documents by which one party granted authority to another. Members of this family of clauses followed at least five different formulae, with the Necessary and Proper Clause following the most restrictive formula. As pointed out by the Constitution's advocates during the ratification debates, the Clause is designed to remind the reader of two legal default rules:

> (1) "Necessary" – the express grants of authority to Congress include those implied powers that qualify as *incidental*; and
>
> (2) "Proper" – congressional enactments must comply with *standards of fiduciary obligation*.

According to then-established legal usage, the word "necessary" extended beyond factual necessity; it was a term of art meaning "incidental." An unstated power was incidental if it met BOTH of the following criteria:

- It was inferior to ("less worthy" than) the express power, AND ALSO
- It met at least one of the following three alternatives:
  - indispensable to the express power, *or*
  - required to avoid "great prejudice" to the exercise of the express power; *or*
  - a customary means of exercising the express power.

A power failing to comply with either of these criteria could not be incidental. The criterion of inferiority was *independent* of the second criterion of indispensability, great prejudice, or custom. In other words, the Necessary and Proper Clause does not authorize an unstated power if that power is "as worthy as" the principal power; if the unstated power fails the first criterion (inferiority), it is irrelevant if the unstated power might pass the second criterion by being indispensable, desirable, or customary.

These criteria are very similar to the criteria this Court applies in many contexts today. They serve as a guide for deducing the intent of the parties to the document.

Under the meaning of the Necessary and Proper Clause, the ACA's insurance mandate is not a *necessary* law because authority to impose it does not qualify as "incidental" to the Commerce Clause:

Authority to require private parties to contract with other private parties is at least as significant as the usual power to "regulate Commerce."

Additionally, the mandate does not qualify as a *proper* law because it violates fiduciary limitations embodied in the word "proper."

This conclusion is confirmed not only by eighteenth-century law and practice, but by the drafting and adoption history of the Necessary and Proper Clause; by a complete reading of the Supreme Court's first great case on the subject, McCulloch v. Maryland, 17 U.S. 316 (1819), and by Chief Justice John Marshall's public explanations of *McCulloch*.

To the extent, therefore, that the constitutionality of the individual mandate depends upon the power "To make all Laws which shall be necessary and proper for carrying into Execution . . . the power to regulate Commerce . . . among the several States," the mandate is unconstitutional.

ARGUMENT

I. The government's claim that the individual mandate is supported by the Commerce Power is really a claim that it is supported by the Necessary and Proper Clause rather than by the Commerce Clause alone.

Although it is common to refer loosely to constitutional cases involving congressional economic regulation as "commerce clause cases," this is usually inaccurate as a technical matter. Most cases involve not the core Commerce Clause alone, but also the Necessary and Proper Clause. U.S.CONST. art. I, §8, cl.18. Thus, in Gonzales v. Raich, 545 U.S. 1 (2005), the Court upheld a congressional law based not on the Commerce Clause alone but because the law was within "the power vested in Congress by Article I, §8, of the Constitution '*[t]o make all Laws which shall be necessary and proper for carrying into Execution*' its authority to 'regulate Commerce with foreign Nations, and among the several States.'" *Id*. at 5 (italics added). Similarly, in United States v. Darby, 312 U.S. 100, 118 (1941), the Court distinguished the "regulation of commerce among the states" (that is, the core Commerce Clause) from "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" (that is, the Necessary and Proper component, as shown by the immediately-ensuing citation of *McCulloch*). *Id*. at 118-19. *See also* Wickard v. Filburn, 317 U.S. 111, 125 (1942) ("But even if appellee's

activity be local and *though it may not be regarded as commerce*, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.") (italics added); *Raich* at 22 ("as in *Wickard* . . . Congress was acting well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce . . . among the several States.' ").

Many economic activities regulated by Congress are based on the Necessary and Proper Clause because those activities are outside the Constitution's core meaning of "regulate Commerce," which is limited primarily to governance of mercantile trade and of certain closely-related activities, such as navigation, commercial paper, and the channels and instrumentalities of commerce. *See* Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L.REV. 101 (2001); Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L.REV. 847 (2003); Natelson, *The Legal Meaning of "Commerce" In the Commerce Clause*, 80 ST. JOHN'S L.REV. 789, 836-39 (2006).[2] As Justice Scalia explained when concurring in *Raich*:

---

[2] Assertions that the Constitution uses "commerce" in the idiosyncratic sense of "all human interaction" are unsupportable textually and have been disproven. *See* Natelson & Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICH. L.REV. FIRST IMPRESSIONS 55 (2010), http://www.michiganlawreview.org/articles/commerce-in-the-commerce-clause-a-response-to-jack-balkin (citing contemporaneous dictionaries and numerous founding-era sources).

> [U]nlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, as this Court has acknowledged since at least *United States v. Coombs*, 12 Pet. 72, 9 L.Ed. 1004 (1838), Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause.

545 U.S. at 34 (Scalia, J., concurring).

The Necessary and Proper Clause authorizes regulation of economic activities outside the core meaning of "commerce" when such regulation is *incidental* to the regulation of commerce. McCulloch v. Maryland, 17 U.S. 316, 406 (1819) (discussing "incidental or implied powers"); United States v. Lopez, 514 U.S. 549, 554 (1995) (describing earlier cases regulating activities outside a strict reading of the Commerce Clause as "incidental regulation"). Thus, the validity of the ACA's individual insurance mandate depends on whether the mandate is incidental to Congress's power to regulate interstate commerce, as contemplated by the Necessary and Proper Clause.

Newly-published research into the origins of the Clause has been conducted by four leading scholars of

constitutional law and history with disparate political and jurisprudential views. GARY LAWSON, GEOFFREY MILLER, ROBERT NATELSON & GUY SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE (Cambridge University Press, 2010) (hereinafter "ORIGINS"). That research demonstrates that the Necessary and Proper Clause does not support the ACA's individual mandate. A mandate to citizens to purchase a product from private entities[3] does not qualify as "necessary"

[3] The Constitution authorizes some mandates that citizens transact with *government*. These are within Congress's core enumerated powers, and do not depend on the Necessary and Proper Clause. Taxes are authorized directly by U.S.CONST., art. I, §8, cl.1. Jury service is inherent in the power "To constitute tribunals inferior to the supreme Court," art. I, §8, cl.9, a fact confirmed by the Constitution's jury guarantees. Art. III, §2, cl.3; amends. V, VI & VII. Military conscription is embraced by the power to "declare War," art. I, §8, cl.11, and to "raise . . . Armies," art. I, §8, cl.12; Cox v. Wood, 247 U.S. 3 (1918). Eminent domain is inherent in several express powers, including that of erecting "Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." Art. I, §8, cl.17; *see also* amend. V ("nor shall private property be taken for public use, without just compensation.").

There is no founding-era evidence that a mandate requiring citizens to engage in commerce with private parties was encompassed within the power to "regulate Commerce," even if the mandate were designed to finance other regulation. On the contrary, to "regulate" an activity naturally presupposes an activity to regulate. *See*, *e.g.*, President James K. Polk, Veto message, Dec. 15, 1847, *in* VETO MESSAGES OF THE PRESIDENTS OF THE UNITED STATES 209 (Poore ed., 1886) ("To 'regulate' admits or affirms the pre-existence of the thing to be regulated.") Using the power to "regulate Commerce" to punish persons not in commerce is akin using the power to "establish Post Offices" (art. I, §8, cl.7) to finance the postal service by fining non-users.

(incidental). Moreover, the mandate is not "proper" in the sense the Constitution uses that word.

II. The Necessary and Proper Clause is a recital informing the reader that the doctrine of incidental powers applies to the Constitution's enumerated grants of authority.

A. Under founding-era law and practice, when an instrument granted enumerated powers and then followed the enumeration with a clause authorizing "necessary" actions in furtherance thereof, the clause was a mere recital that the doctrine of incidental powers applied to the instrument.

When promoting the Constitution during the ratification debates, advocates repeatedly explained that the Necessary and Proper Clause was a recital only, that it granted no additional power, and that the Constitution's legal force would have been the same without it. *Infra* Part II(C). Their position was fully consistent with contemporaneous law and legal practice.

During the founding era, both governments and individuals often created instruments by which persons or entities granted authority to other persons or entities. These grants included powers of attorney, trust instruments, corporate charters, commissions,

and other fiduciary documents. ORIGINS at 52-83, 144-76 (citing numerous such instruments).

A fundamental obligation of the eighteenth-century fiduciary[4] was to act only within the scope of delegated authority. In describing the scope of delegated authority, drafters usually followed fixed customs. They might list express powers and specifically limit the grantee to those powers. More commonly, however, they listed express powers and added a general clause informing the reader of any additional authority beyond that explicitly conveyed.

The scope of additional authority depended on the precise language of the general clause. There were at least five common formulae, some of which conveyed more power than others. ORIGINS at 72-78. For example, some formulae gave the grantee almost limitless discretion. *See*, *e.g.*, U.S.CONST., art. II, §3 (granting the President power to make such recommendations to Congress "*as he shall judge* necessary and expedient") (emphasis added); *id*., art. V (granting Congress power to propose amendments whenever Congress "shall deem it necessary"). However, for the Necessary and Proper Clause, the Framers adopted *the most restrictive formula* among those

[4] The underlying principles of founding-era fiduciary law were generally similar to fiduciary law today. *See generally* Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L.&POL. 239 (2007) (describing eighteenth-century fiduciary principles).

commonly employed. The Clause authorized only laws that were both "proper" (discussed *infra* Parts V & VI) and "necessary." ORIGINS at 77-78.

In this context, the word "necessary" did not always exclusively coincide with factual necessity. *Cf. McCulloch*, 17 U.S. 316, 413 (discussing different meanings of "necessary"). Rather, it was a term of art meaning *incidental*. ORIGINS at 61n.26 (citing many examples). When a legal instrument conveying express authority also authorized actions "necessary" to effectuate that authority, it was referring to the prevailing common law *doctrine of incidental powers*. That doctrine altered the maxim that delegated powers are strictly construed, by widening construction of the instrument to effectuate the intent of the parties. ORIGINS at 66-67. For example, if construed strictly, a grant of authority to "manage my farm" might be limited to on-site activities, thereby excluding crop sales. The doctrine of incidental powers widened that grant to include crop sales, if the parties so intended.

When the Constitution was adopted, the doctrine of incidental powers had become the legal default rule. It was applied to instruments in absence of contrary language. ORIGINS at 64, 76-77; 2WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *347 (1765-69) ("A subject's grant shall be construed to include many things, besides what are expressed, if necessary for the operation of the grant."). Nevertheless, drafters often added a recital to alert readers that incidental powers were included. As Lord Coke

had explained, such recitals "declare and express to laymen . . . what the law requires in such cases." Boroughe's Case (K.B. 1596) 76 Eng.Rep. 1043, 1044-45 (reporter's commentary). The Necessary and Proper Clause is an example of such a recital. Its inclusion was important because the Articles of Confederation had expressly excluded incidental powers.[5]

B. The drafting history of the Necessary and Proper Clause also confirms that it is a recital of the founding-era incidental powers doctrine.

A majority of the delegates to the 1787 federal convention were or had been practicing lawyers. The non-lawyer delegates also were knowledgeable about law as a result of personal study, business and professional experience, and government service. ORIGINS at 85.

The Articles of Confederation had contained a provision excluding incidental powers, thereby explicitly negating the default rule. Most convention delegates, however, wanted the new Constitution to grant incidental as well as express authority. They believed

[5] ARTS. OF CONFED., Art. II ("Each state retains . . . every Power, Jurisdiction and right, which is not by this confederation *expressly* delegated to the United States . . . ") (emphasis added).

that the failure of the Articles of Confederation to do so had been a mistake. Among delegates holding this view was John Dickinson of Delaware (a primary drafter of the Articles), who had, in addition to public service, been a highly prominent practicing lawyer. Dickinson's outline for a new Constitution contained a forerunner of the Necessary and Proper Clause. SUPPLEMENT TO MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 86, 89 (Hutson ed., 1987) (authorizing Congress "to pass Acts" for executing certain powers).

Drafting of the Necessary and Proper Clause was undertaken by the Committee of Detail. Like Dickinson, four of the five members of that Committee were distinguished attorneys.[6] The fifth, Nathaniel Gorham, had served as president of Congress[7] and as a business agent.[8]

The first draft of the Clause, extant in Randolph's handwriting, expressly referenced the incidental power doctrine as a tool of judicial interpretation.

---

[6] Edmund Randolph (who would become the first Attorney General of the United States), Oliver Ellsworth (third Chief Justice), John Rutledge (second Chief Justice of this Court), and James Wilson (one of the most eminent lawyers in America, and an original Justice of this Court). ORIGINS at 85-86.

[7] *Id.* at 85.

[8] *See*, *e.g.*, *Resolve Empowering Nathaniel Gorham, Esq., Agent*, ch.25, 1779 Mass. Acts 17 (noting the state's previous appointment of Gorham as an agent in the same matter). (In 1779 the title "Esquire" did not necessarily mean that the person was a lawyer.)

2MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 144 (1937) ("all incidents without which the general principles cannot be satisfied shall be considered, as involved in the general principle"). The provision was replaced by one in Rutledge's handwriting, which substituted the most common legal label for incidental powers: "necessary." The new provision read: "a right to make all Laws necessary to carry the foregoing Powers into Execu-." *Id.*

Two more additions remained. The first clarified that Congress's incidental legislative authority also applied to powers the Constitution enumerated outside Article I, Section 8 ("and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"). This acknowledged the Constitution's conveyance to Congress of "[a]ll legislative Powers herein granted." U.S.CONST., art. I, §1.[9] The other addition required

---

[9] In the Committee draft, the latter section read: "The legislative power shall be vested in a Congress . . . " 2FARRAND at 163.

While admitting that the "foregoing powers" part of the Clause merely recites the incidental powers doctrine, some have argued that authority "To make all Laws which shall be necessary and proper for carrying into Execution . . . *all other Powers*" bespeaks a further grant of unspecified authority. The argument is irrelevant to the present case, because the Commerce and Taxation Clauses on which the ACA is purportedly based are both among the "foregoing powers."

Even if it were relevant, that interpretation is untenable. It requires applying variant meanings, within the same Clause, to the single specialized phrase "necessary and proper." It also

(Continued on following page)

that incidental legislation be "proper." The Committee and Convention approved the Clause without significant controversy.

C. The ratification history of the Necessary and Proper Clause further demonstrates its role as a recital of the founding-era incidental powers doctrine.

The Necessary and Proper Clause was much-discussed during the ratification debates. The American public seems to have understood and appreciated fiduciary law to a considerable degree – which in the governmental context the founding generation called the rules of "public trust." Natelson, *Judicial Review of Special Interest Spending*: *The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L.& POL. 239, 247-48 (2007) (discussing the

---

contradicts repeated Federalist explanations to the public at the Founding, *infra* Part II(C), and disregards the limiting words "*vested by this Constitution* in the Government of the United States, or in any Department or Officer thereof." (Emphasis added.) Departments and officers are, of course, created by Congress, which even in absence of this language would have incidental authority to delineate their duties. "The Government of the United States" refers to institutions of the federal government other than departments or officers of the United States, such as joint actors or single houses of Congress. *E.g.*, U.S.CONST., art. II, §2, cl.2 (treaty power exercised by President and by one house of Congress). This phrase acknowledges that Congress may exercise any legislative incidents of that authority, such as the power to adopt laws implementing treaties.

fiduciary knowledge of the eighteenth-century general public and some reasons for it). That was why the floor leader of the Federalists at the North Carolina ratifying convention, James Iredell (a future Justice of this Court), could describe the Constitution as "a great power of attorney" and believe the characterization would be persuasive. 4THE DEBATE IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 148 (Elliot ed., 2d ed., 1891).

A leading concern of "Anti-Federalists" opposing the Constitution during those debates was that the document could be construed to grant unlimited authority to the federal government. They cited the Necessary and Proper Clause as an example. However, in the course of their argument, Anti-Federalists persistently misquoted the Clause as if it followed another of the common formulae for such clauses – a formula granting wider power. *E.g.*, 13THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 402 (Jensen *et al.* eds., 1976) (anti-Federalist tract changing "necessary and proper" to "which the *Congress shall think necessary and proper*").

To correct the inaccuracy, Federalists explained to the ratifying public that the Clause as actually worded granted no substantive authority. It was inserted merely from an abundance of caution, to avoid quibbling disputes about the extent of federal authority and to clarify that the express grants in the Constitution (unlike those in the Articles of Confederation) encompassed incidental means.

The representation that the Clause granted no additional power was a core portion of the Federalist argument, repeated by many of the Constitution's advocates. These included James Madison, Alexander Hamilton, James Wilson (future Supreme Court Justice), James Iredell (another future Justice), Oliver Ellsworth (a future Chief Justice), Edmund Pendleton (Virginia's leading lawyer), George Nicholas (law professor, member of Virginia House of Delegates), and several others. ORIGINS at 97-108 (citing *The Federalist* and numerous other sources). The Federalists added that the legal effect of the Constitution's power grants would have been precisely the same if the Necessary and Proper Clause were not included. This was because enumerated powers always encompassed incidental powers unless expressly excluded. *Id.* Several ratifying conventions recommended declaratory amendments to cement this understanding. The declarations were eventually encapsulated in the Ninth and Tenth Amendments. *Id.* at 113-14 (explicating rationale for proposed amendments).

D. Subsequent history confirms that the Necessary and Proper Clause is a recital of the incidental powers doctrine.

During the 1791 congressional debates over chartering a national bank, opponents and advocates disagreed about whether chartering was "incidental" to Congress's principal enumerated powers. However, they generally agreed that the doctrine of incidental powers under the Necessary and Proper Clause

controlled the question. ORIGINS at 114-19 (citing congressional debate). Shortly after the debates, Attorney General Edmund Randolph, who had served on the Convention's Committee of Detail, confirmed in writing that the word "necessary" had been intended as a synonym for "incidental." ORIGINS at 88n.28 (U.S. Attorney General Randolph's opinion on the constitutionality of a proposed national bank).

The same view was expressed by the Supreme Court under the leadership of Chief Justice John Marshall, who had served as a leading advocate of the Constitution at the Virginia ratifying convention. In McCulloch v. Maryland, 17 U.S. 316 (1819), the Court applied the Clause as a recital of the incidental powers doctrine. In public writings explaining *McCulloch*, moreover, Marshall explicitly endorsed that view of the Clause. *See* JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 166-176 (Gunther ed., 1969) (quoting Marshall's language). In keeping with the nearly-uniform Federalist representations during the ratification debates, *supra* Part II(C), Marshall also emphasized that the Clause granted no additional power. *Id.* at 176 ("The third & last proposition . . . is, 'that the insertion of the words necessary and proper in the last part of the 8th section of the 1st article, did not enlarge powers previously given, but were inserted only through abundant caution.' . . . I do not mean to controvert this proposition."), 186 ("[T]he constitution may be construed as if the clause which has been so much discussed, had been entirely omitted.") In subsequent cases, the Supreme Court has

continued to recognize that the Necessary and Proper Clause is a statement of the incidental powers doctrine.[10]

In short, the legal background, drafting history, and ratification history all demonstrate that the Clause did not extend congressional authority beyond the enumerated powers. It merely affirmed the default rule that the Constitution's express grants of power included incidental powers proper to effectuate the express powers.

III. Under the original meaning, for an unstated power to qualify as "necessary" (i.e., incidental) to an express power, the unstated power had to be both (1) inferior to the express power, and (2) so connected to it by custom or need as to justify inferring that the parties intended the inferior power to accompany the express power.

As noted above, during the founding era, the word "necessary" in provisions similar to the Necessary

---

[10] *E.g.*, United States v. Comstock, 130 S.Ct. 1949, 1956 (2010) (quoting *McCulloch*); Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964) ("the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof"); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 214 (1946) ("No constitutional provision forbids Congress to do this. On the contrary, its authority would seem clearly to be comprehended in the 'necessary and proper' clause, as incidental to both its general legislative and its investigative powers.").

and Proper Clause was a synonym for *incidental* – it signified application of the doctrine of incidental powers. That doctrine, in turn, was part of a wider body of jurisprudence by which incidents, appurtenances, appendants, and fixtures were attached to more important "principals." ORIGINS at 60-61. The purpose of the doctrine of principals and incidents in grants was to assist the interpreter in arriving at the probable intent of the parties. ORIGINS at 66-67, 82-83 (citing, inter alia, Chief Justice Marshall's statement that "All instruments are to be construed fairly, so as to give effect to their intention. . . . The object of language is to communicate the intention of him who speaks, and the great duty of a judge who construes an instrument, is to find the intention of its makers.").

In order to deduce the probable intent of the parties, the courts applied a series of tests to determine whether a purportedly-incidental power was, in fact, incident to the principal. As explained below, these tests required that the purported incident be *both* inferior to its principal *and* attached to it either by custom or particular showings of factual need.

A. For an unstated power to qualify as "necessary" (incidental) to an express power, it must be "inferior" to it – less valuable, and subsidiary.

In founding-era jurisprudence, an incident was "a thing necessarily depending upon, appertaining to,

or following another thing *that is more worthy or principal*." GILES JACOB, A NEW LAW-DICTIONARY (10th ed., 1782) (unpaginated) (emphasis added). In other words, an unexpressed power could not be an incident to an express power unless it was essentially inferior to it. To qualify as an incident,

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

ORIGINS at 61-62.

To illustrate, the power to *sell* land was considered independent of, or at least as "worthy" as, the power to *manage* that land. So authority to manage the land could carry incidental power to make short-term leases, but it never included power to sell the fee. 1MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 235-36 (5th ed., 1786); 3CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY 538-40 (1742).[11]

---

[11] Bacon's *Abridgment* was a digest first published early in the eighteenth-century and frequently republished. Highly popular during the founding era, it has been cited in 55 Supreme Court cases, most recently in *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Viner's *Abridgment* (written by the man who

(Continued on following page)

Thus, the Necessary and Proper Clause incorporated as incidents only items subsidiary and inferior to their principals.

This was the rule applied in Chief Justice Marshall's opinion in *McCulloch v. Maryland*. *Before* reaching the more famous part of his analysis, Marshall addressed whether power to grant a corporate charter was a power equal to those powers expressly enumerated, or was inferior. He concluded that incorporation was "not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers." 17 U.S. at 417. Instead, incorporation "must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means. . . ." *Id*. at 421.

Of course, once the Court decided that the power to incorporate was truly inferior, the Court then had to address the further criteria of custom and need. *Id*. at 408 ("It can never be pretended, that these vast powers draw after them others of inferior importance, merely because they are inferior").[12] However, the

---

arranged for William Blackstone's academic appointment at the University of Oxford) was the largest digest of the time. Supreme Court Justices have cited it at least a dozen times. *E.g.*, Hawk v. Olson, 326 U.S. 271, 275 (1945).

[12] In examining the portion of *McCulloch* reached after the finding of subsidiarity, modern readers sometimes conclude that the Court applied rather lax criteria because the Court held that

(Continued on following page)

threshold requirement was whether the incorporation power was inferior to those expressly enumerated. If it were not, there would have been no incidental authority to incorporate a bank, no matter how indispensable or useful that institution might be.

In explaining *McCulloch* to the general public, Marshall further affirmed that an incident was always less "worthy" than the enumerated powers it supported. JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND, at 171.

---

a subsidiary means could be incidental if merely "convenient," 17 U.S. at 413, or "appropriate," *id.* at 421, for executing express powers. However, these readers sometimes forget that the finding of subsidiarity had to be met first.

Moreover, when *McCulloch* was issued, *both "convenient" and "appropriate" had distinctly narrower meanings than they do today*. Specifically, "convenient" meant "Fit; suitable; proper; well-adapted." SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (multiple editions, unpaginated); THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1789) (unpaginated) ("convenient" means "Fit, suitable, proper"). As Marshall himself observed, MARSHALL, DEFENSE, *supra*, at 106, the contemporaneous meaning of "appropriate" also was fairly narrow: It meant "peculiar," "consigned to some particular use or person," – "belonging peculiarly." *Cf.* SHERIDAN ("appropriate" is "peculiar, consigned to some particular"); JOHNSON ("peculiar" is "appropriate; belonging to anyone with exclusion of others" and "Not common to other things" and "Particular, single").

B. For an inferior power to qualify as "necessary" (incidental), it also had to be so connected to its principal by custom or need as to justify inferring that the parties intended the inferior power to accompany the express power.

Being inferior to a principal was a *precondition* to qualifying as "necessary" (incidental), but was not *sufficient*. *McCulloch*, 17 U.S. at 408 ("It can never be pretended, that these vast powers draw after them others of inferior importance, merely because they are inferior"). In addition, one of three other circumstances was required:

- The inferior power was indispensable to exercise of the principal. *E.g.*, The King v. Richardson (K.B. 1757) 96 Eng.Rep. 1115, 1127.
- The inferior power was so valuable to the principal that without it the principal would have little value – i.e., without the putative incident the principal would suffer "great prejudice." 3MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW *406 (1786). Fish (personal property) are not absolutely necessary to the existence of the pond containing them (real property), but "they are so annexed to and so necessary to the well-being of the [real-property] inheritance, that they shall accompany the land wherever it vests. . . ." 2BLACKSTONE, at *427-28.

- The inferior power was a recognized, customary way of exercising the principal. For example, a broker enjoyed incidental authority to extend credit to customers if a broker of that kind customarily received that authority. Anonymous (K.B. 1701) 88 Eng.Rep. 1487.

Thus, if a power was not inferior, it was not incidental. If the power was inferior, but the power was neither indispensable, nor required to avoid "great prejudice," nor customary, then the interpreter could infer that the parties did not intend that power to accompany the grant.[13]

C. In the years since the Founding, this Court has applied similar tests of incidence in many contexts.

In the years since the Founding, the Supreme Court has applied similar tests of incidence in many contexts. Under the law of this Court, incidents are inferior (or in the word of Justice Brandeis, "subsidiary"[14])

---

[13] *Cf.* Linder v. United States, 268 U.S. 5, 18 (1925) ("Obviously, direct control of medical practice in the states is beyond the power of the federal government. Incidental regulation of such practice by Congress through a taxing act cannot extend to matters plainly inappropriate and unnecessary to reasonable enforcement of a revenue measure.").

[14] New York Life Ins. Co. v. Dodge, 246 U.S. 357, 381 (1918) (Brandeis, J., dissenting) ("It was an act contemplated by the policy and was subsidiary to it, as an incident thereof.").

to their principals,[15] sometimes being referred to as "mere incidents."[16] If subsidiary, an item may qualify as an incident if it is indispensable to the principal.[17]

---

[15] *See*, *e.g.*, Michaelson v. United States ex rel. Chicago, St.P., M.&O.Ry.Co., 266 U.S. 42, 65 (1924) ("The discretion given the court in this respect is incidental and subordinate to the dominating purpose of the proceeding."); Anderson v. Forty-Two Broadway, 239 U.S. 69, 73 (1915) (stating approvingly that "Congress deemed that corporate indebtedness is an incident only if it does not exceed the corporate capital," and if otherwise, "the carrying of the indebtedness should be considered as a principal object of the corporate activities"). *Cf.* Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 36 (1961) (Harlan, J., concurring and dissenting) ("[T]he Commission can properly assert this *more limited power as an incident* of its transportation certificating powers.") (emphasis added); International Union v. Russell, 356 U.S. 634, 642-43 (1958) ("The power to order affirmative relief under § 10(c) is merely incidental to the primary purpose of Congress").

[16] *E.g.*, Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 368 (1968) ("mere incidents"); United States v. Sealy, 388 U.S. 350, 356 (1967) (same).

[17] *E.g.*, Dames & Moore v. Regan, 453 U.S. 654, 682, 688 (1981) (President's power to settle debts is nearly indispensable to recognition of foreign governments, and is long-standing, and therefore is incidental); Nebraska v. Wyoming, 325 U.S. 589, 636 (1945) (approvingly quoting United States v. Haga, 276 F. 41, 43 (D.Idaho 1921) that certain activities are "necessarily incident to practical irrigation"); First National Bank in St. Louis v. State of Missouri, 263 U.S. 640, 656 (1924) (national banks "can rightfully exercise only such [powers] as are expressly granted or such incidental powers as are necessary to carry on the business for which they are established"); Lewis Publishing Co. v. Morgan, 229 U.S. 288, 314 (1913) ("the right to exercise that power carries with it the authority to do those things which are incidental to the power itself, or which are plainly necessary to make effective the principal authority when exerted."); Wood v.

(Continued on following page)

This Court sometimes refers to indispensable incidents as "necessary incidents."[18]

Similarly, a subordinate power may qualify as incidental if the value of the principal would suffer "great prejudice" without it.[19] Finally, a power inferior to a principal power may, under the jurisprudence of this Court, be incidental by reason of pre-existing

---

Chesborough, 228 U.S. 672, 678 (1913) ("To the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right."); Miller v. King, 223 U.S. 505, 510 (1912) (applying statute permitting bank to "exercise all such incidental powers as shall be necessary to carry on banking").

[18] *E.g.*, Dames & Moore, 453 U.S. at 688 ("But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute"); United States v. Barnett, 376 U.S. 681, 699-700 (1964) (" 'The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident . . . of a court, without which it could no more exist than without a judge.' "); Chesborough, 228 U.S. at 678 (1913) ("To the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right."); Ex Parte, In the Matter of Duncan N. Hennen, 38 U.S. 230, 259 (1839) ("In the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and *necessary* rule, to consider the power of removal as incident to the power of appointment.") (emphasis added).

[19] *See* United States v. Carter, 231 U.S. 492, 494 (1913) (an action was a legitimate incident in the exercise of appellate jurisdiction when "it will prevent a destruction of or *render practically unavailing* the reviewing power.") (italics added). *Cf.* Marin v. Augedahl, 247 U.S. 142, 156 (1918) ("such incidental business as may reasonably be necessary for the purposes of its organization.") (Clarke, J., dissenting).

custom.[20] The Court calls such incidents "customary," "usual," or "ordinary" incidents."[21] Some incidents, of course, are the product of *both* necessity and custom.[22] If, however, both necessity and custom are absent, the item is not an incident.[23]

---

[20] *E.g.*, United States v. Equitable Life Assur. Society, 384 U.S. 323, 331 (1966) ("the established practice of awarding costs in the ordinary sense fairly renders those items an incident"); *see also* sources cited in the following note.

[21] *E.g.*, Crowell v. Benson, 285 U.S. 22, 71 (1932) ("customary incidents of a judicial hearing," and "usual incidents"); Comm'r of Internal Revenue v. Wodehouse, 337 U.S. 369, 418 (1948) ("ordinary incidents"); United States v. Carbone, 327 U.S. 633, 641 (1946); Hawes v. State of Georgia, 258 U.S. 1, 4 (1922) ("Distilling spirits is not an ordinary incident of a farm"); City of Covington v. South Covington & C.St.Ry.Co., 246 U.S. 413, 418-19 (1918) (street railroads, but not steam railroads, are "one of the ordinary incidents of a city street").

[22] *E.g.*, Dames & Moore, 453 U.S. at 682, 688 (President's power to settle debts is necessary to recognition of foreign governments *and* is long-standing, and therefore is incidental); Fort Smith Spelter Co. v. Clear Creek Oil & Gas Co., 267 U.S. 231, 233 (1925) ("Everything in short pointed to a very extensive enterprise *which hardly would be possible* without the power incident to this public service under the laws of the State. *It would be most unusual*, as all know, for such a Company to attempt to work in any other way. It already had franchises in several towns and cities to supply gas.") (emphasis added).

[23] *Cf.* United States v. Pink, 315 U.S. 203, 252-53 (1942) (Stone, J., dissenting) (summarizing and agreeing with a prior holding to the effect that a claimed incident did not qualify as such if neither necessary or customary).

IV. The individual mandate is not authorized by the Necessary and Proper Clause because under the meaning of that Clause, the mandate does not qualify as "incidental" to the regulation of commerce.

The founding-era history of the Necessary and Proper Clause demonstrates that for a power to be incidental to an express grant, the power must be within an intent-based construction of the express grant, standing alone. *Supra* Part III. In other words, the scope of authority is determined by an intent-based construction *in the absence of the Necessary and Proper Clause*. Thus, the individual mandate must be within an intent-based construction of the words, "The Congress shall have Power . . . To regulate . . . Commerce . . . among the several States," U.S.CONST., art. I, §8, cl.3, without further assistance from the Necessary and Proper Clause.

The criteria for deducing intent, and therefore incidence, are set forth in Part III: As a threshold matter, the putative incident must be inferior to (subsidiary to, less "worthy" than) the enumerated power. If the inferiority requirement is met, then the power is incidental only if it accompanies the principal power by virtue of custom or is "indispensable" or is required to avoid "great prejudice."

One might argue that the ACA mandate's unprecedented nature shows that it is not "customary" to the regulation of commerce, and that previous state regulation demonstrates that it is neither

"indispensable" nor required to avoid "great prejudice." There is no need to consider those points, however, because *the mandate does not even meet the threshold test of subsidiarity*.

The authority claimed by the government in this case – to compel private citizens to purchase approved products from other, designated private persons – is certainly not inferior to garden-variety regulations of commerce. It is a power truly awesome in scope, and one that, if granted to Congress, the Constitution surely would have enumerated separately.

Consider an analogy: If one were to grant a power of attorney to a person to manage an apartment building, one would not deduce, in absence of specific language, that the manager also received authority to *sell* the building. The power to sell a fee is not "less worthy than" (in the language of the founding era) the power to manage. If a property owner also wished to grant authority to sell, the authorizing instrument would so specify.

Forcing people to perform a particular activity is not subsidiary to mere regulation. On the contrary, it is greater, more sweeping. It cannot, therefore, be incidental to the power to regulate. Bluntly put, it is inconceivable that those adopting the Constitution intended to grant Congress sweeping authority to compel all private citizens to do business with any other private persons. If they had so intended, they unquestionably would have enumerated the power separately. *Cf. McCulloch*, 17 U.S. at 417, 421.

V. The Necessary and Proper Clause also serves as a recital informing the reader that laws are subject to fiduciary ("public trust") constraints.

A. To be "proper" within the meaning of the Clause, a law must comply with basic fiduciary norms.

In addition to being "necessary" (incidental), congressional enactments under the Necessary and Proper Clause must be "proper." The fact that propriety was a separate requirement from necessity is confirmed by the decision of the federal convention's Committee of Detail to add "proper" separately, and at a later time than when it inserted "necessary." 2FARRAND, RECORDS OF THE FEDERAL CONVENTION, at 144. It is further confirmed by evidence from the text itself. Lawson, *Discretion As Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L.REV. 235, 249-55 (2005) (explaining that the word "proper" could not have been redundant with the word "necessary").

A law is "proper" within the meaning of the Necessary and Proper Clause only if the law conforms with the fiduciary norms of public trust – that is, with such duties as impartiality, good faith, and due care, and the obligation to remain within the scope of granted authority. Several aspects of the historical and legal record confirm this.

First: The generation that wrote and adopted the Constitution believed free government to be

constrained by obligations applying to fiduciaries – the limitations of "public trust." Political discourse was filled with assessments of government rules and actions according to fiduciary standards. ORIGINS at 52-56; Natelson, *The Constitution and the Public Trust*, 52 BUFF. L.REV. 1077 (2004). This was particularly true in the federal and state ratifying conventions and in the public debate over the Constitution. *Id.* at 1083-86 (numerous examples, including formal resolutions from the Virginia and Maryland ratifying conventions).

Second: During the founding era, the words "proper" was often applied to actions that complied with fiduciary norms, and "improper" was often applied to actions that did not. This was particularly true at the 1787 federal convention. ORIGINS at 89-91 (citing numerous examples). Ratification-era discussion exhibited the same characteristic, marked by suggestions that laws violating the fiduciary obligations of Congress would be "improper," and therefore unconstitutional. *Id.* at 108-09. Founding-era speakers frequently employed the term "proper" to refer to actions peculiarly within the jurisdiction of an actor. Lawson & Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993) (citing numerous examples, including, but not limited to, contemporaneous dictionaries, use of the term in state constitutions and in the ratification debates, and in the First Federal Congress).

Third: The founding generation often viewed the Constitution as a kind of corporate charter; the view was unsurprising since corporate charters were also grants of authority and often public or quasi-public instruments. ORIGINS at 147. Such charters very frequently contained language similar to the Necessary and Proper Clause. A recent scholarly survey of founding-era corporate charters has confirmed that the word "proper," particularly when coupled with "necessary," described compliance with fiduciary obligations. *Id*. at 173-74 (survey of 374 contemporaneous charters).

B. The fiduciary rules encapsulated by the requirement that laws be "proper" included well-established limitations on delegated governmental power.

When the Constitution was adopted, a series of judicial holdings already had applied to government authority the fiduciary norms encapsulated in the requirement that laws be "proper." Perhaps the first was Rooke's Case (C.P. 1598) 77 Eng.Rep. 209,[24] which involved a statute giving sewer commissioners power to assess landowners for the costs of repairing water-control projects. The statute authorized the commissioners to assess the landowners as the commissioners "shall deem most convenient to be ordained." The

[24] *Rooke's Case* is the foundational authority for the interpretation of delegated powers. WILLIAM WADE & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW 293-94 (10th ed., 2009).

commissioners used this statute to impose the full costs of a repair on a single landowner, even though others also benefitted from the project. The court ruled for the landowner because,

> notwithstanding the Words of the commission give Authority to the commissioners to do according to their Discretions, yet their Proceedings ought to be limited and bound with the Rule of Reason and law. For Discretion is a Science or Understanding to discern between Falsity and Truth, between Wrong and Right, between Shadows and Substance, between Equity and colourable Glosses and Pretences, and not to do according to their Wills and private Affections. . . .

77 Eng.Rep. 210.

In other words, discretion, even when textually unlimited, had to be exercised reasonably – and in a disinterested and *impartial* fashion.

By the end of the seventeenth century, fiduciary-style constraints on delegated power had become firmly established. STANLEY DE SMITH ET AL., JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 297-98 (5th ed. 1995); *see also* Estwick v. City of London (K.B. 1647) 82 Eng.Rep. 515, 516 ("wheresoever a commissioner or other person had power given to do a thing at his discretion, it is to be understood of sound discretion, and according to law").

In the eighteenth century, courts continued to apply those constraints, even to very broadly worded

grants of discretion. *E.g.*, Keighley's Case (C.P. 1709) 77 Eng.Rep. 1136, 1138 (statute authorizing sewer commissioner to make rules "after your own wisdoms and discretions" implicitly required the agent to exercise discretion "according to law and justice"); Leader v. Moxon (C.P. 1773) 96 Eng.Rep. 546. In *Leader*, paving commissioners, under a statute giving them power to pave or repair streets "in such a manner as the commissioners shall think fit," ordered a road repair that effectively buried the doors and windows of plaintiff's house. In awarding damages, the court wrote that the agents

> had grossly exceeded their Powers, which must have a reasonable construction. Their Discretion is not arbitrary, but must be limited by Reason and Law. . . . [H]ad Parliament intended to demolish or render useless some houses for the Benefit or Ornament of the rest, it would have given express Powers for the Purpose, and given an Equivalent for the loss that Individuals might have sustained thereby.

Id. at 546-47.

These constraints on government discretion were inherent in the exercise of delegated governmental power during the founding era. In England, these rules did not apply to Parliament itself because they were inferences about Parliament's intentions in delegating to executive and judicial agents. The American Constitution, however, *did* apply fiduciary rules to Congress, which, unlike Parliament, received only

delegated authority. The Necessary and Proper Clause is the Constitution's vehicle for making this clear.

Prevailing case law had established that discretion in governmental actors must be exercised impartially (*Rooke's Case*; *Keighley's Case*), with attention to causal efficacy (*Keighley's Case*), in a measured and proportionate fashion (*Leader*), and with regard for the rights of affected subjects (*Leader*). *See* ORIGINS at 120, 137-41 (elaborating the substantive requirements contained in the leading cases). These fiduciary-style limitations were encapsulated by a provision stating that laws for executing powers must be "proper."

Thus, the Necessary and Proper Clause affirmed that Congress (1) enjoyed incidental powers, but (2) only to the extent exercised in conformance with the full panoply of fiduciary duties. ORIGINS at 80.

VI. The individual mandate is not a "proper" law for executing the Commerce Power.

As detailed *supra*, the Founders sought to incorporate fiduciary standards into the Constitution. One way they did so was to require that federal laws be "proper." Propriety requires, at the least, compliance with basic fiduciary norms.

One of the most basic fiduciary obligations is the duty of impartiality, i.e., to treat all principals with presumptive equality. RESTATEMENT (SECOND) OF TRUSTS §183 (1995) ("When there are two or more beneficiaries of a trust, the trustee is under a duty to

deal impartially with them."). In *Keighley's Case*, for instance, the sewer commissioners could not impose the full costs of projects or repairs on only some of the affected landowners, even when the governing statutes seemed to provide that discretion. Nor under *Leader* could the paving commissioners repair a road by burying one person's house.

The purpose of the individual mandate is to force people who choose not to buy insurance to enter the market in order to subsidize other people. Although Congress could fund an insurance subsidy program for high-risk individuals through general taxation, the individual mandate is not a tax but is essentially a taking or a form of involuntary servitude. It is analogous to, for example, compelling physicians, under penalty of fine, to devote fifteen hours per week to providing health care to favored individuals. It also is analogous to relieving distress in the automobile industry by compelling citizens to buy cars. Similarly, Congress cannot use the Necessary and Proper Clause to force one group of citizens to buy a product to benefit other groups, even if Congress could assist by resorting to legitimate constitutional powers.

Although the individual mandate is unprecedented, the Founders were familiar with a related commercial regulation: the government-chartered monopoly. When government chartered a monopoly, it limited the market to one provider. All or most monopolies were less intrusive than the individual mandate, because under monopoly conditions citizens

remained free to "go without" – to abstain from purchasing the product altogether. Thus, the citizens of Boston in 1773 abstained from purchasing monopolized tea. But as the Boston Tea Party demonstrated, grants of monopolies were profoundly unpopular.[25] They were seen as violations of the public trust; because they erected a system of commercial favoritism, they violated the government's fiduciary obligation to treat citizens impartially. For this and other reasons they also were held to violate common law. Case of Monopolies (Q.B. 1602) 77 Eng.Rep. 1260.

Leading Founders were split on whether the congressional power to regulate commerce included authority to establish monopolies. *Compare* 2FARRAND, RECORDS OF THE FEDERAL CONVENTION, at 616 (James Wilson claiming such authority), 633 (Elbridge Gerry

---

[25] *See* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14THE PAPERS OF THOMAS JEFFERSON 21 (Boyd ed., 1958) ("With regard to monopolies they are justly classified among the greatest nuisances in Government."). Jefferson agreed. Letter from Thomas Jefferson to James Madison (July 31, 1788), in 7THE WRITINGS OF THOMAS JEFFERSON 98 (Bergh ed., 1907).

Several state ratifying conventions proposed that the Constitution be amended to prohibit the grant of a commercial monopoly. HERMAN AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY 255 (1897); *see also* Grzandziel, *A New Argument for Fair Use Under the Digital Millennium Copyright Act*, 16 U. MIAMI BUS.L.REV. 171, 177-81 (2008) (discussing requests by Mass., N.H., N.C., and N.Y. for amendments to prohibit Congress from creating monopolies and describing the hostility of the Founders to monopolies, except for copyrights and patents).

to like effect) *with* 616 (George Mason to the contrary). Yet during the ratification debates, the Constitution's advocates asserted that any law creating a monopoly, even if otherwise within congressional power, would be invalid as "improper" under the Necessary and Proper Clause. As a Federalist writer calling himself the "Impartial Citizen" pointed out:

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

8 DOCUMENTARY HISTORY at 431.

The conclusion is clear: If a commercial monopoly – which citizens may avoid by not purchasing the product monopolized – is constitutionally void as "improper," then far more "improper" is a mandate for the benefit of a favored few that none but a favored few may avoid.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

DAVID B. KOPEL
Counsel of Record
INDEPENDENCE INSTITUTE
727 East 16th Avenue
Denver, Colo. 80203
(303) 279-6536
Counsel for Amici Curiae