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Bad News for Everybody: Lawson and Kopel on Health Care Reform and Originalism

Gary Lawson and David Kopel's Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate argues, on the basis of recent research, that the Necessary and Proper Clause incorporates norms from eighteenth-century agency law, administrative law, and corporate law, and that the health care mandate (and perhaps much else in the U.S. Code, though they are coy about this) violates those norms. The Necessary and Proper Clause, as the authors understand it, tightly limits the scope of implied powers to those that are less "worthy" or "dignified" than the principal powers to which they are subsidiary. These claims are obscure even on their own terms. It is mysterious how we are to know whether the power to impose a penalty for going without health insurance is less "dignified" or "worthy" than the power to regulate interstate commerce. Nor is it clear how an effort by Congress to guarantee that all Americans have adequate health care could violate a fiduciary duty of impartiality. Their logic implies the greatest revolution in federal power in American history. (And this would decidedly be a revolution from above.) There is also the larger methodological question of the role of original meaning in constitutional interpretation: they think that new evidence of original meaning is, without more, a legitimate basis for hamstringing Congress's power to address pressing national problems. This would be an insane way to run a civilization. It is bad news for everybody.

INTRODUCTION

Gary Lawson and David Kopel's *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*¹ purports to reply to my essay defending the constitutionality of the health care mandate.² Surprisingly, however, most of my claims about the scope of the commerce and taxing powers attract little of their attention.³ And even with respect to the Necessary and Proper Clause, which is the focus of Lawson and Kopel's essay, these authors do not defend—or even mention—the principal target of my attack: the reasoning of the federal district courts that have agreed with them that the mandate is unconstitutional.

The really big surprise is their account of the Necessary and Proper Clause. Relying on a new book coauthored by Lawson, *The Origins of the Necessary and Proper Clause*,⁴ they argue that the Clause incorporates norms from eighteenth-century agency law, administrative law, and corporate law, and that the mandate (and perhaps much else in the U.S. Code, though they are coy about this⁵) violates those norms. The book is a valuable contribution, an original and enlightening exploration of the contemporaneous meaning of the Clause. The book is, however, careful to take no position on how the Clause should be interpreted today.⁶ *Bad News for Professor Koppelman* is bolder. It is, to my knowledge, the first piece of modern scholarship that has ever proposed that these eighteenth-century norms become the master concepts for determining the scope of congressional power today.⁷

1. Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267 (2011), <http://yalelawjournal.org/2011/11/08/lawson&kopel.html>.
2. Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1 (2011), <http://yalelawjournal.org/2011/04/26/koppelman.html>.
3. They do challenge those claims briefly in explaining that “lack of space” prevents a fuller rebuttal. Lawson & Kopel, *supra* note 1, at 268 n.8.
4. GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (2010) [hereinafter *ORIGINS*].
5. See *infra* text accompanying notes 23-25 & 48-49.
6. See Gary Lawson, Geoffrey P. Miller, Robert G. Natelson & Guy I. Seidman, *Raiders of the Lost Clause: Excavating the Buried Foundations of the Necessary and Proper Clause*, in *ORIGINS*, *supra* note 4, at 1, 8-9.
7. The proposal is suggested, with little elaboration, in a few passages in Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243, 319-21 (2004).

Because what they offer is *new* news, it seems harsh to reproach me for not taking the limits they offer into account in my own consideration of congressional power. How could I have known? Nor am I alone in my innocence. For nearly 200 years, the federal government has taken on ever larger responsibilities without reference to these limits, which had been forgotten. From now on, Lawson and Kopel tell us, everything will have to be different. Any question of congressional power must ignore all of this history and be resolved solely with reference to “careful study of the Clause’s origin, purpose, and meaning.”⁸

The Necessary and Proper Clause, as they understand it, tightly limits the scope of implied powers to those that are less “worthy” or “dignified” than the principal powers to which they are subsidiary. Their logic implies the greatest revolution in federal power in American history. (And as I shall shortly explain, this would decidedly be a revolution from above.) The stakes go way, way beyond health care reform. Lawson and Kopel do not merely want to burn the house to roast the pig. They are ready to torch the whole city.

I. THE NEW (ORIGINAL) NECESSARY AND PROPER CLAUSE

Lawson and Kopel raise two constitutional objections to the mandate. First, “a law enacted under the Clause must exercise a subsidiary rather than an independent power.”⁹ The mandate does not satisfy this requirement, because “the power to order someone to purchase a product is not a power subordinate or inferior to other powers.”¹⁰ Second, an exercise of power must treat citizens impartially, “with an eye toward the interests of *all* affected persons.”¹¹ This requirement is violated by a mandate that requires people to buy insurance “in order to subsidize other people.”¹² These are, Lawson and Kopel acknowledge, unfamiliar rules of law, “perhaps strange-sounding to modern ears.”¹³ I will consider each in turn.

8. Lawson & Kopel, *supra* note 1, at 268-70.

9. *Id.* at 270.

10. *Id.* at 271.

11. *Id.* at 288.

12. *Id.*

13. *Id.* at 270.

A. *Worthy and Dignified*

The first of these requirements is puzzling. An incident must be “a thing necessarily depending upon, appertaining to, or following another thing that is more worthy or principal.”¹⁴ How are we to tell if one power is as “worthy” or “dignified” as another? To return to a case I focused on in my first essay,¹⁵ how are we to know that the power to jail those who rob the mails is “less important or less valuable”¹⁶ than the enumerated power to operate a post office?¹⁷

These terms (“worthy,” “dignified”) may have made sense in the eighteenth century. “By the founding era, the jurisprudence of principals and incidents had become a prominent and well-developed branch of the law. Numerous cases had specified which lesser interests were incident to which greater interests.”¹⁸ But it is not obvious how to translate these terms from their then-familiar applications in property law or the law of corporations to the very different context of governmental powers. Chief Justice Marshall tried to do it in *McCulloch v. Maryland*.¹⁹ So did others at the time who struggled with the question presented there: whether Congress had the power to charter a bank.²⁰

Lawson and Kopel are right that I paid no attention to these discussions. The reason was because these terms are no part of modern constitutional doctrine: as they concede, “[m]ore recent cases no longer use the language of principals and incidents.”²¹ Since the lower courts to which I was responding

14. *Id.* at 273 (quoting GILES JACOB, A NEW LAW-DICTIONARY (London, Strahan et al., 10th ed. 1782)).

15. Koppelman, *supra* note 2, at 5, 8-9.

16. Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in ORIGINS, *supra* note 4, at 52, 61.

17. U.S. CONST. art. I, § 8, cl. 7. Lawson and Kopel respond to this difficulty by arguing that, under a 1711 English statute, “the power to ‘establish’ a post office seems directly to have included the power to define and punish crimes against the post office.” Lawson & Kopel, *supra* note 1, at 278 n.42. But the only evidence they offer for this proposition is the title of the English statute, “An Act for Establishing a General Post Office,” the substance of which extends to defining crimes against the post office. *Id.* It will take more than one statute’s casual use of a label to establish that the shared semantic meaning of “post office,” evident to any reasonable person in the eighteenth century, included the apparatus of criminal justice.

18. Natelson, *supra* note 16, at 62.

19. 17 U.S. (4 Wheat.) 316, 413-21 (1819).

20. See Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, in ORIGINS, *supra* note 4, at 84, 114-19.

21. Lawson & Kopel, *supra* note 1, at 283.

have claimed that the mandate was unconstitutional under existing law, I thought that my task was to justify the mandate under that law.

These terms take us into terra incognita. The debates at the time of *McCulloch* show that even then, there was deep uncertainty about how to apply the doctrine of principals and incidents to Article I of the Constitution.²² It is even harder to know how to apply them today. And what would be the consequence if we did? All we are told is that the holdings of more recent cases – meaning cases decided in the last century – “are broadly consistent with that framework,”²³ and that sustaining the constitutional objection to the individual mandate “does not require overruling any decision.”²⁴ They add that “one could fairly argue that those decisions misapplied the original meaning of the Necessary and Proper Clause, but those arguments would involve issues not raised here.”²⁵ It is, in short, an open question how much of existing law would have to be scrapped if this worth-and-dignity rule were adopted by the courts.

What is not uncertain is that the federal government now exercises unenumerated powers that are not obviously lesser to the enumerated ones. The enumerated power “to establish a uniform Rule of Naturalization”²⁶ seems no more “dignified”²⁷ than Congress’s plenary authority to regulate immigration and exclude aliens.²⁸ Perhaps what they say about the mandate is also true of control over the borders: this “is an extraordinary power of independent significance . . . that would be enumerated as a principal power if it were granted at all to the federal government.”²⁹ Congress regulates air and water pollution under the Clean Air Act³⁰ and the Clean Water Act,³¹ which is “not a ‘less worthy’ or less substantial power than the power to regulate

22. See *supra* text accompanying notes 19–20.

23. Lawson & Kopel, *supra* note 1, at 283. They do, however, express doubt that the federal government has any power to regulate the insurance industry. *Id.* at 271 n.14.

24. *Id.* at 284 n.66.

25. *Id.* at 283.

26. U.S. CONST. art. I, § 8, cl. 4.

27. Lawson & Kopel, *supra* note 1, at 279.

28. See *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *United States v. Jung Ah Lung*, 124 U.S. 621 (1888); *Chew Heong v. United States*, 112 U.S. 536 (1884).

29. Lawson & Kopel, *supra* note 1, at 280.

30. 42 U.S.C. § 7401 (2006).

31. 33 U.S.C. § 1251 (2006).

commerce.”³² Nor is the power to regulate intrastate railway rates that have “a close and substantial relation to interstate traffic[,] . . . to the efficiency of interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms.”³³ Nor is the power to ban racial discrimination in places of public accommodation that serve interstate travelers or that sell products shipped across state lines³⁴: the Civil Rights Act of 1964 may be in trouble.³⁵ Nor is the power to regulate the sale of adulterated food: the Food, Drug, and Cosmetic Act may also have to go.³⁶ Nor is the sale of securities, which typically is not conducted across state lines: so much for the Securities and Exchange Commission.³⁷ Nor is banking: out goes the Federal Reserve.³⁸ Congress has the enumerated power to “coin Money,”³⁹ but the power to print paper money is not obviously inferior or subordinate to this, and Madison denounced any such power at the end of Federalist 10.⁴⁰

B. *Fiduciary Duties*

Exercises of power under the Necessary and Proper Clause, Lawson and Kopel argue, must conform to the fiduciary obligation “to treat all principals with presumptive equality when there is more than one principal.”⁴¹ The mandate violates this: “The purpose of the individual mandate is to force people who choose not to buy a particular type of insurance from government-favored oligopolists to buy the unwanted product in order to subsidize other people.”⁴²

32. Lawson & Kopel, *supra* note 1, at 280.

33. *Houston E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342, 351 (1914).

34. See *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

35. Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C.).

36. Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified at 21 U.S.C. § 201 (2006)).

37. Securities Exchange Act of 1934, Pub. L. No. 73-291, ch. 404, 48 Stat. 881 (codified at 15 U.S.C. § 78a (2006)).

38. Federal Reserve Act, Pub. L. No. 63-43, ch. 6, 38 Stat. 251 (1913) (codified at 12 U.S.C. §§ 221-228 (2006)).

39. U.S. CONST. art. I, § 8, cl. 5.

40. THE FEDERALIST NO. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961). As has Lawson. See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 33 (1994).

41. Lawson & Kopel, *supra* note 1, at 288.

42. *Id.*

Note the peculiar formulation in the cumbersomely constructed sentence just quoted, which uses “to” twice to refer to two different infinitive verbs,⁴³ thus stating the Act’s purpose ambiguously. Which of these do they take to be the purpose: to force people to buy, or to subsidize health care consumers who would lose out in an unregulated market? It is a silly question, of course. The answer is both. However, it is clear (and the sentence implicitly acknowledges) which is the end and which is the means. The reason for the mandate, its instrumental purpose, is to spread the cost of insuring those with preexisting conditions who would be unable to buy insurance absent the regulatory scheme.⁴⁴ If the latter is the fundamental purpose of the law, then it is hardly clear that Congress has not acted “with an eye towards the interests of *all* affected persons.”⁴⁵ Congress is trying to make sure that everyone equally has access to adequate and affordable health care. Lawson and Kopel have not explained why that is not “to treat them all fairly.”⁴⁶ Indeed, it is arguable that Congress violated its fiduciary obligations by allowing the health care issue to fester, and millions to go uninsured, for decades before it finally addressed it.

Maybe Lawson and Kopel understand the impartiality requirement more radically than this: to require not just that government act for impartial reasons, but that all laws not benefit or harm any distinct class of citizens. There may not be “political favorites.”⁴⁷ But all laws classify and create winners and losers. If that is what is forbidden, then all laws would be, at least presumptively, unconstitutional.⁴⁸ How that presumption of anarchy could be rebutted—and what the new “general federal ‘equal protection’ doctrine that extends far beyond the specific case of the individual mandate”⁴⁹ would entail—is something that Lawson is not yet ready to tell us. Until he does, the claim that the mandate violates this rule is too cryptic to answer.

43. Actually it contains four infinitive verbs, but “to force” and “to subsidize” are the two plausible candidates for the statute’s purpose.

44. The mandate is an eminently rational means to that end. See Koppelman, *supra* note 2, at 2, 14-18.

45. Lawson & Kopel, *supra* note 1, at 288.

46. Natelson, *supra* note 16, at 59.

47. Lawson & Kopel, *supra* note 1, at 291.

48. The anarchical tendencies of Lawson’s suspicion of law are noted in Larry Alexander, *Proving the Law: Not Proven*, 86 NW. U. L. REV. 905, 905 (1992).

49. Lawson & Kopel, *supra* note 1, at 291 n.94.

II. A LARGER AGENDA

I said at the outset that their “reply” may not really be a reply. They implicitly concede my central claim, that the mandate is plainly legitimate under the Necessary and Proper Clause as it has been understood in the United States for more than half a century. The judicial opinions declaring the mandate unconstitutional were transparently dishonest in claiming that their approach was required by (or even consistent with) settled precedent concerning the scope of congressional power.⁵⁰ Lawson and Kopel properly treat those arguments as beneath their notice. Conformity with precedent is no part of their project.

The rules that Lawson and Kopel’s originalist research claims to have uncovered,⁵¹ if implemented, would seem to accomplish just what I have said that other arguments against the mandate would do: “randomly blow up large parts of the U.S. Code.”⁵² But this cannot be said of Lawson and Kopel. It rather appears that they would *deliberately* blow up large parts of the U.S. Code. Why would one think that the destruction of so much existing American law is appropriate? It would obviously be silly to claim that settled law is untouchable, but is it not equally obvious that it should not be trashed whenever new archival research casts doubt on its originalist credentials?

Of the two authors, Lawson is the one with the most thoroughly worked-out interpretive theory, so I will focus on his other work for an answer.⁵³ The most prominent scholars who claim that the mandate is unconstitutional are all hunting for bigger game; all have long sought a revolution in federal power.⁵⁴ Lawson, one of our most sophisticated constitutional theorists, is no exception. But even within this crowd, his well-matured constitutional theory incorporates an unusual degree of recklessness.

50. See Koppelman, *supra* note 2, at 7-9.

51. Not being a historian, I cannot judge the accuracy of those claims, but I have no reason to doubt them. The authors of *The Origins of the Necessary and Proper Clause* are all respected and careful scholars.

52. Koppelman, *supra* note 2, at 11.

53. Kopel may not agree with Lawson’s larger project, so the critique in Part II is addressed exclusively to Lawson. Lawson and Kopel’s argument stands on its own, and the argument of Part I, *supra*, recognizing its radical implications does not in any way rely on Lawson’s prior work. That said, my claim is reinforced by evidence that those implications are intended. When you, the reader, evaluate their interpretation of the Constitution, I think it is relevant (this is one of my methodological differences with Lawson, see *infra* notes 59-66 and accompanying text) that the judicial adoption of that interpretation would harm you and your family.

54. Koppelman, *supra* note 2, at 18, 21-22.

Lawson is untroubled by the wholesale overruling of precedent, because he does not think that precedent is part of the Constitution and thinks that it is almost always unconstitutional to give it any weight at all.⁵⁵ He is also confident that “[t]he post-New Deal administrative state is unconstitutional.”⁵⁶ The elimination of all federal regulation of the complex American economy might, of course, devastate the lives of millions of people, turning American life into a nightmare of pollution, consumer fraud, contaminated food and drink, and rampant racial discrimination. A judicial decision that U.S. paper money is worthless might throw the whole world economy into depression, possibly precipitating famines and wars. Other opponents of the health care law—such as Randy Barnett and Richard Epstein,⁵⁷ who want to dismantle the modern administrative state—are naively optimistic about the results that will follow from its demolition.⁵⁸ Lawson just does not care. He is prepared “to hold fast to the Constitution though the heavens may fall.”⁵⁹ In interpreting the Constitution, he has warned, we must not “contaminate the interpretative inquiry with concerns about real-world decisionmaking.”⁶⁰

Lawson thinks that constitutional interpretation must *never* be contaminated by such nontextual considerations—that, in fact, any mode of

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55. Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007) (building on Lawson, *supra* note 40).
 56. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994).
 57. See RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004) [hereinafter BARNETT, RESTORING]; RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992); RICHARD A. EPSTEIN, MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE? (1997) [hereinafter EPSTEIN, MORTAL PERIL]; Randy E. Barnett, *The Case for a Federalism Amendment*, WALL ST. J., Apr. 23, 2009, <http://online.wsj.com/article/SB124044199838345461.html>; Richard A. Epstein, *Impermissible Ratemaking in Health-Insurance Reform: Why the Reid Bill Is Unconstitutional*, POINT OF LAW (Dec. 18, 2009), <http://www.pointoflaw.com/columns/archives/2009/12/impermissible-ratemaking-in-he.php>.
 58. See BARNETT, RESTORING, *supra* note 57 (claiming that Americans will be much freer without federal regulation); EPSTEIN, MORTAL PERIL, *supra* note 57 (suggesting that most people will still have health care without Medicare and Medicaid).
 59. Lawson, *supra* note 56, at 1249. His views on this question are somewhat unclear, however. Elsewhere he suggests that it may be impossible to show that the Constitution has authority in the contemporary United States. See Gary Lawson, *Interpretative Equality as a Structural Imperative (or “Pucker Up and Settle This!”)*, 20 CONST. COMMENT. 379, 381 (2003); Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1835-36 (1997) [hereinafter Lawson, *On Reading Recipes*]. Evidently he doubts the Constitution’s authority but is prepared to invoke it whenever it would help defeat any assertion of state power.
 60. GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY 9 (2004).

reasoning that does take consequences into account is not entitled to be called interpretation.⁶¹ Rather, it is “self-evident”⁶² that interpreters must read constitutional texts in isolation from their effects. It makes no difference whether we are reading the Confederate constitution or the one that governs the United States today.⁶³

It would be silly to wrestle with him⁶⁴ over who gets to use the term “interpretation,” but I will note that the public meaning of the term in contemporary America refers to the practice of parsing the Constitution as it is, in fact, done by the federal courts. American constitutional interpretation—like it or not, that is the label that the natives around here attach to the practice—does not rely exclusively on original intention or meaning. Philip Bobbitt has shown that American constitutional argument also draws on precedent, inferences from the overall structure of the government that has been established, prudence, and the Court’s sense of the national ethos. Constitutional arguments aim to draw all of these together into coherent accounts of constitutional meaning.⁶⁵ Because we must live with the results, our deepest collective aspirations also inevitably influence the interpretive inquiry.⁶⁶ We do not read the Constitution we have to live with the way we read the Confederate one.

The real originalist question is one of original purpose at different levels of abstraction. The commerce power has been stretched beyond anything specifically intended by the Framers. But the Framers also had a more abstract intention: in Robert Stern’s words, “that no hiatus between the powers of the state and federal governments to control commerce effectively was intended to

61. See Lawson, *On Reading Recipes*, *supra* note 59.

62. LAWSON & SEIDMAN, *supra* note 60, at 9.

63. *Id.*

64. He is ready to wrestle. See Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 78 n.79 (2006).

65. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982). Bobbitt denies that there is any algorithm for constitutional interpretation but defends the consequent indeterminacy on the basis that it “gives us a way to measure a possible legal world against our sense of rightness, going back and forth between a proposed interpretation and its world, and ourselves.” PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 158 (1991). Robert Tsai has shown that constitutional law is even more indeterminate than Bobbitt allows, inasmuch as it has been significantly shaped by rhetorical moves that do not fit into any of Bobbitt’s modalities. See ROBERT L. TSAI, ELOQUENCE AND REASON: CREATING A FIRST AMENDMENT CULTURE 31-32 (2008).

66. JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011).

exist,”⁶⁷ and that the people of the United States should not “be entirely unable to help themselves through any existing social or governmental agency.”⁶⁸ It is like the old question whether the general purpose of the Fourteenth Amendment—to mandate the legal equality of blacks—should trump its Framers’ specific intention to permit school segregation and miscegenation laws.⁶⁹ The general purpose of the Constitution—the overriding reason why the Articles of Confederation were abandoned, and a reason known by every reasonable interpreter of the document at the time—was that the country was facing pressing national problems that no one state could solve.⁷⁰ This is why it is a legitimate move in constitutional argumentation to dismiss an argument for constraints on congressional power, even constraints that some Framers may specifically have had in mind as “so pernicious in its operation that we shall be compelled to discard it.”⁷¹ Lawson and Kopel’s originalism is not the only possible originalism.⁷² What is fundamentally perverse about their reading of the Necessary and Proper Clause is that it reproduces the situation that the Constitution was an attempt to overcome.⁷³

67. Robert L. Stern, *That Commerce Which Concerns More States than One*, 47 HARV. L. REV. 1335, 1365 (1934).

68. *Id.* at 1335.

69. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 117–33, 161–63 (1977); Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224 (1966).

70. In the terms that one of Lawson’s coauthors proposes, one might reasonably think that the power to solve problems that the states are separately incompetent to address is an “incidental power to undertake acts not within a strict construction but within the scope presumptively intended by the parties.” Natelson, *supra* note 16, at 67.

71. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 416 (1819).

72. Originalism is now a large cluster of very different theories. See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009). Jack Rakove’s warning is pertinent here:

With its pressing ambition to find determinate meanings at a fixed moment, the strict theory of originalism cannot capture everything that was dynamic and creative, and thus uncertain and problematic, in the constitutional experiments of the Revolutionary era Where we look for precise answers, the framers and ratifiers were still struggling with complex and novel questions whose perplexities did not disappear in 1788.

JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 10 (1996).

73. For Lawson, the Constitution should be interpreted from the standpoint of a hypothetical reasonable interpreter of semantic meaning. See LAWSON & SIEDMAN, *supra* note 60, at 10–11. Robert Bennett has noted Lawson’s tendency to implicitly ascribe nonobvious traits to this decipherer of constitutional meaning. See Robert W. Bennett, *Originalism and the Living*

III. "ORIGINALISM" AS A RATIONALIZATION FOR OLIGARCHY

There is also a question of democratic legitimacy. The mandate was enacted by Congress after a big, public, political fight. Lawson and Kopel propose to override this and to have the federal courts strike it down, in the name of a highly contestable conception of the Constitution.

Lawson, a former Reagan Administration official, is frustrated that Presidents Ronald Reagan and George H.W. Bush never opposed legislation on the grounds that it exceeded Congress's enumerated powers and certainly never tried to dismantle the modern regulatory state.⁷⁴ They did not do it because they knew it would be politically disastrous. Voters do not like poisoned food, air, and water.

The solution, then, is to do it through the courts: to impose—in the name of an admittedly fictitious We the People of the United States⁷⁵—results that most of the actual population of the United States would hate. To Lawson, it does not matter what the people think. A small elite of enlightened ones, drawing on specialized knowledge, will bring us a higher form of democracy that reflects the people's deepest interests, and they will do it by seizing centralized power.

But of course, we need to put originalist scholarship in context.⁷⁶ Lawson may be ready to dismantle the entire modern administrative state, but—as he often cheerfully admits⁷⁷—that is not going to happen. His work is, however, likely to be right handy for political actors inclined to be more selective. A revealing text here is a footnote from Justice Clarence Thomas's concurrence in *United States v. Lopez*,⁷⁸ which advocated a restriction of federal power much like Lawson and Kopel advocate, but with this proviso:

Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of *stare*

American Constitution, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 78, 107 (2011). The inclination to privilege specific over general purposes is one of those nonobvious traits.

74. Lawson, *supra* note 56, at 1237.

75. See Lawson & Seidman, *supra* note 64, at 59-61.

76. For another, related attempt to do this (in the Establishment Clause context), see Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727, 749-50 (2009).

77. See, e.g., Lawson, *supra* note 56, at 1236; Lawson, *supra* note 40, at 33.

78. 514 U.S. 549 (1995).

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decisis and reliance interests may convince us that we cannot wipe the slate clean.⁷⁹

Thomas's deference to precedent is only partial, however. He is still prepared to use originalism to trash those aspects of existing practice that he is satisfied that the country can do without.⁸⁰ There is a sense in which Thomas is more moderate than Lawson: a proposal to shoot everyone is more extreme than a proposal to shoot only those whom some central decisionmaker decides to liquidate. On the other hand, Thomas's modification of Lawsonian originalism transforms it from an exotic and weird philosophy of governance into one that is depressingly familiar: a little group of oligarchs get to govern everyone else.⁸¹ Lawson seems a charming, mostly harmless⁸² crank because his proposals are so unreal. In the hands of Thomas, however, originalism loses its harmlessness and thus its charm.

CONCLUSION: BAD NEWS FOR EVERYBODY

If we read the Constitution as Lawson and Kopel propose, then historical research of the kind that they have been doing becomes a lever that can move the world. New evidence of the original meaning of the Necessary and Proper Clause shows that American law misconstrues that meaning. So much the worse for American law. The rest of us, if we believe in the rule of law, are obligated to upend our lives and adapt to the new marching orders that emerge from the archives, at least until the next round of research yanks us off in

79. *Id.* at 601 n.8 (Thomas, J., concurring); see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (admitting to being a selectively "faint-hearted originalist").

80. For example, Justice Thomas recently declared, "my view [is] that the Establishment Clause restrains only the Federal Government, and that, even if incorporated, the Clause only prohibits 'actual legal coercion.'" *Utah Highway Patrol Ass'n v. Am. Atheists Inc.*, 132 S. Ct. 12 (2011) (Thomas, J., dissenting from denial of certiorari) (quoting *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring)). This would destroy at a stroke a large doctrinal structure of constitutional restraints on state imposition of religion, such as the prohibition of official prayer in schools.

81. See generally JEFFREY A. WINTERS, *OLIGARCHY* (2011).

82. He is not altogether harmless, because his scholarship has influenced Supreme Court decisionmaking. See, for example, *Printz v. United States*, 521 U.S. 898, 924 (1997), which cites Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993), to impose limits on the Necessary and Proper Clause; and *United States v. Comstock*, 130 S. Ct. 1949, 1972 n.2 (2010) (Thomas, J., dissenting), relying on the same article to attempt to impose still further limits.

another direction.⁸³ This would be an insane way to run a civilization. It is bad news for everybody.

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83. The mercurial tendency of this kind of originalism is inadvertently displayed in Lawson's own work. His earlier research produced an entirely different account of the Clause, even more severe than the present one, under which *McCulloch v. Maryland* "presents a hard case." Lawson & Granger, *supra* note 82, at 331. Yet, for some reason, the authors of *The Origins of the Necessary and Proper Clause* think that their own work is complementary with Lawson and Granger's article. See Gary Lawson & Guy I. Seidman, *Necessity, Propriety and Reasonableness*, in ORIGINS, *supra* note 4, at 120, 142; Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, in ORIGINS, *supra* note 4, at 144, 155, 175; Natelson, *supra* note 20, at 89-90.

The well-established, broad reading of congressional power under the Necessary and Proper Clause (under which the mandate is obviously authorized, *see* Koppelman, *supra* note 2) is clearly a persistent irritant for Lawson. It is the fly in his ointment, the frog in his throat, the weed in his garden, the leak in his boat, the bats in his belfry, the pebble in his shoe, the bull in his china shop, the mouse in his stew. Cf. Cole Porter, *You Irritate Me So*, in THE COMPLETE LYRICS OF COLE PORTER 304 (Robert Kimball ed., 1992).