

GARY LAWSON & DAVID B. KOPEL

Bad News for John Marshall

In Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate, we demonstrated that the individual mandate's forced participation in commercial transactions cannot be justified under the Necessary and Proper Clause as the Clause was interpreted in McCulloch v. Maryland. Professor Andrew Koppelman's response, Bad News for Everybody, wrongly conflates that argument with a wide range of interpretative and substantive positions that are not logically entailed by taking seriously the requirement that laws enacted under the Necessary and Proper Clause must be incidental to an enumerated power. His response is thus largely unresponsive to our actual arguments.

INTRODUCTION

So Chief Justice John Marshall was really a city-torching,¹ pollution-loving,² law-hating,³ killing machine?⁴ Who knew?

Such is the upshot of Professor Andrew Koppelman's hyperbolic reaction to our recent essay⁵ explaining that the individual mandate in the Patient

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1. Andrew Koppelman, *Bad News for Everybody: Lawson and Kopel on Health Care Reform and Originalism*, 121 YALE L.J. ONLINE 515, 517 (2012), <http://yalelawjournal.org/2012/03/13/koppelman.html>.
 2. *Id.* at 519.
 3. *Id.* at 522.
 4. *Id.* at 522-23.
 5. 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>.

Protection and Affordable Care Act (PPACA)⁶ is not constitutionally authorized by the Necessary and Proper Clause.⁷ We showed that the original meaning of the Clause authorizes the exercise only of powers that are “incidental” to an enumerated power. The power to compel private parties to purchase products from other private parties cannot be incidental to the power to regulate interstate commerce. In other words, the power to compel involuntary commerce is at least as great (or as “dignified” or as “worthy”) as the power to regulate voluntary interstate commerce.⁸

Second, we showed that the mandate’s establishment of a privileged oligopoly of health insurance companies with whom people are forced to transact is not “proper” because it violates the fiduciary norms embodied in the Clause. Government-created monopolies are the paradigm of an “improper” law under the original meaning of the Clause; a fortiori, compelling commerce with a government-created oligopoly is improper.⁹

The first point tracks precisely the analysis offered by Chief Justice Marshall (and all of the Justices who unanimously joined his opinion) in *McCulloch v. Maryland*.¹⁰ The case recognized that the incidental nature of the power of incorporation had to be established *before* one determined if an incorporated national bank was “necessary and proper for carrying into Execution”¹¹ federal powers. If, as Professor Koppelman appears to believe, only reprobates intent upon ending civilization, crashing the world financial order, and randomly killing off the populace could advance our arguments, a new biography of John Marshall is clearly warranted.

Looking past the ad homines and conspiracy theories that densely populate Professor Koppelman’s work, Professor Koppelman does not actually dispute our scholarly claims about the original meaning of the Necessary and Proper Clause. Since those were the only claims that we were making, we could perfectly well declare victory and go home. By the same token, Professor Koppelman correctly notes that we did not devote much attention to challenging *his* claims about the Commerce Clause, the Taxing Clause, or the specific reasoning employed by the various federal courts that have found the

6. Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (to be codified primarily in scattered sections of 42 U.S.C.).

7. U.S. CONST. art. I, § 8, cl. 18.

8. Lawson & Kopel, *supra* note 5, at 272-77, 279-84.

9. *Id.* at 287-91.

10. 17 U.S. (4 Wheat.) 316 (1819); see Lawson & Kopel, *supra* note 5, at 277-79.

11. U.S. CONST. art. I, § 8, cl. 18.

mandate unconstitutional.¹² Accordingly, *he* could very well have declared victory on that basis and gone home. Indeed, had he stopped his most recent essay after its first paragraph, we would all be on to other projects by now.

But no. In the course of casting our essay as the eighth sign of the apocalypse, Professor Koppelman commits a number of profound scholarly mistakes that merit correction, so here we are one more time.

Professor Koppelman's argument amounts to the following sequence of propositions: (1) people have not talked about principals and incidents in connection with the Necessary and Proper Clause for a long time and so it is therefore inappropriate to do so now; (2) if one accepts the notion that the Necessary and Proper Clause includes the doctrine of principals and incidents, and thus only grants Congress incidental powers, one must also accept all tenets of Professor Lawson's particular version of originalism; (3) the doctrine of principals and incidents leads to various constitutional outcomes that Koppelman finds, and that many readers will likely find, unappealing; and (4) if those constitutional outcomes were applied as grounds for decision in cases, really bad real-world consequences would follow. Each proposition embodies its own set of serious scholarly missteps, on which we offer some very brief thoughts seriatim.

**I. OUT WITH THE OLD . . . AND ALSO OUT WITH THE NEW . . .
AND ALSO OUT WITH PRETTY MUCH EVERYTHING ELSE THAT
PROFESSOR KOPPELMAN DOES NOT LIKE**

Professor Koppelman seems almost offended that we would remind modern readers of the premises underlying *McCulloch v. Maryland*.¹³ Modern courts do not talk that way. How dare we suggest that they consider doing so!

12. That is not because we agreed with his claims, no more than Professor Koppelman must be held to agree with everything we wrote that he did not specifically contest. Perhaps the day will come when scholars will send each other interrogatories or requests for admissions, but we are not there yet. Except in footnotes, we did not address issues beyond the Necessary and Proper Clause because (a) *The Yale Law Journal Online* has word limits, and (b) we thought we had fresher and more interesting insights to offer on the Necessary and Proper Clause.

13. Koppelman, *supra* note 1, at 516 (“*Bad News for Professor Koppelman* is . . . 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.”); *id.* at 516-17 (“[I]t 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?”). We are by no means the first modern scholars to propose application of the doctrine of principals and incidents. In fact, we borrowed the idea from Robert Natelson, who has been tirelessly

The ultraconservatism and anti-intellectualism of this response is startling to see in a scholarly journal. Professor Koppelman seems to believe that whatever forms of discourse exist at a particular moment in time are the only forms of discourse that responsible scholars or litigants can permissibly employ. Is no one ever to suggest a different or new or old way to think about problems? Do the concepts that appear in the current pages of the federal reporter system represent the final and ultimate stage in legal evolution? Of course not. Changing the forms of discourses, including reviving previously employed discourses, is a routine part of the real-world process of law.¹⁴ Moreover, the common law method that underlies Professor Koppelman's multimodal form of interpretation frequently (one might even say essentially) involves drawing out, articulating, and applying what is implicit or immanent in prior decisions or discussions.

The doctrine of principals and incidents has never been rejected. Until the unprecedented usurpation of power by the individual mandate, there were no obvious modern occasions to invoke it. That does not mean that it is not a correct understanding of the Constitution, and it does not mean that people interested in the correct understanding of the Constitution should not employ it.

II. BEING GARY LAWSON

Professor Koppelman appears to believe that acceptance of the doctrine of principals and incidents entails acceptance of a sweeping theory of constitutionalism exemplified by Professor Lawson's corpus of academic

researching such issues for years. See, e.g., Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243 (2004).

Besides, if the doctrine of principals and incidents is a novelty to many law professors, it has never been so to the Supreme Court. The Supreme Court has used the doctrine in many different contexts, in dozens of cases, of which the most famous recent one is *Dames & Moore v. Regan*, 453 U.S. 654 (1981). See 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), at 19 & n.10, 25-28 & nn.14-23, U.S. Dep't of Health & Human Servs. v. Florida, No. 11-398 (U.S. Feb. 13, 2012).

14. See, e.g., *Crawford v. Washington*, 541 U.S. 36 (2004) (transforming the discourse concerning the Confrontation Clause, based largely on scholarly work regarding the Clause's original meaning); JACK M. BALKIN, *LIVING ORIGINALISM* (2011) (arguing that constitutional discourse is always changing and that original meaning should always be an important part of constitutional discourse).

writings. This claim is silly on its face.¹⁵ John Marshall, for one, accepted our argument that the Necessary and Proper Clause grants only incidental powers¹⁶ (or, more precisely, we accepted John Marshall's argument), yet John Marshall did not agree with, *inter alia*, Professor Lawson's theory of precedent¹⁷ or his theories about the power of Congress to allocate jurisdiction among federal courts.¹⁸ Was John Marshall foolish or logically inconsistent? Is Professor Lawson's constitutional theory so powerful and so obviously correct that to dip one's toe into any aspect of originalism is to be irrevocably and tragically sucked into the Lawsonian vortex?

Professor Lawson is flattered that Professor Koppelman would so intimate, but modesty compels him to admit that it is possible to endorse some facets of his positions while rejecting others without committing a plain logical fallacy.¹⁹ In particular, the argument that we advanced in *Bad News for Professor Koppelman* was *not* a purely Lawson argument. Initially, there's the empirical fact that it was a Lawson-Kopel argument (and indeed one that was largely inspired by insights from Rob Natelson, Guy Seidman, and Geoffrey Miller). Moreover, a person could believe, for example, that precedent operates either as some part of original meaning or as some kind of side constraint upon it and could still agree with us about both the general doctrine of principals and incidents and the specific application of that doctrine to the individual

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15. If Professor Koppelman does not mean to assert this claim, it becomes very difficult to imagine why he spends so much time describing work by Professor Lawson that has little or nothing to do with the present argument.
 16. We also believe that John Marshall would have endorsed our specific application of the doctrine of principals and incidents to the individual mandate, but to justify that belief would require a separate article. Fortunately, Professor Kopel and Robert Natelson have already written it. Robert G. Natelson & David B. Kopel, "Health Laws of Every Description": *John Marshall's Ruling on a Federal Health Care Law*, 12 *ENGAGE* 49 (2011), available at http://www.fed-soc.org/doclib/20110603_NatelsonKopelEngage12.1.pdf.
 17. Compare *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401-02 (1819) (invoking legislative and executive precedent as a grounds for upholding the constitutionality of the Bank of the United States), with Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 *AVE MARIA L. REV.* 1 (2007) (arguing that precedent is almost never a valid source of constitutional meaning).
 18. Compare *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-76 (1803) (holding that Congress cannot expand the Supreme Court's original jurisdiction), with Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 *COLUM. L. REV.* 1002, 1037-42 (2007) (arguing that it can).
 19. To be clear: Professor Lawson thinks that he is right about most of what he says (he occasionally offers up a few tentative ideas about which he is not sure in order to stimulate thought), but to get to many of his positions requires chains of reasoning that go far beyond the simple insight that the Necessary and Proper Clause embodies the doctrine of principals and incidents.

mandate. (The precedent-bound person would know that the doctrine of principals and incidents has never been rejected and that nothing relevantly like the individual mandate has ever been upheld.) A person could also believe that broader or more general conclusions regarding federal power—those one might reach by undiluted application of Lawsonian original meaning—are interpretatively foreclosed by any of the various modalities of which Professor Koppelman is so fond, if those modalities are part of that person’s own interpretative framework.

Our argument represents an overlapping consensus among a wide range of theories that employ some version of originalism, and most of those theories do not compel Lawsonian purity. If Professor Koppelman wants to describe the interpretative consequences of adopting the doctrine of principals and incidents, he needs to describe the interpretative consequences of adopting the doctrine of principals and incidents, not the interpretative consequences of being Gary Lawson.²⁰ So we now turn to the doctrine itself.

III. BURNING DOWN THE HOUSE?

For someone who decries the uncertainty and indeterminacy surrounding the doctrine of principals and incidents as it applies to the Necessary and Proper Clause,²¹ Professor Koppelman is remarkably confident that use of such a doctrine would “blow up large parts of the U.S. Code.”²² He sees the imminent demise of federal immigration law, pollution control law, intrastate

20. As to whether Professor Koppelman has accurately described the interpretative consequences of being Gary Lawson, Professor Lawson would have to write a separate article to address the subject point by point—it is a mixed bag. Professor Koppelman surely comes close enough to shock and horrify the people that he was trying to shock and horrify. Professor Lawson is cheerfully capable of being shocking and horrifying. He is also, however, cheerfully capable of being blandly conventional. He has written five editions of an unremittingly doctrinal administrative law casebook, teaches unremittingly doctrinal courses, and has a corpus of unremittingly doctrinal scholarship to go along with his edgier work. He frequently coauthors work with folks decidedly to the left (not just to *his* left, which is pretty much everyone, but to the *country’s* left). His article with Kopel (a lifelong registered Democrat) sits comfortably within a zone of overlapping consensus among a wide range of persons who take the meaning of the Constitution seriously.

21. See Koppelman, *supra* note 1, at 518-19. We cannot resist juxtaposing this passage with footnote 65 of the same essay, which celebrates the rampant indeterminacy of Professor Koppelman’s favored multimodal interpretative approach. *Id.* at 524 n.65.

22. *Id.* at 522.

railroad rate regulation, antidiscrimination law, food and drug law, securities law, and banking law.²³

Professor Koppelman's central methodological error is plain: he is using the doctrine of principals and incidents as a stand-in for every conceivable argument that any person of any conceivable interpretative persuasion could make against any conceivable exercise of federal power. This is the same error that some people used to make about *Lochner v. New York*.²⁴ *Lochner* was a case about whether the Fourteenth Amendment limited a state's abilities to set maximum hours laws, absent sufficient evidence that the maximum hours law protected health and safety. Whether or not *Lochner* was correctly decided,²⁵ the decision had nothing to do with doctrines such as the delegation of lawmaking power to an administrative agency, the scope of the Interstate Commerce Clause, the scope of the federal taxing power, the scope of the federal spending power, and so on. Yet "*Lochner*" was used as an epithet to attack any decision that ruled against anything that the early twentieth-century Progressives wanted to do.

Similarly, Professor Koppelman's litany involves an enormous and diverse set of federal laws. Perhaps there are textualist or originalist arguments that could be made that would call some of them into question.²⁶ But would following *McCulloch v. Maryland*²⁷—that is, would applying the doctrine of principals and incidents—kill every one of those laws? Professor Koppelman is confident that the answer is "yes." We are not so sure. In our essay, we provided a detailed examination of how the doctrine of principals and incidents applies to the individual health insurance mandate. We encourage scholars to examine the constitutionality of all federal laws, including the ones listed by Professor Koppelman, through the same lens, but we doubt that such analysis would eliminate all the ones in his list.

For example, federal water pollution regulation is straightforwardly derived from the federal power to regulate the waters of the United States, which in turn flows (no pun intended) from the fact that the channels of navigation can

23. See *id.* at 519-20.

24. 198 U.S. 45 (1905).

25. For whatever it is worth, the arch-anarchist Professor Lawson thinks that it was wrongly decided.

26. Professor Lawson, for example, has specifically criticized at least some of those laws on nondelegation grounds. See Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 379-81 (2002).

27. 17 U.S. (4 Wheat.) 316 (1819).

be regulated under the Commerce Clause.²⁸ No strong inference from the Necessary and Proper Clause is necessary. Regulating intrastate rail rates to prohibit discriminatory pricing between interstate and intrastate markets is easily incidental to the power to regulate interstate rates. And if, by some chance, any of the laws that Professor Koppelman believes (perhaps correctly) are so essential to civilized life that their absence is unthinkable are in fact unconstitutional, we are confident that the overwhelming public support for Professor Koppelman's position will easily allow corrective amendments—which is precisely how the Constitution itself contemplates adjustment to changing circumstances.²⁹ The Constitution has been amended six times to give Congress new powers to address civil rights problems.³⁰ When Professor Koppelman's Progressive ancestors convinced the public that Congress needed new power to address an important national problem, the Eighteenth Amendment was ratified in under thirteen months.³¹ The Constitution simply requires that, when Congress wishes to exercise a power that was not granted by the Constitution, Congress ask for and receive a new grant of power from the American people. Congress cannot usurp new powers for itself simply because a bare majority of Congress and some law professor enablers think that the novel power would be beneficial.

With respect to mail robbers, the power to punish violations of federal law and to create offices and appropriate funds for enforcement³² is comfortably incident to a governmental power to pass laws. This is why the Necessary and Proper Clause can authorize the prescription of penalties, the creation of offices, and the appropriation of funds for enforcement. As Chief Justice Marshall explained, "the power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers."³³ The punishment of mail robbers does not raise an issue about the conceptual scope of incidental power—which is why Chief Justice Marshall discussed mail robbery in the context of rejecting Maryland's

28. See Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 ST. JOHN'S L. REV. 789 (2006).

29. See U.S. CONST. art. V (explaining how to amend the Constitution).

30. *Id.* amends. XIII-XV, XIX, XXIV & XXVI. Each of these amendments includes a clause giving Congress the power to enforce the amendments by appropriate legislation.

31. Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919, 924 n.26 (1979).

32. See, e.g., *McCulloch*, 17 U.S. (4 Wheat.) at 417-18.

33. *Id.* at 418.

claim that “necessary” meant “indispensably necessary,”³⁴ and why Marshall did *not* discuss mail robbery in the context of rejecting Maryland’s claim that chartering a corporation could not be an incident.

We get the sense that Professor Koppelman simply does not understand the difference between an argument that something is not even theoretically an incident and an argument that something is not incidental in a particular context because it is not “necessary and proper for carrying into Execution”³⁵ a principal power. A full assessment of whether a law is authorized by the Necessary and Proper Clause requires four distinct inquiries: (1) is the claimed power even potentially an incident; (2) if potentially an incident, does the claimed power “carry[] into Execution” some other federal power; (3) if potentially an incident, is the claimed power “necessary” for carrying some power into execution and thus included among the incidental powers actually granted by this particular agency instrument; and (4) if potentially an incident and necessary, is exercise of the claimed power “proper” for executing federal power? The individual mandate flunks the first inquiry. The other laws identified by Professor Koppelman do not (or at least Professor Koppelman has not constructed a persuasive argument that they do).

The Koppelman parade of horrors also rests on a misunderstanding of how the doctrine of principals and incidents applies to the Necessary and Proper Clause. As we detailed in our essay, the Necessary and Proper Clause definitely does not authorize Congress to *compel* involuntary commerce among private parties. (The power to compel involuntary commerce is not an incident of, and is not “less worthy” than, the power to regulate voluntary interstate commerce.³⁶) Fortunately, it was not until 2010 that Congress ever claimed that it had such a power. So the recognition that Congress cannot compel commerce does not cast doubt on any federal statute, other than the PPACA itself. However, Congress can, under the Necessary and Proper Clause, sometimes regulate voluntary *intrastate* commerce. That is because the power to regulate voluntary intrastate commerce can indeed be an incident (a “lesser” power) of the enumerated power to regulate interstate commerce. Conceptually, the doctrine of principals and incidents *allows* the regulation of intrastate commerce and forbids a mandate to engage in involuntary

34. *Id.* at 417. For whatever it is worth, the arch-anarchist Professor Lawson agrees with Chief Justice Marshall on this point: Maryland and Thomas Jefferson were wrong to think that the word “necessary” in the Necessary and Proper Clause means “indispensable.” See Gary Lawson, *Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 246 (2005).

35. U.S. CONST. art. I, § 8, cl. 18.

36. Lawson & Kopel, *supra* note 5, at 277-79.

commerce. The constitutionality of a particular federal law premised on the interstate commerce power, and using the Necessary and Proper Clause to reach intrastate commerce, depends on the characteristics of the law that determines whether it is “necessary and proper for carrying into Execution”³⁷ some federal power. All we can say for certain is that if there is a constitutional problem with such a law, the problem is *not* that the law’s regulation of intrastate commerce is a violation of the doctrine of principals and incidents.

As *McCulloch* demonstrates, the scope of the constraint imposed by the doctrine of principals and incidents is quite narrow. Indeed, perhaps one of the reasons why modern cases have not discussed it is because, until the mandate, there was no occasion to do so. If Professor Koppelman wishes to make a detailed argument that some particular federal law violates the doctrine of principals and incidents, we would welcome his analysis. For the time being at least, we are skeptical that each and every law on his list must vanish simply from treating *McCulloch v. Maryland* as binding precedent.

It is interesting to see how often the advocates of the individual mandate, including Professor Koppelman, keep insisting that, if the Supreme Court strikes down a single, novel, and utterly unprecedented congressional usurpation of power, then more than a century’s worth of federal laws on other subjects will come crashing down with it.³⁸ While one of us, as Professor Koppelman notes, would be quite pleased to dispense with much of that century’s work product,³⁹ the doctrine of principals and incidents will not do the trick. It is not even close.⁴⁰

37. U.S. CONST. art. I, § 8, cl. 18.

38. Koppelman, *supra* note 1, at 519-20.

39. *Id.* at 522-23.

40. Neither will the fiduciary principle of equal treatment implicit in the Necessary and Proper Clause. Mandating purchases from government-favored oligopolists is obviously unconstitutional under the fiduciary principle, but the principle’s scope beyond that setting is not dramatically beyond the scope of current Equal Protection doctrine, which we assume Professor Koppelman does not regard as “anarchical.” *Id.* at 521 n.48. As for all federal laws therefore being “presumptively . . . unconstitutional,” *id.* at 521, this would be true only in a very limited sense: it is an obvious consequence, not of anything peculiar to our interpretation of the Necessary and Proper Clause (or any other clause), but of the whole idea of a government of enumerated powers. He who asserts must prove, and anyone who asserts the existence of a federal power therefore has to prove it. Professor Koppelman may be uncomfortable with the idea of a less-than-omnipotent government, but that is no reason to cast aside basic principles of epistemology.

IV. THE CONSTITUTION PREVAILS OVER POLICY ASSERTIONS

As freely as Professor Koppelman predicts the doctrinal consequences of theories that he professes to find baffling and unfamiliar, he even more freely predicts the real-world consequences of legal doctrines and policy positions, boldly pronouncing on complex social phenomena whose intelligent analysis requires expertise in a dizzying range of fields. To eliminate federal regulation, he declares, is to “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.”⁴¹ At other points in this exchange, Professor Koppelman makes confident pronouncements about the real world consequences of monetary policy,⁴² fiscal policy,⁴³ and even the wide range of scientific disciplines (chemistry, biology, physics, oceanography, meteorology, nephology, botany, statistics, etc.) necessary to make credible statements about global climate trends.⁴⁴ We know that Northwestern University School of Law values interdisciplinary work, but we were not aware that, in Professor Koppelman, they had a veritable Da Vinci in their midst.

Of course law professors, like other people, are entitled to have and express opinions on matters about which they have no particular qualifications to opine. But Professor Koppelman does more than simply opine: he *proclaims*, with the kind of arrogance that suggests that anyone who thinks otherwise on these weighty matters is foolish or deluded. At the risk of grave error, we frankly doubt whether Professor Koppelman knows enough about any of these topics to qualify as an expert under Federal Rule of Evidence 702⁴⁵ (even if, by some chance, he happens to be right about some of them). We would probably not qualify either. Accordingly, we will not consume space in a scholarly legal journal to exchange amateur opinions about whether the fate of civilization depends upon meekly accepting the most extravagant modern extrapolations of cases from seven or eight decades ago, cases that belong to a short period when the Court was more supine to the other federal branches than it ever was before or ever has been since then; about whether states are incompetent to deal with

41. *Id.* at 522.

42. *Id.* at 522-23.

43. Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 23 (2011), <http://yalelawjournal.org/2011/04/26/koppelman.html>.

44. Koppelman, *supra* note 1, at 522-23; Koppelman, *supra* note 43, at 23.

45. FED. R. EVID. 702.

health care issues⁴⁶ or pollution;⁴⁷ about whether states are incapable of passing laws against contaminated food or consumer fraud; or about whether the labor laws of the New Deal were racially regressive.⁴⁸ We prefer to stick to a subject about which we can plausibly claim professional expertise: ascertaining the meaning of the Constitution. And the meaning of the Constitution with respect to the Necessary and Proper Clause and the individual mandate is clear.

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46. The states seem to think themselves competent; twenty-seven of them are suing to have the PPACA declared unconstitutional.

47. Professor Kopel spent four years as an Assistant Attorney General for the State of Colorado helping to enforce antipollution laws.

48. See DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* (2000).