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

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**Introduction**

Gary Lawson & 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 their essay, they 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 eighteen-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 modern piece that has ever

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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.
⁵ See infra notes 23 - 25, 48-49 and accompanying text.
proposed that these eighteenth-century norms become the master concepts for determining the scope of congressional power today.\footnote{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 WESTERN RESERVE L. REV. 243 (2004).}

Because what they offer is \textit{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.”\footnote{Lawson & Kopel, \textit{supra} note 1, at 268-70.}

The Necessary and Proper Clause, as they understand it, tightly limits the scope of implied powers. 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.

\textbf{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.”\footnote{\textit{Id.} at 270.} 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.”\footnote{\textit{Id.} at 271.} Second, an exercise of power must treat citizens impartially, “with an eye towards the interests of \textit{all} affected persons.”\footnote{\textit{Id.} at 288.} This requirement is violated by a mandate that requires people to buy insurance “in order to subsidize other people.”\footnote{\textit{Id.} at 270.} These are, they acknowledge, unfamiliar rules of law, “perhaps strange-sounding to modern ears.”\footnote{\textit{Id.} at 270 (quoting GILES JACOB, A NEW LAW-DICTIONARY (London, Strahan et al., 10th ed. 1782))).} I will consider each in turn.

\textit{A. Worthy and Dignified}

The first of the requirements is puzzling. An incident must be “a thing necessarily depending upon, appertaining to, or following another thing that is more worthy or principal.”\footnote{\textit{Id.} at 273 (quoting GILES JACOB, A NEW LAW-DICTIONARY (London, Strahan et al., 10th ed. 1782))).} 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, how are we to know that the power to jail those who rob the mails is “less important or less valuable” than the enumerated power to operate a post office?

These terms 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.” 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. Marshall tried to do it in *McCulloch v. Maryland*. So did others at the time who struggled with the question presented there: whether Congress had the power to charter a bank. Lawson and Kopel are right that I paid no attention to these discussions. The reason was that 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.” Since the lower courts to which I was responding 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. 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,” and that sustaining the constitutional objection to the individual mandate “does not require overruling any decision.” 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.” 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.

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15 Koppelman, *supra* note 2, at 5, 8, 9.
17 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. 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.
19 17 U.S. (4 Wheat.) 316, 413-21 (1819).
21 Lawson & Kopel, *supra* note 1, at 283.
22 See supra notes 19-20 and accompanying text.
23 *Id.* 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.
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”\textsuperscript{26} seems no more “dignified”\textsuperscript{27} than Congress’s plenary authority to regulate immigration and exclude aliens.\textsuperscript{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.”\textsuperscript{29} Congress regulates air and water pollution under the Clean Air Act\textsuperscript{30} and the Clean Water Act,\textsuperscript{31} which is “not a ‘less worthy’ or less substantial power than the power to regulate commerce.”\textsuperscript{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.”\textsuperscript{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 lines\textsuperscript{34}: the Civil Rights Act of 1964 may be in trouble.\textsuperscript{35} Nor is the power to regulate the sale of adulterated food: the Pure Food and Drug Act may also have to go.\textsuperscript{36} Nor is the sale of securities, which typically is not conducted across state lines: so much for the Securities and Exchange Commission.\textsuperscript{37} Nor is banking: out goes the Federal Reserve.\textsuperscript{38} Congress has the enumerated power to “coin Money,”\textsuperscript{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.\textsuperscript{40}

B. Fiduciary Duties

Exercises of power under the Necessary and Proper Clause, they argue, must conform to the fiduciary obligation “to treat all principals with presumptive equality when there is more than one principal.”\textsuperscript{41} The mandate violates this: “The purpose of the individual mandate is to force

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\textsuperscript{26} U.S. CONST. art. I, § 8, cl. 4.
\textsuperscript{27} Lawson & Kopel, \textit{supra} note 1, at 279.
\textsuperscript{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).
\textsuperscript{29} Lawson & Kopel, \textit{supra} note 1, at 280.
\textsuperscript{32} Lawson & Kopel, \textit{supra} note 1, at 280.
\textsuperscript{34} See Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241 (1964).
\textsuperscript{36} Pub. L. No. 59-384, 34 Stat. 768.
\textsuperscript{39} U.S. CONST. art. I, § 8, cl. 5.
\textsuperscript{41} Lawson & Kopel, \textit{supra} note 1, at 288.
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."\(^{42}\)

Note the peculiar formulation in the cumbersomely constructed sentence just quoted, which uses the preposition "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 any laws that it enacts does 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.

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

\(^{42}\) Id.

\(^{43}\) 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 (1992).

\(^{49}\) Lawson & Kopel, supra note 1, at 291 n.94.
congressional power. 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, 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.” 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. 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. 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.

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 indeed unconstitutional to give it any weight at all. He is also confident that “the post-New Deal administrative state is unconstitutional.” 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 would 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, who want to dismantle the modern administrative state,

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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 - 62 and accompanying text) that the judicial adoption of that interpretation would harm you and your family.
54 Koppelman, supra note 2, at 18-23.
are naively optimistic about the results that will follow from its demolition. Lawson just does not care. He is prepared “to hold fast to the Constitution though the heavens may fall.”

Lawson thinks that constitutional interpretation must never be contaminated by such nontextual considerations—that, in fact, any mode of reasoning that does take consequences into account is not entitled to be called interpretation. Rather, it is “self-evident” 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.

It would be silly to wrestle with him 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—for 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 upon 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.

Because we must live with the results, our deepest collective
aspirations also inevitably influence the interpretive inquiry. We don’t 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 was intended to exist,” and that the people of the United States should not “be entirely unable to help themselves through any existing social or governmental agency.” It is like the old question whether the general purpose of the Fourteenth Amendment—to mandate the legal equality of blacks—should trump the framers’ specific intention to permit school segregation and miscegenation laws. The general purpose of the Constitution, the overriding reason why the Articles of Confederation were abandoned, 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. That 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.” Lawson and Kopel’s originalism is not the only possible originalism. What is fundamentally perverse about their reading of the Clause is that it reproduces the situation that the Constitution was an attempt to overcome.


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


67 Id. at 1335.


69 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 Originalism is now a large cluster of very different theories. See Thomas B. Colby & Peter J. Smith, Living Originalism, 59 Duke L.J. 239 (2008). Jack Rakove’s warning is pertinent here:

With its pressing ambition to find determinate meanings at a fixed moment, the strict theory of orginalism 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.


72 Robert Bennett has noted Lawson’s tendency to implicitly ascribe nonobvious traits to his hypothetical appropriate decipherer of constitutional meaning. Robert Bennett, Originalism and
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 even opposed legislation on the grounds that it exceeded Congress’s enumerated powers and certainly never tried to dismantle the modern regulatory state. 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 States—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. Lawson may be ready to dismantle the entire modern administrative state, but—as he often cheerfully admits—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, 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 decisis and reliance interests may convince us that we cannot wipe the slate clean.

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.

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

73 Lawson, _supra_ note 56, at 1237.
74 See Lawson & Seidman, _supra_ note 63, at 59-61.
75 For another, related attempt to do this, see Andrew Koppelman, _Phony Originalism and the Establishment Clause_, 103 NW. U. L. REV. 727, 749-50 (2009).
76 See, _e.g._, Lawson, _supra_ note 56, at 1236; Lawson, _supra_ note 40, at 33.
78 _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”).
79 Thus, for example, he recently declared “my view that the Establishment Clause restrains only the Federal government, and that, even if incorporated, the Clause only prohibits ‘actual legal coercion.’” Utah Highway Patrol Assn. v. American Atheists, 565 U.S. __, __ (2011)(Thomas, J., dissenting from denial of cert.), 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
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.80 Lawson seems a charming, mostly harmless81 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 another direction. 82 This would be an insane way to run a civilization. It is bad news for everybody.

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Constitutional restraints on state imposition of religion, such as the prohibition of official prayer in schools.

80 See JEFFREY WINTERS, OLIGARCHY (2011).

81 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), citing 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.

82 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 81, at 331. Yet, for some reason, the authors of The Origins of the Necessary and Proper Clause think that the two works are complementary. See Gary Lawson & Guy I. Seidman, Necessity, Propriety and Reasonableness, in ORIGINS, supra note 4, at 120, 124; Natelson, supra note 20, 89-90; Geoffrey P. Miller, The Corporate Law Background of the Necessary and Proper Clause, in ORIGINS, supra note 4, at 144, 155, 175.

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. See Cole Porter, You Irritate Me So, in THE COMPLETE LYRICS OF COLE PORTER 304 (Robert Kimball ed. 1992).
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