

# WHY DO (SOME) ORIGINALISTS HATE AMERICA?

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*That doesn't sound attractive, does it? But that is where a prominent strand of modern originalist constitutional theory would lead us. This Essay is a critique of originalist methodology. The deepest flaw in the originalist program is not its methodological errors, however, but its weird political ideal.*

## TABLE OF CONTENTS

INTRODUCTION .....	1034
I. MOTIVATING THE INTERNAL POINT OF VIEW .....	1035
II. RUTHLESS CRITICISM.....	1037
III. PETTY TEXTUALISM.....	1042
IV. THE BLAND REVOLUTION .....	1047
V. THE SUBTERRANEAN CONSTITUTION .....	1050
VI. DEMOCRACY AS A RATIONALIZATION FOR OLIGARCHY .....	1054
VII. SOMETHING HAS GONE WRONG .....	1056
VIII. THE BATTLEAXE .....	1060

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## INTRODUCTION

To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.<sup>1</sup>

Imagine a regime whose fundamental law is only to be found in ancient archives. Their mysterious contents take years to unearth, layer by layer. With new discoveries, bodies of established law are unexpectedly invalidated and discarded. Others, previously rejected, spring back to life as scholars revise earlier conclusions. The operations of government are in constant confusion. This state of affairs is likely to persist indefinitely.

That doesn't sound attractive, does it? But that is where a prominent strand of modern originalist constitutional theory would lead us. This Essay is a critique of originalist methodology. The deepest flaw in the originalist program is not its methodological errors, however, but its weird political ideal.

Any discussion of originalism nowadays must explain which originalism it is talking about because originalism comes in many forms.<sup>2</sup> Here, I focus on the program of digging deep into historical sources to discern the original meaning of the Constitution's terms, word by word, with the aim of finding clear and determinate rules of law. This originalism presumes that the Constitution enacts rules, not standards or principles; it derives those rules from new research into the supposed original semantic meaning of the Constitution's terms; and it relies on the law thus discovered to revolutionize our practices, always subject to further revision in light of later research.

This enterprise has recently received a sophisticated defense. It is claimed that all this is merely ordinary lawyer's work, unremarkably revealing to us what the law always already was. Originalism has also become the basis of a new research program, corpus linguistics, that relies upon recently developed techniques of analyzing big databases of texts of the founding period. The program is labor-intensive and therefore expensive, but the work and expense are justified by the promise that they may yield surprising new discoveries.

Originalism began as a revolutionary doctrine. It offered a redemptive vision. It promised to recover the lost purity of the Constitution's original meaning. It demanded of constitutional lawyers and judges: you must change your life!

Yet today, without abandoning its revolutionary implications, it presents itself as a passionless series of logical inferences. Don't be fooled. One would not embark on this radical, revisionary enterprise unless one were convinced that there is something deeply wrong with American law as it is—that America is fundamentally defective and that the law we have is not worth preserving. You

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1. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

2. *See generally* Lawrence B. Solum, *Cooley's Constitutional Limitations and Constitutional Originalism*, 18 *GEO. J.L. & PUB. POL'Y* 49, 53–56 (2020).

shouldn't accept this bland description unless you are willing to commit to the radicalism. Revolution demands passion. The passion is there. It is not very nice.

This Essay will proceed by exploring the methodological missteps, each of which had a certain plausibility, that brought us here.<sup>3</sup> Part I observes that one possible and sometimes appropriate attitude toward the law is selective disgust, regarding it as contaminated by illegitimate elements that need to be purged. Part II shows that a prominent form of originalism reflects this attitude. Originalism began as an attack on the work of the Warren and Burger Courts, which the first originalists felt produced morally repellent decisions. The species of originalism this article critiques, which I call *Rule-Reductive Originalism*, has a different avowed target: the failure to conform to a certain formalistic conception of law. It assumes that historical research will yield rules that leave the interpreter little or no discretion in application and proposes to purge the law of any elements inconsistent with those rules. Part III shows that the search for determinacy has led originalists to rely on what Victoria Nourse calls *petty textualism*, the assumption that words should be assigned a fixed meaning without regard to their legislative context. That assumption underlies the recent vogue for corpus linguistics research, which uses big-data analysis to determine the contemporaneous legal meaning of words and phrases. Part IV critiques recent efforts by William Baude and Stephen E. Sachs to show that originalism's revolutionary ambitions are a mere clarification of existing law. Part V argues that this method generates a conception in which existing law is in principle unknowable. It is thus inconsistent with the rule of law. Part VI shows that the consequences of Rule-Reductive Originalism are so baleful that even the most zealous originalist judges, such as Justice Clarence Thomas, find them untenable and so apply them selectively, restrained by their own unguided intuitions of what is practically possible. What began as a program of judicial restraint thus has become a prescription for judicial oligarchy. Part VII examines one prominent example of originalist reasoning, Sachs's defense of the constitutional challenge to Obamacare, to show that the argument crucially depends on a (usually unspoken) assumption that existing law is deeply flawed and requires radical reconstruction. Part VIII argues that this revolutionary project makes no sense unless those who undertake it hate the America that actually exists today.

## I. MOTIVATING THE INTERNAL POINT OF VIEW

To engage in legal argumentation, one must regard law from what H.L.A. Hart called the internal point of view: one must accept its authority as a guide to practical conduct.<sup>4</sup> Only after one has done that can one reason from its premises to normative conclusions.

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3. I also examine a modification proposed by Justice Clarence Thomas, which displays a different pathology: to limit the revolutionary potential with judges' discretion to give weight to "*stare decisis* and reliance interests," *United States v. Lopez*, 514 U.S. 549, 601 n.8 (1995) (Thomas, J., concurring), a discretion that itself is not limited by anything. A philosophy that began by seeking to constrain judges has thus become a prescription for judicial oligarchy. *See infra* Part VI.

4. H.L.A. HART, *THE CONCEPT OF LAW* 56 (2d ed. 1994).

A prominent recent defense of originalism, developed by William Baude and Stephen E. Sachs<sup>5</sup>—one that, we shall see, carefully preserves originalism’s revolutionary potential—builds on Hart to defend its central claims about American law. Before we examine it, it will be helpful to understand Hart’s argument.

It is, of course, common to regard legal systems from external perspectives. One may try to understand the thinking of foreign lawyers who work in legal systems in which one does not participate. One may even study lawyers in a behavioristic way, trying to discern regularities in their conduct, the way an entomologist tries to map the behavior of wasps.

When one is living within a legal regime, however, one must decide how to regard the law’s claim to authority. One might regard it as an alien force, and grudgingly comply with the commands of state actors under the threat of punishment (or live a life of crime). The internal point of view, on the contrary, treats the law as a “reason and justification”<sup>6</sup> for action and as the “basis for claims, demands, admissions, criticism, or punishment.”<sup>7</sup> Scott Shapiro observes that the internal point of view need not imply moral acceptance:

From Hart’s perspective, people can have any number of reasons for accepting rules. They may be guided by a rule because they think that it is in their long-term self-interest to be so committed. Judges might apply the law simply to pick up their paychecks.<sup>8</sup>

Sometimes, however, moral acceptance matters. Sometimes law speaks to our aspirations. Or it attacks them. One reason for accepting the law’s claim to authority is that it embodies our hopes for a just society. One reason for rejecting the law’s claim to authority—even for actively sabotaging its operation—is that it is part of an evil system. Think of Germany in 1940 or South Carolina in 1850. In such a system one has good reason to reject the internal point of view.

There is a third, intermediate possibility between accepting or rejecting the internal point of view. One can *partly* embrace it, regarding the legal system as contaminated but redeemable. That would, for example, be the situation of a German lawyer in 1946. Hitler appropriated an ancient and admirable legal tradition and directed it to his own purposes. In order for German law to be a body of doctrine with respect to which one could decently take the internal point of view, it would have to be cleansed of its Nazi elements. The internal point of view would be taken selectively: some aspects of preexisting positive law would remain authoritative, while some rules and even principles would be regarded with hostility and eradicated.<sup>9</sup> That could be a purely technical operation, but it helps to raise the

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5. Here, I take them together because they have coauthored several times and because (except where noted, *see infra* notes 47 and 122) none of their claims in their solo-authored articles that I examine here are inconsistent with the claims made by the other.

6. Hart, *supra* note 4, at 11.

7. *Id.* at 90.

8. Scott J. Shapiro, *What is the Internal Point of View?*, 75 *FORDHAM L. REV.* 1157, 1162 (2006).

9. Nazi law incorporated principles as well as rules, for example, by treating as a source of criminal law “the sound instinct of the people,” here understood as a racist instinct.

emotional stakes. You're more likely to do the job well if you really hate Naziism.<sup>10</sup> James Madison observed long ago that hatred has a legitimate role in constraining official misbehavior.<sup>11</sup>

## II. RUTHLESS CRITICISM

Originalism is an innovation in constitutional theory. It only began to be developed as a scholarly construct, rather than a rhetorical trope, in the early 1980s.<sup>12</sup> Most existing constitutional doctrines were not devised with it in mind. That is why it is radical. Heresy is everywhere. Karl Marx called for “a *ruthless criticism of everything existing*, ruthless in two senses: The criticism must not be afraid of its own conclusions, nor of conflict with the powers that be.”<sup>13</sup> Originalism arrives in this respect (albeit, concededly, only in this respect) in the spirit of Marx. It demands upheaval. Upheaval is the point. That raises the question of why upheaval is a good idea.

Originalism was born in the administration of President Ronald Reagan, whose top Justice Department lawyers despised certain substantive doctrines that they felt to be both morally wrong and abuses of judicial power: the expansion of the rights of criminal defendants, the shrinking protection of state autonomy, and

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This principle was invoked, in the absence of any statutory prohibition, as a possible basis for punishing Aryans who left Germany to marry Jews. See Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 997 n.295 (1998).

10. One might also embrace a body of law wholeheartedly while regarding some of its minor details as defective and in need of correction. That, however, is not the wholesale overhaul that would be demanded by the 1946 German.

11. James Madison, *The Virginia Report*, in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 243, 263 (Marvin Meyers ed., rev. ed. 1981) (“Should it happen, as the Constitution supposes it may happen, that either of these branches of the government may not have duly discharged its trust, it is natural and proper that, according to the cause and degree of their faults, they should be brought into contempt or disrepute, and incur the hatred of the people.”).

12. Or even later: “Serious academic work on public meaning originalism as a rigorous theory really began only in the 1990s, and much of the most important work was done in the first decade of the new millennium.” Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 295 (2017).

Today, of course, it is both a scholarly construct and a rhetorical trope, with the scholarly construct often conceding indeterminacy and discretion, and the rhetorical trope misleadingly signaling rule-like constraint. See Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011). Michael Dorf has suggested that one ought not to identify as an originalist because that gives unearned credibility to dishonest judges who invoke that theory as a basis for imposing conservative results whenever they feel like doing that. Michael C. Dorf, *Why Not to Be an Originalist*, DORF ON LAW (Nov. 14, 2019), <http://www.dorfonlaw.org/2019/11/why-not-to-be-originalist.html> [https://perma.cc/K6ZC-ZYYD]. The scholars examined here do not concede indeterminacy. They purport to cabin discretion by focusing tightly on the original meaning of the Constitution, word by word.

13. Karl Marx, *For a Ruthless Criticism of Everything Existing*, in THE MARX-ENGELS READER 13 (Robert C. Tucker ed., 2d ed. 1978).

above all, the right to abortion.<sup>14</sup> These, the first originalists thought, were horrible policies. They were hurting America. They were undemocratic, manifesting unaccountable judicial discretion. Originalism was a tool for combating them. Its proponents were animated by a sense of moral urgency: errors in constitutional law had led to the freeing of career criminals who would rob and kill again, the dictatorship of federal bureaucrats, and the mass murder of unborn babies.

Originalism now has a life of its own. It is offered as a method with purportedly universal application. The aspirations that drive it now are legal craftsmanship and formal elegance.<sup>15</sup>

There was nothing new about the idea that the Constitution's legal content is properly determined by what its words and phrases meant at the time of the founding.<sup>16</sup> That idea leaves much undetermined: "original meaning" might mean the meaning according to a hypothetical fully informed person living at the Founding, the meaning according to the best legal understanding of well-trained lawyers at the Founding, or the "communicative content" of the words to ordinary people at that time.

The variant that has become increasingly influential is none of these. Rather, it understands texts at the microscopic level, each provision being read at the level of generality specified by each word.<sup>17</sup> The hope is that one can build up from these individual units a rigid structure with an undeniable and inevitable meaning, a set of *rules*, purged of the messiness of judicial discretion.<sup>18</sup> (As we shall see, however, originalism has paradoxically become a basis for massively expanding

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14. The idea of a "jurisprudence of original intent" was first popularized by Attorney General Edwin Meese III, who specifically denounced judicial activism, the Supreme Court's failure to protect states' rights, the excessive protection of criminal defendants, and the interpretation of the Establishment Clause to demand neutrality between religion and nonreligion. Attorney General Edwin Meese III, *Before the American Bar Association (July 9, 1985)*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 47 (Steven G. Calabresi ed. 2007). On abortion, see ROBERT H. BORK, THE TEMPTING OF AMERICA 111–16 (1990) (denouncing the Court's abortion decisions); Brief for United States as Amicus Curiae in Support of Appellants at 24, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (Nos. 84-495, 84-1379), 1985 WL 669620 at \*24 (calling for overruling of *Roe*) ("Constitutional interpretation retains the fullest measure of legitimacy when it is disciplined by fidelity to the framers' intention as revealed by history . . ."); *Roe v. Wade*, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting) (citing evidence of original intent of the framers of the Fourteenth Amendment).

15. This is not to repudiate formalism, which can sometimes be powerful. See, e.g., Andrew Koppelman, Bostock, *LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1, 36–37 (2020).

16. That idea was invoked, for example, by Chief Justice Roger B. Taney in *Dred Scott v. Sandford*, 60 U.S. 393 (1857); and by President Franklin D. Roosevelt in his speech *Fireside Chat* of March 9, 1937.

17. See Lawrence B. Solum, *Living with Originalism*, in CONSTITUTIONAL ORIGINALISM: A DEBATE 148–50 (2011).

18. That impossible yearning for a law shorn of discretion or judgment invites psychological speculation about its motives. See Andrew Koppelman, *Why Jack Balkin is Disgusting*, 27 CONST. COMMENT. 177 (2010).

judicial discretion.) That meaning will then be available as a basis for criticizing present constitutional doctrine.

The assumption that constitutional law consists solely of rules is surprising inasmuch as the document contains such abstract standards and principles as “the freedom of speech,” “equal protection of the laws,” “due process,” “unreasonable searches and seizures,” and “cruel and unusual punishment.”<sup>19</sup> The form of originalism that concerns me is distinctive because it presumes that all such terms can be reduced to rules. Call it *Rule-Reductive Originalism*: the quest for the original meaning of the Constitution with the guiding assumption that what is to be found is a set of rules.<sup>20</sup>

Jack Balkin argues that “by offering a standard or principle, the constitutional text constrains and regulates politics *in a different way* than it does when it offers a hardwired rule.”<sup>21</sup> Such terms in the document “force people to justify their actions by reference to the standards and principles, but they do not constrain people in the same way that rules do.”<sup>22</sup> Rule-Reductive Originalists reject Balkin’s claim. They think that sufficient investigation into original meaning, using original interpretive methods, will yield a Constitution that is rules all the way down.<sup>23</sup>

Why this demand for rules, rather than the standards and principles that appear on the face of the text?

The moral imperative that drives contemporary Rule-Reductive Originalists—one that transcends the specific goals of the Reagan Administration lawyers—is the need to limit judicial discretion. Judges should follow the law rather than invent it. Standards and principles do not offer enough constraint.

19. There is thus unintentional irony in Justice Antonin Scalia’s claim that “it is perhaps easier for me than it is for some judges to develop general rules, because I am more inclined to adhere closely to the plain meaning of a text.” Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989).

20. The insistence on this assumption, with no evidence that it was shared by the Framers or their audience, is an instance of what I have called “Maximally Degraded Originalism: The Framers were very wise men. Therefore it follows that they would have agreed with me.” Andrew Koppelman, *How the Obamacare Case Defined Deviancy Down*, 92 TEX. L. REV. 1617, 1623 (2014). This term signifies something different from what Jamal Greene describes in *Rule Originalism*, 116 COLUM. L. REV. 1639, 1639 (2016), which argues that courts in fact tend to rely on originalist sources, but they do so primarily when disambiguating constitutional provisions that clearly set forth rules and not standards.

21. JACK M. BALKIN, *LIVING ORIGINALISM* 43 (2011).

22. *Id.* “Rules are distinguished from standards by how much practical or evaluative judgment they require to apply them to concrete situations.” *Id.* at 349 n.12.

23. Lawrence Solum has argued that, given that “the actual text of the U.S. Constitution contains general, abstract, and vague provisions,” *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 458 (2013), interpreters should concede that “the communicative content of the constitutional text underdetermines the legal content of constitutional doctrine and the decision of constitutional cases.” *Id.* at 537. Because these terms are vague, they “invite consideration of principle and policy.” *Id.* at 505. His claim that interpretation leaves such a “construction zone,” *id.* at 458, has been met with fierce resistance from other originalists. See *id. passim* (responding to criticisms by Bryan Garner, Antonin Scalia, John McGinnis, Michael Rappaport, Gary Lawson, and Michael Paulsen).

Constitutional decisions should be made “through a rule-like process that preserves the political and ideological neutrality of the judicial process.”<sup>24</sup>

This felt imperative reflects an important, unquestionably valid aspect of the ideal of the rule of law. Those who wield power must be bound by legal limits. That limitation on discretion is closely related to the demand for publicity, another element of the rule of law: power must be deployed in accordance with criteria publicly known in advance of their application (more on that shortly). That entails constraint. But Rule-Reductive Originalism is the wrong kind of constraint. Not only is it inconsistent with the text but it also cannot be reconciled with the requirement of publicity.

Here are a few examples:

In the Obamacare case, *National Federation of Independent Business v. Sebelius* (*NFIB v. Sebelius*),<sup>25</sup> Congress’s power to require people to purchase health insurance appeared, to most lawyers familiar with settled doctrine, to follow easily from the Necessary and Proper Clause. The Clause was expansively interpreted, as assigning to Congress a broad choice of means for carrying out its enumerated powers, since the 1819 decision in *McCulloch v. Maryland*.<sup>26</sup> That interpretation had recently been reaffirmed in *United States v. Comstock*.<sup>27</sup> Congress had been legislating in reliance on that understanding for almost 200 years.

Gary Lawson and David Kopel, however, argued, offering a new interpretation of the historical evidence, that the Clause incorporates norms from eighteenth-century agency law, administrative law, and corporate law, and that the health insurance mandate (and perhaps much else in the U.S. Code, though they were coy about this) violates those norms. The Necessary and Proper Clause, as Lawson and Kopel understand it, tightly limits the scope of implied powers to those that are less important—less “worthy” or “dignified” (they attribute these terms of

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24. JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 153 (2013). McGinnis and Rappaport attribute to the Framers the determination to constrain with rules rather than standards. There is doubt about whether this is consistent with the Framers’ own practice, see Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 UNIV. ILL. L. REV. 815, 834–37 (2012), or the actual practice of modern constitution writers at the state level or in other countries. *Id.* at 838–41. Their research is still work in progress and it is too early to know whether they will even be able to claim that their reliance on original interpretive methods will be able to yield determinate answers to all contested constitutional questions. See Solum, *supra* note 23, 503–11. But even if their research program succeeds, their originalism would still have the defects as a political ideal that I describe here.

25. 567 U.S. 519 (2012) (holding that the individual mandate is not a valid exercise of Congress’s power under the Necessary and Proper Clause).

26. 17 U.S. (4 Wheat.) 316, 324 (1819) (sustaining Congress’s power to charter the Bank of the United States, even though that power is not enumerated, because this is a convenient means for carrying out the enumerated powers).

27. 560 U.S. 126, 129 (2010) (upholding a law authorizing civil commitment of mentally ill sexual predators who remain dangerous after completing their federal prison sentences).

art to the Framers)—than the principal powers to which they are subsidiary.<sup>28</sup> The scope of this limit is mysterious, and its effects on the structure of the present federal government are similarly mysterious but potentially dramatic.

What is remarkable here is the novelty of the argument—something that’s valued in the academy but mischievous as a basis for governance. Nobody in Congress knew or could have known of Lawson and Kopel’s argument at the time Obamacare was enacted. It was not even an element of Randy Barnett’s constitutional attack on the law, the eventual basis of the lawsuit, which was unveiled as the law was about to pass in the Senate.<sup>29</sup> It appeared for the first time more than a year after the President signed the bill into law.

The fundamental purpose of the Constitution is to constitute federal power. If Lawson and Kopel are correct, however, Congress, at a time when it was laboriously constructing major legislation, did not know and could not have known what the limits of its powers were.

A related, prominent debate concerns congressional power under the Commerce Clause, which is the foundation of much post-New Deal legislation. Barnett argues, citing voluminous new research, that the word “commerce” was commonly used to refer only to trade and transportation, not manufacturing or agriculture. If Barnett’s discoveries mean what he thinks they mean, then much of present federal law is unconstitutional.<sup>30</sup> But maybe not. We must await further research.

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28. Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267, 279 (2011). They repeated their arguments in an amicus brief, coauthored with Robert G. Natelson and Guy Seidman, in the Supreme Court. Brief for Authors of The Origins of the Necessary and Proper Clause, HHS v. Florida, No. 11-398, 2012 WL 484061. It appears to have influenced the opinion of Chief Justice Roberts. See Andrew Koppelman, ‘Necessary,’ ‘Proper,’ and Health Care Reform, in THE HEALTH CARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS 105 (Nathaniel Persily, Gillian Metzger, and Trevor Morrison eds., 2013).

I respond to the argument of Lawson and Kopel in Andrew Koppelman, *Bad News for Everybody: Lawson and Kopel on Health Care Reform and Originalism*, 121 YALE L.J. ONLINE 515 (2012). They in turn answer me in Gary Lawson & David B. Kopel, *Bad News for John Marshall*, 121 YALE L.J. ONLINE 529 (2012). The exchange was provoked by Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1 (2011). It is perhaps illustrative of this Article’s claims that I was astounded by their initial article, which was based on constitutional objections that were previously unknown, not only to me, but also to the other scholars who were attacking the statute and to the judges who first declared it constitutionally invalid.

29. See ANDREW KOPPELMAN, THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM 76–79 (2013).

30. See Randy E. Barnett, *Jack Balkin’s Interaction Theory of “Commerce,”* 2012 U. ILL. L. REV. 623. Balkin has offered a nonrevolutionary originalist response that relies on the same kind of evidence, arguing that the commerce power authorized Congress to govern all intercourse—business, commercial intercourse, transportation, and communication—that affects more than one state. See BALKIN, *supra* note 21, at 138–82. Each offers examples of the contemporaneous usage of the word.

A hard case for many originalists, including both those who focus on the original legal meaning of the Constitution and those who focus on original understanding, is paper money. It has seemed to many of them that this was constitutionally prohibited<sup>31</sup>—a conclusion that, if courts declared American paper currency to be worthless, would almost certainly produce a catastrophic worldwide depression. Then came Robert Natelson’s clever article arguing, on the basis of previously neglected evidence, that paper bills are an exercise of Congress’s power to “coin money.”<sup>32</sup> It remains to be seen whether Natelson’s analysis withstands critical scrutiny. Meanwhile the world continues to use American bills, blithely unaware of the fearful danger it faces.

Rule-Reductive Originalism means that every area of constitutional law is ripe for revision, perhaps fundamental revision. Practices that have long been standard in judicial decision-making, such as reliance on settled law and weighing of consequences, have no weight unless they can produce satisfactory originalist credentials. Absent such credentials, they are trespassers in our system. Call the bouncer.

### III. PETTY TEXTUALISM

In order to operate in the mechanical way it aspires to, originalism needs to be married to an interpretive method that promises rigidity. The method that is increasingly prevalent focuses on words and phrases taken in isolation from larger principles and purposes. The attraction of this narrow focus is that it purports to constrain the interpreter. Otherwise the standards in question will be sufficiently open-ended that they can be applied in ways likely to line up with the interpreter’s political aspirations and commitments.<sup>33</sup>

This focus on individual words is not necessarily tied to originalism. Its originalist credentials are in fact doubtful. It is hard to find judges in the founding period carrying on this way. They did not treat words and phrases as analytic Lego pieces which retained the same rigid meaning in every context. But there are elective affinities between this interpretive method, Rule-Reductive Originalism, and the idea that we might be radically mistaken about what our Constitution authorizes. In this political vision, rigid rules are built up from rigid molecules, and there is no telling where the chain of inference might lead us.

It is, however, a bad interpretive method. In practice it leads to perverse interpretations that can defeat the purposes of the laws it purports to interpret.<sup>34</sup>

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31. See sources cited in Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL’Y 1017, 1019–25 (2008).

32. *Id. passim*.

33. For example, different interpreters attribute different meanings to the Thirteenth Amendment’s prohibition of “slavery.” See Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1480–81 (2012). At a minimum, of course, the Amendment must prohibit the exact abuses that constituted slavery, such as the compulsion of women to bear children. Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1938 (2012).

34. See Andrew Koppelman, *Passive Aggressive: Scalia and Garner on Interpretation*, 41 BOUNDARY 2: INT’L J. LITERATURE & CULTURE 227 (2014).

This sort of thing was attempted in *King v. Burwell*,<sup>35</sup> where a “plain meaning” argument that is almost a parody of microtextualism—conspicuously destroying Obamacare’s legislative scheme in the guise of interpreting it—was embraced by three Supreme Court Justices. Coincidentally, they were the ones most hostile to the statute.<sup>36</sup> That maneuver is an example of an interpretive technique Victoria Nourse calls *petty textualism*: “the interpreter pulls one or two words out of a lengthy statute, holds them up as chunks of text, declares the words plain and, as plain, ends the case.”<sup>37</sup> This presents itself as a constraint on discretion, but it actually liberates the interpreter to do what she likes. “As philosophers of language know, words taken *out of context* have so many meanings they have none—other than the meaning the interpreter assigns.”<sup>38</sup> This procedure is also likely to produce the cognitive failure known as bounded awareness: the focus on one or two words causes the observer to miss large and relevant facts about their context.<sup>39</sup> Petty textualism, Nourse observes, is not a traditional interpretive approach; it “is a new phenomenon . . . . Harmony, not isolation and fixation, is the theme of standard statutory interpretative methodology.”<sup>40</sup>

The pertinent sources that modern originalists rely upon include dictionary definitions, corpus-linguistics analyses, and “partial immersion in the relevant linguistic world via written texts.”<sup>41</sup> Such immersion can lead the interpreter to better appreciate the Constitution’s standards and principles, but because these are open to multiple interpretations, they will not be especially constraining. Rule-Reductive Originalists are drawn toward more rigid approaches. That is the attraction of petty textualism. Corpus-linguistics analysis is increasingly influential.<sup>42</sup> The method is labor intensive. One draws upon massive databases of writings from the pertinent period to capture uses of the word in question. Then each instance of the word must be coded by humans for its meaning and context. All the findings then must be collated, correlated with word patterns in which the term appears, and the multiple senses of the term (if any) counted and their frequency

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35. 576 U.S. 473, 497 (2015).

36. *Id.* at 499 (Scalia, J., joined by Thomas, J., and Alito, J., dissenting).

37. VICTORIA NOURSE, *MISREADING LAW, MISREADING DEMOCRACY* 107 (2016).

38. *Id.*

39. *Id.* at 117–19.

40. *Id.* at 113.

41. Solum, *supra* note 12, at 285. The methodological notions that have led to reliance on corpus-linguistics analysis are nicely explained in James C. Phillips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S. Constitution: A Corpus Linguistic Analysis of American English from 1760–1799*, 59 S. TEX. L. REV. 181, 184–201 (2018). That article is a good example of the implausibility of the method: by focusing on the contemporaneous usage of the single word “emolument,” it develops a reading of the emoluments clauses that is so narrow that the clauses’ purposes can easily be defeated by a foreign government that would like to transfer funds to an official’s personal bank account.

42. See, e.g., Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 289 (2019); Stephanie Barclay, Brady Early, & Annika Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 ARIZ. L. REV. 505 (2019); James C. Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool To Make Originalism More Empirical*, 126 YALE L.J. F. 20 (2016).

calculated. If different databases yield different results, then this must be accounted for. The enterprise will be the work of years. And all of this involves a microscopic examination of each word, taken out of context.<sup>43</sup> Corpus-linguistics analysis is the handmaiden of petty textualism.

If one contemplates the Constitution as a whole, the themes that dominate inevitably entail contestability in interpretation. The Constitution aims at a middle ground between the weakness of the Articles of Confederation and the tyranny of Bad King George as adumbrated in the Declaration of Independence. Obviously each of these principles—no weakness, no tyranny—can be invoked against the other in any constitutional debate. They usually are. Then there are the principles of equality and individual rights set forth in the Reconstruction Amendments, which press against the undoubted power of states to govern themselves as they see fit. All these leave plenty of room for selective emphasis, depending on the background ideals with which one approaches the text.

This is a problem for the advocates of federal feebleness. The Constitution was adopted because under the Articles of Confederation, a number of major problems could be addressed neither by the states nor by the federal government. At Philadelphia in 1787, the Convention resolved that Congress could “legislate in all cases . . . to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.”<sup>44</sup> This was then translated by the Committee of Detail into the present enumeration of powers in Article I, Section 8, which was accepted as a functional equivalent by the Convention without much discussion.<sup>45</sup>

It is then a mistake, when interpreting the enumerated powers, to make the petty textualist assumption that “everything hinges on, for example, the accuracy of Balkin’s historical claims regarding the meaning of the word ‘commerce.’”<sup>46</sup> Balkin does not rely solely on linguistic claims. The reading of the power to regulate commerce “among the several States” that is most consistent with the Framers’ purposes, he argues, is that it authorizes Congress to regulate, as Chief Justice Marshall put it, “commerce which concerns more States than one”—which has interstate spillover effects or generates collective action problems that no state can solve alone.<sup>47</sup> The germinal work here is that of Robert Stern, who observed in 1934

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43. The methodological challenges are described in Phillips & White, *supra* note 41, at 202–07. The method has been shown to be unreliable even with respect to the meaning of words that are in use today, since the most common usages tend to cluster around prototypical meaning, rather than the full extension of meaning as understood by native speakers. See Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 748 (2020).

44. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 21 (Max Farrand ed., 1911); see also 1 *id.* at 21 (Resolution VI of the Virginia Plan).

45. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 177–78 (1996).

46. Stephen E. Sachs, *The “Constitution in Exile” as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2297 (2014).

47. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824); BALKIN, *supra* note 21, at 140, 160–62. The most rigorously worked-out defense of this reading of the Commerce Clause is Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory*

that the Framers did not intend for some commerce to be uncontrollable by either the state or the federal governments, nor that the people of the United States “be entirely unable to help themselves through any existing social or governmental agency.”<sup>48</sup>

Originalism need not depend on petty textualism. I repeat what I have said before:

Americans tend to merge the Constitution with some of our deepest hopes for ourselves and our society, and constitutional language is, in American culture, a conventional way of communicating those hopes . . . we feel bound by the handiwork of the framers of the Constitution because we in some way identify with them, and feel that their accomplishments are ours . . . . Originalism is a claim to base one’s argument of the moment on continuity with that past. In that sense, everyone who makes claims about American constitutional law is an originalist. But this originalism is a rhetorical style, not an algorithm for certainty in constitutional meaning.<sup>49</sup>

This kind of talk gets one drummed out of the club of originalists, who long for certainty with a great and tragic longing.<sup>50</sup>

Rule-Reductive Originalism is, in short, the confluence of several different errors. It envisions constitutional law as a set of rules, rigid and incapable of adaptation to changing circumstances. It implements that vision through petty textualism. Its petty textualism directs interpreters to previously unexamined sources, most conspicuously in the turn to corpus linguistics, creating a significant likelihood of unexpected transformations of the law.

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*of Article I, Section 8*, 63 STAN. L. REV. 115 (2010); see also Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554 (1995); Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1349 (1934).

Baude’s views on this question are uncertain. He joins Sachs in doubting the validity of “‘commerce’ regulation of wholly intrastate activity;” William Baude & Stephen E. Sachs, *Originalism’s Bite*, 20 GREEN BAG 2D 103, 108 (2016), but elsewhere writes that “Congress’s power to reach purely in-state conduct is premised on the possibility of interstate spillovers.” William Baude, *State Regulation and the Necessary and Proper Clause*, 65 CASE W. RES. L. REV. 513, 514 (2015). The first quotation cites *Wickard v. Filburn*, 317 U.S. 111 (1942), as an example of the rule that is questioned, but that case was predicated on interstate spillovers.

48. Stern, *supra* note 47, at 1335. When Randy Barnett describes the defects of the Articles, he focuses only on state debt-relief legislation, trade barriers, and military weakness. Any concern that the federal government might have any affirmative domestic responsibilities is omitted from the narrative. RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* 53–58 (2016).

49. Andrew Koppelman, *Respect and Contempt in Constitutional Law, Or, Is Jack Balkin Heartbreaking?*, 71 MD. L. REV. 1126, 1140 (2012).

50. The drums sound for Lawrence Solum in the work of many prominent originalists. See *supra* note 23.

The core error—the source of the others—is a misunderstanding of the ideal of the rule of law. Lon Fuller observed that, even if there are clear rules, the rule of law can still fail to be achieved if there is “a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe . . . a failure to make rules understandable,” or “introducing such frequent changes in the rules that the subject cannot orient his action by them.”<sup>51</sup> All of these are aspects of the virtue of publicity. To say it again: the rule of law is not only regularity; it is also publicity. The Rule-Reductive Originalists embrace regularity but have entirely neglected publicity.

The Rule-Reductive Originalists’ turn toward reliance on obscure sources, most prominently the turn to corpus linguistics, makes the law unknowable in principle. No one can predict what big-data searches of the archives will reveal. So no one can know how the law will change. It is, as someone once wrote, “one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so they could not easily be read.”<sup>52</sup> At least Nero himself knew what the edicts were. In the new Rule-Reductive Originalist world, *no one knows the law*. *No one can possibly know the law*. We live under a forest canopy of Damoclean swords that overhang all our laws. There is plenty of constraint in this vision, which proposes that judges obediently and mechanically revise constitutional doctrine with each new discovery. But publicity is not the only desideratum of the rule of law that is missing from this political vision.

Paul Gowder observes that the most important reason why regularity (consistent deployment of state power) and publicity (the regularities are known to the subject population) matter is because they provide protection against hubris (the unaccountable use of power) and terror (the unpredictable use of power). Regularity and publicity are means to the end of preventing hubris and terror. The rule of law exists when those evils have been effectively prevented.<sup>53</sup>

The Rule-Reductive Originalists are keenly sensitive to the danger of hubris. Their central aim is to curb the arrogance of judges. But they are remarkably oblivious to terror. In their world, no one can know when judges who faithfully follow their method will, guided by the latest scholarly revelations, abruptly destroy structures of state power on which citizens depend.<sup>54</sup>

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51. LON FULLER, *THE MORALITY OF LAW* 39 (1964).

52. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 17 (Amy Gutmann ed., 1997).

53. PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD passim* (2016). For a short overview of Gowder’s argument, see Andrew Koppelman, *What is the Rule of Law Good For?*, *NEW RAMBLER* (March 5, 2020), <https://newramblerreview.com/book-reviews/law/what-is-the-rule-of-law-good-for> [<https://perma.cc/CEA2-B72M>].

54. Gowder’s discussion of terror emphasizes the inequality it engenders: those subject to it experience “relative powerlessness and fear” and “are forced to act out their subordination by behaving submissively toward powerful officials.” GOWDER, *supra* note 53, at 21. This way of putting it emphasizes the relation of dominance between official and subject and so tends to make it an aspect of hubris. Terror, however, can exist even if state decisionmakers scrupulously follow strict rules, if those subject to the law cannot predict what

The avoidance of hubris is not all that we ask of law. We also want to exercise collective agency and use the law in order to shape a world in which we will be at home. We do not want to be the prisoners of alien forces. A familiar objection to egalitarianism is that it may be satisfied by levelling down: inequalities of wealth, for example, could be eliminated by impoverishing everyone.<sup>55</sup> Rule-Reductive Originalism threatens to level down in a different way. To say that the dead will rule us would be unfair to the dead. Rule-Reductive Originalism threatens to bring into being a world that they never intended, that no majority ever intended.

#### IV. THE BLAND REVOLUTION

This approach raises a puzzle. It purports to be an account of present law. Yet it may demand a wholesale revision of that law. How is that possible?

Baude and Sachs have offered a sophisticated response. They have never embraced Rule-Reductive Originalism, but they have cited its proponents with approval,<sup>56</sup> and they have defended its vision of the Constitution as a set of land mines primed to blow up various areas of existing doctrine on the basis of new historical discoveries.

They claim that “originalism is best understood as a claim about our modern law—which borrows many of its rules, constitutional or otherwise, from the law of the past.”<sup>57</sup> It simply reports what the law presently is: “our system’s official story is that we follow the law of the Founding, plus all lawful changes made since.”<sup>58</sup> America’s law “reflects a deep commitment to our original law, publicly displayed in our legal practice.”<sup>59</sup>

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officials will do. “Even if the KGB officer is constrained by rules, if an ordinary individual doesn’t know what those rules are, or will have no say in their application, he still has reason to fear the officer’s power.” *Id.* Such a regime has “regularity, but not publicity.” *Id.*

Publicity matters to my analysis in a different way than Gowder emphasizes, and I’m using the term *terror* in a slightly different sense than he does. Terror has two aspects: the unpredictability of state action and the fact that its victim “will not be able to participate in his own defense if he does come into conflict with the officer.” *Id.* My focus is on the former. With Rule-Reductive Originalism, publicity, and the capacity “to dispute official decisions,” *id.* at 16, comes too late for those constrained by the law to be able to conform their conduct to it. In the Obamacare case, for example, a mighty effort was made to address a difficult, life-threatening problem that endangered millions. Then we were told that clever new archival work meant that the whole edifice had to be struck down, and the country had to start over. Scruton’s observation is pertinent here: “the work of destruction is quick, easy, and exhilarating; the work of creation slow, laborious and dull.” ROGER SCRUTON, *HOW TO BE A CONSERVATIVE*, at vii-ix (2014).

55. The most sophisticated defenses of egalitarianism carefully avoid this result. *See, e.g.*, T.M. SCANLON, *WHY DOES INEQUALITY MATTER?* (2018); JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

56. *See infra* notes 59, 110.

57. William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 *L. & HIST. REV.* 809, 809 (2019).

58. William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 *NW. U. L. REV.* 1455, 1455 (2019).

59. *Id.* at 1458.

They rely on Hart's account of what makes legal rules valid. Such rules "ultimately derive from society's ultimate 'criteria for identifying the law'—a 'complex, but normally concordant, practice of the courts, officials, and private persons.'"<sup>60</sup> Those criteria constitute a "chain of authority" that "eventually terminates in an ultimate rule of recognition, one that requires no further legal validation and that's grounded directly on social facts."<sup>61</sup> Law that is traceable to this ultimate source of authority is valid, whether or not that happens to be recognized at any given time.

While the "ultimate rule of recognition" is a social rule, existing only to the extent that it's recognized in practice, intermediate legal rules—including those entailed by originalism—can be said to exist when they are "valid given the system's criteria of validity," even if they aren't themselves generally accepted in practice.<sup>62</sup>

Baude and Sachs argue that, under the American rule of recognition, laws are valid only to the extent that they conform to the originalist official story. In judicial practice, text and original meaning consistently prevail over other sources of constitutional meaning when they conflict. And the Court never explicitly contradicts originalism.<sup>63</sup> Originalism is the path to discovering what our law actually is.

There is reason to doubt this descriptive claim. The fixed points of American law also include certain precedents, with doubtful originalist credentials, that originalists have felt constrained somehow to legitimate. One is the unconstitutionality of the Sedition Act of 1798. Another is the invalidation of racially segregated schools in *Brown v. Board of Education*.<sup>64</sup> Originalist theorists have engaged in somewhat comical contortions to show that these holdings are consistent with their theories, even though neither result was expected by the founding generation.<sup>65</sup> What is revealing is not the comedy but the evident constraint. The rightness of these results evidently *precedes* constitutional interpretation, including originalist interpretation.<sup>66</sup>

Regardless of its descriptive validity, this theory provides a new foundation for originalism. Mitchell Berman observed in 2009 that originalists tended to root their argument either in transcendent linguistic necessity or in some form of rule-consequentialism. He also showed in considerable detail that neither of these

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60. *Id.* at 1466 (quoting HART, *supra* note 4, at 101, 110).

61. *Id.* at 1471.

62. *Id.* at 1469 (quoting HART, *supra* note 4, at 110).

63. William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2371 (2015).

64. Mitchell Berman offers a longer list of such fixed points in *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1344–48 (2018).

65. See, e.g., Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1929–36 (1995).

66. In this respect they are like the paradigm cases that Jed Rubenfeld focuses on, JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 183 (2001). However, unlike his paradigms, which the drafters unquestionably had in mind, they are not part of the original meaning of the pertinent provisions.

arguments, in any of their multitudinous forms, were persuasive.<sup>67</sup> Baude and Sachs accept that criticism *sub silentio*: both foundations are quietly abandoned in favor of a new, positivist one, that originalism just happens to be the basis of the law we now have.

The overall tone is reassuring. Originalism, they write, need not exclude other sources of law, such as precedent. But not too reassuring. The revolutionary potential is carefully preserved.

If all law must be rooted in original meaning, then whatever law we now happen to have is legitimate only to the extent that original meaning supports it. Original meaning is *the* source of law, and any other source must be traced to it.<sup>68</sup> The ubiquitous practice of reliance on precedent, for example, might or might not be proper.<sup>69</sup> “Maybe stare decisis is itself commanded by a proper reading of Article III. Maybe it’s supportable on the same grounds that favor originalist approaches.”<sup>70</sup> But it might be only partly supportable. We’ll have to wait and see what the research shows.<sup>71</sup> Baude is distinctive among originalists in offering an “inclusive originalism,” which incorporates other sources of law by reference. It might be, Baude argues, that nonoriginalist arguments are permissible within originalism. That has made him somewhat controversial among originalists who want nothing to do with such sources. But he cautions that inclusive originalism “is not infinitely

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67. Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009). An important effort to rehabilitate rule-consequentialism as a basis for originalism (which in turn is offered as a possible basis for radically revising existing constitutional doctrine) has been offered by John McGinnis and Michael Rappaport. It relies in significant part on a reconstruction of the procedures that hypothetical rational, risk-averse persons allegedly would choose were they in the Framers’ position. MCGINNIS & RAPPAPORT, *supra* note 24 *passim*. Whether or not they satisfactorily answer Berman in *id.* at 80–82, the familiar conservative worry about innovation on the basis of abstract theory is pertinent here.

The science of constructing a commonwealth, or renovating it, or reforming it, is, like every other experimental science, not to be taught *à priori*. . . . it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or on building it up again, without having models and patterns of approved utility before his eyes.

EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 152 (Conor Cruise O’Brien ed., 1968) (1790).

68. Originalism, Berman observes, is “the thesis that original meaning either is the only proper target of judicial constitutional interpretation or that it has at least lexical priority over any other candidate meanings the text might bear.” Berman, *supra* note 67, at 22. Baude and Sachs are clearly originalists thus defined.

69. In this they are moderates among originalists, some of whom reject any reliance on precedent. *See, e.g.*, Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007).

70. Stephen E. Sachs, *The “Constitution in Exile” as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2280 (2014).

71. Similarly, in related practice of constitutional liquidation, vague terms become concrete through practice. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019).

inclusive—it allows for precedent and evolving interpretations only to the extent that the original meaning *itself* permits them.”<sup>72</sup>

Inclusive originalism does not leave law just as it found it: “as a practical matter, this understanding of American constitutional law might turn out to support or to undermine a wide variety of legal doctrines.”<sup>73</sup> Thus, for example:

[W]e doubt (say) that the original Constitution let states impair contracts on claims of “economic emergency” – or that this power was ever lawfully conferred since. We likewise doubt the pedigree of modern cases on executive agreements; jury numbers or unanimity; counsel comment on failure to testify; one-person one-vote; diversity jurisdiction for D.C. citizens; “commerce” regulation of wholly intrastate activity; administrative adjudication of private rights; and maybe even commandeering state officers or Article III limits on standing.<sup>74</sup>

“[N]early every originalist has a long list of practices or precedents that he would describe as inconsistent with the original meaning of the Constitution.”<sup>75</sup>

These doctrines might be “right despite our doubts, or at least tolerable under original doctrines of *stare decisis*. (Again, we haven’t done the research.)”<sup>76</sup> They are “largely irrelevant to the battle over interpretive theory. But their fates may well be implications of that battle, and are all the more reason to take theory seriously.”<sup>77</sup>

Baude and Sachs are untroubled by the fact that their originalism might unexpectedly destroy a lot of present American law. “Legal reasoning is an inferential process that can lead us to surprising results.”<sup>78</sup> Thus, “it’s perfectly coherent to say (as we have) that while originalism is the official story of our legal system, many individual cases may turn out to be wrongly decided under that standard.”<sup>79</sup> That official story remains, “though the officials charged with carrying it out are sometimes mistaken, bribed, or responding to extralegal pressures.”<sup>80</sup> Really big surprises could happen: “it’s even possible for an entire society to be mistaken—to experience ‘global error’ about its law—if its members have thus far overlooked some fact of agreed-on legal significance.”<sup>81</sup>

## V. THE SUBTERRANEAN CONSTITUTION

*Is this our law?* Sachs quotes and does not dispute David Strauss’s descriptive claim that American courts decide constitutional questions “on the basis

72. Baude, *supra* note 63, at 2352 (italics in original),

73. Baude & Sachs, *supra* note 58, at 1458.

74. William Baude & Stephen E. Sachs, *Originalism’s Bite*, 20 GREEN BAG 2D 103, 108 (2016) (footnotes omitted).

75. Baude, *supra* note 63, at 2354.

76. Baude & Sachs, *supra* note 74, at 108.

77. *Id.*

78. Baude & Sachs, *supra* note 58, at 1465.

79. *Id.* at 1468.

80. *Id.* at 1469.

81. *Id.* at 1473.

of precedents, both judicial and non-judicial, combined with judgments of fairness and good policy—just as common law judges decide questions on those bases.”<sup>82</sup> Sachs responds that even these practices do not displace the fact that “the text has a privileged place in American law; it can’t be overruled or set aside the way a precedent can.”<sup>83</sup>

That privileged place does not necessarily involve rules. It can also include the standards and principles that Balkin emphasizes.<sup>84</sup> Hart observes that “in some systems of law, as in the United States, the ultimate criteria of legal validity might explicitly incorporate besides pedigree, principles of justice or substantive moral values, and these may form the content of legal constitutional restraints.”<sup>85</sup>

Sachs is correct when he responds that Balkin’s emphasis on standards and principles rests on contingencies: “Balkin concedes that his flexible readings might be true or false based on the history.”<sup>86</sup> Thus, for instance, Sachs thinks that when Balkin defends the broad power that Congress now exercises under the Commerce Clause:

[E]verything hinges on, for example, the accuracy of Balkin’s historical claims regarding the meaning of the word ‘commerce.’ If he’s wrong, then there might really be widespread contradictions between theory and practice, and he’d need to decide whether to abandon originalism in favor of some other theory.<sup>87</sup>

The word “wrong” in the passage just quoted cites Barnett’s analysis, which focuses on specific uses of the term that were common at the time of the framing.<sup>88</sup> Evidently, those specific uses could constrain the broad principles on which Balkin relies. Doubtless, more historical work can be done on this question. There are more materials to be found in remote libraries. The ongoing project of digitizing them makes possible ever more extensive big-data analysis of the meaning of “commerce” in 1789. It will be the work of decades. If archival work concludes that Balkin is wrong and Barnett is right, then the modern administrative state will have to go. That would be devastating news for the millions of people who depend upon it for their financial security, health, or safety. Unless, that is, contemporary law can be

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82. Sachs, *supra* note 46, at 2290 (quoting David A. Strauss, *We the People, They the People, and the Puzzle of Democratic Constitutionalism*, 91 TEX. L. REV. 1969, 1970 (2013)). This descriptive claim is persuasively elaborated in RICHARD H. FALLON JR., *THE NATURE OF CONSTITUTIONAL RIGHTS: THE INVENTION AND LOGIC OF STRICT JUDICIAL SCRUTINY passim* (2019).

83. Sachs, *supra* note 46, at 2294.

84. Balkin, *supra* note 21 *passim*.

85. HART, *supra* note 4, at 247. This passage is from Hart’s posthumously published postscript, the value of which is disputed by some scholars since he never deemed it publishable in his lifetime. It cites and accurately summarizes earlier writings that said the same thing.

86. Sachs, *supra* note 46, at 2297.

87. *Id.*

88. *Id.* at 2297 n.294 (citing Randy E. Barnett, *Jack Balkin’s Interaction Theory of “Commerce,”* 2012 U. ILL. L. REV. 623, 623–25).

justified by precedent, whose authority must likewise be established by similarly extensive historical research.

Sachs ridicules the notion of “a nefarious ‘Constitution in Exile,’ waiting in their subterranean lairs to subdue the populace and abolish the New Deal.”<sup>89</sup> But in his telling, the lair simply stops being subterranean. It now towers over the landscape. If new research shows that the original meaning—say, of the word “commerce”—is different than we had previously thought, then we must upend our legal system in response. At least until the next bit of historical research comes along. And it will. There are great professional rewards for professors who successfully attack the conventional wisdom. Someone is always trying. If some later academic shows us that the first one was wrong, then we must lurch back to the law we had before. Large federal programs may disappear and reappear, depending on the state of the latest scholarship.

In *NFIB v. Sebelius*,<sup>90</sup> the Court’s premier originalists, Antonin Scalia and Clarence Thomas, would have invalidated the statute on the grounds that the Necessary and Proper Clause did not authorize laws inconsistent with the federal structure.<sup>91</sup> Elsewhere, Thomas explained that he regarded “proper” as a separate limitation on congressional action.<sup>92</sup> Four years later, Samuel Bray argued, on the basis of extensive historical research, that in the phrase’s original meaning, “proper” is not a disjunctive requirement, but rather that the two words together have a single meaning. “‘Necessary’ means the connection between the enumerated end and the incidental power must be close, while ‘proper’ reaffirms that connection and clarifies that ‘necessary’ is not to be taken in its strictest sense.”<sup>93</sup> Thomas recently cited Bray’s article with approval.<sup>94</sup> Is he perhaps now ready to confess error? Might he perhaps have to say that he mistakenly voted to take health insurance away from more than 20 million people because the historical research happened to be incomplete?

This is, in short, a purportedly bland, deductive, descriptive theory that would randomly introduce chaos into the law.

In considering originalist proposals to reshape American constitutional law, one should not ignore the enormous success of the American regime and the flourishing of individual freedom therein. This is the best reason for taking the internal point of view and granting authority to American law. The United States is largely peaceful, prosperous, and has managed to rid itself of such ancient evils as slavery and famine. Law obviously has something to do with this. That’s one reason

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89. *Id.* at 2254.

90. 567 U.S. 519 (2012).

91. *Id.* at 651–60 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

92. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 47–52 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part).

93. Samuel L. Bray, “*Necessary AND Proper*” and “*Cruel AND Unusual*”: *Hendiadys in the Constitution*, 102 VA. L. REV. 687, 694 (2016).

94. *Trump v. Mazars*, 140 S.Ct. 2019, 2037 (2020) (Thomas, J., dissenting).

why American constitutional law has been so widely emulated worldwide.<sup>95</sup> Edmund Burke said “It is a presumption in favour of any settled scheme of government against any untried project, that a nation has long existed and flourished under it.”<sup>96</sup> It is odd to use “conservatism” as a label for a theory that proposes to disrupt all this with no practical payoff other than greater fidelity to the theory.<sup>97</sup> If American law looked different, it might not inspire emulation. It might be the object of pity and contempt.

Consider the debate over the original meaning of Congress’s power to regulate commerce among the several states. Many originalists read it narrowly, hoping to shrink the federal government to the modest role it had 200 years ago. Look at what that would call into question. Modern economies involve a vast and complex web of transactions, with equally complex effects. Those effects require an equally complex pattern of regulation. Consumers rely on government to ensure the quality of many of the goods and services they are sold—to guarantee that the medicines they buy are safe and effective, that their cars will not explode on impact, and that the meat they purchase in the supermarket is not tainted. Transactions often have external, interstate effects on nonparties, notably pollution and climate change.<sup>98</sup> There is a wide array of well-known types of market failure, such as collective action and holdout problems.<sup>99</sup> Unregulated economies are also subject to catastrophic cycles of boom and bust, which modern central bankers have learned to moderate.<sup>100</sup> Every advanced, industrialized country has a huge regulatory apparatus that addresses these problems. Unemployment and welfare benefits are provided; health, education, labor relations, and the environment are regulated; civil

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95. See 1 STEVEN GOW CALABRESI, *THE HISTORY AND GROWTH OF JUDICIAL REVIEW* 7 (2021).

96. Edmund Burke, Speech on Reform of Representation (May 7, 1782), in *ON EMPIRE, LIBERTY, AND REFORM: SPEECHES AND LETTERS* 268, 274 (David Bromwich ed., 2000).

97. See Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL’Y 509 (1996). Edmund Burke wrote: “It seems to me a preposterous way of reasoning, and a perfect confusion of ideas, to take the theories, which learned and speculative men have made from that government, and then, supposing it made on these theories, which were made from it, to accuse the government as not corresponding with them.” Burke, *supra* note 96, at 275. Roger Scruton observes that conservatism “tells us that we have collectively inherited good things that we must strive to keep” and that it understands “that good things are easily destroyed, but not easily created.” SCRUTON, *supra* note 54, at viii.

98. Every modern nation-state has assumed some responsibility for environmental protection. See generally David John Frank et al., *The Nation-State and the Natural Environment Over the Twentieth Century*, 65 AM. SOC. REV. 96 (2000). Even Richard Epstein, who laments the growth of federal power, acknowledges that government may legitimately “adopt programs that aid in the effective enforcement of private rights when the high costs of private actions make them insufficient to deter or eliminate wrongful behavior,” for example when pollution has “multiple sources and/or multiple victims.” RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* 353 (2014).

99. See THOMAS A. LAMBERT, *HOW TO REGULATE: A GUIDE FOR POLICYMAKERS* (2017).

100. PAUL SAMUELSON & WILLIAM NORDHAUS, *ECONOMICS* (19th ed. 2010).

rights are protected.<sup>101</sup> Absent these preconditions, our present prosperity might not have happened.

Abandoning all this might have catastrophic implications, but for these originalists this has no weight in determining what the law is. “The fact that [an originalist criterion of legality] is largely removed from the most salient moral issues of the day can be a virtue here. It means that applying originalism is a way to limit the relevance of political or moral criteria that judges may feel an obligation to push aside.”<sup>102</sup> An objection based upon consequences “is like a complaint that tax rates are too high. It is a complaint that our law is not any better than it is.”<sup>103</sup> Judges should just enforce the law. “Originalism may sometimes result in individual practices or doctrines being modified, but not because judges are changing the law. Judges are acting properly by using such originalism, and indeed judges would be required to use it.”<sup>104</sup>

Rules, Frederick Schauer writes, are “crude probabilistic generalizations that may thus when followed produce in particular instances decisions that are suboptimal or even plainly erroneous.”<sup>105</sup> There are circumstances in which these costs are worth it: prescriptive rules sometimes allocate power appropriately and give clear notice about how power will be deployed. But the obvious costs are the reason why we do not guide ourselves entirely by rules.

And neither do the Rule-Reductive Originalists. Their official political ideal is in practice so destructive that they are unable to stick to it. They have devised means of escape that bring back the discretion they fear, unconstrained even by the standards whose vagueness they protest against.

## VI. DEMOCRACY AS A RATIONALIZATION FOR OLIGARCHY<sup>106</sup>

Originalism began in a revulsion against judicial discretion. It has ended up, paradoxically, as a prescription for judicial oligarchy. This isn’t a mistake. It has been brought there by its own logic. Its machinery is so dangerous that it demands a manual override, and that override is entirely unconstrained by law.

Consider Justice Clarence Thomas, the most prominent and uncompromising originalist on the Supreme Court. Like Barnett, he proposes to revolutionize the law of Congress’s commerce power. He would return to the old, pre-New Deal categories, proposing that “commerce” be understood to include only “selling, buying, and bartering, as well as transporting for these purposes.”<sup>107</sup>

101. JACOB S. HACKER & PAUL PIERSON, *AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER* (2016).

102. William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2226–27 (2017).

103. Baude & Sachs, *supra* note 57, at 817.

104. Baude, *supra* note 63, at 2393.

105. FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE*, at xv (1991).

106. Evidently oligarchy has many possible rationalizations. See Andrew Koppelman, *How “Decentralization” Rationalizes Oligarchy: John McGinnis and the Rehnquist Court*, 20 CONST. COMMENTARY 11 (2003).

107. *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring).

## 2021] WHY (SOME) ORIGINALISTS HATE AMERICA 1055

Congress should therefore be understood to have no power over productive activities such as manufacturing and agriculture.<sup>108</sup> Thus, for example, he voted to invalidate the Affordable Care Act: if Congress has no power to regulate activity that substantially affects interstate commerce (where “commerce” is understood this narrowly), then of course the mandate is unconstitutional.<sup>109</sup>

Thomas is correct that most of the Framers envisioned a far smaller central government than the one we (along with every other modern industrialized nation) now have. But the Constitution does not expressly command that, and his formulation is in tension with the Framers’ most basic purpose: to enable the American people to effectively govern themselves.

His vision comes accompanied by a crucial 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.<sup>110</sup>

His deference to precedent is only partial.<sup>111</sup> He is still prepared to use originalism to get rid of those aspects of existing practice he is satisfied the country can do without. For example, he is prepared to abandon all enforcement of the ban on state establishments of religion.<sup>112</sup> Thomas gets to decide—as he understands his job, he *must* decide—which parts of the modern federal government have to be trashed. The massive social engineering this would involve would demand, if it were a legislative proposal, careful investigation, drawing upon expert studies and certainly with the opportunity of those potentially affected to have their concerns heard. Instead, Thomas envisions himself making these decisions secretly in chambers, with no possibility of collecting this kind of information. His political ideal resembles a blindfolded man in a crowded room swinging a baseball bat.

The regime would in this respect resemble Iran or Hong Kong: there would be elections, but a group of unelected mandarins would decide, on the basis of unlimited discretion, what matters the electorate may decide. Thomas’s discretion would not even be constrained by constitutional principles. He has nothing to rely on but his own sense of prudence. He is condemned to be free.

Iran can coherently justify this kind of oligarchy because ancient lore unknown to most citizens, to which the clerics have privileged access, represents the will of God. But of all the reasons that might be offered for taking us there, there is

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108. See *id.* at 584–602; *United States v. Morrison*, 529 U.S. 598, 627–28 (2000) (Thomas, J., concurring).

109. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 707–08 (2012) (Thomas, J., dissenting).

110. *Lopez*, 514 U.S. at 601 n.8 (Thomas, J., concurring).

111. In a later opinion, he suggests that even *stare decisis* and reliance interests should have no weight in preserving precedents that are wrongly decided. *Gamble v. United States*, 139 S. Ct. 1960, 1980–89 (2019) (Thomas, J., concurring).

112. See *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 565 U.S. 994, 994 (2011) (Thomas, J., dissenting from denial of cert.).

something heroically daffy, a kind of willful mortification of the intellect, in the claim that this kind of centralized, unaccountable power is necessary in order to protect democracy and constrain judicial discretion.

### VII. SOMETHING HAS GONE WRONG

Originalism thus ends up exploring new frontiers in judicial creativity. One essay by Sachs, defending the constitutional challenge to Obamacare, shows the possibilities and is unusually revealing about what underlies the enterprise.<sup>113</sup>

Consider again *NFIB v. Sebelius*,<sup>114</sup> a constitutional challenge brought by self-styled originalists on the basis of theories that were absolutely unheard of before the suit was filed (which is why Congress failed to anticipate them).<sup>115</sup>

A central purpose of the Patient Protection and Affordable Care Act of 2010 (ACA) was to extend insurance to people with preexisting medical conditions, whom insurers had become very efficient at keeping off their rolls (or excluding the preexisting conditions from any coverage that was provided). This group includes not only sick people but anyone likely to file an expensive medical claim, such as women of childbearing age. A rule prohibiting discrimination against those people, standing alone, would mean that healthy people could wait until they get sick to buy insurance. Because insurance pools rely on cross-subsidization of the sick by the healthy participants, Congress feared that its law might bankrupt the entire individual insurance market. Congress responded with the ACA's so-called "individual mandate," which required nearly everyone to purchase health insurance, imposing a penalty or a tax—as things turned out, it matters a lot what you call it<sup>116</sup>—that must be paid by those who fail to carry a minimum level of health insurance coverage.<sup>117</sup>

The constitutional challenge claimed that the state can't make you do things—that it may regulate only those who engage in some self-initiated action. This action/inaction distinction, of course, appears nowhere in the Constitution. Chief Justice Roberts wrote that "the distinction between doing something and doing nothing would not have been lost on the Framers, who were 'practical statesmen,'

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113. Stephen E. Sachs, *The Uneasy Case for the Affordable Care Act*, 75 L. & CONTEMP. PROBS. 17 (2012).

114. 567 U.S. 519 (2012).

115. See KOPPELMAN, *supra* note 29, at 72–106. The invention of this limit just before the law was passed reminds me of a dishonest trick I learned when I was about five years old: to announce, while playing a game, a new rule that interpreted what had just happened in a way that favored the speaker. I later got the impression that adults didn't do this sort of thing. The Obamacare case was a clarifying corrective.

116. The Court decided that the mandate was not authorized by the commerce power but upheld it as an exercise of the taxing power. *See id.* at 107–22.

117. Patient Protection and Affordable Care Act, 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. The specific provision is § 1501(b), 124 Stat. at 244 (codified at 26 U.S.C. § 5000A).

not metaphysical philosophers.”<sup>118</sup> But the question for originalists shouldn’t be whether the Framers would have understood it, but whether they wrote it into the Constitution.

Here is the case for the mandate’s constitutionality under existing precedent in four sentences. “Insurance is commerce. Congress can regulate it. Therefore, Congress can ban discrimination on the basis of preexisting conditions. Under the Necessary and Proper Clause, it gets to decide what means it may employ to make that regulation effective.”<sup>119</sup>

Yet Sachs thinks that this was a hard case. In making that argument, he illustrates once more how an originalist can inadvertently slide into luxuriant creativity. His constitutional doubts about the ACA rest entirely on the need to construct a limitation on congressional power. The Framers certainly intended some such limitation, but the limits Sachs suggests have little relation to the originalist method he elsewhere espouses.

His skepticism about the ACA evidently grows from his originalism. Existing precedents and doctrines support the law’s validity. “But it’s no accident that many people who oppose the mandate don’t buy into a theory of law based exclusively on precedents and doctrines . . . . For instance, many mandate opponents base arguments on their views of the Constitution’s original meaning.”<sup>120</sup>

He concedes that Congress has a broad choice of means under the Necessary and Proper Clause.<sup>121</sup> Yet he proposes a novel, narrow reading of the Clause’s language, one that makes it less open-ended and more rule-like:

[U]nlike many traditional “means” of implementing a law, the mandate isn’t designed to ensure compliance with the Act. It’s designed to keep the Act from destroying insurance companies, which could religiously observe the pre-existing-conditions rule until the day they file for bankruptcy. In that sense, the mandate doesn’t help carry the ban on preexisting-condition discrimination *into effect*, in the way that a ban on robbing the mail helps execute the power to move letters from Point *A* to Point *B*. What the mandate does is prevent entirely collateral consequences of the ACA’s other provisions, which otherwise might make the ACA a really lousy idea.

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118. *Sebelius*, 567 U.S. at 555 (opinion of Roberts, C.J.). If one were going to think like a practical statesman, one might point out that this rule, which would essentially ban the privatization of any part of the social safety net, was at odds with policies that Republicans had been advocating for decades. Only one Republican judge noticed that. *See Seven-Sky v. Holder*, 661 F.3d 1, 53 (D.C. Cir. 2011) (Kavanaugh, J., dissenting with respect to jurisdiction). On the other hand, Judge Kavanaugh is no originalist. *See* Eric Posner, *Is Brett Kavanaugh an Originalist?* (July 18, 2018), <http://ericposner.com/is-brett-kavanaugh-an-originalist/> [https://perma.cc/UTT2-2WJN].

119. KOPPELMAN, *supra* note 29, at 67.

120. Sachs, *supra* note 113, at 26.

121. *See* Koppelman, ‘Necessary,’ ‘Proper,’ and Health Care Reform, *supra* note 28, at 106–10.

But Congress has no general power to control the consequences of its own legislation . . . .<sup>122</sup>

The notion that Congress can't ameliorate the collateral consequences of its own actions is strange. Set aside the inconsistency with *United States v. Comstock*,<sup>123</sup> which upheld a law authorizing civil commitment of mentally ill sexual predators who remain dangerous after completing their federal prison sentences—an appropriate federal role, Congress found, because no state may be willing to take custody and the federal imprisonment, by severing the predator's ties with any state, had created that problem. Quite a lot of federal law concerns collateral consequences.<sup>124</sup> It is a federal crime to trespass on military firing ranges.<sup>125</sup> Some of those ranges are used for ordnance that involves secrecy, but the law's primary aim is to keep the military from inadvertently killing those who might imprudently wander into the line of fire. Must Congress remit that goal to state law?

Sachs thinks such a power would have absurd implications:

Suppose [Congress] lets everyone send mail to family members for free. That costs too much money, so Congress then makes all Americans live within ten miles of their grandparents. Or suppose that, having stifled innovation with bad patent laws, Congress fixes the problem by forcing every American to submit three patentable ideas a week. Both of these measures pass rational-basis review, but they hardly seem “incidental” or “plainly adapted” to the enumerated powers to establish post offices or secure patent rights.<sup>126</sup>

These implications are indeed absurd. But they reveal nothing about the limits on Congress's choice of means, other than to repeat the observation in *McCulloch v. Maryland* that Congress is restricted to means “which are not prohibited, but consist with the letter and spirit of the constitution.”<sup>127</sup> Sachs's examples both involve severe intrusions on well-established constitutional liberties and so are not subject to deferential rational-basis review. The first probably violates substantive due process.<sup>128</sup> The second probably violates the Thirteenth Amendment.<sup>129</sup> These tell us nothing about whether Congress may use convenient

122. Sachs, *supra* note 113, at 23–24. Here Sachs parts company with Baude, who thinks that the mandate is valid under the Necessary and Proper Clause. William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1817–18 (2013).

123. 560 U.S. 126, 149 (2010).

124. See also *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 141 (1948) (“[T]he war power includes the power ‘to remedy the evils which have arisen from its rise and progress . . . .’”).

125. 18 U.S.C. §1382. The provision has taken on new relevance as a new generation of fools trespass onto Area 51 in Nevada in search of extraterrestrial artifacts. Paolo Zialcita, *‘Storm Area 51’ Fails To Materialize*, NPR (Sept. 20, 2019).

126. Sachs, *supra* note 113, at 24.

127. 17 U.S. (4 Wheat.) 316, 421 (1819).

128. *Moore v. City of East Cleveland*, 431 U.S. 494, 499–500 (1977).

129. See the cases cited in Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 490–92 (1990).

means that do not violate constitutional rights. And Sachs does not claim that a requirement to purchase insurance violates any constitutional right.

What really animates the lawsuit, Sachs acknowledges, is its opponents' sense that "the mandate—as the apotheosis of the substantial-effects test—is a signal that Something Has Gone Wrong in our reading of the Constitution. If we can't invalidate this, they argue, we'll have given up hope of any coherent account of Congress's enumerated powers."<sup>130</sup> Barnett's claim, that limits can be derived from the contemporaneous meaning of "commerce," is nowhere to be seen here. We are in the world of purposivism and construction. The imperative is somehow to construct a limit on Congress. Something Has Gone Wrong. American law needs to be cleansed of the hypertrophy of congressional power. If clear rules limiting congressional power do not exist, it is necessary to invent them. Originalism impels the creation of limits but doesn't tell us what they are.<sup>131</sup> The situation of the contemporary American constitutional lawyer starts to look like that of the 1946 German.<sup>132</sup>

One might respond that other, more sensible restrictions on congressional power could be constructed.<sup>133</sup> The action/inaction distinction doesn't seem to restrict Congress in any significant way outside of this politically loaded case.<sup>134</sup> But what matters here is that this distinction has no relation at all to petty textualist originalism. This suit, and Sachs's defense of it, instantiate the kind of broad purposivism that in other contexts drives originalists nuts. The purpose that they care about is constraining power—and that is certainly one of the original public purposes of the Constitution. But the other, the central reason for discarding the Articles of Confederation, is that the federal government should be adequate to the problems that the nation confronts. (The Obamacare challengers were curiously oblivious to the government's interest in protecting its citizens from sickness and death.) Had the Framers only wanted to be sure that federal power does not get out of hand, they should have stuck with the Articles.

Those who want to return to the old limitations on the commerce power tend to have a pretty dour picture of today's America. Richard Epstein, for example, claims that before the New Deal, constitutional constraints on government "fueled the rise of the mightiest nation on the globe;"<sup>135</sup> the "intolerable expansion of

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130. Sachs, *supra* note 113, at 27.

131. Baude and Sachs suggest that construction's discretionary element can be limited by rules of interpretation in a way much like that proposed by McGinnis and Rappaport. William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1130–32 (2017). It is not clear how any such rules constrain Sachs's treatment of the Obamacare statute.

132. See *supra* text accompanying notes 9–10.

133. KOPPELMAN, *supra* note 29, at 64–67.

134. *Id.* at 119–20. But see BARNETT, *supra* note 48, at 11, 13 (arguing that it is "huge" that "the Court held that economic mandates are unconstitutional under both the Commerce and Necessary and Proper Clauses"); Andrew Koppelman & Steven Lubet, *Is the Roberts Court Going To Let Coronavirus Kill Us?*, JUST SECURITY (Apr. 17, 2020) (arguing that the logic of the decision might bar the federal government from mandating COVID-19 testing or vaccination).

135. EPSTEIN, *supra* note 98, at 167.

government power”<sup>136</sup> since then “is disastrous in its relentless efforts to cartelize industry after industry through a set of legal devices that have only served to stymie the economic prosperity and social stability of the United States.”<sup>137</sup> Here is what stymied prosperity looks like: from 1991 to 2012, net of inflation, the U.S. economy grew 63 percent, compared with: France, 35 percent; Germany, 28 percent; and Japan, 16 percent.<sup>138</sup>

### VIII. THE BATTLEAXE

The petty textualist effort to constrain federal power is presented as an unremarkable inference from the law that we obviously now have. Any surprising conclusions are taken to be equally unremarkable. The Faithful Restorer of the Good Old Ways of that old-time originalism<sup>139</sup> is supplanted by the Faceless Bureaucrat, who enforces the rules with utter indifference to their larger purposes. You might be frightened when you see the battleaxe swinging toward your arm, but you will be relieved to learn that (1) it isn’t an axe, just an unusually shaped nailclipper, and (2) you never really had an arm to begin with.

At some point, however, the wielder of the axe is likely to notice that he’s covered with blood and will have to tell himself some story about why that’s ok. If he’s busily butchering programs on which people depend, not merely following orders but making discretionary decisions about which programs get the axe, he will likely feel inclined to construct some narrative about why those programs deserve it. And if he actively seeks the job, then he probably already embraces some such narrative.

It’s difficult for anyone to deliberately bring about this sort of cataclysm without some passion. That’s why the narrow reading of the Commerce Clause is so closely associated with libertarian political philosophy,<sup>140</sup> and why petty textualism is indispensable if one is to distract the reader’s attention from the fact that the Constitution’s primary purpose was to create a far more powerful government than had existed theretofore. Today’s problems are not those of 1789, and that is why today’s government is not that of 1789. Modern nostalgia for the old, small government is nothing that the Framers had an opinion about,<sup>141</sup> but it has obvious

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136. *Id.* at 571.

137. *Id.* at 168.

138. EDWARD CONARD, UNINTENDED CONSEQUENCES: WHY EVERYTHING YOU’VE BEEN TOLD ABOUT THE ECONOMY IS WRONG 23 (2012).

139. Steven D. Smith, *That Old Time Originalism*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 223 (Grant Huscroft & Bradley W. Miller eds. 2011).

140. Barnett’s constitutional theory, for example, has close affinities with his libertarianism. See KOPPELMAN, *supra* note 29, at 80–90. The defects of libertarian philosophy are further explored in ANDREW KOPPELMAN, BURNING DOWN THE HOUSE: HOW LIBERTARIAN PHILOSOPHY WAS CORRUPTED BY DELUSION AND GREED (St. Martin’s Press, forthcoming 2022).

141. Roscoe Pound noted more than a century ago the tendency of law to degenerate into a “mechanical jurisprudence,” to “stifle independent consideration of new problems and of new phases of old problems, and to impose the ideas of one generation upon another.”

charms for those who are frightened or inconvenienced by the power of the federal government.

The narrative is clear. The regime has been contaminated by monstrous innovations. These are vile and polluting. Something Has Gone Wrong. A wholesale reformation is necessary in order to get rid of them. It helps a lot—in fact, it may be indispensable—to feel that there is something fundamentally rotten about America as it exists today. You need to really hate it.

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Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 606 (1908). Pound thought that the tendency is inevitable:

The effect of all system is apt to be petrification of the subject systematized. Perfection of scientific system and exposition tends to cut off individual initiative in the future, to stifle independent consideration of new problems and of new phases of old problems, and to impose the ideas of one generation upon another. This is so in all departments of learning.

*Id.* at 607. Originalism has sometimes been subject to similar criticism. The form of originalism I have examined here, however, does not impose the ideas of one generation upon another. It pulls some of an earlier generation's ideas out of context in order to empower a subset of the present generation that has been unable to persuade the voters to adopt its views.