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CARICATURE ASSASSINATION: ANDREW KOPPELMAN AND THE MYTH OF TOUGH LUCK LIBERTARIANISM

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ABSTRACT

In 2010, President Obama signed the Patient Protection and Affordable Care Act into law. Over four years later, it is still the subject of heated debate, administrative tinkering, and more importantly for our purposes, books and lawsuits. In *The Tough Luck Constitution and the Assault on Health Care Reform*, Northwestern School of Law Professor Andrew Koppelman analyzes the legal opposition to the law, and the purported ideology behind that opposition. Kop-

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pelman ultimately argues that the Supreme Court properly upheld the constitutionality of the individual mandate in *NFIB v. Sebelius*. But his argument rests not on what the Constitution means, and instead, on what it cannot mean—and to Koppelman, the Constitution cannot require libertarianism. Koppelman sees the opposition to Obamacare and what he calls "Tough Luck Libertarianism" as inextricably linked, and because the latter is so repulsive, he argues that the Constitution cannot require it.

This review takes a look at "Tough Luck Libertarianism," both as it allegedly applies to the Affordable Care Act now, and as it has applied to arguments against expansive uses of government power in other eras. By taking a closer look at Tough Luck Libertarians' rhetoric as articulated in legal briefs and court opinions, it becomes clear that opponents of government intervention are quite moderate, and have consisted not just of politically powerful businessmen, but of politically powerless groups as well. Many exploited or subjugated groups who ostensibly "needed" government intervention have wanted to be left alone—often because government intervention would have done more harm than help. From this perspective, the arguments against the ACA find a strong basis in American constitutional tradition, and Koppelman's attack on libertarianism turns out to be an attack on a caricature.

INTRODUCTION

Andrew Koppelman's *The Tough Luck Constitution and the Assault on Health Care Reform*[2] is not so much about what the Constitution means, but rather what it cannot mean, and to Koppelman, the Constitution cannot require libertarianism. Koppelman introduces his view of the Constitution—in particular his interpretation of the

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[2] ANDREW KOPPELMAN, THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM (Oxford University Press 2013) [hereinafter *The Tough Luck Constitution*].

Commerce Clause—under a theory he calls Collective Action Federalism.[3] But for the most part, *The Tough Luck Constitution* is not a manifesto in support of a particular viewpoint, but instead an attack on the constitutional challenge to Obamacare,[4] its supporters, and the purported ideology behind it.

According to Koppelman, opponents of Obamacare subscribe to "Tough Luck Libertarianism," or the belief that "[t]he sick and poor have no legitimate claim on the property of the rich and healthy,"[5] and that when government "extract[s] money" to help them, that "violate[s] citizens' rights."[6] In other words, "[n]o one should have to subsidize anyone else."[7] This belief "emphasiz[es] rule following rather than consequences,"[8] and thus Tough Luck Libertarians would have struck down the ACA "even if it were the only way to achieve near-universal health care."[9] Essentially, to Tough Luck Libertarians, "tough results [don't] matter."[10]

To Koppelman, this is not merely incorrect as a matter of constitutional law, it is incorrect as a world view. Because libertarians think that the government cannot, or even should not, "help" peo-

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[3] For an in depth treatment of Collective Action Federalism, *see, e.g.*, Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010); Richard E. Levy, *Federalism and Collective Action*, 45 U. KAN. L. REV. 1241 (1997).

[4] For ease and brevity, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), is referred to as "Obamacare" or "ACA" throughout. Though several other lawsuits abound, *see, e.g.*, King v. Burwell, 759 F.3d 358 (4th Cir. 2014) cert. granted, No. 14-114, 2014 WL 3817533 (U.S. Nov. 7, 2014); Halbig v. Burwell, 758 F.3d 390 (D.C. Cir. 2014) *reh'g en banc granted, judgment vacated*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014); Sissel v. U.S. Dep't of Health & Human Servs., 760 F.3d 1 (D.C. Cir. 2014), Coons v. Lew, 762 F.3d 891 (9th Cir. 2014), *pet. for cert. filed* Nov. 5, 2014. Koppelman's critique is limited to the 2012 Supreme Court decision in Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

[5] KOPPELMAN, *supra* note 2, at 11.

[6] KOPPELMAN, *supra* note 2, at 11.

[7] KOPPELMAN, *supra* note 2, at 11.

[8] KOPPELMAN, *supra* note 2, at 11.

[9] KOPPELMAN, *supra* note 2, at 15.

[10] KOPPELMAN, *supra* note 2, at 11.

ple, libertarians are "nasty,"[11] unsophisticated,[12] "crude,"[13] not serious,[14] and crony.[15] Their motivation is self-interest.[16] The consequences are warring oligarchies,[17] or feudalism.[18] And these libertarians have no principled legal basis for their objection to Obamacare; they merely invented the legal challenge for politically opportunistic reasons.[19] And so even though Koppelman performs a constitutional analysis of the arguments against Obamacare, the reader's impression is that Koppelman believes the Constitution cannot require libertarianism not because of what the Constitution actually says, but because libertarian ideas are so repulsive.

Koppelman's view is typical of other critiques of libertarianism today: people don't oppose government regulation because they actually think personal responsibility is preferable to government help, but because they are uncaring people.[20] Tough Luck Libertarians are not just rule-followers, they're "nasty,"[21] "inconsistent,"[22]

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[11] KOPPELMAN, *supra* note 2, at 9.

[12] *See* KOPPELMAN, *supra* note 2, at 80 (Randy Barnett's libertarianism is "unusually sophisticated.").

[13] KOPPELMAN, *supra* note 2, at 3, 106, 116.

[14] *See* KOPPELMAN, *supra* note 2, at 11 ("Almost no one is a serious Tough Luck Libertarian.").

[15] *See* KOPPELMAN, *supra* note 2, at 144.

[16] KOPPELMAN, *supra* note 2, at 144.

[17] KOPPELMAN, *supra* note 2, at 85.

[18] KOPPELMAN, *supra* note 2, at 86.

[19] *See, e.g.*, KOPPELMAN, *supra* note 2, at 2 (Republicans "invented the objections as the bill was nearing passage.").

[20] *See, e.g.*, David E. Bernstein, *Brandeis Brief Myths*, 15 GREEN BAG 2d 9 (2011) (A pervasive myth is that "*Lochner*" and by extension, Tough Luck Libertarianism, "represented a triumph of formalistic legal reasoning over attention to the actual social conditions facing workers in early twentieth-century America."); John E. Nowak, *The 'Sixty Something' Anniversary of the Bill of Rights*, 1992 U. ILL. L. REV. 445, 452 (1992) ("None of these cases [defending economic liberty] represents a defense of civil liberties. The Court merely used libertarian philosophy to protect the wealthy from progressive legislation.").

[21] KOPPELMAN, *supra* note 2, at 9.

[22] *See* KOPPELMAN, *supra* note 2, at 86.

"[un]sophisticated" [23] rule-followers with "terrible legal arguments"[24] who don't care about consequences.[25]

This turns out to be an attack on a caricature. The challenge to Obamacare was really quite limited, and defensible from a traditional legal perspective that has nothing to do with Tough Luck Libertarianism. And looking back throughout American history at other eras that purportedly exemplify the ideology, it is clear that arguments for limited government were made not only by those who opposed redistribution of their own money, but also by those who would have purportedly benefitted from government help.[26] Many exploited groups who "needed" government intervention wanted to be left alone—often because government intervention would have done more harm than help.[27] This is especially evident when looking at legislation and lawsuits from the Progressive Era. Young women who sought the right to earn a living marched alongside factory owners in protesting maximum hours legislation. And racial minorities opposed minimum wage laws because the purportedly paternalistic measures actually harmed their chances of being employed.[28]

In sum, arguments against Tough Luck Libertarianism are attacks on a strawman, and say nothing about the validity of the legal challenge to Obamacare, or arguments for limited government generally. The opposition to Obamacare, limited in scope and rooted in arguments for economic liberty, has a strong basis in American history and in no way reflects the "nasty" motivations and consequences Koppelman ascribes to it.

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[23] *See* KOPPELMAN, *supra* note 2, at 80.
[24] KOPPELMAN, *supra* note 2, at 117.
[25] *See* KOPPELMAN, *supra* note 2, at 11.
[26] *See infra* Part III. A.
[27] *See infra* Part III. A.
[28] *See infra* Part III. A.

I. SYNOPSIS AND CRITIQUE

The Tough Luck Constitution begins with a brief introduction to the history of health insurance policy in the United States, the problems with the system today, and the events that led to the passage of Obamacare. As Koppelman sees it, the problem is that health care and health insurance costs have continuously risen, and insurers and providers would rather weed out sick people than find other ways to reduce costs, leading to a large group of sick or poor Americans who cannot obtain coverage.[29] Meanwhile, the free market cannot provide an adequate solution because healthy individuals do not want to subsidize the cost of the sick.[30] Obamacare solves this problem by forcing everyone into the system and redistributing costs from the sick to the healthy.[31]

Koppelman argues that Obamacare was a necessary solution, because no other solution would have worked, and it was a constitutional one.[32] Using a self-described "Originalist" approach,[33] he argues that because the Constitution was meant to be a broader grant of government power than the Articles of Confederation, the document grants the government the ability to solve any national problem.[34] The opponents of Obamacare are wrong because under their theory of the Constitution, there would be some problems, like the problem of people being uninsured, that nobody, "not the

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[29] *See* KOPPELMAN, *supra* note 2, at 28-29.

[30] *See* KOPPELMAN, *supra* note 2, at 19. In truth, health care delivery for many decades has been significantly altered by government programs, most notably Medicaid and Medicare. A true free market approach would have a greater impact on reducing costs.

[31] *See* KOPPELMAN, *supra* note 2, at 31.

[32] *See* KOPPELMAN, *supra* note 2, at 67-68 (using Massachusetts as an example of why states cannot act alone and arguing that the mandate is constitutional).

[33] *See* KOPPELMAN, *supra* note 2, at 43.

[34] *See* KOPPELMAN, *supra* note 2, at 40-41, 89.

states, not the federal government could solve."[35] And limiting Congress's power to solve a national problem contravenes the fundamental purpose of the Constitution.[36]

But the heart of the book seems to argue by innuendo that the opponents of Obamacare are wrong not as a matter of constitutional law, but as a matter of principle. Koppelman hones in on Randy Barnett, who has often been called the "godfather" of the constitutional objection to Obamacare,[37] to connect anti-Obamacare sentiments to Tough Luck Libertarianism.[38] Thus he quickly shifts from analyzing Professor Barnett's constitutional arguments to criticizing his political philosophy. Accordingly to Koppelman, Randy Barnett is a Tough Luck Libertarian, albeit an "unusually sophisticated"[39] one, because his political theory would inevitably lead to "warring oligarchies," in which "any peace is fragile and temporary."[40] Under Barnett's rules, the world would be akin to the "Mafia Commission," and "punctuated by frequent wars and assassinations."[41] Barnett's libertarianism would not only inevitably fail people who need help, it would fail even the "ruling class."[42] In other words, Barnett's world is an awful place.

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[35] *See* KOPPELMAN, *supra* note 2, at 15. If it were a good idea, there is no reason why states or Congress could not provide universal healthcare. This is another example of Koppelman's strawman argumentation.

[36] KOPPELMAN, *supra* note 2, at 89.

[37] *See, e.g.*, JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 251(2013); Kate Zernike, *Proposed Amendment Would Enable States to Repeal Federal Law*, N.Y. TIMES, Dec. 19, 2010, *available at* http://www.nytimes.com/2010/12/20/us/politics/20states.html?_r=2&src=tptw& (last visited November 20, 2014).

[38] *See* KOPPELMAN, *supra* note 2, at 80.

[39] KOPPELMAN, *supra* note 2, at 80.

[40] KOPPELMAN, *supra* note 2, at 85.

[41] KOPPELMAN, *supra* note 2, at 85.

[42] KOPPELMAN, *supra* note 2, at 85.

Perhaps because his constitutional arguments are quite simplistic,[43] Koppelman spends much of the book attacking opposing viewpoints in this manner, and declaring that libertarianism evidences an intolerable worldview. Thus, if you don't agree with him as a matter of constitutional interpretation, you must agree as a matter of principle. Whatever the Constitution says, Tough Luck Libertarians and their challenge to Obamacare are so awful that the Constitution cannot possibly mean what those Tough Luckers say.

Though Koppelman is ostensibly pleased with the result of *NFIB v. Sebelius*, the last half of the book criticizes the Supreme Court's holding that the individual mandate could not be sustained under Congress's commerce power, as well as its holding that the Medicaid expansion was unconstitutional under the spending power.[44] And though Koppelman acknowledges that the opinion is commendable for upholding the mandate, he criticizes the Court for not going far enough, because it did not uphold it under the commerce power, but under the taxing power instead, and because it did not uphold Obamacare in its entirety.[45]

There are a few small problems throughout. Koppelman's claim that he is using Originalism is dubious. By arguing that the Founders intended that federal power under the Constitution be stronger than it was under the Articles of Confederation, Koppelman seems to be appealing to Original Intent Originalism, or the belief that the Constitution should be interpreted by reference to the "goals, objectives, or purposes of those who wrote or ratified the text."[46] The

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[43] *See, e.g.*, KOPPELMAN, *supra* note 2, at 89 ("[t]he Constitution was adopted specifically to give Congress power adequate to address the nation's problems," yet "on Barnett's reading of the Constitution, the existence of large numbers of people without adequate health care is a problem that no one can address."). These statements are typical of the empty, overbroad and conclusory diatribes.

[44] KOPPELMAN, *supra* note 2, at 107 ("Terrible arguments… carr[ied] the day.").

[45] *See* KOPPELMAN, *supra* note 2, at 107-46.

[46] Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001).

problems with Original Intent Originalism have been detailed in other places.[47] But even if Original Intent is accepted as a viable theory, it is an enormous and unfounded leap to say that, because the Founders intended to strengthen government power under the Constitution, the government should have the power to solve "*any* national problem" under the Constitution.[48]

Koppelman claims he is using "Original Public Meaning" Originalism when interpreting the Commerce Clause,[49] perhaps because it is the method one of his main targets, Randy Barnett, utilizes.[50] He states that the term "commerce" is ambiguous, and notes the debate over the meaning of the term between Professor Barnett and Jack Balkin.[51] While Barnett argues that "commerce" in the Constitution is limited to trade and transportation, Balkin believes the term refers to all interaction between people. Koppelman resolves this debate in one sentence, noting that "Balkin's reading is more consistent with the overall purpose and history of the Constitution."[52] This statement evidences the shallow nature of Koppelman's constitutional arguments. In one sentence, the author dismisses a tremendous amount of research and analysis on the other side. Professor Barnett had found that every time the term "commerce" was used in the Constitutional Convention, Ratification Debates, and the Federalist papers, it was uniformly used in a narrow

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[47] *See, e.g.*, *id.*; Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

[48] KOPPELMAN, *supra* note 2, at 107 (In *NFIB,* at least four Justices explicitly rejected this proposition. *See* Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. at 2650) ("Article I contains no whatever-it-takes-to-solve-a-national-problem power.") (dissenting opinion).

[49] *See* KOPPELMAN, *supra* note 2, at 43.

[50] RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 100 (1st ed. 2005).

[51] *See* KOPPELMAN, *supra* note 2, at 42.

[52] KOPPELMAN, *supra* note 2, at 42. This very statement indicates that Koppelman is actually using a very crude form of Original Intent Originalism, which, as noted, is highly problematic even when fairly applied.

sense to refer to trade or exchange.[53] But under Koppelman's "original public meaning" approach, this evidence is disregarded in favor of his understanding of the Constitution's broad purpose.

Relatedly, Koppelman's overall theme that the Constitution can't possibly require libertarianism because libertarianism is so awful suffers methodological failings.[54] Just because Koppelman thinks a certain reading of the Constitution would lead to awful results does not mean that reading is incorrect. This method of constitutional interpretation "gets it completely backwards. … One must first determine, through interpretation, what the Constitution means. Then, and only then, can one determine whether the properly interpreted Constitution generates any political obligations."[55] Determining meaning is separate from determining legitimacy. And if we determine that the meaning is not legitimate, the best course of action is not to pretend the document says something different, but to change it through appropriate and legitimate means. Acknowledging that the Constitution has a fixed meaning prevents the legislature and courts from aggrandizing their power by changing that meaning, and helps protect individual rights.[56] Yet Koppelman argues that the Constitution's meaning is determined by its legiti-

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[53] Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001). Likewise, from 1728-1800, the term was consistently used in Benjamin Franklin's newspaper *The Pennsylvania Gazette* to refer to trading activity. Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 857 (2003). For Barnett's critique of Balkin's theory, see Randy E. Barnett, *Jack Balkin's Interaction Theory of "Commerce"*, 2012 U. Ill. L. Rev. 623 (2012).

[54] *See* David E. Bernstein, *No, The Supreme Court is Not Poised to Adopt a Radical Libertarian Agenda and Certain Commentators Should Be Embarrassed for Suggesting Otherwise*, *in* A CONSPIRACY AGAINST OBAMACARE 209 (Trevor Burris ed., 2013) ("the strength and validity of legal arguments does not depend on who is representing the parties nor on whether the relevant legal arguments were invented or influenced by 'radicals' who have a political agenda that extends well beyond the precise issues before the Court.").

[55] Gary Lawson, *On Reading Recipes… and Constitutions*, 15 GEO. L.J. 1823, 1823 (1997).

[56] *See* BARNETT, *supra* note 50, at 117.

macy, when in fact we can only determine its legitimacy after we discover its meaning.

The overall tone of *The Tough Luck Constitution* is also problematic.[57] Koppelman's abundant use of pejoratives makes the book seem more like a work of partisanship than of scholarship. But more than that, it's not clear that Tough Luck Libertarianism warrants a book that harangues it; it's not even clear Tough Luck Libertarianism is connected to the challenge to Obamacare in any meaningful way. When examining the arguments against Obamacare, it appears that the challenge was much more modest than Koppelman contends. And when examining similar arguments for limited government and economic liberty throughout history, it is clear that those arguments were waged not only by greedy business owners or callous wealthy individuals, but also by people who wanted to be free from regulation---people who do not fit into Koppelman's stereotype of "Tough Luck Libertarians," and people whose ideological underpinnings fit squarely within an American legal tradition that predates even the Constitution.

II. *NFIB v. SEBELIUS* DOESN'T REQUIRE LIBERTARIANISM; LIBERTARIANISM DOESN'T REQUIRE TOUGH LUCK LIBERTARIANISM

A. THE OBAMACARE CHALLENGE AS MODERATE

Koppelman argues that the challenge to Obamacare is awful because 1) it is extremely radical and would require the dismantling of the regulatory state,[58] and 2) it represents a nasty worldview that

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[57] The tone is reminiscent of what Randy Barnett has termed "the disdain campaign," or the belief that "in addition to whatever may be wrong with their principles and doctrines, the conservative Justices simply have a bad attitude. To paraphrase the Captain in Cool Hand Luke, they don't have their 'minds right.'" *See* Randy Barnett, *The Disdain Campaign*, 126 HARV. L. REV. 1, 1 (2012).

[58] *See* KOPPELMAN, *supra* note 2, at 65.

is indifferent to the tough consequences it would create.[59] Koppelman states that, if accepted, Tough Luck Libertarianism—supposedly the driving force behind the legal challenge to Obamacare—would require eliminating Medicare, Medicaid, Social Security, the Civil Rights Act, the Clean Air and Clean Water Acts, "and the rest of the apparatus of the administrative state."[60] Redistribution would be "absolutely forbidden."[61] A "large population" of uninsured Americans would be "constitutionally required."[62]

In reality, opposing Obamacare does not require scaling back government at all. The Obamacare challenge itself was self-consciously limited, and focused on preventing the expansion of government power—not reducing it from its current size.[63] In fact, the challenge was even more modest than that; it was aimed at preventing the evisceration of all limits on Congress's power under the Commerce Clause.[64] The argument was based on the wholly *un*-radical idea that the individual mandate was unconstitutional because, if upheld under the Commerce Clause, it would turn Congress's limited commerce power into an expansive federal police power.[65] If Congress could mandate an action because inactivity substantially affects interstate commerce, it could mandate anything—because nearly every decision not to buy a particular prod-

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[59] *See, e.g.*, KOPPELMAN, *supra* note 2, at 9-11.

[60] *See* KOPPELMAN, *supra* note 2, at 65.

[61] KOPPELMAN, *supra* note 2, at 51.

[62] KOPPELMAN, *supra* note 2, at 122.

[63] Randy E. Barnett, *Turning Citizens into Subjects: Why the Health Insurance Mandate is Unconstitutional*, 62 MERCER L. REV. 608, 617 (2011) ("Should the Supreme Court decide that Congress may not commandeer the people in this way, such a doctrine would only affect one law: the PPACA. Because Congress has never done anything like this before, the Supreme Court does not need to strike down any previous mandate.").

[64] *See* David E. Bernstein, *Has the Pro-ACA Side Come Up With a "Limiting Principle"?*, *in* A CONSPIRACY AGAINST OBAMACARE 182-83 (Trevor Burris ed., 2013).

[65] Brief for State Respondents at 24, NFIB v. Sebelius, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 392550, at *24 (The individual mandate "rests on unbounded assertions of federal power.").

uct, in the aggregate, will have an effect on the product's market.[66] Under that rationale, Congress could force you to do anything, because if you do not do it, that inaction justifies the government mandating you to do it.[67] Thus, the opponents of the ACA did not seek to radically restrict the scope of Congress's commerce power; they sought to prevent its dramatic expansion.

This was evidently a concern of at least some of the Justices as well. Preceding oral argument there was widespread debate over whether, under the same rationale, the government could force individuals to purchase broccoli.[68] In other writings, Koppelman himself admitted that this was a possibility, but dismissed it because of the purported implausibility that Congress would ever create a broccoli mandate.[69] This sentiment was echoed by Akhil Amar, who once said that the only necessary limit on government power was to "vote the bums out."[70] At oral argument Justice Scalia outright

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[66] Brief *Amicus Curiae* of Cato Institute, et al., NFIB v. Sebelius, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 504615, at *35 ("If the federal power to enact economic mandates is upheld, Congress would be free to require anything that is part of a national regulatory plan and to then hide those costs from the American public.").

[67] *See* Randy Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 607 (2010) ("Accepting [the government's theory for Obamacare] would open the door for an infinite variety of mandates in the future" and "effectively obliterate, once and for all, the enumerated powers scheme that even the New Deal Court did not abandon.").

[68] *See, e.g.*, RANDY E. BARNETT ET AL., A CONSPIRACY AGAINST OBAMACARE 91-92, 105-06, 119, 225-26 (Trevor Burris ed., 2013); Joe Palazzolo, *Is Broccoli Overexposed?*, WALL ST. J., June 28, 2012, *available at* http://blogs.wsj.com/law/2012/06/28/is-broccoli-overexposed/ (last visited Nov. 11, 2014).

[69] *See* Andrew Koppelman, *Health Care Reform: the Broccoli Question,* BALKINIZATION BLOG (Jan. 19, 2011), http://balkin.blogspot.com/2011/01/health-care-reform-broccoli-objection.html (last visited Nov. 21, 2014); *see also* Ilya Somin, *Broccoli, Slippery Slopes, and the Individual Mandate, in A* CONSPIRACY AGAINST OBAMACARE 91-92, *supra* note 68.

[70] *Supreme Court Health Care Argument Preview* (video) at 26:50, C-SPAN (Feb. 16, 2012), http://www.c-span.org/video/?304464-1/supreme-court-health-care-argument-preview (last visited Nov. 21, 2014) ("The limiting principle is that they are taxing in effect us. …We don't need constitutional lawyers and judges pulling prin-

asked Solicitor General Verrilli whether the government could compel individuals to buy broccoli on the rationale that everybody is in the market for food.[71] Justice Kennedy, asking the second question at oral argument, suggested a similar theme: "Can you create... commerce in order to regulate it?"[72] He later asked, "your question is whether or not there are any limits on the Commerce Clause. Can you identify for us some limits on the Commerce Clause?"[73] Thus while Koppelman rightly points out that part of the Justices concern was the government's ability to mandate redistribution, the broader concern was that it could issue an unlimited number of mandates—relating to any available good or service.

Importantly, under the Supreme Court's ruling and the theory put forth by the Obamacare opponents, Congress retains a great deal of power over interstate commerce. Congress can still regulate wheat prices; it just cannot force people to buy wheat. Congress can still regulate the health insurance industry; it just cannot compel people to buy health insurance. Indeed, Congress could enact a law providing universal healthcare for everyone. The point is that the form of the regulation matters, because if Congress can direct individuals to enter into commerce on the basis that they chose not to enter it, there would be no end to what the government could mandate people to do. The aim of the Obamacare challenge was never to neuter the Commerce Clause or even to turn back the clock—though some undoubtedly would like to—but rather to "prevent the Commerce Clause from becoming a grant of the very police

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ciples out of thin air to limit the ability of Congress to pass silly laws… Congress won't do it and hasn't done it.").

[71] Transcript of Oral Argument at 13, NFIB v. Sebelius, 132 S. Ct. 2566 (2012) (No. 11-398).

[72] *Id.* at 4-5.

[73] *Id.* at 17.

power that all concede the Constitution withholds from Congress and reserves to the States."[74]

By comparison, Koppelman's own constitutional theory seems far more radical.[75] According to him, the "Constitution was adopted specifically to give Congress power adequate to address the nation's problems,"[76] and it therefore should be able to regulate any issue of national importance. Remarkably, Koppelman would permit Congress to be the sole arbiter of what constitutes a national problem, and therefore of what it could regulate. He argues that decisions about what is truly national and what is truly local involve decisions about what collective ends society should pursue. The Constitution is "largely silent" on what these ends should be,[77] and leaves this decision to the legislature.[78] Democracy would mean nothing, he says, if a minority of judges, and not the legislature,

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[74] Brief for State Respondents at 15, NFIB v. Sebelius, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 392550, at *15.

[75] Professor Jonathan Adler notes that, in addition to being unlimited, Collective Action Federalism cannot account for the Court's current federalism jurisprudence. *See* Jonathan Adler, *The Search for a Limiting Principle for Federal Power: Collective Action Problems in* A CONSPIRACY AGAINST OBAMACARE, *supra* note 68, at 210-12.

[76] KOPPELMAN, *supra* note 2, at 40.

[77] KOPPELMAN, *supra* note 2, at 64.

[78] This is not entirely convincing. As Timothy Sandefur notes, "The Constitution—any constitution—is made for people of fundamentally *shared* views—people who *agree* on the basic principles, but differ about the specific policies. … Approaching the Constitution… as a purely procedural framework with no normative orientation, leads to crazy outcomes—it renders the phrase 'due process' unintelligible, for instance, and it makes the checks and balances system into a set of arbitrary rituals and taboos. Approaching the Constitution from the classical liberal perspective, by contrast, provides an explanation of why we have things like checks and balances, or a Bill of Rights, or textual references to 'liberty' and 'due process of law.'" Timothy Sandefur, *The Wolf Amendment*, VOLOKH CONSPIRACY (Jan. 14, 2014), http://volokh.com/2014/01/14/wolf-amendment/ (last visited Nov. 21, 2014); *see also* James W. Ely Jr., *The Constitution and Economic Liberty*, 35 HARV. J.L. & PUB. POL'Y 27, 29 (2012) (refuting the same sentiment as famously stated by Oliver Wendell Holmes in his *Lochner* dissent).

were able to decide what is on the national agenda.[79] Thus, all that courts should ask for is "1) a plausible description of a collective action problem and 2) the failure of states to solve it."[80]

But to suggest that the legislature should be the adjudicator of its own power would dispense with any limits on legislative power. As James Madison wrote, "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."[81] One of the only ways to curb that tendency is through written constitutional limits enforced by an independent judiciary "whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."[82] The legislature will always be eager to assert that it has more power than is granted to it. That the Founders outright rejected the idea that the legislature could police itself is evidenced by the

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[79] *Cf.* TIMOTHY SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION 113 (Cato Institute 2014) ("Probably the most common complaint about substantive due process is that it is anti-democratic: unelected, life-tenured judges… exploit that doctrine to impose their will on a democratic society. … The Constitution does not provide that whatever the majority decrees is law… it carefully limits the power of the majority by drawing a legal boundary around it, restricting what voters and elected officials may do. Since the Constitution takes precedence over the will of the majority, it is proper for courts to enforce the Constitution.").

[80] KOPPELMAN, *supra* note 2, at 66. Even if Collective Action Federalism is a viable constitutional understanding of Congress's commerce power, there is good reason to question whether health insurance and health care is a collective action problem that states cannot separately address. *See* RICHARD EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 190-91 (2014).

[81] THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).

[82] THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* Marbury v. Madison, 5 U.S. 137, 176 (1803) ("To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed.").

existence of a written constitution, and especially Article III thereof.[83]

Finally, Koppelman suggests that the states' failure to separately solve the problem can be used as evidence of a collective action problem. But failure to act does not necessarily evidence the inability to act. Some states may very well fail to act to, for example, pass an individual mandate, raise the minimum wage, make gay marriage illegal, decriminalize marijuana, or the like, exactly because they oppose that policy. It is also odd to suggest that a state's failure to enact a policy can be used as evidence that the state supports it. Using a state's "failure" to pass a law as evidence that a national law is necessary would override state preferences and frustrate federalism.[84]

In short, the challenge to Obamacare did not seek to dismantle the welfare state; it was a modest challenge that sought to affirm that Congress's lawmaking power is limited in scope. And by comparison, Koppelman's own theory of government is far more radical, because it would turn Congress's commerce power into a national police power—a proposition that the Framers expressly rejected.

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[83] *See* BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 50, at 103 ("The Constitution is a law designed to restrict the lawmakers. Although the Constitution itself may have multiple purposes and functions, its 'writtenness' has many fewer.. Though it is entirely possible to have an unwritten constitution, written constitutions are in writing for a reason[:]… to better constrain the political actors it empowers to accomplish various ends.").

[84] Proponents of Collective Action Federalism seem to admit that the only limit on federal power under their theory is a political limit. *See* Cooter & Siegel, *supra* note 3. Neil Siegal has suggested three limits on government power under Collective Action Federalism: 1) psychological externalities should not justify the use of the commerce power, 2) externalities must be significant, and 3) courts should impose a reasonableness inquiry. *See* Neil Siegal, *Collective Action Federalism and Its Discontents*, 91 TEX. L. REV. No. 7 (2013). To the extent these suggestions act as limits, they find no basis in the text of the Constitution.

B. NOT ALL LIBERTARIANISM IS TOUGH LUCK LIBERTARIANISM

Koppelman's second critique of the Obamacare challenge is that it represents Tough Luck Libertarianism. Koppelman best describes Tough Luck Libertarianism when contrasting it with "Tragic Antistatism," a different form of libertarianism that he considers less objectionable.[85] In terms of substance, there is no apparent difference between Tragic Antistatism and Tough Luck Libertarianism. The difference is a matter of attitude. Tragic Antistatists "hold[] that there's some tough luck that we just have to live with," whereas Tough Luck Libertarians just don't care about consequences at all.[86] Tragic Antistatists understand that "[p]eople sometimes lose out in a market, but if the state intervenes, the effects on incentives will be disastrous, citizens' self-reliant character will be sapped, and everyone will be worse off. It's a mistake to think that there can be a society in which everyone has adequate medical care, and a bigger mistake to try to bring that about."[87] Tough Luck Libertarians would have struck down the ACA "even if it were the only way to achieve near-universal health care."[88] In other words, Tragic Antistatists are nicer people than Tough Luck Libertarians. They both want the same thing, but for different reasons.

Though some opponents of Obamacare might take a Tough Luck Libertarian view, there is no reason to think that the majority, or even a large portion, do; there are many brands of libertarianism in existence.[89] To tie the legal opposition to the ACA to Tough Luck

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[85] *See* KOPPELMAN, *supra* note 2, at 12.

[86] KOPPELMAN, *supra* note 2, at 12.

[87] KOPPELMAN, *supra* note 2, at 12.

[88] KOPPELMAN, *supra* note 2, at 15.

[89] Other popular types of libertarianism include bleeding heart libertarianism, civil libertarianism, anarcho-capitalism, and objectivism; many other types abound. For an overview of a variety of libertarian thinkers and philosophies, see BRIAN DOHERTY, RADICAL FOR CAPITALISM (2007). For a justification of government intervention purportedly based on libertarian theory, see Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

Libertarianism, Koppelman notes the association of the *NFIB* lawsuit with Randy Barnett. But even Randy Barnett—the supposed epitome of Tough Luck Libertarianism—seems to reject the attitude Koppelman describes.

Despite Barnett's predominant focus on non-consequentialism, he has often written about the importance of consequences in evaluating the validity of any political philosophy.[90] For one, consequentialism can provide a "conceptual 'checks and balances' mechanism by which errors in our normative analysis may be detected and prevented."[91] Thus, where consequentialism leads to different results than moral rights philosophy, "that call[s] upon us to reconsider our analysis or further refine our analytic techniques."[92] And if the results of both converge, that gives us reason to be more confident in our approach than if we had used only one.

Moreover, as Barnett rightfully acknowledges, each analysis has its own appeal. Whereas moral rights theory "takes seriously the individual," consequentialism "takes seriously the wide-reaching and highly dispersed effect that the actions of individuals and their associations may often have on others."[93] He thus summarizes the problem for classical liberals (or libertarians) as follows: "Given that the actions of each person in society are likely to have effects on others, on what conditions is it possible for a person to live and

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[90] *See, e.g.*, Randy E. Barnett, *The Moral Foundations of Modern Libertarianism, in* VARIETIES OF CONSERVATIVISM IN AMERICA 4, 51-75 (Peter Berkowitz ed., Stanford, Cal.: Hoover Institute Press 2004); Randy E. Barnett, *Afterword: The Libertarian Middle Way*, 16 CHAP. L. REV. 349 (2013).

[91] Barnett, *supra* note 90, at 56.

[92] Barnett, *supra* note 90, at 59.

[93] Barnett, *supra* note 90, at 57; *see also* Randy E. Barnett, *Afterword: The Libertarian Middle Way*, 16 CHAP. L. REV. 349 (2013) ("It is inaccurate to characterize [libertarians] as premised on some 'atomistic individualism' that assumes that each man in an island independent of others in society[.] On the contrary, what is sought are the prerequisites of a peaceful societal coexistence in a world in which each person's actions are very likely to affect others.").

pursue happiness in society with other persons?"[94] This is hardly the radical "though heavens may fall" Tough Luck Libertarian Koppelman describes in his book.

As Barnett has explained, "*most* libertarians hold the 'radical' views they do" because "they believe that people will be better off in the highest sense if their liberties are acknowledged and respected."[95] Thus, though Koppelman continuously tries to paint opposition to Obamacare, and opposition to expansive government power in general, as associated with some callous personality trait, it is not true that the two are necessarily attached. Tough Luck Libertarianism has little to do with the legal challenge to Obamacare, both because that challenge was limited in scope, and because there is no evidence that the attitude Koppelman ascribes to the challengers is actually associated with them. Throughout history, especially during the hey-day of Progressivism (where Koppelman places much attention), we see that people do not advocate for limited government in spite of consequences; they largely oppose big government *because* of its consequences. Indeed, some such opponents would have been the beneficiaries of government help.

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[94] Barnett, *supra* note 90, at 63; *see also* Randy E. Barnett, *Afterword: The Libertarian Middle Way*, 16 CHAP. L. REV. 349 (2013) ("[W]hile some libertarians may promote liberty as an end in itself, for most, liberty is a means to other ends. Liberty enables the individual who is living in society with others to pursue happiness, or the good life.").

[95] *See* Randy E. Barnett, *Afterword: The Libertarian Middle Way*, 16 CHAP. L. REV. 349, 350 (2013). For a general discussion of classical liberalism and the public good, see GEORGE H. SMITH, THE SYSTEM OF LIBERTY 26-48, 27 (Cambridge University Press 2013) ("Most early [classical] liberals considered social utility and natural rights to be perfectly compatible.").

III. "TOUGH LUCK LIBERTARIANISM" IS A CARICATURE ATTACK

A. TOUGH LUCK LIBERTARIANISM IN HISTORY---NOT THE RHETORIC YOU WOULD EXPECT

In order to malign the challenge to Obamacare and Tough Luck Libertarianism, Koppelman compares the two to *Lochner*-style jurisprudence,[96] which he says put economic liberty and judicially crafted limits above the needs of the populace.[97] He refers to the time as an "unhappy story of judicially crafted limits,"[98] and describes *Lochner*-type decisions as leading to horrible outcomes, including civil rights violations, and child labor.[99]

But looking back at cases from that era, opposition to government regulation often did not come in spite of the consequences to others, but because of the consequences. Take, for example, maximum hours legislation—which in many states initially applied only to women.[100] Proponents argued that maximum hours legislation was necessary because 1) working long hours was a pervasive problem that 2) could not be solved in any other way.[101] Fewer occupations were open to women, meaning competition was greater among them, and thus women ostensibly would be forced to accept jobs no matter how low the wage or how long the hours.[102] It was

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[96] *See* Bryan J. Leitch, *Where the Law Meets Politics: Freedom of Contract, Federalism, and the Fight Over Health Care*, 27 J.L. & POL. 177 (2011) (also comparing opponents of Obamacare to the *Lochner*-style ideology, but not in the same pejorative sense). The term comes from the case *Lochner v. New York*, 198 U.S. 45 (1905), a case infamous for its robust protection for economic liberty.

[97] KOPPELMAN, *supra* note 2, at 51, 102.

[98] KOPPELMAN, *supra* note 2, at 47.

[99] *See, e.g.*, KOPPELMAN, *supra* note 2, at 48-50, 53.

[100] Nancy S. Erickson, Muller v. Oregon *Reconsidered: The Origins of a Sex-Based Doctrine of Liberty of Contract*, 30 LAB. HIST. 228, 234-35 (Issue 2) (1989).

[101] *See* David E. Bernstein, *Lochner's Feminist Legacy*, 101 MICH. L. REV. 1960, 1984 (2003).

[102] Erickson, *supra* note 100, at 244.

thought that, because female laborers could not say no, and because of competition between businesses, no employer would voluntarily increase their wages. Instead, wages would continue on an untenable downward spiral. In other words, this was exactly the sort of collective action problem that Koppelman would find suitable for federal legislation.[103]

In order to prove the effect of the prevailing wages and hours on women, and therefore justify the use of legislative power to curb those effects, proponents offered evidence of women's physical weakness or economic inequality as compared to men. Often this "evidence" had no basis in science, and instead relied upon stereotypes and contemporaneous assumptions about the proper role of women in society.

For example, Louis Brandeis's brief in support of maximum hours legislation in *Muller v. Oregon* argued that women are physically weaker than men, and thus could not sustain as many hours as men.[104] The brief repeatedly refers to the physical "inferiority" of women to men,[105] in terms of "strength," "nervous energy" and "the powers of persistent attention and application."[106] Bear in mind this was not manual labor; the law at issue applied to work at laundries. The job did entail standing for long periods of time. But, experts wrote, "woman is badly constructed for the purposes of standing eight or ten hours upon her feet."[107] One such expert concluded, "It is not good for women to stand … at all really."[108] The

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[103] Richard Epstein notes that "[i]t is only the progressive love affair with national monopolies that treats competitive federalism as a destructive prisoner's dilemma game," and that to libertarians, "centralization poses far greater risks than decentralized decisions that place states in competition with each other." *See* EPSTEIN, *supra* note 80, at 191.

[104] Brief for Petitioner, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605.

[105] *Id.* at 21.

[106] *Id.* at 18.

[107] *Id.* at 19.

[108] *Id.* at 30.

experts noted that "there appears to be general agreement that women are more docile and amenable to discipline," "that they can do light work equally well," and that "they are steadier in some respects," but they were also "often absent on account of slight indisposition, and they break down sooner under strain."[109] Women were best left to housework, because it allowed them "a certain freedom of doing or of leaving undone."[110] In other words, women needed to be protected, because "[i]n strength as well as in rapidity and precision of movement women are inferior to men. This is not a conclusion that has ever been contested. It is in harmony with all the practical experience of life."[111]

Any harm women suffered as a result of working too many hours was particularly dangerous because of their role as childbearers. Indeed, women's reproductive capacity was repeatedly used during this time to justify protective labor legislation. This came to be known as the "mother of the race" argument.[112]

Brandeis and others further argued that, were women to work long shifts, it would lead to a decline in family life and public morals. His brief questioned whether "[u]nder such circumstances" a woman could "truly care for her children and her home."[113] Not only would women spend less time with their families, but overworking would drive them to pursue "alcoholic stimulants and other excesses,"[114] because "[l]axity of moral fibre follows physical debility."[115]

Court opinions upholding maximum hours legislation likewise rang in paternalistic tones. Women could not be licensed as attor-

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[109] *Id.* at 22.
[110] *Id.* at 25.
[111] *Id.* at 21.
[112] Erickson, *supra* note 100, at 245.
[113] Brief for the State of Oregon at 51, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605, at *51.
[114] *Id.* at 44.
[115] *Id.*

neys because their "paramount destiny" was to "fulfill the noble and benign offices of wife and mother."[116] Notably, this was often not the view of the working women themselves.[117] But to progressives, it did not matter what women wanted, because women owed a duty to society, and had to make certain sacrifices for society's benefit. The desire of any individual woman would have to be subordinated to the interests of the children they would inevitably bear, and society as a whole.[118] This is the flip-side of Tough Luck Libertarianism, which we can call Tough Luck Progressivism. If you don't like the consequences of legislation, tough luck, the consequences are better for some discrete interest group. Or tough luck, government knows better.[119]

In comparison, opponents of maximum hours legislation and courts that struck down such laws rooted their arguments in women's right to economic liberty, individual autonomy, and equality with men. Laws limiting the ability to contract were considered "an insulting attempt to put the laborer under legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as citizen of the United States."[120]

One state court noted, "The right to contract is the only way by which a person can rightfully acquire property by his own labor. 'Of all the rights of persons it is the most essential to human happiness.'" Thus, of course "[t]he law accord[ed] to [women]... the natu-

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[116] Bradwell v. People of State of Illinois, 83 U.S. 130, 141 (1872).

[117] Bernstein, *supra* note 101, at 1963-64; Erickson, *supra* note 100, at 241.

[118] In a similar vein, Brandeis urged that maximum hours legislation was necessary so that immigrants could have more time for civic lessons, and therefore better assimilate. It was thought that "with more leisure, workers would be in proper physical and mental condition to study and discuss social and political problems, and to become cultured persons," a belief that did not consider the preferences of the workers themselves. *See* David P. Bryden, *Brandeis' Facts*, 1 CONST. COMMENT. 281, 299 (1984).

[119] The results can be drastic. Take the case of access to potentially life-saving drugs that are not yet approved by the FDA. You want access? Tough luck.

[120] Godcharles & Co v. Wigeman, 113 Pa. 431, 437 (1886).

ral right to gain a livelihood by intelligence, honesty, and industry in the arts, the sciences, the professions, or other vocations."[121] Another court wrote:

> [A]n adult female is not to be regarded as a ward of the state, or in any other light than the man is regarded, when the question relates to the business pursuit or calling. She is no more a ward of the state than is the man. She is entitled to enjoy, unmolested, her liberty of person, and her freedom to work for whom she pleases, where she pleases, and as long as she pleases, within the general limits operative on all persons alike, and shall we say that this is valid legislation, which closes the doors of a factory to her before and after certain hours? I think not.[122]

Even those opinions which echoed the stereotypical sentiments of the time emphasized women's equal right to men to earn a living. The factory owner who challenged the maximum hours law in *Muller* argued that though, "we may regret that all women may not be sheltered in happy homes, free from the exacting demands upon them in pursuit of a living… their right to pursue any honorable vocation... is just as sacred... as the same right enjoyed by men."[123]

Koppelman argues that under Tough Luck Libertarianism, "[p]oor and helpless people are unlikely to get much in American politics unless their interests are in some ways tied to those of the wealthy and powerful," as if the only opponents of progressive legislation are wealthy business owners who act selfishly. But in the Progressive Era, opponents of economic regulations purportedly protecting women often included women themselves. The women

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[121] Ritchie v. People, 155 Ill. 98, 105, 40 N.E. 454, 456 (1895) (quoting Leep v. St. Louis, I.M. & S. Ry. Co., 58 Ark. 407, 25 S.W. 75, 77 (1894)).

[122] People v. Williams, 189 N.Y. 131, 135-36, 81 N.E. 778, 780 (1907) (relying on *Lochner*, 198 U.S. 45).

[123] Brief for Muller at 24, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107).

witnesses at trial in *Ritchie*---a challenge to Illinois's maximum hours legislation for women---testified that they preferred to work longer hours in order to make more money, rather than have their work hours capped by the law at issue.[124] Twenty-seven year old Mollie Fach testified that she was never unwilling to work the hours that she did—about 9 hours and forty-five minutes per day. Indeed she wanted to work this much because she was "anxious to earn as much money as possible; the more money I can earn the better I am able to support myself."[125]

Another woman, Lizzie Furlong, testified that she worked from 7:10 am until 5:35 pm each day, with half an hour for lunch.[126] She too preferred to work as many hours as possible in order to earn a greater living. She added that the factory was "clean, well lighted and [the] ventilation [was] very good."[127] Her testimony concluded, "I have agreed with the rule for six years, and it has agreed with me."[128]

Mary Breen, who wrapped peanut candy for nine hours a day—with half an hour for lunch—testified that "I wanted to work more than eight hours; they pay me according to the length of time I work; if my hours are shorter I get less pay; I need all the money I can earn to live on and help support my family."[129] Said Mamie Robinson, "My father is dead; I work to pay for my clothes." She added that though she had agreed several times to work overtime, she "might have said no if [she] wanted to."[130] Fourteen year old Rosie Koeneke testified that she was one of nine children, and her

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[124] Abstract of Record, Ritchie v. People, 155 Ill. 98, 105, 40 N.E. 454, 456 (1895), *available at* http://florencekelley.northwestern.edu/archives/court/ (last visited Nov. 24, 2014).

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

father was an invalid; thus, five of the children worked to support the family.[131] The other women who testified said much the same: were they able to choose, they would have chosen longer hours and increased pay rather than the maximum hours law at issue.[132]

These women and their manufacturer bosses further argued that reducing women's hours necessarily meant reducing their pay—potentially below the amount necessary to support a family.[133] They also noted that as productivity decreased, prices would rise, "and the employed, as the consumer, will be the first one to pay the penalty for his or her dearly bought leisure."[134] Thus:

> [t]he proper length of time for a man or woman to work *is the time he or she has fixed upon* as what his or her necessities, aims, or desires require. When a third party intervenes to decide this question for the employed, be it Congress, legislature or trade unions, just then does the employed lose recognition in the scale of civilization. Whether he chooses to work twelve hours a day and have leisure; whether he will pass his youth in toil with the hope of a middle and old age in dignity, honor and repose, or surrender the prospects of rising in the world for the sake of present ease, is a problem which he himself is best able to solve.[135]

For many women, work was liberating. Work provided young women with a social outlet when they had none. "[U]nlike their brothers," young women, "seemed to have no permanent street-

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[131] *Id.*

[132] Likewise, one of the plaintiffs in *Adkins* was a woman who lost her job due to D.C.'s minimum wage law. *See* Adkins v. Children's Hosp. of the D.C., 261 U.S. 525, 542 (1923).

[133] Brief for Plaintiffs in Error, 58-60, *Ritchie*, 155 Ill. 98, *available at* http://florencekelley.northwestern.edu/archives/court (last visited Nov. 26, 2014).

[134] *Id.*

[135] *Id.*

corner groups and few single-sex social clubs."[136] Work therefore offered "a unique place of refuge from family and neighborhood surveillance and an opportunity for free sociability with peers."[137] Given that women were often segregated from men in the workplace and given easier workloads, many women may have preferred the long hours to going back home to their families.

Organizations like The Women's League for Equal Opportunity, the Equal Rights Association, the National Federation of Business and Professional Women, and the National Women's Party (NWP) likewise opposed protective laws for women.[138] The NWP believed that these laws prevented women from entering industries typically reserved for men.[139] While all women worked fewer hours in states that passed maximum hours legislation, those who were hit hardest were those who aspired to break into male-dominated professions in order to support themselves.[140]

Indeed, there is evidence that maximum hours laws were worse than paternalistic, and intended exactly for the purpose of excluding women from the workforce for the benefit of male laborers. Notably, the American Federal of Labor supported protective labor laws for women, but opposed the same for men.[141]

At best, proponents of protective labor legislation believed government intervention was necessary to "protect" women from long hours or too low of wages. Even then, many women preferred their economic liberty. Women felt they were perfectly capable of choosing how many hours they wanted to work to support their families, and to strike their own balance between working and staying home. But at worst, this legislation was aimed at pricing women out of the

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[136] LESLIE WOODCOCK TENTLER, WAGE-EARNING WOMEN 61, (Oxford University Press 1979).

[137] *Id.*

[138] Bernstein, *supra* note 101, at 1973-74.

[139] Bernstein, *supra* note 101, at 1974.

[140] Bryden, *supra* note 114, at 298.

[141] Bernstein, *supra* note 101, at 1975.

market and protecting male laborers from competition. This caused a broader coalition of women to oppose the supposedly benign laws.

The same is true with regard to minimum wage laws. Koppelman, like others before him, characterizes opponents of these laws as precluding legislation that was desperately needed by helpless workers and minorities—in other words, as indifferent towards the horrible consequences they would create.[142] But the facts of the era prove otherwise.

Though portrayed as helpful government intervention, minimum wage laws were far from a panacea for exploited workers, and were especially harmful to black workers. By instituting a mandatory, above-market price for labor, these laws harmed black workers by eliminating the only competitive advantage blacks had over whites: their willingness to work for lower wages.[143] By preventing blacks from undercutting white laborers' wages, these laws reduced businesses' incentive to hire minorities—especially given that most union members were white, and union members were privy to training and apprenticeship opportunities that non-union members were not.[144] By raising wages, prevailing wage laws also encouraged businesses that had previously employed blacks at a market price to instead use their money to replace obsolete machinery, or to simply get rid of the paid position altogether, rather than submit to increased pay.[145] According to the Labor Department, between 30,000 and 50,000 workers—most of whom were southern blacks—lost their jobs within two weeks after the minimum wage provision of the Fair Labors Standards Act was enacted in 1938.[146]

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[142] KOPPELMAN, *supra* note 2, at 47-56 (describing the purported harmful effects of *Lochner*-style jurisprudence on minorities and children).

[143] David Bernstein, *Roots of the "Underclass": The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Unions*, 43 AM. U. L. REV. 85, 102 (1993).

[144] *Id.* at 117.

[145] *Id.* at 121.

[146] *Id.* at 130.

These and similar policies led leaders like W. E. B. Du Bois and Marcus Garvey to argue that blacks should stand with capitalists in their opposition to union-driven legislation.[147]

Frederick Douglass is perhaps the epitome of the sentiment Koppelman rallies against in his book. Contrary to lamenting being left alone by the government, Douglass championed it. To those who asked whether self-help would be fair, Douglass answered, "Give the negro fair play and let him alone. If he lives, well. If he dies, equally well. If he cannot stand up, let him fall down[.]"[148] He continued, "Throw open to [blacks] the doors of the schools, the factories, the workshops, and of all mechanical industries. For his own welfare, give him a chance to do whatever he can do well. If he fails then, let him fail!"[149] Self-help was the answer to injustice, not the cause of it.

Court decisions and laws that diminished the power of the unions and restored freedom of contract thus liberated, rather than oppressed, minority laborers. In fact, the truth is exactly the opposite of Koppelman's narrative: "liberty of contract, rather than generally serving the interests of the elite at the expense of humble laborers, often served to protect the most disadvantaged, disenfranchised workers from monopolistic legislation sponsored by politically powerful discriminatory labor unions."[150] Indeed, it was the progressives who, at best, ignored the economic consequences of their legislation in favor of paternalism, and at worse, deliberately

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[147] Such practices led Frederick Douglass to also oppose unionization in "The Folly, Tyranny, and Wickedness of Labor Unions." *See* JASON L. RILEY, PLEASE STOP HELPING US 86-87 (2014) (recounting how labor unions have harmed minorities' economic opportunity); *see also* Paul Moreno, *Unions and Discrimination*, 30 CATO J. No. 1, 67 (2010) (same).

[148] Frederick Douglass, *Self Made Men*, *in* RACE AND LIBERTY IN AMERICA 110 (Jonathan Bean ed., 2009). *See* Riley, *supra* note 147, on the same point today.

[149] Frederick Douglass, *Self Made Men*, *in* RACE AND LIBERTY IN AMERICA 110 (Jonathan Bean ed., 2009).

[150] Bernstein, *supra* note 143, at 91.

enacted such legislation because of its detrimental effect on competition.[151] Far from endorsing constitutional limits out of indifference to working conditions for women, or to the plight of minorities,[152] or the effect of labor on children,[153] libertarians urged courts to strike down legislation on both moral and consequential grounds.

In other words, where in history does Koppelman find these Tough Luck Libertarians he decries? And if they are only a subset of libertarians generally, why try to take down the legal challenge to Obamacare by associating it with the small, unrepresentative subset? Tough Luck Libertarianism is a caricature of libertarianism, and one that is not supported by the actual legal cases and rhetoric of the period Koppelman associates with the type of legal arguments used in the case against Obamacare.

B. TOUGH LUCK LIBERTARIAN JUDGES: RADICAL MODERATES

Nor was opposition to legislation necessarily radical. Koppelman argues that Tough Luck Libertarianism, as illustrated by *Lochner*-era jurisprudence, would lead to the dismantling of the administrative state, and that redistribution would be "absolutely forbidden." But the *Lochner* opinion itself is quite moderate, and held no such thing.

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[151] For a case study on how interest groups continue to harness government power to exploit politically powerless groups, see Timothy Sandefur, *A Public Convenience and Necessity and Other Conspiracies Against Trade: A Case Study from the Missouri Moving Industry*, 24 GEO. MASON U. C.R. L.J. 159 (2014); *see also* Timothy Sandefur, *A Gleeful Obituary for Poletown Neighborhood Council v. Detroit*, 28 HARV. J.L. & PUB. POL'Y 651 (2005).

[152] For an explanation of how restrictions on economic liberty continue to have a disproportionate and harmful effect on minorities, see Timothy Sandefur, *Can You Get There from Here?: How the Law Still Threatens King's Dream*, 22 L. & INEQ. 1 (2004).

[153] Indeed, Richard Epstein has argued that child labor was not a collective action problem for states, nor is it necessarily true that legislation improved children's condition, because "far from protecting children from industrial abuse, child-labor laws dr[ove] them into prostitution, begging, and worse." EPSTEIN, *supra* note 80, at 166-67.

The opinion begins by presuming the right of the laborer to work the amount of hours he wishes in order to support his family. Liberty is the background assumption that requires the Court to inquire into the state's justification for infringing that liberty. Liberty assumes limits on government's ability to regulate, and necessitates a judicial inquiry into the reasonableness of the regulatory means used. But that limit on government power is not radical. Indeed, that presumption can be overcome if the state shows that is has a legitimate reason for acting.

Thus, though scholars, like Koppelman, tend to see the *Lochner* Era as supporting the principle of rights-trump-all, in reality, during that time rights were merely a background principle that required reasonable limits on government power.[154] Judges would not simply take the legislation at face value. They analyzed the statute in question to ensure that the legislation 1) had an appropriate means-end relationship, and 2) the ends themselves were legitimate. As the Court said in *Lochner*, "The act must have a direct relation, as a means to an end, and the end itself must be legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person . . . ."[155]

The review had bite; scrutiny was viewed as an appropriate exercise of judicial review, part of the Justices' "solemn duty" to "look at the substance of things" to determine whether "a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has a real or substantial relation to those objects" or was "a palpable invasion of rights secured by fundamental law."[156] Rational basis review ensured that liberty---whether

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[154] Joseph F. Morrissey, *Lochner, Lawrence, and Liberty*, 27 GA. ST. U. L. REV. 609, 610 (2011) (The *Lochner* Era was "dominated by a simple presumption that people should be allowed the liberty to order their own affairs through contract and that regulatory encroachments on that liberty interest should be evaluated critically.").

[155] Lochner v. New York, 198 U.S. 45, 57 (1905).

[156] *Id.* at 68 (citation omitted).

having economic, political, or other overtones---was not being illegitimately infringed, but also ensured that the state's rightful power to legislate was not unduly hampered. Thus, the *Lochner* Era Court actually upheld several laws that regulated the right to earn a living, or the right to contract during that time.[157]

Moreover, though Koppelman suggests that the Tough Luck Libertarian legal challenge was invented for purposes of political opportunism,[158] the idea of robust constitutional protection for economic liberty exemplified by the opponents of the ACA fits squarely within American legal history; indeed its underlying ideology may predate even the Constitution.[159] During the Revolution, American resistance to British paternalism in both politics and law infiltrated economic ideology and lent support to laissez-faire economics—including a belief in liberty of contract.[160] Economic liberty was indistinguishable from "other kinds" of liberty central to the American Revolution, because "[b]asic notions of liberty are contingent upon liberty of contract, without which liberty itself is illusory. The ability to enter freely into contracts allows people to achieve

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[157] *See* DAVID E. BERNSTEIN, REHABILITATING LOCHNER 50 (2011) (observing that federal courts upheld a large number of economic regulations during the so-called *Lochner* era); *See also* David N. Mayer, *Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract*, 60 MERCER L. REV. 563, 657-58 (2009) ("[T]he [Lochner] Court upheld literally hundreds of laws as valid exercises of the police power," including three Due Process cases (*Buchanan v. Warley*, *Meyer v. Nebraska,* and *Pierce v. Society of Sisters*) which struck down laws that required housing segregation, that banned private schools, and that infringed civil liberties, respectively, and which promoted minority rights."). After reading the over two hundred cases categorized as *Lochner* era cases, Michael J. Phillips determined that only sixty of the cases that are alleged to have improperly struck down legislation actually fit the standard economic due process model. *See* MICHAEL J. PHILLIPS, THE LOCHNER COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S 89 n.243 (Praeger 2001).

[158] *See, e.g.*, KOPPELMAN, *supra* note 2, at 2, 3, 106, 116.

[159] Mayer, *supra* note 157, at 575; TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING 23-25 (Cato Institute 2010).

[160] Mayer, *supra* note 157, at 575.

their personal desired balance of all that life has to offer."[161] Likewise, without the right to property, other cherished liberties could not thrive.[162] "For eighteenth-century Americans, property and liberty were one and inseparable, because property was the only foundation yet conceived for security of life and liberty; without security for his property, it was thought, no man could live or be free except at the mercy of another."[163]

Thus, liberty was defined broadly and included economic liberty. Cato's Letters, which were frequently quoted in early American newspapers, stated that liberty included "the right of every man to pursue the natural, reasonable, and religious dictates of his own mind; to think what he will, and act as he thinks, provided he acts not to the Prejudice of another; to spend his own Money himself, and lay out the Produce of his Labour his own Way; and to labour for his own Pleasure and Profit, and not for others who are idle, and would live and riot by pillaging and oppressing him, and those that are like him."[164] Here, economic liberty interests are placed on equal footing with freedom of thought and religion. Liberty is merely the right to live as one wishes---in all aspects of life, economic or otherwise. While liberty must be restrained by government, that restraint must itself be limited, "consistent with the purpose for which government was established."[165]

The challenge to Obamacare in particular rests on a philosophy of healthcare libertarianism that can hardly be said to have been

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[161] Mayer, *supra* note 157, at 653.

[162] *See generally* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT (3d ed. 2008). Said James Madison, "This is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called." SANDEFUR, *supra* note 159, at 24.

[163] Mayer, *supra* note 157, at 580.

[164] Mayer, *supra* note 157, at 580.

[165] Mayer, *supra* note 157, at 578.

invented in response to Obamacare. Healthcare libertarianism was a forceful movement long before the debate over Obamacare began, having origins as far back as the Founding Era.[166] In early America, many viewed medical licensing laws as the mainstream medical establishment's attempt to monopolize the industry, and waged a war on these regulations.[167] Though these battles were fought outside of the courts, they were waged in constitutional terms, and included arguments for bodily freedom, economic freedom, freedom of religion and conscience, and freedom of inquiry.[168] These early proponents of healthcare freedom saw the issue as rooted in the constitutionally protected economic liberty of both practitioners and patients, and believed that licensing laws would create a monopoly that "would threaten their freedom as well as their pocketbooks," by violating physicians' right to earn a lawful living and consumers' freedom to contract with whom they chose.[169] Opponents "linked... tyrannical economic coercion against unlicensed practitioners with an equally oppressive bodily coercion against patients."[170]

Given the historical debate over medical licensing laws for practitioners, as well as the modern debate over such issues as access to life-ending drugs,[171] access to unapproved drugs by termi-

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[166] *See generally* Lewis A. Grossman, *The Origins of American Healthcare Libertarianism*, 13 YALE J. HEALTH POL'Y L. & ETHICS 76 (2013).

[167] *Id.* at 80.

[168] *Id.* at 77; One of the biggest proponents of medical liberty was Benjamin Rush—a signer of the Declaration of Independence and a member of the Pennsylvania ratifying convention. *Id.* at 94.

[169] *Id.* at 92; In a petition sent to the New York legislature, some such proponents of healthcare libertarianism wrote, "It is one of the privileges of an independent people to pay their money to whom they please, and for what they please, without the direct or indirect interference of anyone." *Id.* at 117. This statement sounds like it could have come from a modern-day Obamacare opponent.

[170] *Id*.

[171] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997).

nally ill patients,[172] medical marijuana, and others, Koppelman cannot fairly state that conservatives, libertarians, and others who challenged Obamacare were not fighting on philosophical grounds laid down over centuries. And the same is true of arguments for economic liberty generally. Just as "Tough Luck Libertarianism" has not been so "tough" after all, neither has it been radical, nor unprincipled. The doctrines of economic liberty and healthcare libertarianism are entrenched in American legal history, and have been expressed in courts by parties and judges in thoughtful and moderate ways.

CONCLUSION

To argue by innuendo that the Constitution cannot require libertarianism because libertarianism is so awful misses the distinction between constitutional meaning and constitutional legitimacy. But even so, the challenge to Obamacare that Koppelman associates with Tough Luck Libertarianism was neither "invented" out of whole cloth, nor radical, nor awful. It was a limited legal challenge which sought to vindicate the limits on government power laid out in the Constitution. And though Koppelman associates those arguments with the purportedly radical and horrible *Lochner* Era, similar arguments were actually expressed during that time by both business and grass roots interests who were concerned with the consequences of their arguments. The fact is, hardly anyone advocates for a Tough Luck Constitution. People seek self-reliance both on moral and consequentialist grounds. Thus, as Koppelman argues, the Constitution may very well not require Tough Luck Libertarianism. But that point is of little import, because Tough Luck Libertarianism is a convenient, but unrepresentative, caricature.

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[172] *See, e.g.*, Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach, 495 F.3d 695 (D.C. Cir. 2007).