

## DECENTRALIZING CONSTITUTIONAL PROVISIONS VERSUS JUDICIAL OLIGARCHY: A REPLY TO PROFESSOR KOPPELMAN

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Professor Koppelman pays me the compliment of responding to my recent article. *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*.<sup>1</sup> In particular, I am grateful for his kind remark that the article is a "major contribution to scholarship" as the "first unified description" of the Rehnquist's Court jurisprudence, because the major ambition of the paper, as Professor Koppelman himself acknowledges, is descriptive.<sup>2</sup>

Unfortunately, Professor Koppelman comprehensively misstates my normative position and his reply is thus misdirected. Professor Koppelman says that I think the Rehnquist Court has been following and should be following a "principle of subsidiarity."<sup>3</sup> He then argues that his principle invests the Court with such substantial political discretion as to make it a kind of oligarchy.<sup>4</sup> It is important to clarify at the outset that my article does not at all endorse the Court's fabrication and enforcement of the abstract principle of subsidiarity. Instead the article discusses the manner in which the Court has revived decentralizing provisions that *are actually in the Constitution* such as the limitations of the commerce clause, the protection for joint expression afforded by the First Amendment and the neutrality principle

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\* Professor, Northwestern School of Law. I am grateful for the comments of Steven Calabresi, Robert Delahunty, Nelson Lund, Mark Movsesian, Michael Rappaport, and Ilya Somin.

1. See John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002).

2. Andrew Koppelman, *How "Decentralization" Rationalizes Oligarchy: John McGinnis and the Rehnquist Court*, 20 CONST. COMMENT. 11, 12 (2003) (hereinafter "Koppelman").

3. *Id.* at 12, 15 (arguing that the overarching aim of the Rehnquist Court is subsidiarity).

4. *Id.* at 15, 18.

inherent in the religion clauses. To be sure, such provisions show that the Constitution contains an underlying theme of decentralization and I believe that theme is attractive as a policy matter for reasons I discuss, but that is a separate matter. The Court's warrant extends only to enforcing constitutional provisions, not a constitutional theme, and the Rehnquist Court, like any other court, should be applauded insofar as it interprets constitutional provisions correctly, which in my view requires taking account of text, original meaning, and precedent. Contrary to Professor Koppelman's claim, such an interpretivist Court enjoys no more political discretion when enforcing decentralizing provisions than when it enforces other provisions of the Constitution.<sup>5</sup>

Oddly enough, it is Professor Koppelman who consistently evaluates Supreme Court decisions according to his own political discretion. Rather than criticize the basis of the Rehnquist Court's holdings by appealing to text, original understanding, or even a close reading of judicial precedent, Professor Koppelman claims that a broad application of the Court's new decisions will lead to consequences of which he disapproves.<sup>6</sup> This method of criticism is doubly defective. First, he does not himself offer any theory of interpretation and in particular fails to observe the many ways in which attention to text and precedent will prevent the consequences he finds so unfortunate. Second, harping on particular consequences rather than building textual and precedential arguments against the Court suggests that he is guilty of exactly the same failings of which he wrongly attempts to convict the Court—shaping constitutional doctrine to reach preferred policy goals.

Because the Court's justification for its discrete decentralizing decisions derives from the Constitution itself, I never undertook the burden of demonstrating that the Constitution's provisions were wise public policy.<sup>7</sup> The article does note some

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5. *Id.* at 15.

6. *See, e.g., id.* at 23-24 (Rehnquist Court's commerce clause jurisprudence may endanger environmental laws).

7. Koppelman wrongly suggests that I disavow my defense of the Court. *See* Koppelman, *supra* note 2, at 14 n.13. Professor Koppelman once again fails to distinguish between my jurisprudential defense of the Court's work and my discussion of the policy benefits of the Constitution that the Court is enforcing. I freely acknowledge that my essay does not conclusively demonstrate the policy wisdom of all the provisions of the Constitution whose policy justification I discuss. That latter "defense" could hardly be accomplished in an eighty-page article whose primary objective is to describe developments in the Rehnquist Court, as Professor Koppelman himself acknowledges, and then to show how they are reviving a unifying theme implicit in the texts of the Constitution. I also freely admit that I generally admire the consequences of the Constitution—a charter for decentralized and limited government. That is an entirely different matter from be-

modern support for policies that these decentralizing provisions implement—support that Professor Koppelman misunderstands and in some cases misstates. Given the primarily descriptive objectives of my piece, this support also helps explain why the Court may be restoring some of the original Constitution, just as I explained how political theories of the time led the New Deal and Warren Courts to neglect these provisions. In any event, as a matter of political theory, Professor Koppelman offers no framework for assessing circumstances in which centralization of norm creation is better than decentralization. Without a theory, Professor Koppelman can provide anecdotes about the examples of decentralization he dislikes but he contributes little or nothing to the political theory debate over the relative merits of centralization and decentralization.<sup>8</sup>

But what is most puzzling about Professor Koppelman's criticisms of the Rehnquist Court and of my article, even on the terms of his own misunderstanding, is his full-throated endorsement of *Roe v. Wade*.<sup>9</sup> If any decision can be criticized as inevitably bound up in political decisions and as representing the triumph of oligarchy, it is *Roe*. Without relying on a determinate text of the Constitution but on its own assertion of what rights are "fundamental," seven members of the Court invalidated the laws of a large majority of the states and put the issue of abortion beyond democratic control. In contrast, even if the Court were to enforce a principle of subsidiarity, it would at least have a coherent body of economic theory to choose the appropriate level for decisionmaking. Moreover, at the level chosen the decisions would be made more democratically than was the case in *Roe*.

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lieving the Court should make decisions by a case by case policy calculus about the benefits of decentralization.

8. In response, Professor Koppelman argues that he needs no framework because a framework is impossible, "separate from particular judgments about good decisions." Koppelman, *supra* note 2, at 15 n.14. But yet again Professor Koppelman fails to distinguish between jurisprudential theory and policy defenses of constitutional provisions. Professor Koppelman's claim comes in the context of his argument that judicial decisions cannot appropriately enforce a "principle of subsidiarity." But I never suggest they should. As I note in the text, *my* argument about the need for a theory of decentralization comes in evaluating constitutional provisions, where Framers can take policy considerations into account. In this context, it is certainly helpful to have some theory about decentralization to inform overall judgments about whether a particular limitation that the Constitution has imposed on the federal government is wise. For instance, it would be hard to provide a principled opposition to a constitutional amendment giving the federal government power to define the nature of marriage without considering such issues as spillover effects and competition in legal regimes—the very things about which a theory of decentralization guides our thinking.

9. *Id.* at 36-37.

Professor Koppelman's endorsement of *Roe* suggests that he has not seriously addressed as a matter of political theory the problem which the decentralizing provisions of the Constitution help solve. If we were sure that the Court could find exactly what set of social norms would make the best republic, the Constitution should have set up a structure by which the Court dictates such norms. But the Constitution is more skeptical of the dictates of rulers and more sympathetic to experiments by the people. It thus left the appropriate contours of social norms, outside of a few core sets of rights and process norms, to more experientially and experimentally based processes that my article attempts to describe.<sup>10</sup>

### I. PROFESSOR KOPPELMAN'S MISUNDERSTANDINGS AND MISSTATEMENTS

It is most regrettable that Professor Koppelman attributes to me many views I do not hold. As a result, he spends much of his essay gleefully sifting the stuffing from straw men. He appears to believe that I want the Supreme Court to enforce a "principle of subsidiarity."<sup>11</sup> This is simply wrong and it is a mistake that pervades his entire essay. As Professor Koppelman admits, my article rarely even mentions the term subsidiarity,<sup>12</sup> and never suggests that Court should enforce this abstract principle. Instead, it explains how the Court is enforcing the decentralizing constitutional provisions—such as the limitations of commerce clause, the free speech clause, the religion clauses, and the jury trial clauses. This essential point is not obscure, but appears over and over again in the article: "The Rehnquist Court is rediscovering the provisions of the Constitution that create alternate forums [to national democracy] for norm creation."<sup>13</sup> The article observes later that this movement "restores a degree of the Constitution's original meaning"<sup>14</sup> and discusses how this restoration is properly limited by respect for precedent.

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10. My article shows how the limitations of the enumerated powers provide the states with the opportunity to compete in producing social norms where those norms implicate substantial externalities. McGinnis, *supra* note 1, at 519-21. It also shows how the First Amendment allows mediating institutions to compete in producing expressive norms, a category where the negative externalities of government regulation are thought to be greater on the whole than the negative externalities of the activities themselves. *Id.* at 528-29.

11. Koppelman, *supra* note 2, at 12, 15.

12. *Id.* at 12.

13. McGinnis, *supra* note 1, at 490.

14. *Id.* It does not do so completely, of course, because its respect for precedent. *See, e.g., id.* at 522-23.

In several places the article uses text and history to defend the Court's decentralizing decisions.<sup>15</sup> The article closes by observing that the Court is justified in enforcing these provisions against majorities, national or state, as the case may be, because these constitutional provisions have been approved by a supermajoritarian ratification that overcomes many of the defects of ordinary centralized majoritarian processes.<sup>16</sup> It is thus patently central to the thesis of my article that the Court is enforcing constitutional provisions through an interpretation that is guided by their original meaning as modified by established precedent.

Despite my many citations in the preceding paragraph to my own article, Professor Koppelman in rebuttal suggests that this reply "shifts emphasis" from "decentralization" to "textualism and originalism."<sup>17</sup> But he does not provide any evidence of the shift in my jurisprudential position—neither evidence that my original article argued that the Court should enforce a principle of subsidiarity apart from the decentralizing texts in the Constitution nor evidence that it failed to argue that the Court's decisions were justified on originalist and textualist grounds.<sup>18</sup> It is mystifying why Professor Koppelman persists in confusing theories of constitutional interpretation and policy defenses of constitutional provisions and in predicating his entire essay on a claim that I have suddenly adopted an interpretative theory never expressed in any of my work.<sup>19</sup>

Because of this fundamental error, Professor Koppelman expends enormous energy dissecting an article no one has written. First, he suggests that I think the Court should decide cases by determining what is "the best thing for government to do."<sup>20</sup> (As we will see, that interpretative method turns out to be more

15. See, e.g., *id.* at 511-12 (arguing that the Rehnquist Court correctly interprets the commerce clause); *id.* at 528 (providing textual defense of the Rehnquist Court's protection of the speech formation of median institutions); *id.* at 554-55 (defending Court's congruence between free exercise and free speech clauses on originalist grounds).

16. See *id.* at 567-68.

17. Koppelman, *supra* note 2, at 23 n.56.

18. I even noted an instance in which the Rehnquist's Court commerce clause doctrine, guided by the text of the Constitution, might well not comport with an appropriate economic understanding of decentralization. See McGinnis, *supra* note 1, at 518. Such a discussion would not make sense if I believed that the Court should enforce a principle of subsidiarity rather the text of the Constitution, as modified by established precedent.

19. It is particularly strange for Professor Koppelman to claim that I am shifting my views here, because I have always adopted the view that constitutional decisions must be rooted in an original understanding of text. See, e.g. John O. McGinnis and Michael Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 391 (2003) (describing commitment to an originalist form of interpretation).

20. Koppelman, *supra* note 2, at 21.

Professor Koppelman's style of jurisprudence). To the contrary, the Court should try to best understand the meanings of the words of the Constitution, such as the compass of interstate commerce. In section two I will show that Professor Koppelman has not demonstrated that it is doing so in a politicized fashion.<sup>21</sup> A related problem is that he ignores the many constitutional provisions authorizing centralized authority that I also believe should be enforced according to their terms.<sup>22</sup>

Second, given that the Supreme Court has not chosen these principles for itself as a policy matter, it is wrong to suggest that either the Court or I must prove that the principles it enforces are politically sound. The article discusses at some length the seeming paradox of a centralized institution enforcing principles of decentralization that were themselves centrally developed at the Constitutional Convention.<sup>23</sup> The way out of this paradox is to recognize that the Court is enforcing provisions endorsed by a supermajoritarian consensus during the ratification process. As I describe briefly in this article and at length with Michael Rappaport elsewhere, the supermajoritarian origins of the Constitution and its amendment process make their provisions more likely beneficent than ordinary legislation and warrants their enforcement over decisions of mere majorities, state or federal.<sup>24</sup> Thus, so long as the Court is enforcing these provisions, neither the Court nor I have to establish their utility.

Professor Koppelman exaggerates to the point of misstatement the limited observations I do make in support of the political wisdom of decentralization. To provide some explanation of why the Court may be rediscovering the centralizing provisions of the Constitution, I do say that "the Great Society's reforms are widely believed to have had *certain* counterproductive consequences."<sup>25</sup> This statement describes a widely held view. The last Democratic President attempted to take steps to reform welfare to get rid of some of these counterproductive consequences and himself stated that the "era of big government" is over.<sup>26</sup> More generally it is a commonplace among liberals and conser-

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21. As I discuss below at notes 37-66 and accompanying text.

22. For an example, see *infra* notes 57-63 and accompanying text.

23. See McGinnis, *supra* note 1, at 567-68.

24. See *id.*; John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 802-03 (2002).

25. McGinnis, *supra* note 1, at 502 (emphasis added).

26. Alison Mitchell, *Clinton Offers Challenge to Nation, Declaring "Era of Big Government Is Over"* N.Y. TIMES, Jan. 24, 1996, at A1 (quoting President Clinton's State of the Union Address).

vatives alike that we take more seriously the advantages of markets and market-like structures than we did in the 1960s.<sup>27</sup> Professor Koppelman tries to turn this modest descriptive point into a claim that I believe that a vast array of government programs, including “Social Security, the Securities Exchange Commission, and the National Labor Relations Act” are “counterproductive failures.”<sup>28</sup> Last time I looked these were New Deal, not Great Society, programs and I called no particular program a failure. (That is not to say of course that important aspects of even New Deal programs have not been criticized<sup>29</sup> and reforms have been suggested even by people other than those in the right wing of the Republican party).<sup>30</sup> More generally, it is quite clear that my article is concerned with social norms rather than economic ones and does not attack federal economic regulation.<sup>31</sup>

In response to this reply, Professor Koppelman surprisingly attempts to defend his claim that my original article argued that a vast array of New Deal programs are “counterproductive failures.” He suggests that in the prior sentence to the one discussed in the paragraph above I “lumped” the two eras together when I said “the political world today and the political theory that maps it look very different from those of either the late New Deal or the Warren Court” and that I then “cite skepticism” about both.<sup>32</sup> What I then actually said was “skepticism about highly centralized government as a rational planner of broad social reform has grown since the Great Society’s reforms were widely seen to have had certain counterproductive consequences.” Let us assume that this statement fairly implies that skepticism of government has grown since the New Deal era as well as that of the Great Society. It is baffling that Professor Koppelman thinks

27. See, e.g., Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and The Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 34 (1999) (contrasting the New Deal / Great Society regime with the current regime).

28. Koppelman, *supra* note 2, at 31.

29. See, e.g., DAVID E. BERNSTEIN, *ONE PLACE OF REDRESS* 85-117 (2001) (criticizing New Deal Labor laws as harmful to minorities).

30. Senator Daniel Patrick Moynihan, hardly a conservative Republican, recently chaired a bipartisan committee which recommended reform of Social Security, including the development of private accounts. See James Toedtman, *Panel’s Social Security Solutions*, NEWSDAY, Dec. 12, 2001, at A22.

31. See, e.g., McGinnis, *supra* note 1, at 517 (noting that even after *Lopez*, Congress retains plenary economic powers). My article acknowledges that the plight of African-Americans caused by the “original sin of slavery”—a state sponsored form of discrimination—may require more centralized intervention even now, let alone in the 1960s—an intervention justified in many cases by the Fourteenth or Fifteenth Amendments. *Id.* at 536-37.

32. Koppelman, *supra* note 2, at 21 n.101.

that this mild observation about changes in social thought, which he does not dispute, requires one to believe that a vast swathe of New Deal programs were, in Professor Koppelman's words, not mine, "counterproductive failures." Sadly, in this relatively smaller matter as well as the much larger matter of interpretative principle, Professor Koppelman persists in baldly misstating the positions in my original article.

Professor Koppelman also completely and revealingly misunderstands the reason that I am consciously quite tentative in many of my conclusions about the beneficence of substantive norms.<sup>33</sup> For instance, the article does say that "sexual restraint *may* be a positive norm" for some and that such norms *may* need a religious framework for support.<sup>34</sup> The article, however, does not say or imply, as Professor Koppelman says, that the Court should use these "hunches" to arrive at constitutional principles.<sup>35</sup> I make these remarks in the context of observing that the Court is rightly getting rid of the incorrect interpretation of the establishment clause that made it harder for norms generated by religions to compete on an equal basis with secular ideas.<sup>36</sup> It is precisely because neither Professor Koppelman nor I nor some central authority is good at evaluating the beneficence of such norms (even assuming, as I do not, that they are equally beneficent for everyone) that I am tentative in my views of their value, believing that the competition provided by constitutional discovery machines does a better job than armchair analysis of sorting them. As we will see, it is Professor Koppelman who wants to translate his hunches about such matters as the subordination of women to fabricate a substantive code of norms.

Even on their own terms, Professor Koppelman's attacks on decentralization are feeble. (That is not to say that stronger ones could not be mounted: my article itself acknowledges that decentralizing structures have weaknesses.)<sup>37</sup> He spends a few pages attacking Texas as an oligarchy with statistics drawn from a book

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33. Koppelman, *supra* note 2, at 30.

34. McGinnis, *supra* note 1, at 506.

35. Koppelman, *supra* note 2, at 30.

36. Professor Koppelman has little to say about my discussion of the Rehnquist Court's construction of the religion clauses. He says the Rehnquist Court religion jurisprudence has been "statist," see Koppelman, *supra* note 2, at 18 n.24, never grappling with my demonstration that the Rehnquist Court permits religious norms to compete on an equal basis but no more than equal basis with other norms. He also says the Rehnquist Court is promoting "religious triumphalism" without explaining why allowing religious schools to participate on equal basis with secular schools gives religion a favored let alone a triumphalist role. *Id.*

37. McGinnis, *supra* note 1, at 507.

whose premise is Texas should have higher levels of welfare and redistribution.<sup>38</sup> The success of decentralization in the United States obviously cannot be assessed by statistics from a single state. His discussion also focuses only on economic matters when the Court's doctrine and my essay focuses on decentralization in social norms.

In any event, Professor Koppelman's basic claim that an oligarchy has prevented Texas from having the higher welfare benefits that its citizens desire is not persuasive. He argues that oligarchy has prevented these benefits by depressing voter rates through failing to reform campaign finance laws and other bad acts.<sup>39</sup> But we have no evidence that such campaign finance is at fault for low turnouts. Texas has more Hispanics than other states and Hispanics have low turnout rates.<sup>40</sup> To actually understand the complex reasons for low voter turnouts in Texas, one would have to investigate many factors that Professor Koppelman does not.

But what is most striking about his discussion of Texas is his failure to mention, let alone, to grapple with, the most important protection that decentralization provides those potentially oppressed by oligarchy. If Texas has policies that an oligarchy is sustaining, over time the many who are not part of the oligarchy can leave. Unfortunately for Professor Koppelman, Texas has been one of the fastest growing states in the union, moving from the sixth to second in population rank in the last five decades.<sup>41</sup> In contrast, states whose policies he would appear to prefer, like many of those in the Northeast, have been losing people.<sup>42</sup> Professor Koppelman is right to be concerned that a polity's policy mix may diverge from the preferences of its citizens. That is a consequence of the agency costs of government. What is unac-

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38. See CHANDLER DAVIDSON, *RACE AND CLASS IN TEXAS POLITICS* 271 (1990). See also Koppelman, *supra* note 2, at 32-34 (discussing Texas).

39. *Id.* at 33-34.

40. In the Nov. 2000 election, the percentage of eligible voters that actually voted was as follows: Hispanic: 45.1%; Black: 56.8%; White (non-Hispanic): 61.8%. See *Reported Voting and Registration by Selected Characteristics*, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2000, U.S. CENSUS BUREAU 2002, at 6.

41. Texas's population growth is a result not only of foreign immigration but immigration from other states. See UNITED STATES CENSUS OF POPULATIONS 1960, 1970, 1980, 1990, 2000 (showing that Texas has a growing population born in other states of the United States).

42. See *Geographic Mobility March—1999 March 2000*, POPULATION CHARACTERISTICS, CURRENT POPULATION SURVEY, U.S. CENSUS BUREAU, May 2001, at 5. Three of the largest states in the Northeast had the highest tax burdens in the nation. See John B. Burbidge & Gordon M. Myers, *Population Mobility and Capital Tax Competition*, 24 REGIONAL SCIENCE AND URBAN ECONOMICS, 441 (1994).

countable is his failure even to discuss exit rights as a limit on those agency costs—a point made in my own piece—or offer any explanation of why agency costs would not often be worse at the federal level where exit rights are less effective. For instance, if the United States adopts policies that depress employees' wages without corresponding benefits, it is much harder for people of modest means to leave the country than to leave a single state.

## II. THE EMPTY BOX OF PROFESSOR KOPPELMAN'S JURISPRUDENCE

Once Professor Koppelman's misunderstanding of my jurisprudential position is cleared up, his own jurisprudential critique is insubstantial. He argues that the Court has been wrong to enforce the limitations of the commerce clause in such cases as *United States v. Lopez*.<sup>43</sup> But, as we have seen, the basis of a substantive critique cannot be the claim that the Court is improperly basing its decisions on its assessment of "what is, all things considered, the best thing for government to do."<sup>44</sup> Neither the Court nor I embrace this kind of construction, instead interpreting the commerce clause according to normal principles of legal construction by taking account of both its original understanding and precedent. Since he admits that Justice Thomas may be right in his construction of the original understanding of the commerce clause,<sup>45</sup> his critique cannot be that the Court lacks originalist support for its conclusion that carrying guns next to a school is not interstate commerce.<sup>46</sup>

Professor Koppelman suggests in passing two other possible avenues of complaint. First, he notes that his bar review lecturer told him that Congress could do whatever it wanted to under the commerce clause.<sup>47</sup> I freely concede that the Court may have upset Professor Koppelman's and his lecturer's expectations. But their expectations are not the law. The United States never passed a constitutional amendment providing Congress with

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43. 514 U.S. 549 (1995).

44. This is the principal claim of Professor Koppelman's essay made in italics. See Koppelman, *supra* note 2, at 21.

45. *Id.* at 23. Professor Koppelman does briefly suggest that originalism is indeterminate, *id.*, but makes no serious attempt to show this, or why any other judicial methodology is better.

46. Unlike other scholars, see, e.g., Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000), Professor Koppelman does not make an argument that the judiciary should not enforce the limitations of the enumerated powers because the political process can be entrusted to enforce them.

47. Koppelman, *supra* note 2, at 19.

plenary powers and the only way a provision of the Constitution, like the limitations in the commerce clause, can wholly disappear is through the amendment process.<sup>48</sup>

As a matter of judicial review, it is thus appropriate for the Court to return to the original understanding when that understanding is not foreclosed by precedent. Indeed, because the provisions of the Constitution have a presumption of greater beneficence than those norms passed by a majoritarian legislature, the Court has a duty under judicial review to maintain them when it can distinguish prior cases. In *Lopez*, the Court found a distinction between commercial matters and non-commercial matters that squares the prior cases with its new doctrine and restores some of the original understanding.<sup>49</sup> If Professor Koppelman believes that the Court cannot enforce any aspect of the original understanding unless it enforces the original understanding in every respect, he betrays a misunderstanding of how law works. The Court has and should attempt to harmonize, as far it is able, the original understanding with past precedent. A Court might be accused of exercising political discretion if it overruled a lot of cases without offering any consistent and principled basis for doing so, but the Rehnquist Court has overruled no cases in its commerce clause jurisprudence and few in the area of federalism generally.<sup>50</sup>

Professor Koppelman's only attack on the commercial-noncommercial distinction on which *Lopez* relies is that it is "indeterminate."<sup>51</sup> But he makes no sustained argument to this effect and does not tell us why it is more indeterminate than other distinctions in constitutional law like those between commercial speech and noncommercial speech and those between a public forum and a limited public forum. He does suggest that this distinction would deprive Congress of "all authority over such non-trivial matters as the spoliation of the environment."<sup>52</sup> This claim is a very substantial overstatement and is inattentive to actual constitutional doctrine: most environmental laws can be upheld because the regulations apply to manufacturing—clearly a com-

48. See McGinnis & Rappaport, *supra* note 24, at 795 n.393 (critiquing Bruce Ackerman's theory of "constitutional moments" as being unable to explain the difference between the effect of constitutional amendments and precedent).

49. Professor Koppelman does not attack the Court's distinctions of prior case law in his essay.

50. See John O. McGinnis, *Continuity and Coherence in the Rehnquist Court*, 47 ST. LOUIS U. L.J. 875 (2003) (discussing adherence to precedent in the Rehnquist Court).

51. Koppelman, *supra* note 2, at 24.

52. *Id.* at 22 (emphasis added).

mercial process.<sup>53</sup> It may be true that the Court's construction of the commerce clause will prevent regulation of wetlands that are within a single state and are not being used commercially.<sup>54</sup> But while Professor Koppelman clearly does not like this result, he does not explain why that is a fatal defect of the construction of the commerce clause. Just a few pages earlier in his essay he disparaged a jurisprudence in which the Court decided cases on the basis of what is the best thing for government to do.<sup>55</sup> Perhaps it would be better to give the federal government authority over noncommercial wetlands, but by his own argument that consideration should not dictate judicial construction.

At times Professor Koppelman suggests that commerce clause jurisprudence is inevitably political,<sup>56</sup> but he does not clarify why it requires any more political judgment than other issues on which he believes the Court should rule, such as the First Amendment's applicability to campaign finance regulations. Withholding commerce clause authority over noncommercial matters will affect federal legislation favored by both the left and right. For instance, because Congress does not have the plenary authority imagined by Professor Koppelman's bar review lecturer, the Court cannot use the commerce clause to ban same sex marriage or penalize someone for possessing obscene literature made at home.<sup>57</sup> If the Court nevertheless upheld such a law, we might be right in concluding that it could not be trusted with the commerce clause. But until then Professor Koppelman has not demonstrated that the new commerce clause jurisprudence is incapable of being applied in a neutral way to invalidate both federal overreaching whether of the left or the right.

Professor Koppelman's discussion of section 5 power also fails to offer convincing textual, structural or precedential arguments against the Court's and my position, but instead implies that my position suggests that the federal government must per-

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53. See, e.g., *Allied Local & Regional Mfrs. Caucus v. EPA*, 215 F.3d 61, 82 (D.C. Cir. 2000) (upholding amendments to the Clean Air Act against a commerce clause challenge).

54. See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (suggesting that Congress's attempt to regulate noncommercial wetlands would raise serious constitutional questions). For an excellent exploration of the doctrinal developments of this case, see Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1 (2003).

55. Koppelman, *supra* note 2, at 21.

56. See, e.g., *id.* at 15.

57. Judge Stephen Reinhardt recently used the commerce clause jurisprudence to hold that the federal government could not ban possession of child pornography. See *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003).

mit rape and lynching.<sup>58</sup> He simply fails to consider an intermediate construction of the Fourteenth Amendment between one that provides the federal government with plenary power and one that mandates federal acquiescence in the raping and lynching of particular groups.

The Fourteenth Amendment was not a focus of my original article, and I can provide here only the briefest sketch of why this mediating position is a sound reading of Fourteenth Amendment precedent and the text of section 5. At the outset I should note that much of the jurisprudence on section 1 of the Fourteenth Amendment is questionable as an original matter if only because the Court discarded the privileges or immunities clause rather than interpret it to preclude invidious discrimination in state determinations of civil rights.<sup>59</sup> The Court has interpreted the equal protection clause, however, to some similar effects.

Of course, all laws discriminate between groups defined in some fashion. The Court has thus long limited the application of the equal protection clause to requiring a rational basis for discrimination except when either the presence of a suspect class or fundamental rights requires a higher level of scrutiny.<sup>60</sup> This interpretation permits the Amendment to address the plight of African-Americans at whom it was addressed and to invalidate other classifications based on invidious status classifications. This construction also helps the amendment cohere with the federalist structure of the government, preventing the federal government from simply overriding any distinctions in state laws that it opposes.

Section 5 of the Fourteenth Amendment should be construed to reflect this basic structure, because its language simply permits Congress to "enforce, by appropriate provisions, the provisions of this article." By its text, Congress is limited to en-

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58. Koppelman, *supra* note 2, at 27. Professor Koppelman is a little unclear here. At the end of his discussion Professor Koppelman informs us that "rape and lynching" are social norms as if my theory suggests that Court should allow state experimentation with such norms. *Id.* at 27 & n.74. If my theory requires the federal government to acquiesce in state policies that permit some groups to be raped and murdered, it is a serious charge. If my theory does not, this sentence does no work other than to cast innuendos on both the Court and my theory of the Court.

59. See John Harrison, *Reconstructing the Privileges and Immunities Clause*, 101 *YALE L.J.* 1385, 1387 (1992) (arguing that privileges or immunities clause does not provide substantive rights but a non-discrimination principle on granting rights). Under this view the equal protection clause provides a separate nondiscrimination principle in the administration of those legal rights.

60. See, e.g., *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 2 (1973); see also Ronald D. Rotunda, *The Eleventh Amendment, Garrett, and the Protection of Civil Rights*, 53 *ALA. L. REV.* 1183, 1188 (2002)

forcement which does not generally connote a special power of interpretation over and above Congress's ability to interpret any provision of the Constitution.<sup>61</sup> The language of appropriateness also does not suggest that the judiciary should defer to Congress' interpretation of the preceding sections any more than any other provision of the Constitution.<sup>62</sup>

*Board of Trustees of the University of Alabama v. Garrett*<sup>63</sup>—criticized by Professor Koppelman—presents an analysis of section 5 that grows out of this understanding. *Garrett* means that in the absence of a suspect class or fundamental rights, the Congress can use its enforcement power only to act against irrational discrimination and even then only with a remedy that is “congruent and proportional” to the targeted violation.<sup>64</sup> While Professor Koppelman, like Justice Breyer in dissent, believes that Congress should be given leeway to define what is a suspect class and what constitutes irrational discrimination, this view does not flow from the circumscribed authority that Congress enjoys under the language of section 5. The scope for states to compete in the formation of appropriate social norms afforded by this construction also has the advantages described in my article. But under this construction, Congress nevertheless can set bounds to this competition by protecting suspect classes, who tend to be the subject of discrimination wherever they move, and by outlawing irrational discrimination in any state.

Accordingly, nothing justifies Professor Koppelman's implication that *Garrett* or my theory leaves the federal government powerless to stamp out rape and lynching.<sup>65</sup> If a state discrimi-

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61. See Saikrishna Prakash, *A Comment on Congressional Enforcement*, 32 IND. L. REV. 193, 201 (1998). The language does permit Congress the ability to fashion prophylactic rules to help enforce the Amendment.

62. *Id.* at 204. According to Professor Koppelman, I fail to grapple with the “devastating originalist” arguments against that the proposition that the Court has the exclusive authority to interpret the Constitution. Koppelman, *supra* note 2, at 25 n.63. As a departmentalist, I have never believed that Court has such “exclusive interpretive authority,” but it does have authority to provide its own independent interpretation of the Constitution in the context of a case, except where the Constitution lodges that authority elsewhere. I argue that the text of the Fourteenth Amendment does not provide such an exception.

63. 531 U.S. 356 (2001).

64. Rotunda, *supra* note 60, at 1188. This interpretation is confirmed by Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003), where the Court recently upheld Congress's ability to subject states to legal liability for violating a family medical leave act—a statute passed in response to sexual stereotypes.

65. Professor Koppelman's response to this point is a nonsequitur. It is to reiterate that the Court invalidated the Violence Against Women Act in Morrison and some other past statutes. Koppelman, *supra* note 2, at 27 n.74. But there Congress failed to structure the act in accordance with the powers it undoubtedly has under the Fourteenth Amendment to act against state officials who are enforcing laws that discriminate against pro-

nates in its enforcement of rape and murder laws, thereby failing to protect a group of victims, it is obviously engaged in discrimination that has no rational basis. (Since all states to my knowledge have laws that severely punish rape and lynching, Professor Koppelman must be concerned about the maladministration of those laws rather than a state's failure to enact them). The federal government can and should create causes of actions, criminal and civil, which will impose sufficiently harsh penalties that the acquiescence in rape and lynching will disappear.

Professor Koppelman's critique of *Dale v. Boy Scouts of America*<sup>66</sup> follows the now familiar pattern of ignoring textual arguments and then demanding that constitutional doctrine lack all nuance. My support for the decision was rooted in a construction of the First Amendment which he does not discuss.<sup>67</sup> Instead, he declares that the decision logically requires that all antidiscrimination laws are unconstitutional.<sup>68</sup> In my article, I suggested reasons that many other antidiscrimination laws could be distinguished and successfully applied. First, insofar as they apply to commercial enterprises, such enterprises may receive less protection for discrimination in employment because their overall purpose is not expressive.<sup>69</sup> Second, a state may have a compelling interest to prevent discrimination against suspect classes, like African-Americans and other minorities.<sup>70</sup> Such a development of *Dale* would allow competition without upsetting established law. It also demonstrates the extravagance of Professor Koppelman's charge that *Dale* can be explained only by a special affection for the Boy Scouts or a particular disdain for protections for homosexuals—a charge belied by the Court's decision in *Romer v. Evans*.<sup>71</sup>

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tected classes or who fail to enforce laws because of discrimination. Once again Professor Koppelman seems to have no interest in seeing whether careful attention to text and precedent actually leads to the consequences he imputes to interpretations of the Constitution that he dislikes.

66. 530 U.S. 640 (2000).

67. See McGinnis, *supra* note 1, at 528. In response, Professor Koppelman notes that he addresses my textual arguments in a not yet published essay to which I can hardly have been expected to reply. Koppelman, *supra* note 2, at 117 n.76. For purposes of this essay, however, it is significant that he acknowledges that I argued for the jurisprudential correctness of *Dale* on the basis of a text of the Constitution. Professor Koppelman here provides more evidence that his claim that I believe the Court should enforce a principle of subsidiarity rather than constitutional provisions, many of which have decentralizing effects, is false.

68. Koppelman, *supra* note 2, at 27.

69. McGinnis, *supra* note 1, at 537.

70. *Id.*

71. 517 U.S. 620 (1996).

Moreover, distinctions that depend on the nature of the organization regulated and the nature of the discrimination law at issue are necessary under any reasonable view of First Amendment protection for expressive association. Without such distinctions it is unclear why the government could not apply antidiscrimination laws to require an organization dedicated to reviving laws against sodomy to admit homosexual members, to require the Catholic Church to hire female priests, and to require Democrats to permit Republicans to help determine the identity of their candidates.<sup>72</sup>

Professor Koppelman also complains the Boy Scouts decision protects a large organization rather than a small, local organization and this undermines the decentralizing import of the decision. But this observation does not undermine either the jurisprudential or public policy soundness of the decision. As a jurisprudential matter, the First Amendment has never been interpreted to provide differential protection of organizations on the basis merely of their size.<sup>73</sup> As a public policy matter, Alexis de Tocqueville celebrated both localities and mediating institutions, not just local institutions.<sup>74</sup> In a continental republic, large mediating institutions are useful because they have the heft to compete in their social norms with our huge institutions of government. But if local chapters of the Boy Scouts are unhappy with the policy of the larger organization, they can secede and, if they wish, join other organizations with similar goals but without the policy. Even large and very well established organizations risk radical decline when they take a path that triggers exodus by their members: just ask some of the mainline Protestant churches. In contrast, the antidiscrimination provision at issue in *Dale* would have made it *impossible* for any purely local organization in New Jersey to pursue the Boy Scouts' goals using the Boy Scouts' policies. Thus, Professor Koppelman's claim that the *Dale* decision detracts from decentralization is not correct as a policy matter if we look at the sum total of local expressive association at issue.

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72. As I discussed at length in my article, see McGinnis, *supra* note 1, at 538-40, in a decision that mirrors *Dale* the Supreme Court held that government could not require Republicans to permit Democrats to participate in their primary. See *California Democratic Primary v. Jones*, 530 U.S. 567 (2000).

73. Cf. *Buckley v. Valeo*, 424 U.S. 1, 51-53 (1975) (holding that individuals were at liberty to spend as much of their money on their own election campaigns as they wished).

74. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 115 (Phillips Bradley ed., 1990).

### III. PROFESSOR KOPPELMAN'S EMBRACE OF OLIGARCHY

Professor Koppelman's attack on the Rehnquist Court's enforcement of decentralizing structures takes its most peculiar turn when he praises the jurisprudence of abortion as making the norm about abortion "more decentralized than any other rule of law could" be.<sup>75</sup> With respect, this claim makes his entire position incoherent at both the level of judicial methodology and of substantive political theory. Having criticized the Rehnquist Court's federalism jurisprudence for the political discretion it provides, he makes no attempt in his reply to show how *Roe* is not similarly based on political considerations. Much of my original article showed how fundamental rights jurisprudence could not be a part of a jurisprudence of decentralization because its norms were simply fabricated by the Supreme Court.<sup>76</sup> I expressly contrasted the enforcement of these norms with ones rooted in the text of the Constitution.<sup>77</sup>

Thus, Professor Koppelman's criticisms of decentralization as mask for judges' political decisions ring hollow in light of the kind of jurisprudence he endorses. It is certainly coherent to reject judicial review altogether and thus to oppose both enforcing the limitations of the commerce clause and individual rights. It is also coherent to adopt a jurisprudence focusing on reinforcing democracy and thus oppose both *Roe* and the enforcement of commerce clause limitations on the grounds that neither reinforces democracy. Criticizing the federalism cases for their inevitably political character while embracing *Roe*, however, betrays a blindness to the contingency of one's own political commitments. This blindness is widespread in the academy, perhaps because few academics know many people who oppose abortion.<sup>78</sup> Professor Koppelman's piece has other features that seem explicable only by the expectation that his readers will have spent their lives in the academic echo chamber. For instance, he characterizes (without any argument in support) "right-wing" Republican ideas, like the privatization of social security, as "widely regarded as loony."<sup>79</sup> He also denounces the majority in *Bush v.*

75. Koppelman, *supra* note 2, at 36.

76. McGinnis, *supra* note 1, at 566.

77. *Id.* at 567-68.

78. See Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1678 (1997).

79. Koppelman, *supra* note 2, at 31. Many serious academic economists have supported social security privatization. See, e.g., Laurence J. Kotlikoff, *Privatizing Social*

*Gore* as a “manipulating elite” without even showing why the case is wrongly decided.<sup>80</sup> These kind of asides work only when you are sure that almost the entire audience is on your side.<sup>81</sup>

It is true that Professor Koppelman cites his own article that provided a justification for *Roe v. Wade*<sup>82</sup> but his own unique defense of *Roe* proves the insularity of his approach. His claim there that laws against abortion violate the Thirteenth Amendment because any unwanted pregnancy is “involuntary servitude” would not persuade anyone one who was not already persuaded that the Constitution contained a right to abortion.<sup>83</sup> It is not only that no reasonable person at the time would have thought that unwanted pregnancy was a form of involuntary servitude. Even now such an argument would be treated at best as a pun on labor rather than seriously advanced in a court of law. Servitude, particularly as the context of an amendment that was designed to end slavery relates to economic obligation, not familial obligations. Unwanted pregnancy is no more involuntary servitude than are the other unwanted obligations that may force parents to work for their children, like child support. In fact it is less so because these other obligations may trigger imprisonment if they are not kept. But even assuming the alternative universe in which a Court would apply this clause to the issue of abortion, Professor Koppelman still must make broad political assertions about the subordination of women to counter the obvious point that at least some women voluntarily become pregnant and then, changing their mind, wish to terminate a pregnancy.<sup>84</sup>

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*Security: How it Works and Why it Matters*, 86 AM. ECON. REV. 368 (1996).

80. Koppelman, *supra* note 2, at 35 (“In the 2000 election the only elite that was manipulating the process to keep itself in power was the Republican-dominated Supreme Court.”).

81. Another indication of the confidence he has in his audience comes from his dismissal of originalism with two citations and without so much as a parenthetical describing their supposedly conclusive arguments. Koppelman, *supra* note 2, at 23 n.57.

82. *Id.* at 36 n.127 (citing Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990)).

83. See Koppelman, *supra* note 82.

84. *Id.* at 504-05. Professor Koppelman complains that I do not address his Thirteenth Amendment arguments in favor of a right to abortion—an argument which he did not himself describe in his original essay. Koppelman, *supra* note 2, at 36 n.127. But I have just devoted a whole paragraph to challenging this argument as insubstantial. In fact, very few others have ever expended as much text discussing this claim. That Professor Koppelman’s argument has not won any substantial support in the decade since he made it is yet another indication of its implausibility, because the overwhelming majority of academics favor abortion rights and would like nothing more than to put the decision on a more secure basis than *Roe* provided. And Professor Koppelman’s decision to invoke originalism, however factitious in its nature, while deriding originalism elsewhere, see *id.* at 23 n.57, is yet more evidence of the result-oriented nature of his jurisprudence.

But more than its methodological incoherence, Professor Koppelman's endorsement of *Roe* shows an incoherence in his substantive political philosophy. If one endorses the individual right of a woman to decide to terminate her pregnancy as a decentralizing norm, why would one not also endorse an individual right to contract as a decentralizing norm? Why does not the rule in *Lochner*, a case Professor Koppelman savages,<sup>85</sup> similarly make norm creation, in Professor Koppelman's terms, "more decentralized than any other rule of law could" be by permitting each individual the decision to contract? Why does *Lochner* not allow individuals in Professor Koppelman's words to "take control of their own lives."<sup>86</sup> No doubt some would say that a right to contract permits exploitation of interests of the defenseless, but millions of our fellow citizens think the same about the right to abortion. When norms acted on by individuals arguably do harm to some interest, whether the welfare or the worker or the fetus, and are not expression protected by the First Amendment, some political structure is need to sort out whether those norms are on the whole beneficial.

Thus, Professor Koppelman's blithe embrace of *Roe* and equally blithe rejection of *Lochner* show that he has not begun to consider the hard questions that my article poses about the appropriate locus of norm creation. As I note there, generating the appropriate set of social norms—the balance between liberty and license, freedom and order—is the hardest issue for a democratic republic to get right.<sup>87</sup> In more ancient forms of gov-

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It is hard to think of any decision that was less prudent or more disturbing of settled practice than *Roe*. Yet prudence and respect for settled practice are supposedly the touchstones of Professor Koppelman's jurisprudence, *see id.* at 23 n.56.

85. Koppelman, *supra* note 2, at 31-32. It is relatively unimportant but Professor Koppelman also misunderstands what little I have to say about *Lochner*. *See id.* at 31 n.103 (complaining that Court could not be following "reigning economic" theories since democratic institutions passed statutes inconsistent with those theories). In saying that reigning economic theories influence the Court in *Lochner* I was expressly explaining why elite groups, like the Supreme Court, tend to follow social theories of other elites like the academy rather than "ratify unthinkingly the preferences of the denizens of a mass democracy." McGinnis, *supra* note 1, at 498. Thus it is irrelevant as *an explanatory matter* that the people in general did accept these theories, just as it is irrelevant if people in general today do not accept theories of sexual autonomy that have motivated the Court's sexual autonomy jurisprudence. More generally, it is perfectly plausible to say even today that reigning economic theories impugn such policies as rent control or protectionist tariffs, while recognizing that some democratic institutions nevertheless pass those laws. Evolution too is a reigning scientific theory even if a majority of people in this nation does not agree with it.

86. Koppelman, *supra* note 2, at 36.

87. *See* McGinnis, *supra* note 1, at 520-21. *See also* Nelson Lund, *Federalism and Civil Liberties*, 45 U. KAN. L. REV. 1045, 1060-64 (1997).

ernment, determining the appropriate set of social norms was not so problematic because they were written down on divine tablets, sung by oracles, or dictated by the anointed. Discovering the appropriate norms may well be even harder in our era than in previous republican ones because large technological changes may call for rapid transformation of norms. Hence my focus on reviving structures of the Constitution that create discovery machines for social norms in the expectation that through competition and experimentation we will discover the right norms. Such provisions comport with the republicanism born in the English Enlightenment, because they try to create a political structure comporting with the empiricism and skepticism that are the hallmarks of that tradition.

Professor Koppelman either fails to understand this essential problem of republican governance, or proposes a solution that is reactionary in the sense of approximating the ancient forms of discovering social norms. For all his talk of democracy, Professor Koppelman's solution for the discovery of the most salient norms is to return us to a *deus ex machina*—in the form of the Supreme Court justices. They will discern the appropriate norms for essential issues of our day, whether cloning or assisted suicide, in the penumbras of the Bill of Rights, the mysteries of substantive due process, or perhaps worst of all, like Professor Koppelman himself, in oracular inferences from provisions that have nothing to do with the question at hand.<sup>88</sup> This process is deeply oligarchic in that it is driven by an elite group that is isolated in either Washington or in the academy from the ebb and flow of civic forces within the nation. The process provides no assurance that these norms have received a majoritarian endorsement, let alone the supermajority that should be required before overriding a majoritarian consensus. Finally, such a jurisprudence cuts off the experimentation in social norms that helps filter good norms from bad.

Professor Koppelman's self-contradictory critique is paradigmatic of a larger failure of much of contemporary left-liberal scholarship in the era of the Rehnquist Court. Liberal constitu-

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88. Professor Koppelman's willingness to cite the Thirteenth Amendment to support a right to abortion is thus no more a defense to the claim that he wants to enforce preferred rights not found in the Constitution any more than Justice Douglas's citation of the Third Amendment is a defense to the claim that *Griswold* supports unenumerated rights. Indeed, because they are less candid than a frank avowal of an unenumerated rights approach, the factitious arguments of Justice Douglas and Professor Koppelman have the potential to be even more corrosive of the Constitution.

tional theory (with substantial exceptions in the works such as those of John Hart Ely and Akhil Amar) has put itself into a box because of its previous treatment of the Warren Court. Having defended those decisions ideologically rather than by the use of text, history, or precedent, many liberal constitutional scholars have deprived themselves of most of the ammunition in the arsenal of constitutional interpretation. They can hardly attack the Rehnquist Court on the basis of text or the original understanding, because the Warren Court's decisions they most applaud were indifferent and often hostile to text and the original understanding. They lack standing to impugn the Rehnquist Court for any failure to follow precedent, because the Warren Court shredded precedent on many of the occasions where it was most celebrated. Such scholars are thus largely left to complaints about judicial activism which seem hypocritical in light of their past romances or to outright ideological complaints whose jurisprudential thinness seems better suited to the soapbox.

### CONCLUSION

Ideally a theory of the Constitution should both correctly construe its individual provisions and offer a theory of the way that these provisions form a coherent whole. The strength of John Hart Ely's defense of the Warren Court lay in his ability to provide plausible constructions of the text of individual provisions and then to weave them together to show that they had a more general pattern of democracy reinforcement.<sup>89</sup> My aspirations are similar, even if my construction of constitutional provisions and the more overarching theme I discover within them are not identical. Neither Ely nor I engage in free-form constitutionalism: we believe that decisions have a textual basis, and I, at least, believe the decisions have a basis in the original understanding. Professor Koppelman's first major error is to cast my article as an effort in free-form constitutionalism. His second major error is his failure to look in the mirror and see that his complaints against the Rehnquist Court's doctrine—that it is masking the political value judgments of oligarchs—perfectly fit many of his own positions. Professor Koppelman has not so much replied to my article as replied to himself.

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89. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).