

## REVIEWS

### Casebooks and Constitutional Competency

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#### I. INTRODUCTION

The first law school casebook in constitutional law was published in 1895 by Harvard law professor James Bradley Thayer.<sup>1</sup> Thayer observed that every teacher, "has his own gifts or lack of gifts,—methods as incommunicable as his temperament, his looks, or his manners."<sup>2</sup> He distinguished, however, between how teachers might manage the classroom and how students must prepare themselves:

[a]s to modes of study, a very different matter, Dean Langdell's associates have all come to agree . . . that there is no method of preparatory study so good as the one with which his name is so honorably connected,—that of studying cases, carefully chosen and arranged so as to present the development of principles.<sup>3</sup>

The case method of law study, however, has changed a great deal since Langdell's time, not only because the quantity of cases (and other important materials) has exponentially increased, but also because the competency expected of lawyers today requires even more critical inclinations, less acquiescence in accustomed forms, perhaps a more skeptical disposition, and greater skills not only of understanding, but of refinement, adjustment, growth, and creative use.

In addition, constitutional law itself has dramatically grown, both in scope and in complexity. Reflecting (and in turn, no doubt, contributing to) the more activist orientation familiar since the Warren

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1. 2 JAMES BRADLEY THAYER, CASES ON CONSTITUTIONAL LAW (1895).
2. *Id.* at vi.
3. *Id.*

Court, casebook editors since the late 1950s have included suggestions and questions calculated to induce students to challenge, to connect, to critique, and to explore more intensively and more extensively than had been commonplace before. Today's casebooks are thus far better adapted for fostering constitutional competency among lawyers than were their earlier counterparts.<sup>4</sup>

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4. If we assume that casebooks influence students' learning, hence their thinking, and thus their professional lives and their contributions to our society, whether casebooks do their jobs well or poorly can be of enormous significance.

We might wish, however, to accept less responsibility. This point is made well (and with humor) in an exchange of letters I had with Gerald Gunther when I returned to teaching in 1981 after an interlude in practice. I wrote saying I was teaching from his casebook, as I had sometimes done before, and said:

Returning to the subject after some absence, however, I am reading the materials with a degree of care which had lapsed somewhat when I was so familiar with them before. Thus it is that I have found a remarkable typographical error which not only may amuse you, but may provide a point of take-off for brief discussion in your classes, as it will in mine.

On page 5 of your 10th edition, in the text of *Marbury v. Madison*, appears this sentence:

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive *professes* a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.

The italicized word, for reasons which in this day should not be difficult to discern, puzzled me; and I therefore went back and checked the original U.S. Reports. The word in the original is, in fact, as I had thought, "possesses." The significance of the difference is so plain that it requires no comment.

This typographical error, I find on checking old editions, has been present consistently at least as far back as your 7th edition with Dowling; I am amused by wondering whether the same error might have appeared in Professor Dowling's earlier editions, including the one that Dick Nixon might have used when he went to law school.

Professor Gunther replied promptly and with his accustomed modesty, cordiality, and good humor, saying:

A letter such as yours should ordinarily bring chagrin and embarrassment, and to some extent it does: I know of no similar error in the book, and I strongly suspect (though after this episode I wouldn't want to swear to it) that *Marbury* is the only case in the old Dowling book I did not reedit from scratch. But I laughed too hard at the irony of that mistake to really be moved to tears. "Professes" indeed: I am really tempted to keep it in not only for my next basic constitutional law course, but for the life of the book. At least so long as executive power advocates such as Nixon live in memory (or infamy) it really is too delicious a slip to omit. Of course, I would have to put out a Teachers' manual to inform the uninitiated (which, until today, included me), and that is a task I have always avoided.

Thanks so much for calling it to my attention. I suspect, though I have not yet checked, that the error does indeed go back to the days in which Nixon was a law student. The thought is horrifying. If Nixon was indeed as good and obedient a law student as he is reputed to have been, the blame may lie with a constitutional law professor. At least it was Dowling, not me. And I console myself with the fact that we

Yet I find them all deficient regarding one branch of constitutional law which already is resurgent and will surely develop further as the new millennium proceeds. The casebooks do not provide students the resources and insights required for the critical understanding, competent use, and beneficent development of basic elements of federalism law, particularly the principle of enumerated powers. Reflecting the dated sophistication that “intrinsic” constitutional limits on federal legislative power are passé, the casebooks give little significant instruction in the difficulties and possibilities of intelligently accomplishing substantial decentralization of governmental discretion and authority so as to enhance self-governance and liberty—the most important reasons for having a constitution at all.

Part 1 of this Article traces the evolution of the constitutional law casebook from Thayer’s massive compilation of raw data in the Langdell tradition, to the modern style of extensively edited cases with comments and questions to help students identify, anticipate, and assess potential avenues of analysis and development.

Part 2 examines some basic concepts of federalism law still afforded too little attention by casebook editors. The classic analysis of enumerated powers (including Congress’ power under the necessary and proper clause) was eclipsed a century ago by the rise of the misconceptions now commonly generalized as “dual federalism.” Justice Stone led a revival of the classic approach beginning in 1937; but just as its operation under modern conditions was beginning to be made clear, Justice Black set a contrary course which led to federalism issues being treated for decades less as issues of law than as political questions. Part 3 details those developments, and Part 4 then discusses the challenge and opportunity facing casebooks now that federalism has attracted renewed judicial interest and constitutional opinion teeters between refining the viable, classic constitutional analysis of federal legislative power, and falling back on the old, discredited dual federalism idea.

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no doubt tend to give too much credit to the influence we have as teachers.

(correspondence of David Engdahl, Professor, Seattle University School of Law, with Gerald Gunther, Professor, Stanford Law School, (Aug. 31 and Sept. 4, 1981) (on file with the *Seattle University Law Review*).

I did later ascertain that not even Dowling can be blamed for any transgressions of Mr. Nixon. Although the error has been present from the first time Dowling included the relevant paragraph from *Marbury* in his book at all, it was never included until his fourth edition, in 1950. Nixon, however, had finished law school thirteen years earlier, in 1937—months, in fact, before Dowling’s first edition even appeared. None of the earlier casebooks by others had included that paragraph, either. Thus, Dowling as well as the other casebook editors are exonerated, no matter which casebook Nixon might have used!

## II. PART 1: EVOLUTION OF THE CONSTITUTIONAL LAW CASEBOOK

### A. *The Present Proliferation*

Faculty teaching law school courses in constitutional law have a larger selection of casebooks to choose from today than ever before. The twelve current choices constitute half the titles ever published for law school use in this field. Until 1986 there were still only seven; until 1975 the most there ever had been at one time was five.

Of the twelve currently offered, three appeared in new editions in 1997<sup>5</sup> or 1998<sup>6</sup>. One appeared for the first time in 1996,<sup>7</sup> when new editions of five others also appeared.<sup>8</sup> The other debuted a new edition in 1993 or 1992.<sup>9</sup>

Three of the twelve current titles can be traced, through several editions and a succession of author-editors, to 1964,<sup>10</sup> 1959,<sup>11</sup> and 1937<sup>12</sup> respectively. However, only two of the other nine existed before 1981, and none of them existed before 1975. Five are new within the past twelve years.

In contrast, just one new constitutional law casebook for law schools was introduced during the entire fifteen-year period of 1960 through 1974, even though at that time the profession (and certainly the law professoriat) was enthralled and preoccupied with constitutional

5. GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW (13th ed. 1997); WILLIAM COHEN & JONATHAN D. VARAT, CASES AND MATERIALS ON CONSTITUTIONAL LAW (10th ed. 1997); RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW CASES AND NOTES (5th ed. 1997).

6. DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY (2d ed. 1998); DAVID CRUMP ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW (3d ed. 1998).

7. DONALD E. LIVELY ET AL., CONSTITUTIONAL LAW: CASES, HISTORY, AND DIALOGUES (1996).

8. JEROME A. BARRON ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICY, CASES AND MATERIALS (5th ed., 1996); DAAN BRAVEMAN ET AL., CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM (3rd ed., 1996); WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW: CASES - COMMENTS - QUESTIONS (8th ed. 1996); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (3rd ed. 1996); NORMAN REDLICH ET AL., CONSTITUTIONAL LAW (3rd ed. 1996).

9. PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISION-MAKING: CASES AND MATERIALS (3rd ed. 1992).

10. LOCKHART ET AL., *supra* note 8 (originally WILLIAM B. LOCKHART, YALE KAMISAR & JESSE H. CHOPER, CONSTITUTIONAL LAW: CASES - COMMENTS - QUESTIONS (1964)).

11. COHEN & VARAT, *supra* note 5 (originally EDWARD L. BARRETT, JR., PAUL W. BRUTON & JOHN HONNOLD (1959)).

12. GUNTHER & SULLIVAN, *supra* note 5 (originally NOEL T. DOWLING, CASES ON AMERICAN CONSTITUTIONAL LAW (1937)).

events of the Warren court and the Nixon era. One might be tempted to attribute the dearth of new entries during that period, compared to the last fifteen years, to the quality of the competition already in place. However, the 1996 and 1997 editions of the three survivors from that period maintain their high quality, and yet now contend with nine others. The plethora thus does not seem attributable to any decline in the stalwarts. Perhaps it is just that law school market growth has induced more publishing houses to seek market share with books of their own;<sup>13</sup> and perhaps a shrinking market might eventually squeeze out one or two. In any event, the variety available now to satisfy pedagogical tastes is unprecedented.

### B. Thayer's Tomes

Constitutional law has been a staple of the law school curriculum for only about sixty or seventy years.<sup>14</sup> Langdell's model at Harvard gave the subject no place. Even after 1878, when the law degree course was extended to three years, the subject was not included.<sup>15</sup> Near the end of the century, however, James Bradley Thayer developed it as a third-year elective.<sup>16</sup> Constitutional law remained an elective at Harvard even after the curriculum reforms undertaken during the administration of Dean Landis in the late 1930s.<sup>17</sup>

Thayer hoped the casebook he published in 1895 would "help to promote a deeper, more systematic, and exacter study of this most

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13. During the 1960s and 1970s, the market belonged to West, Foundation, and Little, Brown, until Bobbs-Merrill's introduction of the Barron & Dienes book in 1975. Today, in addition to West with three, Foundation with two, and Little, Brown's successor Aspen with two, Matthew Bender vies with three entries, and Michie and Anderson with one apiece.

14. In earlier decades academic law schooling had typically included attention to constitutional law in the broad sense typified by *Story's Commentaries on the Constitution*, including considerable emphasis on matters of structure and government organization. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITES STATES (Boston, Little, Brown and Co. 1833). By the Civil War, however, that had been generally crowded out by the increasing time demands of private law subjects on the typical one or two years of law degree study. See ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 171, 296, 349 (1921). For the remainder of the nineteenth century, with a few exceptions, in those law schools where the subject was taught at all, its scope was restricted to the issues of constitutional limitation elaborated by Professor and Michigan Supreme Court Justice Thomas M. Cooley in his popular TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Boston, Little, Brown and Co. 1868). See also REED, *supra*, at 302 and 296.

15. REED, *supra* note 14, at 379.

16. See JOSEPH REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS 46 (1914).

17. See James Bradley Thayer, *The New Curriculum of the Harvard Law School*, 51 HARV. L. REV. 965, 980-981 (1938).

interesting and important subject, too much neglected by the profession."<sup>18</sup> It was an enormous, two-volume compilation totaling 2,420 pages<sup>19</sup> and containing hundreds of principal cases, both state and federal. Because he reproduced the opinions nearly full-length, the volumes had to be printed in eye-straining small type. Annotations containing excerpts from many additional cases, some explanatory notes, and a few extensive selections from scholarly articles (most notably Thayer's own) were set in even smaller type. Part One of the collection, which had first appeared the previous year shortly after Thayer's classic article, "The Origin and Scope of the American Doctrine of Constitutional Law,"<sup>20</sup> included a good deal of historical and other secondary material about constitutions in general and about the judiciary's function and role.

The daunting bulk of Thayer's book exemplifies the extraordinary demands the undiluted Langdell case method placed upon students. Thayer wrote that in preparing the collection "I have had chiefly in mind the wants of my own classes at the Harvard Law School" as well as "students elsewhere who follow similar methods of study,"<sup>21</sup> and he explained that he wanted the student "to see the topic grow and develop under his eye":

Nothing else can bring home to a student . . . the scope of the questions presented, and the true limitations of the legal principles that govern them, with anything like the freshness, precision, and force, and I might add also the fascination, which accompany the orderly tracing of these things in the cases.

. . . [T]here is no method of preparatory study so good as . . . that of studying cases, carefully chosen and arranged so as to present the development of principles.<sup>22</sup>

Thayer also wished to convey "the existence and the nature of" the constitutional lawmaking process. He said:

The study of Constitutional Law is allied not merely with history, but with statecraft, and with the political problems of our great and complex national life.

In this wide and novel field of labor our judges have been pioneers. There have been men among them, like Marshall, Shaw,

18. 2 THAYER, *supra* note 1, at v.

19. Thayer explained, "I have preferred to make the two volumes as large as they could well be, with any regard to convenient use, and to pack them closely, rather than to take the much easier course of letting the work run over into three or four volumes." *Id.*

20. 7 HARV. L. REV. 129 (1893).

21. 2 THAYER, *supra* note 1, at v.

22. *Id.* at vi.

and Ruffin, who were sensible of the true nature of their work and of the large method of treatment which it required, who perceived that our constitutions had made them, in a limited and secondary way, but yet a real one, coadjutors with the other departments in the business of government; but many have fallen short of the requirements of so great a function. Even under the most favorable circumstances, in dealing with such a subject as this, results must often be tentative and temporary. Views that seem adequate at the time, are announced, applied, and developed; and yet, by and by, almost unperceived, they melt away in the light of later experience, and other doctrines take their place.<sup>23</sup>

What Thayer demanded of law students, however, differed only in degree from what he considered to be required of law teachers. As Chair of the American Bar Association Section of Legal Education, he said,

[E]very man who proposes really to understand any topic . . . must search out that one topic through all its development. Such an investigation calls for much time, patience, and labor, but it brings an abundant harvest in the illumination of every corner of the subject. . . .<sup>24</sup>

23. *Id.* at v-vi.

Compare these observation about the Langdell case method generally, as employed in common law courses.

Under the old method law is taught to the hearer dogmatically as a compendium of logically connected principles and norms, imparted ready made as a unified body of established rules. Under Langdell's method these rules are derived, step by step, by the students themselves by a purely analytical process out of the original material of the common law, out of the cases; a process which forbids the *a priori* acceptance of any doctrine or system either by the teacher or by the hearer.

REDLICH, *supra* note 16, at 13.

If the student were given only cases which, from the instructor's point of view, were correctly decided, the study of cases would be more like the use of a text-book, containing illustrations of principles; but even then the case system would offer this distinct advantage, that the student would be required to express in his own language the material facts in the case, and the exact principle which the court considered necessary to the decision thereof, whereas in the text-book system, if the author has been successful in his work, the student finds it done for him. In truth, however, the attempt is made, in selecting cases for the use of the student, to present the same principle from many points of view, as involved in the same or different facts, and as considered by different minds, and the decision may be good or bad in principle, and may or may not be recognized as law. The student is thereby forced not only to analyze cases, but to compare them, to discriminate and choose between them.

William A. Keener, *The Inductive Method in Legal Education*, 17 REP. A.B.A. 473, 482-483 (1894).

24. James Bradley Thayer, *The Teaching of English Law at Universities*, 9 HARV. L. REV. 169, 177, 178 (1895).

The law teacher, he said, "to put himself in a position to explain it to others, in his own field of study must explore . . . all the decided cases relating to it."<sup>25</sup> Of course the law student, just beginning his study, and taking on several subjects at once, must for practical reasons be limited to the relatively few cases a teacher had carefully selected; but those cases were to be given to the student essentially in their raw state, requiring each student to devote the same kind of time-intensive "patience and labor" to bring in the harvest Thayer promised. Afterwards, in the classroom, there might be some help in weighing and grinding the grain, depending of course on the teacher's "gifts or lack of gifts"; but in preparing for class the student was left with only the cases—and his own time and talents—to gather the sheaves and separate the wheat from the chaff.

"[W]hile good teaching will differ widely in its methods," Thayer observed, "there is at least one thing in which all good teaching will be alike; no teaching is good which does not rouse and 'dephlegmatize' the students, . . . which does not engage as its allies, their awakened, sympathetic, and cooperating faculties."<sup>26</sup> He continued, "[a]s helping to that, as tending to secure for an instructor this chief element of success, I do not think that there is or can be any method of study which is comparable with the one in question."<sup>27</sup>

There was more demand for practicing lawyers, however, than there were students sufficiently capable and patient to realize Thayer's Langdellian ideal. Indeed, case-method law teaching in general did not achieve dominance until Langdell's model of massing barely edited cases had been moderated some by successors.<sup>28</sup> In 1901, when he was seventy years old, Thayer recorded his intention to prepare "a small Vol. on Const. Law"<sup>29</sup> once his second volume on evidence was done. Just five months later, however, death intervened.

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25. *Id.* "[T]he competent teacher of law must carefully and minutely explore the history and development of his subject." *Id.* at 178.

26. 2 THAYER, *supra* note 1, at vii.

27. *Id.*

28. Thayer did note that, "[i]n order to keep this collection within the compass of two volumes and yet do anything like justice to the subject," he had departed in one respect from the standard Langdell format. "[I]t has been necessary," he said, "almost always, to omit the arguments of counsel." *Id.*

29. See ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD* 210 (1967).



### C. *Hall, Evans, and Others Before the New Deal*

Not until 1913 did there appear any alternative to Thayer's enormous tomes for teaching constitutional law by the case method. In that year, University of Chicago Law School Dean James Parker Hall's casebook was published.<sup>30</sup> Although Hall found it "peculiarly difficult adequately to cover the subject of Constitutional Law by selected cases within the compass of a single manageable volume,"<sup>31</sup> his coverage was admirable. His book had little more than half as many pages as Thayer's, even though it was printed in slightly larger type. Its several hundred cases (again, both state and federal) included not only many from the intervening years, but even a few earlier ones Thayer had excluded.<sup>32</sup> Hall's book was also more heavily endowed with annotations. He fit all of this within 1400 pages by editing the opinions more severely than Thayer (although still far less than has since become standard).

Hall explained the pedagogical principle underlying his collection this way:

The principles of many legal topics may be stated or exemplified with a definiteness denied to those of Constitutional Law. . . . Government is not a simple matter, and the doctrines that would limit it form a fascinating complex of history, law, and politics. Every word of the most carefully phrased abstraction must be made flesh in a hundred concrete examples before the living principle is revealed. Here, as in other fields of practical judgment, there is "an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions." To secure a sound basis for such an intuition in the student's mind nothing can take the place of the consideration of a multitude of instances and much and varied reasoning and discussion.<sup>33</sup>

At law schools where even Hall's book seemed too large and unchewed, an alternative (if constitutional law was offered at all) was to teach by textbook and lecture supplemented with a selection of cases for illustration and discussion. In 1898, Chicago political scientist Carl Evans Boyd published "a suitable casebook of moderate size,"<sup>34</sup> about

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30. JAMES PARKER HALL, *CASES ON CONSTITUTIONAL LAW SELECTED FROM DECISIONS OF STATE AND FEDERAL COURTS* (1913).

31. *Id.* at xi.

32. *E.g.*, *United States v. Cruikshank*, 92 U.S. 542 (1876); *Fort Leavenworth RY. Co. v. Lowe*, 114 U.S. 525 (1885).

33. HALL, *supra* note 30, at xi.

34. CARL EVANS BOYD, *CASES ON AMERICAN CONSTITUTIONAL LAW* iii (1898).

a quarter as large as Thayer's behemoth. Its 667 pages contained just 63 cases, and almost nothing in the way of annotating notes or synopses of other cases or materials. However, it was designed not for law schools, but "to form the basis of a university course in that subject."<sup>35</sup> A similar collection of 64 cases was published in 1916 by Lawrence Boyd Evans, who had been head of the Tufts College department of history and public law before attending the Harvard Law School.<sup>36</sup> His book "found considerable favor in college classes,"<sup>37</sup> but seems not to have seen much use in law schools.

As more law schools came to include constitutional law in their curricula, however, West Publishing Company included the subject in its "Hornbook Case Series." A limited number of cases from Hall's large collection (and later from its 1926 supplement) was published as *Illustrative Cases on Constitutional Law*,<sup>38</sup> a volume designed for use with Henry Campbell Black's constitutional law Hornbook which went through several editions in the teens and the 1920s. The publisher's preface explained the purpose of the *Illustrative Cases* series:

The object of these Casebooks is to illustrate the principles of law as set forth and discussed in the volumes of the Hornbook Series. The text-book sets forth in a clear and concise manner the principles of the subject; the Casebook shows how these principles have been applied by the courts, and embodied in the case law. . . . Unlike casebooks prepared for the "Case Method" of instruction, no attempt has been made to supply a comprehensive knowledge of the subject from the cases alone. It should be remembered that the basis of the instruction is the text-book, and that the purpose of these Casebooks is to illustrate the practical application of the principles of the law.<sup>39</sup>

The case method of study, however, was ascendant. In 1939, West would publish another constitutional law Hornbook with an accompanying volume of *Illustrative Cases*,<sup>40</sup> but then the genre disappeared.

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35. *Id.* Having only about one-fifth the number of Thayer's principal cases, Boyd's book was less suited to the goal Thayer had set for a *law school* course, instilling an appreciation of "the existence and the nature of" the *process* of constitutional jurisprudence.

36. LAWRENCE BOYD EVANS, *LEADING CASES ON AMERICAN CONSTITUTIONAL LAW* (1st ed. 1916).

37. LAWRENCE BOYD EVANS, *LEADING CASES ON AMERICAN CONSTITUTIONAL LAW* v-vii (2d ed. 1925).

38. JAMES PARKER HALL, *ILLUSTRATIVE CASES ON CONSTITUTIONAL LAW* (2d ed. 1927).

39. HALL, *supra* note 38, at v.

40. The 1939 Hornbook and volume of illustrative cases were by Professor Henry Rottshaefer of Minnesota, whose earlier casebook in the CCH University Casebook Series and

Meanwhile, in 1925, Evans completed an elaborate overhaul of his small 1916 casebook. His second edition<sup>41</sup>—substantially an entirely new work—rivalled Hall's casebook both in length and in sophistication. Its more than 1340 pages contained not only three times the number of principal cases included in his first edition, but also a large number of long and scholarly notes.

Evans's notes were a modest but significant pedagogical departure. The annotations in Hall's casebook consisted of case summaries, quotations, and citations, and did not include questions, critical suggestions or comments designed to focus or guide analysis. Students preparing for the classroom with Hall's casebook thus were left with no guidance for their efforts in study and reflection, apart from the editor's selection and arrangement of the cases themselves. Students were left to organize their own "unnamed and tangled impressions," and to develop their "intuition of experience" through unguided "consideration of a multitude of instances and much and varied reasoning and discussion,"<sup>42</sup> employing (as Thayer had earlier put it) a great deal of "time, patience, and labor"<sup>43</sup> which better guidance might have helped them more efficiently use. Many of Evans's notes were similar, but several included insightful comments providing some substantive guidance.<sup>44</sup> Perhaps in recognition of the Thayer-Hall "figure it out for yourself" tradition, Evans observed in his preface that his notes contained "some material which classes in law schools may

later casebook for West are discussed below.

41. EVANS, *supra* note 37.

42. HALL, *supra* note 30, at xi.

43. Thayer, *supra* note 24, at 177.

44. For example, in a note following *Stafford v. Wallace*, 258 U.S. 495 (1922), and some other cases, Evans observed:

The domestic commerce of each State which is confined entirely within its own boundaries is not under Federal control, but inasmuch as Congress is authorized to adopt whatever laws may be necessary and proper for carrying its powers into execution, it may regulate the domestic commerce of the States in so far as such regulation is necessary to the effective regulation of foreign or interstate commerce.

EVANS, *supra* note 37, at 787-88. And,

Since Congress may enact any legislation which is "necessary and proper for carrying into execution" its war powers, it is vested in time of war with practically absolute control over the man power and property of the country. . . . It may authorize the President to take over and operate the railways and to fix both interstate and intrastate rates thereon. In such case the police power of the States becomes subordinate to the paramount authority of the Federal Government. . . . For the protection of the health and moral welfare of the army, it may authorize the Secretary of War to prevent the establishment of disorderly houses within such distance of army camps as he may prescribe. . . .

*Id.* at 566.

find superfluous.”<sup>45</sup> However, some of his comments illuminated analytical points which could easily have been overlooked.

Evans’s second edition was used in several law schools.<sup>46</sup> After Evans’s death in 1928, Western Reserve Law Professor Archibald H. Throckmorton prepared a third edition, published in 1933, which incorporated intervening court decisions, rearranged topics, and reorganized Evans’s scholarly notes. Later editions with different editors kept this casebook a staple of political science curricula until the 1960s; however, the law school market came to be dominated by others.

Hall’s 1913 casebook was republished in 1926, bound with a 400 page supplement containing cases decided during the intervening thirteen years. Like the original, this “supplemented” edition eschewed editorial commentary and critique. However, enough of the cases between 1913 and 1929 seemed so controversial to Hall that for the supplement he altered his format somewhat: observing that “the pressure and interaction of conflicting interests in politics, society, and business have been reflected in” the judiciary’s recent constitutional work, he said that “[s]ome of the questions discussed are so debatable and perhaps subject to later reconsideration that liberal extracts have been included from notable dissenting opinions.”<sup>47</sup> This was certainly a step, though only a modest one, toward encouraging students to interact more critically with authorities.

Eighteen months after Evans’s second edition, in the same year when Hall’s supplemented edition appeared, a smaller casebook alternative was published by University of Colorado law professor Joseph Ragland Long. Long’s shorter book used somewhat larger type and still had just 950 pages, half the number of Hall’s and two-thirds the number of Evans’s. Long’s objective had been to make “a book of moderate size” presenting “all the cases needed to afford material for a course sufficiently comprehensive to meet the needs of the average law school”;<sup>48</sup> and most of the 250 cases he included were very heavily edited or merely excerpted. He explained that “[i]n editing the

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45. EVANS, *supra* note 37, at v.

46. See LAWRENCE B. EVANS, *LEADING CASES ON AMERICAN CONSTITUTIONAL LAW* (3d ed. 1933).

47. JAMES PARKER HALL, *CASES ON CONSTITUTIONAL LAW* iii (Supp. 1996). Among the intervening cases for which Hall printed significant dissenting excerpts were *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *United States v. Doremus*, 249 U.S. 86 (1919), *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922), *Wilson v. New*, 243 U.S. 332 (1917), and *Block v. Hirsh*, 256 U.S. 135 (1921).

48. JOSEPH RAGLAND LONG, *CASES ON CONSTITUTIONAL LAW* iii (1926).

opinions all matter not pertinent to the point or points for which the case was selected has been eliminated, and thus the cases have been kept down to a reasonable length, and also, it is believed, they have been made more readable."<sup>49</sup>

Long's severe editing, of course, eliminated a great deal of the "much and varied reasoning and discussion" that Hall had deemed indispensable to a soundly based legal intuition; it certainly obscured the *process* of judicial evolution and adaptation, the "true nature of their work," that Thayer had deemed important for students to understand. Long did make space, however, for a number of notes with citations to related cases, as well as a little instructive text at the beginning of each of his chapters.

On a number of points Long included critical observations. In contrast to Evans's comments, however, Long's, for the most part, were not critical in any analytical sense, but were mere expressions of opinion. For example, regarding *Pollock v. Farmers' Loan & Trust Co.* he wrote, "The fact that the court was divided in opinion . . . does not at all indicate that the decision was wrong. . . . Notwithstanding much adverse criticism of this decision, it now seems pretty clear that the decision was correct."<sup>50</sup> "The decision in the case of *United States v. Doremus*," he wrote, "is probably the most extreme extension of federal power in the history of the Supreme Court, though closely approached by the case of *Caminetti v. United States*."<sup>51</sup> He observed that the *E.C. Knight* sugar trust case "has been severely criticized, though upon the facts as alleged and proved it may be doubted whether adverse criticism is justified."<sup>52</sup> Such comments, with no more elaboration than Long provided, contribute nothing substantial to advancing a student's understanding or critical skills.

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49. *Id.*

50. *Id.* at 503.

51. *Id.* at 574.

52. *Id.* at 597.

D. *Dodd, Barrett, and the Modern Mode*

Long's casebook was followed in 1932 by two others. One of these was by Yale's Walter Fairleigh Dodd;<sup>53</sup> the other was by University of Minnesota Law School Professor Henry Rottschaefer.<sup>54</sup> Between them, these soon displaced not only Long's but also both Evans' and Hall's.

Rottschaefer's book was a title in the CCH University Casebook Series. It ran about 1180 pages, some 300 fewer than Dodd's. The two differed also in substance, not only in how they organized their presentations of the subject, but also in the character of their editorial notes. Rottschaefer's notes were extremely short, consisting of nothing more than citations to additional cases and to law review articles. Dodd's, on the other hand, were very extensive and included not only citations but also substantial excerpts from opinions, and discussions of points subsidiary or tangential to those the principal cases addressed.

More significant for the development of casebooks as teaching tools, however, Dodd's notes (perhaps because of his more contentious nature) included questions and suggestions that were posed deliberately to induce comparison, analysis, extrapolation, and critical assessment by the student. In a couple of dozen instances at least he prodded with such questions or statements as "How is this case to be distinguished from the Employer Liability cases?";<sup>55</sup> or, "Did the opinion of Mr. Justice McReynolds [for the Court] represent the view of a majority of the court as to" a particular issue, where separate opinions also were written;<sup>56</sup> or, "Distinguish this case from" another excerpted in a note fifty pages prior;<sup>57</sup> or, "[t]o what extent is the above argument of Mr. Justice Day supported by the distinction in" a principal case studied in a previous chapter six hundred pages away;<sup>58</sup> or

Why is the court in this case primarily discussing issues under the State Constitution? Is the discussion of freedom of speech to be regarded as disposing of this issue under the Fourteenth Amend-

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53. WALTER F. DODD, *CASES AND OTHER AUTHORITIES ON CONSTITUTIONAL LAW, SELECTED FROM DECISIONS OF STATE AND FEDERAL COURTS* (1932).

54. HENRY ROTTSCHAEFER, *CASES ON CONSTITUTIONAL LAW* (1932).

55. DODD, *supra* note 53, at 613 n.12 (notes following *Southern Ry. v. United States*, 222 U.S. 611 (1911)).

56. *Id.* at 541 n.23 (notes following *Newberry v. United States*, 256 U.S. 232 (1921)).

57. *Id.* at 633 n.15.

58. *Id.* at 965 n.12.

ment? Compare the result in this case with the newspaper censorship dealt with in *Near v. Minnesota*. . .<sup>59</sup>;

To what extent are compulsory minimum wage laws invalid in their application to public employments and to minors? And if an act as adopted applied to women and minors in all industries, can it be considered as separable, so as to uphold it as to minors and as to women in public employment?<sup>60</sup>

and, "Query, whether the scope of the national war power extends to the regulation of production of oil in time of peace, on the ground that a sufficient supply of oil is necessary for naval purposes in time of war."<sup>61</sup>

Not even the few suggestive comments included in Evans's second edition contained such pedagogical potential as these. These notes, more effectively than anything in Thayer's volumes, tended to "dephlegmatize" the student, actually engaging him in the intellectual process of formulating and testing the propositions being promulgated as constitutional law. The number of such suggestions and questions in Dodd's first edition was small, but they pioneered an important technique for casebook instruction toward competency in constitutional law.

In 1939, West published Rottschaefers's Hornbook and the *Illustrative Cases* to accompany it, and in 1948, West published another full casebook by Rottschaefers. The latter was more than two hundred pages shorter than the book Rottschaefers had done for the CCH series seven years before, and less than three-fourths the size of Dodd's. It did include notes, but insofar as these amounted to anything more than those in his 1932 book, they were no more than condensed adaptations of the declarative assertions in his Hornbook. He offered nothing resembling Dodd's provocative questions and suggestions.

When Rottschaefers's 1948 casebook was published, not only Dodd's but also the newer casebook introduced by Columbia's Noel Dowling in 1937<sup>62</sup> had already reached their third editions. Between them, Dodd and Dowling kept a grip on the market that Rottschaefers's book was inadequate to break. Along with one by Georgetown Law

59. *Id.* at 881 n.14 (notes following *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230 (1915)).

60. *Id.* at 933 n.6 (notes following *Adkins v. Children's Hospital*, 261 U.S. 525 (1923)).

61. *Id.* at 529 n.21 (in a note appended to *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919) but discussing the spate of cases spawned by the first World War upholding far-reaching federal laws, including some under the Necessary and Proper Clause).

62. NOEL T. DOWLING, *CASES ON AMERICAN CONSTITUTIONAL LAW* (1937).

Professor Robert A. Maurer, published in 1941,<sup>63</sup> it soon was left by the way.<sup>64</sup> Even the 1950 casebook by Professor John P. Frank of Yale gained too small a following to endure.<sup>65</sup>

Dowling's thrived, however, alongside of Dodd's, through several editions. In fact, while Dodd's waned after six editions, Dowling's continued to run strong into the 1960s when Gerald Gunther took it up and began its regeneration.

Meanwhile, the year 1954 saw not only new editions by both Dowling and Dodd, but also new entries from Michigan and Harvard—all of them taking market share from the six-year-old Rottschaefer and the four-year-old, idiosyncratic Frank. The Michigan entry was Professor Paul Kauper's,<sup>66</sup> a book somewhat smaller than Dowling's and almost four hundred pages smaller than Dodd's. Its notes were encyclopedic, but merely declarative. The Harvard book—a joint enterprise of Professors Paul Freund, Arthur Sutherland, Mark DeWolfe Howe, and Ernest Brown—was a two-volume, 1,750-page contender with Thayer's for designation as the casebook most unmanageably oversized for instructional use.<sup>67</sup> Its extensive notes did, however, make some occasional use of questions to help focus student attention and analysis.

Two other constitutional law casebooks appeared five years later, in 1959. One was the severely edited (873 pages) and too superficial book by Dean Ray Forrester of Tulane, which never saw a second edition.<sup>68</sup> The other was a 1,200-page product of some years of

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63. ROBERT ADAM MAURER, *CASES ON CONSTITUTIONAL LAW* (1941). Maurer did without questions and—except for short background narratives introducing certain chapters—without commentary of any kind.

64. HENRY ROTTSCHAEFER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* (1948). However, Rottschaefer's 1948 book still clung to at least one outpost well over a decade later: when I began law school at Kansas in 1961, dilapidated recirculated copies were the prescribed fare for the constitutional law course taught (poorly) by James Barclay Smith.

65. JOHN P. FRANK, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* (1950). Frank made substantial and valuable use of questions and suggestions to aid and direct student analysis. However, instead of using a topical or systematic structure, he organized the book by historical periods—"The Marshall Era," "The Taney Era," "White and Taft," etc.—followed by chapters on "The Constitution Today" and "Contemporary Problems." A somewhat similar organization has been utilized by the modern casebook of Paul Brest since Sanford Levinson joined as coeditor for the second edition in 1983.

Frank published a revised edition in 1952, which he credited to "the extraordinary rapidity of development in constitutional law in the recent past," and to "the helpful suggestions made by reviewers and informal critics on the first edition."

66. PAUL G. KAUPER, *CONSTITUTIONAL LAW, CASES AND MATERIALS* (1954).

67. PAUL A. FREUND ET AL., *CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS* (1954).

68. RAY FORRESTER, *CONSTITUTIONAL LAW, CASES AND MATERIALS* (1959).



evolution in mimeographed form, coedited by Professor Edward L. Barrett, Jr., then of Berkeley, and his Pennsylvania colleagues Paul W. Bruton and John Honnold.<sup>69</sup> Over the next eighteen years Honnold and then Bruton dropped off; for the major revision constituting the sixth edition in 1981, Barrett enlisted Stanford's William Cohen. Jonathan D. Varat of UCLA joined the team for the eighth edition in 1989. With the ninth edition in 1993, it became the Cohen and Varat casebook, now in its tenth edition.

The 1959 Barrett casebook refined and employed far more extensively the technique that Dodd had modestly pioneered. While Dowling (whose sixth edition appeared just as the Barrett book debuted) used questions in his notes as a rhetorical device to introduce authorities on tangential topics,<sup>70</sup> the predominant use of questions in Barrett's notes was different. The editors' preface explained:

Intensive examination of constitutional problems has been our primary goal. . . . Notes following<sup>71</sup> the cases are designed to carry the student farther into the examination of the problem before him rather than to divert him to minor questions or serve as a collection of authorities. To the same end we frequently set forth statements of facts in the form of problems. These problems are designed for consideration on the basis of the materials which precede them and thus can serve to toughen the students' minds through exercise in applying constitutional principles to situations which are more realistic and difficult than can be posed in the classroom; these problems at the same time test the workability of the ideas developed by the cases.<sup>72</sup>

When Gerald Gunther<sup>73</sup> updated and revised Dowling's classic for its seventh edition in 1965, he began moving it in the same pedagogical direction as Barrett and Dodd had taken. He worked at "the recasting and expansion of textual notes to provide background,

69. EDWARD L. BARRETT, JR. ET AL., *CONSTITUTIONAL LAW, CASES AND MATERIALS* (1959).

70. For example the question, "To what extent is it a judicial question as to whether a taking is for a public purpose?" began a note consisting of excerpts from several cases discussing the requisite deference. DOWLING, *supra* note 62, at 812 n.2.

71. In addition, "In various places where relevant background (historical, economic or social) is not exposed in the opinions of the Court we have prepared introductory notes." BARRETT, J. ET AL., *supra* note 69, at ix.

72. *Id.* at ix.

73. Gunther initially enjoyed the collaboration of his erstwhile Columbia colleague, Herbert Wechsler. See NOEL T. DOWLING & GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* preface (7th ed. 1965).

sharpen focus, and promote analysis . . . in depth.”<sup>74</sup> In succeeding editions, as the book evolved from Dowling’s into Gunther’s own, this characteristic was enhanced.

Meanwhile, Minnesota’s Professors Lockhart, Kamisar, and Choper produced their landmark in 1964.<sup>75</sup> This 1,400-page book quickly became a market leader during a period of substantial growth in the law student population. “LocKamChop” made even more extensive use of questions in its notes than the Barrett casebook had. Many of those questions were very apt to start students in useful directions of criticism and analysis.

It is possible, however, for overuse to spoil a good thing. The number of question marks in the Lockhart book’s extensive notes seemed almost to exceed all other punctuation marks combined. Teaching from it at Colorado in the 1960s, I found many students frustrated and confused rather than excited by these concatenated interrogatories. For many of the questions, students were given too little background for them to be able to cope except in terms of preconceptions and predilections. Sometimes an impossibly large question was put, or a faulty dichotomy posed, where instead a stepped succession of questions or suggestions was needed for analytical guidance.<sup>76</sup> In my experience, many students ignored important questions that, with better calculation, might have helped them to organize and understand complicated issues,<sup>77</sup> and thought themselves sufficiently prepared by considering others that they could dispose of with common sense<sup>78</sup> or political opinion.

74. *Id.* at xi.

75. WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW: CASES - COMMENTS - QUESTIONS (1964).

76. For example, following the utterly ungrounded opinion in *United States v. Sullivan*, 332 U.S. 689 (1948), there was this doubly opaque false lead: “Which is the clearer case for Federal Power—control over misbranding in the *Sullivan* situation or making it a federal crime to commit a state criminal offense after interstate travel for the purpose of committing the crime?” LOCKHART ET AL., *supra* note 75, at 261 n.2(b).

77. For example, following *Stafford v. Wallace*, 258 U.S. 495 (1922), which alluded to Justice Holmes’s “stream of commerce” metaphor: “Is the theory here that the activities in the stockyards actually constitute interstate commerce, or that they are subject to regulation because of their harmful impact on interstate commerce? Might it make any difference which theory is adopted?” LOCKHART ET AL., *supra* note 75, at 197 n.1.

Similarly, following *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937): “[W]as *Butler* a dependable precedent after *Steward*?” LOCKHART ET AL. *supra* note 75, at 239 n.1(c).

78. For example, following *Engel v. Vitale*, 370 U.S. 421 (1962): “Do you agree that ‘pressures to conform’ are difficult to measure? More difficult than many other constitutional determinations? If so, should this bar their consideration?” LOCKHART, ET AL., *supra* note 75, at 1176.

Nonetheless, overall the Lockhart casebook was very good and its successive editions have been highly successful. Moreover, the technique of interrogatory rather than merely declaratory notes and comments—pioneered by Dodd and refined by Barrett, even if overdone by Lockhart a bit—has now been standard in constitutional law casebooks for a generation.

When artfully used, this technique of guiding critical thought with carefully crafted questions is very effective for inculcating in students a sense of vitality and possibility in constitutional law. It promotes a critical orientation toward accustomed doctrine, an inclination to question authority while respecting experience, and a sense that it makes a critical difference what questions are asked (or overlooked), and how a proposition is put. For lawyers who are to deal with issues of governance and freedom in a modern society with aspirations for democracy and liberty as well as order, these are essential requisites of professional competency.

### III. FEDERALISM: THE CASEBOOKS' UNMET CHALLENGE

#### A. *The Opportunity at Hand*

The technique of the modern casebooks, however, has not been utilized with equal diligence and sophistication in all branches of constitutional law. Questions of federalism in particular do not receive the attention and critical imagination necessary to guide students toward competency. Certain recent cases<sup>79</sup> have obliged casebook editors to give some of these issues somewhat more notice, and have elicited a skeptical question or two and some querulous observations. Yet, there still is lacking the attention needed to help students comprehend, clarify, or refine the concepts being asserted (or rediscovered) and applied. The casebooks still treat the notion of intrinsic legal limits to the national government's legislative power (particularly the "commerce power") as ill-founded, outdated, unsophisticated, and dull.

There is room here for specific discussion of only one category of federalism issues the casebooks leave unexplored. It is one, however, with extraordinary significance: the meaning and misconceptions of the Necessary and Proper Clause. More than ten years ago Justice O'Connor, for herself and Justices Rehnquist and Powell, observed that *NLRB v. Jones & Laughlin Steel Corp.*,<sup>80</sup> *United States v.*

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79. *E.g.*, *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992).

80. 301 U.S. 1 (1937).

*Darby*,<sup>81</sup> *Heart of Atlanta Motel, Inc. v. United States*,<sup>82</sup> and the other modern cases regarded as expanding Congress's "commerce power," really rest not on the Constitution's Commerce Clause itself, but on the Necessary and Proper Clause. As O'Connor observed,

The Court based the expansion on the authority of Congress, through the Necessary and Proper Clause, "to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." . . . It is through this reasoning that an intrastate activity "affecting" interstate commerce can be reached through the commerce power.<sup>83</sup>

Justice Thomas noted the same thing in 1995.<sup>84</sup>

This recognition that the so-called "affectation" doctrine turns not on the Commerce Clause itself, but on the Necessary and Proper Clause, opens avenues of analysis and argument that have not been traveled for fifty years. It makes comprehensible the contrast between the classic view of federal legislative power recovered in the later 1930s, and the virtual abrogation of enumerated powers doctrine indulged from the mid-1940s until recently. However, the point is totally lost upon the editors of constitutional law casebooks. Students still are not prompted to explore the differences and connections between these two clauses, or even to perceive them.

These connections and differences become obvious when certain doctrines and developments that are generally familiar are given a closer look. The first of these to be examined is the notion of "dual federalism," which had been scrambling Commerce Clause with Necessary and Proper Clause issues for some decades before the New Deal.

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81. 312 U.S. 100 (1941).

82. 379 U.S. 241 (1964).

83. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 580, 584-85 (1985) (O'Connor, J., joined by Rehnquist, C.J., and Powell, J., dissenting). The excerpt in quotation marks is from the Court's opinion in *United States v. Darby*, 312 U.S. at 124.

O'Connor's observation might have been prompted by a manuscript I had sent to her (and to Justices Rehnquist, Powell, and Blackmun) some weeks after the March 1994, argument of *Garcia*, and before it was set for reargument the next term. After the reargument order, I sent the manuscript in August to all Justices as well as to all counsel in the *Garcia* case. It later was published as *Sense and Nonsense About State Immunity*, 2 CONST. COMM. 93 (1985), and was cited on a different point in the O'Connor-Rehnquist-Powell dissent, 469 U.S. at 587. (This correspondence is on file with the *Seattle University Law Review*.)

84. *United States v. Lopez*, 514 U.S. 549, 588 (1995) (Thomas, J., concurring).

The Necessary and Proper Clause has recently begun receiving serious attention from some young constitutional scholars. See, e.g., Gary Lawson & Patricia B. Granger, *The 'Proper' Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEXAS L. REV. 795 (1996).

### B. *The Dual Federalism Error*

Dual federalism was a melange of intellectual mistakes consolidated in the course of judicial efforts to constrain federal power as Congress grew more active during and after the Progressive era. Rooted in the same Jeffersonian misconceptions that spawned nullification and ultimately secession,<sup>85</sup> dual federalism envisioned the state and the nation as assigned discrete (and essentially exclusive)<sup>86</sup> subject-matter realms of competence. It thus conceived of the states' "reserved powers" as delimiting what Congress could do.

At the time when dual federalism was becoming dominant, no casebook induced prospective lawyers to critically examine its premises, or to compare it to Hamilton's and Marshall's classic analysis of federalism, which it had displaced. Thayer's casebook had been published in 1895, when even the Sherman Act was still very new; *United States v. E.C. Knight Co.*<sup>87</sup> had not even been published in the official reports when Thayer included it in his casebook. Virtually no other laws as to which distinctions between the Commerce and Necessary and Proper Clauses would matter had yet been enacted. Eighteen years later there were some such laws, but Dean Hall, in his 1913 casebook, actually endorsed the dual federalist vision, saying in his preface, "Our dual federal system compels a delimitation of the spheres of state and nation throughout an ever-shifting 'twilight zone.'"<sup>88</sup>

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85. Thomas Jefferson came home from Paris in 1789 to serve under a Constitution which (unlike its "Bill of Rights" Amendments) he had not participated in making and never really quite understood. His misconception of the nation as a confederation or compact of sovereignties, and of its government as an establishment of the several States as such (instead of their several peoples acting in common), died very hard—and, indeed, its ghost occasionally returns to haunt jurisprudence even today. Hamilton's understanding of the Constitution was far more acute. Even Madison, at first, seems to have inclined Hamilton's way—until his bright but impressionable mind reverted to Jefferson's dominium after the older of these close Virginia friends returned from abroad.

86. The presumption of mutual exclusivity underlay, for example, the dual-federalists' objection that to let Congress exclude goods from interstate shipment because of the circumstances of their manufacture would enable Congress to control manufacturing "to the practical exclusion of the authority of the States." *Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918). It also explains the dual federalists' inability to comprehend Hamilton's understanding of the "spending power." See David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1 (1994). The dual federalists mistakenly thought that if the federal will could "reach the subject matter"—by conditioning funds—"its exertion cannot be displaced by state action." *United States v. Butler*, 297 U.S. 1, 74 (1936).

87. 156 U.S. 1 (1895).

88. HALL, *supra* note 30, at xi.

To help mark the boundary between the state and federal domains, dual-federalists employed a verbal distinction—"direct" versus "indirect"—earlier used in reviewing the interstate impacts of state laws when Congress's own power over interstate commerce lay idle. Johns Hopkins Professor W.W. Willoughby, for example, opined that the second federal Employers' Liability Act, enacted in 1908,<sup>89</sup> was unconstitutional because employer liability for employee injuries was not "so directly related to interstate commerce as to bring this liability within the determining power of Congress."<sup>90</sup> In contrast, he said the interstate commerce impact of the 1907 Railroad Hours of Service Act "would, however, seem to be somewhat more direct."<sup>91</sup>

In the Dormant Commerce Clause context, the task of distinguishing "direct" from "indirect" effects was of course a judicial one, for when its own power remained "dormant," Congress ordinarily had made no judgment at all regarding affected state laws. Unfortunately, when this dichotomy was employed when Congress *had* taken action, Justices too easily assumed that in this context, too, the distinction between direct and indirect was for them to judge.<sup>92</sup> Consequently, they invalidated federal laws regulating local activities as means toward interstate commerce ends when *in the Justices' own judgment* the connection to interstate commerce was too indirect.<sup>93</sup> Undue rigor with an adjective thus induced the dual-federalists to overlook the classic Necessary and Proper Clause principle of broad deference to Congress's judgment as to whether and what rules for extraneous matters might help "carry[] into Execution" its will for things acknowledged to lie within the scope of some enumerated power.<sup>94</sup>

This failure to employ classic Necessary and Proper Clause analysis when it truly was called for was only one of dual federalism's mistakes. A second was its misuse of that clause's telic (means-to-end) paradigm to *curtail* the other enumerated powers, most notably the plenary Commerce Clause power. For example, in 1918 the majority in *Hammer v. Dagenhart* wrote, "The grant of power to Congress over

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89. The first Employers' Liability Act, enacted in 1906, had been held unconstitutional in *Howard v. Illinois Central Ry. Co.*, 207 U.S. 463 (1908).

90. WESTEL WOODBURY WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 743 (1910).

91. *Id.* at 745.

92. This was the same era during which the Justices took it upon themselves to displace legislative judgments regarding economic policy under the guise of "substantive due process."

93. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating portions of the Bituminous Coal Conservation Act of 1935). See also *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Adair v. United States*, 208 U.S. 161 (1908).

94. See *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316 (1819).

the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.”<sup>95</sup> *Dagenhart* is the classic example of thus treating the telic (means-to-enumerated-end) requisite of the Necessary and Proper Clause not simply as the essence of one power, but as a restriction of the other enumerated powers—of erroneously taking that clause’s endorsement of extraneous means as a prohibition against extraneous ends<sup>96</sup>—of misapplying the Necessary and Proper Clause to curtail Congress’s choice of how it might use its plenary powers as means.<sup>97</sup>

Even before *Dagenhart*, however, confusion between the plenary Commerce Clause power and the end-dependent Necessary and Proper Clause power prevailed in judicial thinking. This confusion had predominated, for example, in the *Lottery Case*<sup>98</sup> in 1903, where the

95. *Hammer v. Dagenhart*, 247 U.S. 251, 273-74 (1918). The *Dagenhart* majority thus excoriated the act forbidding interstate shipment of child-made goods as “exert[ing] a power as to a purely local matter to which the federal authority does not extend.” *Id.* at 276.

96. Thus, for example, presaging the majority in *Dagenhart*, the dissenters in the *Lottery Case* (*Champion v. Ames*) had denounced the proposition that by means of its enumerated powers Congress “may accomplish objects not entrusted to the General Government,” because they believed that would “defeat the operation of the Tenth Amendment.” 188 U.S. 321, 365 (1908) (dissenting opinion).

97. *Dagenhart* also is notable for the dual federalists’ “all-costs” assertion that [t]his court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority federal and state to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution. 247 U.S. at 276 (And to the end that neither may ever enter the other’s separate, exclusive sphere!).

Dual federalism used state sovereignty even to curtail the Necessary and Proper Clause itself. For example, in one 1926 case during prohibition involving the enforcement clause of the Eighteenth Amendment (analogous to the Necessary and Proper Clause), Justice Sutherland quoted Madison’s espousal of Jefferson’s discredited anti-Hamiltonian view of the latter and denounced the federal law that forbade physicians to prescribe liquor as a regulation of medical practice—a matter which, in dual federalism terms, is reserved exclusively to the States. The law, Sutherland reasoned, even though passed to enforce the amendment’s prohibition, was therefore “in fraud of [the Constitution], and especially of the Tenth Amendment.” *Lambert v. Yellowley*, 272 U.S. 581, 597, 604 (1926) (dissenting opinion). “A grant of power to prohibit for specified purposes,” Sutherland reasoned, “does not include the power to prohibit for other and different purposes.” *Id.* at 603.

98. *Champion v. Ames*, 188 U.S. 321 (1903).

As the dissenters in *Champion* pointed out,

Congress may indeed make all laws necessary and proper for carrying the powers granted to it into execution, and doubtless an act prohibiting the carriage of lottery matter would be necessary and proper to the execution of a power to suppress lotteries; but that power belongs to the States and not to Congress.

188 U.S. at 365 (dissenting opinion).

majority mistakenly thought it necessary to opine that the law against shipping lottery tickets interstate seemed “a fit or appropriate mode for the regulation of that particular kind of commerce,” “appropriate and necessary to protect the country at large against a species of interstate commerce which . . . has grown into disrepute.”<sup>99</sup>

### 1. Harlan Fiske Stone and Dual Federalism’s Demise

Dual federalism’s hold on some of its erstwhile adherents had slipped enough by 1937 that a bare majority of Justices coalesced to validate the National Labor Relations Act (or rather, a narrowed misconstruction of it) in the *Jones & Laughlin* case.<sup>100</sup> Chief Justice Hughes pointed out that Justice Holmes’s misleading “current of commerce” metaphor<sup>101</sup> pertains not to the scope of interstate commerce itself, but to the same “means-to-commerce-clause-end” principle earlier used to justify federal laws on employer liability and the practices of stockyards dealers and commission-men;<sup>102</sup> but Hughes was not exact in tracing that principle to its source. Had all of the *Jones & Laughlin* majority at that time attributed it to the Necessary and Proper Clause, given how *that* clause had already been held to operate in conjunction with *other* enumerated powers,<sup>103</sup> they

Deprecating the majority’s rationale in the *Lottery Case* as “scarcely distinguishable from what has been denominated the Wilson-Roosevelt doctrine of constitutional construction,” Professor Willoughby denounced the child labor bill it inspired as “rather a regulation of the manner in which certain goods are manufactured or produced, than of their transportation across state lines,” and as “an attempt upon the part of the Federal Government to regulate a matter reserved to the control of the States.” WILLOUGHBY, *supra* note 90, at 738, 739, 740 (1910). Willoughby thus presaged the dual-federalism argument that was to prevail against the Child Labor Act in *Hammer v. Dagenhart*.

99. 188 U.S. at 326, 328.

Similarly, in *Hoke v. United States*, 227 U.S. 308 (1913) (sustaining the “White Slave Act” which prohibited transporting women for sex), after characterizing Congress’s power over interstate transportation as “complete in itself,” the Court went stumbling on about “means” that are “incident,” “not only means necessary but convenient to its exercise.” *Id.* at 323.

At the same time, however, the Court did sometimes recognize the Necessary and Proper Clause’s proper role as authority for particular regulations of local matters when the particular regulation was aimed to effectuate Congress’s will for interstate commerce itself. *See, e.g.,* *McDermott v. Wisconsin*, 228 U.S. 115 (1913) (upholding provision against removal of prescribed label even after interstate commerce had ended, to facilitate inspection for the purpose of ensuring that prescribed label had been present during interstate commerce, as required).

100. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

101. *Swift v. United States*, 196 U.S. 375, 399 (1905).

102. *See Mondou v. RR. Co.*, 223 U.S. 1 (1912); *Stafford v. Wallace*, 258 U.S. 495 (1922).

103. *See, e.g.,* *Legal Tender Cases*, 12 Wall. 457 (1871) (wartime legal tender clause in Treasury Notes, to help effectuate power to maintain armies and navy); *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316 (1819) (bank incorporated to facilitate exercise of borrowing and certain other powers); *United States v. Fisher*, 2 Cr. (5 U.S.) 358 (1804) (statutory preferred status of



might not have thought it necessary to disregard the preamble and legislative history<sup>104</sup> of the NLRA and to radically refashion the Act<sup>105</sup> in order to sustain it.

Modern casebooks play *Jones & Laughlin* for dramatic effect rather than pointing out its limited and transitional character. The typical overemphasis on court-packing politics and the dramatic changes in Supreme Court membership between 1937 and 1941, however, obscures the intellectual developments involved. Of the eight Justices who unanimously decided *United States v. Darby* in 1941,<sup>106</sup> Justices Roberts, Hughes and Stone had each been on the Court for a decade or more. By 1941, these three had grown to understand things better than they evidently did even in 1937—and far better than some of the new appointees ever would.

Stone, who wrote the *Darby* opinion, was a former Columbia law professor and dean with a tax and patent lawyer's disposition for detail; and by 1941 he could plainly see the old cases on intrastate rail rates,<sup>107</sup> train safety appliances,<sup>108</sup> hours of service for carriers' noninterstate employees,<sup>109</sup> stockyards practices,<sup>110</sup> and monopolies even of manufacturing where the forbidden impact on interstate commerce was shown,<sup>111</sup> as cases illustrating Congress's power under

United States as creditor of its revenue collectors, to help effectuate collection of taxes).

104. If it were given the scope suggested by its preamble and history and the sweep of its provisions, the Court said,

the Act would necessarily fall by reason of the limitation upon the federal power which inheres in the constitutional grant [i.e., the Commerce Clause], as well as because of the explicit reservation of the Tenth Amendment. *Schechter Corp. v. United States*, 295 U.S. 495, 549, 550, 554. The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.

*Jones & Laughlin Steel Corp.*, 301 U.S. at 30.

105. The Court observed that "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act." It then declared, "We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority." *Id.* Accordingly the Court disregarded Congress's own explicit findings, construed the Act as requiring that the NLRB find the requisite interstate commerce impact case by case, and determined that the NLRB findings were supported by the facts presented. *Id.*

106. Justice McReynolds retired the day before the decision in *Darby* was announced.

107. *E.g.*, *Railroad Comm'n of Wisconsin v. Chicago, Burlington & Quincy RR. Co.*, 257 U.S. 563 (1922); *Houston, East & West Texas Ry. Co. v. United States*, 234 U.S. 342 (1914).

108. *E.g.*, *Southern Railway Co. v. United States*, 222 U.S. 20 (1911).

109. *Wilson v. New*, 243 U.S. 332 (1917).

110. *Stafford v. Wallace*, 258 U.S. 495 (1922); *Swift and Company v. United States*, 196 U.S. 375 (1905).

111. *E.g.*, *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

the Necessary and Proper Clause, not its power under the Commerce Clause itself. Indeed, some of the opinions in those older cases had even used phrases derived from *McCulloch*, or the very words of the Necessary and Proper Clause.<sup>112</sup> It was not quite inaccurate to describe them as “commerce power” cases (or even as “Commerce Clause” cases), because Congress’s power under the Necessary and Proper Clause is always (because inherently) adjunct to some other enumerated power. In like manner, a law giving the United States priority among an insolvent’s creditors might be called an exercise of Congress’s power to tax—even though the displacement of state creditor-rights laws in order to carry into execution Congress’s enumerated power to collect taxes depends technically on the Necessary and Proper Clause. However, while this more casual manner of speaking is not quite inaccurate, it is not precise, and Stone had come to appreciate the importance of greater precision in this regard.

To call such precedents Commerce Clause cases (or to call *United States v. Doremus*, for example, a taxing-power case) is to employ a kind of shorthand.<sup>113</sup> Stone himself continued using this shorthand,<sup>114</sup> but it no longer prevented his seeing—and pointing out—when the Necessary and Proper Clause rather than the Commerce Clause was really at work.

Stone marked the distinction clearly in *Darby*. The shipping prohibition was upheld under the Commerce Clause itself: *Hammer v. Dagenhart*, with its dual-federalist curtailment of Congress’s power over interstate commerce, was overruled and the *plenary* character<sup>115</sup> of that power—recognized early in *Gibbons v. Ogden* and later in Holmes’s *Dagenhart* dissent—was restored. At the same time, Congress’s *telic* power<sup>116</sup> (*not* plenary) over *intrastate* activities for

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112. For example, Congress has power to foster and protect interstate commerce “and to take all measures necessary or appropriate to that end, although intrastate transactions . . . may thereby be controlled.” *Houston, East & West Texas Ry. Co. v. United States*, 234 U.S. 342, 353 (1914).

113. 249 U.S. 86 (1919) (upholding registration and records-keeping requirements of the Harrison Narcotic Drug Act).

114. For example, in *Darby* itself Justice Stone posed the constitutional question as to Sections 15(a)(2) and 6 and 7 as “whether such restriction on the production of goods for commerce is a permissible exercise of the *commerce power*.” 312 U.S. at 118 (emphasis added).

115. Because it is *plenary*, Congress’s power to regulate interstate commerce can be exerted regardless of the end (if any) that is served. Congress can regulate interstate commerce for commercial ends, or for consumer protection ends, or for health or safety ends, or for any other ends whatsoever. It also may impede or destroy interstate commerce should it so choose. Being plenary, the only limits on the commerce power itself (aside from the Bill of Rights) are political.

116. The power granted by the Necessary and Proper Clause depend totally on the constitutional validity of the end being served. It gives no power except to enact laws with the

*interstate commerce ends*—by virtue of which the production wage and hour requirements were sustained—was premised explicitly on *McCulloch v. Maryland*,<sup>117</sup> which is not a Commerce Clause case at all but the quintessential elucidation of the Necessary and Proper Clause.

The next year, a few months after his appointment as Chief Justice, Stone wrote in *United States v. Wrightwood Dairy Co.*<sup>118</sup> that even though the dairy's business "is entirely intrastate," the power of Congress

is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. See *McCulloch v. Maryland*, . . .; *United States v. Darby* . . . .<sup>119</sup>

Stone noted that Congress has plenary power over interstate commerce (a proposition for which he cited *Gibbons v. Ogden*); but when he upheld Congress's regulation of that local dairy's "entirely intrastate" dealings he said, "[i]t is the effect upon interstate commerce or upon the exercise of the power to regulate it, not the source of the injury, which is the criterion of Congressional power."<sup>120</sup> The particular congressional power he was referring to was not any power conferred by the Commerce Clause itself, but rather the power illustrated by *McCulloch v. Maryland*: the power conferred by the Necessary and Proper Clause. He had the same crucial distinction in mind when, a few weeks later, he joined in deciding *Wickard v. Filburn*,<sup>121</sup> where the Government defended the regulation regarding crops for home consumption as "necessary and proper" to effectuate Congress's will for interstate commerce.<sup>122</sup>

Therefore, half a decade after *Jones & Laughlin*, Chief Justice Stone had a firm grasp of the distinction Justice O'Connor would rediscover four decades later. Had there not intervened an hegemony of less patient minds driven by wills even more forceful than Stone's,

requisite telic (means-to-end) relation to matters within the scope of some enumerated power.

117. See *Darby*, 312 U.S. at 118-19.

118. 315 U.S. 110 (1942)

119. *Wrightwood Dairy Co.*, 315 U.S. at 119.

120. *Id.* at 526-27.

121. 317 U.S. 111 (1942).

122. See *Filburn*, 317 U.S. at 119.

we might already have seen in the caselaw the refinements of analysis and expression that attention to this distinction must entail.

The first refinement probably would have been to emphasize the particularistic character of Congress's power over "activities affecting" interstate commerce. The word "activity" is inherently vague, and is commonly used with a wide range of generality. There is a difference, however, between the "activity" of data entry and the "activity" of banking, for example, of which data entry is a small though important part. Raising a family is an "activity" consisting of thousands of "activities," from changing diapers and washing clothes to nurturing adolescents and financing college. Each of these more specific "activities" could be detailed with greater specificity still. Even Justice O'Connor observed (as most constitutional law teachers have) that in today's "integrated national economy," "virtually every state activity, like virtually every activity of a private individual, arguably 'affects' interstate commerce,"<sup>123</sup> but the credibility of that observation depends (at least) on the generality level at which "activity" is conceived. It might seem credible to say that raising a family "affects interstate commerce," but it is more of a stretch to say that changing a diaper does so (although, of course, one determined to mock the Constitution could probably argue that, too).<sup>124</sup>

When Justice Stone in the *Darby* case wrote that Congress's power "extends to . . . activities intrastate which . . . affect interstate commerce," the activity he was considering was not the highly generalized activity of manufacturing, or even of operating the Darby Lumber Company; it was the far more specific activity of "the employment, under other than the prescribed labor standards, of employees engaged in the production of goods for interstate commerce."<sup>125</sup> That more particular "activity" is what the Fair Labor Standards Act reached. In fact, to be even more precise, it was the particular rule prescribed for that more particular activity that the Court found would "affect interstate commerce or the exercise of the power of Congress over it" in such a way as to conduce "to the

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123. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, at 584 (dissenting opinion).

124. See, for example, the extravagant construct of imagination posited by Justice Breyer, dissenting in *United States v. Lopez*, 514 U.S. 549, 618-25 (1995)—which Congress shortly afterwards reiterated, see *Violent Crime Control and Law Enforcement Act of 1994*, P.L. 103-322, § 320904, 108 Stat. 1796 (amending 18 U.S.C. § 922(q) (1994)).

125. *Darby*, 312 U.S. at 117.

attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."<sup>126</sup>

Similarly, the issue in the *Wrightwood Dairy* case did not concern the overall business activity of the dairy company, or others of the thousands of more particular activities it performed. The one specific, particular activity regulated by the law there at issue was setting a price to be paid milk producers; and it was because that particular activity—or rather, performing it as Congress prescribed—was found to affect what Congress desired for interstate commerce, that the regulation was held valid even though neither that activity itself, nor any other activity of the *Wrightwood Dairy Company*, was deemed to be interstate commerce.<sup>127</sup>

This particularity feature is patent on the face of the Necessary and Proper Clause: it confers only power to make “*Laws . . . for carrying into Execution*” any enumerated power (emphasis added). Where this telic requisite is satisfied, it just does not matter to what or to whom a given provision of law might apply. However, no interstate commerce effect of an activity (at whatever level of particularity conceived) can justify *under this clause* the application to that activity (or to any more generalized activity of which it is part) of any *particular provision of law* that fails to pass muster as a means “for carrying into Execution” Congress’s will for interstate commerce (or some other enumerated power).

Nonetheless, this point, which is so obvious on the face of the Necessary and Proper Clause, is easily overlooked when one misattributes the “affecting commerce” doctrine to construction of the Commerce Clause itself. Congress’s power under the Commerce Clause, after all, is plenary. Therefore, if one supposes that *the Commerce Clause itself* embraces “activities affecting” interstate commerce, it seems counterintuitive to doubt that Congress’s power over any such “affecting activity” is plenary, too. Indeed, that plenary character follows *a fortiori*; and a power that is plenary is, by definition, not limited to enacting “*Laws . . . for carrying into Execution*” Congress’s will for interstate commerce (or some other enumerated concern).

The vagueness of the term “activity” itself compounds this potential for totally misconceiving the holdings in *Jones & Laughlin*, *Darby*, *Wrightwood Dairy*, and even *Wickard*. It is easy to misunder-

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126. *Id.* at 118.

127. And, one might add, even if nothing *else* ever done by the dairy company had any impact on interstate commerce at all.

stand so completely as to suppose that Congress may prohibit digging a pit near a church with no more charade of constitutional rationale than that the pit is dug by a strip mining company and strip mining is an "activity" (at a high level of generality) that "affects interstate commerce" in various ways. To one so out of touch with constitutional premises—as most of the Justices apparently were by the time they considered the Surface Mining Act<sup>128</sup>—the question of what effect the particular rule against churchside digging, for example,<sup>129</sup> might have in promoting Congress's will for interstate commerce, would never even occur.<sup>130</sup>

Other refinements would surely have emerged in succeeding cases. There would have been occasion to consider how "substantial" the telic connection must be, and whether any of the other adjectives employed in the course of applying the Necessary and Proper Clause over a century and a half<sup>131</sup> might help illuminate the quality and degree of means-to-end connection that should be required. Differences probably would have been noticed in the latitude allowed for judicial assessment of telic connections when Congress left the issue for case-by-case proof (as under the Sherman Act),<sup>132</sup> when Congress instead delegated the determination to an administrative agency (as in the NLRA as construed in *Jones & Laughlin*),<sup>133</sup> and when Congress itself ascertained the means-to-end connection. In the latter circum-

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128. See *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981).

129. Or even the Act's "prime farmland" provisions, as to which the District Court in Indiana had reasoned more carefully than the Justices themselves deemed appropriate.

130. While the Surface Mining Act was pending in Congress, I suggested to the legal counsel of the Senate Interior Committee the importance of demonstrating, not merely the effects of strip mining upon interstate commerce, but the particularized telic connection between each regulation imposed and some policy of Congress for interstate commerce. His response, however, was both disappointing and instructive: he said, "Huh? Whaddayamean?"

131. For example, "obvious relation to," "natural relation to," and "fairly applicable to," all phrases used by Hamilton in his 1791 Opinion on the United States Bank, 8 THE PAPERS OF ALEXANDER HAMILTON 97, 102 (Syrett ed. 1965); "in fact conducive to," a phrase used by Chief Justice Marshall in *United States v. Fisher*, 2 Cr. (5 U.S.) 358 (1804); "plainly adapted to," "appropriate," "really calculated to," phrases used by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316 (1819); "reasonably adapted to," a phrase used in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

132. The Sherman Act prohibited only such combinations (even among manufacturers) as were "in restraint of trade or commerce among the several states." Consequently, when the requisite proof of such purpose or effect was made, manufacturers could be convicted, as for example in *Addyston Pipe & Steel Co. v. United States*, 75 U.S. 211 (1899). When the requisite proof was *not* made—even if that failure was deliberate because Attorney General Richard Olney wanted to curtail the Sherman Act (after he had failed to secure its repeal)—the manufacturers unsurprisingly went free, as for example in *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

133. See notes 103-04 *supra* and accompanying text.

stance it surely would have been realized that the deference and priority due *congressional* judgments on the issue of “means”—deference accorded and priority recognized since even before *McCulloch v. Maryland*<sup>134</sup>—not only precludes judicial displacement of such telic judgments unless they lack any ground in reason,<sup>135</sup> but also precludes judicial speculation positing conceivable telic judgments that Congress has not manifestly made.<sup>136</sup> There might even have been some early occasion to ponder Hamilton’s suggestion that the

134. See, e.g., *United States v. Fisher*, 2 Cr. (5 U.S.) 358 (1804) (holding bankruptcy priority taken by United States pursuant to Act of March 3rd, 1797 was a proper exercise of Congressional power under necessary and proper clause).

135. This is the familiar “rational basis” rule of such cases as *Katzenbach v. McClung*, 379 U.S. 294 (1964).

What is required under *this* “rational basis” test—in contrast to the *different* “rational basis” test employed, e.g., in the substantive due process and equal protection cases—is *not* merely that the rule imposed by the legislature be a rationally supportable one, but rather that the legislature’s *actual* telic judgment—i.e., its judgment that the particular (extraneous) rule will promote an enumerated power end—be a *rational* telic judgment. The due process and equal protection “rational basis” test indulges sheer speculation because underlying it is the presumption of constitutionality, and the burden is on the challenger to rebut that presumption by showing that no justification is rationally conceivable. In contrast, the Necessary and Proper Clause “rational basis” test does *not* allow speculation because underlying it is the principle of enumerated powers, and the burden is on the supporter of the federal law to establish some constitutional basis for it.

136. This amounts to a “plain statement” rule. As Justice Jackson pointed out in 1953, the rule that the judiciary should defer “to deliberate judgment by constitutional majorities of the two Houses of Congress” is compelling “only when it appears that the precise point in issue here has been considered by Congress and has been explicitly and deliberately resolved.” *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953).

The predominant consideration is that we should be sure Congress has intentionally put its power in issue by the legislation in question before we undertake a pronouncement which may have far-reaching consequences upon the powers of Congress or the powers reserved to the several States.

*Id.* at 447.

Even Justice Black acknowledged this. Explaining his refusal to join the majority’s Necessary and Proper Clause rationale in *Polish National Alliance v. NLRB*, Black declared that the requisite congressional (or NLRB) judgment was not sufficiently apparent to him, and observed,

[I]n certain fact situations the federal government may find that regulation of purely local and intrastate commerce is “necessary and proper” to prevent injury to interstate commerce. . . . In applying this doctrine to particular situations this Court properly has been cautious. . . . It has insisted upon “suitable regard to the principle that, whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear.”

322 U.S. at 652-53 (concurring opinion, citations omitted).

For other applications of a “plain statement” rule, see, e.g., *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984).

intensity of scrutiny under this clause should vary according to what rights are affected by the particular exercise of it.<sup>137</sup>

These and other issues would have been confronted as the classic enumerated powers analysis emerged from dual federalism's shadow into the light of day. However, in 1944 the light was extinguished by a cataclysmic Black-ness.

## 2. Hugo Black and the Reduction of Federalism to Politics

Hugo Black's crusading impatience with technical detail aborted the jurisprudential recovery that Harlan Fiske Stone had led. Contracts of indemnity, and the business of making and performing them, had long been held not to be interstate commerce.<sup>138</sup> Consequently, in upholding the application of the National Labor Relations Act to labor practices at the Chicago headquarters of the Polish National Alliance,<sup>139</sup> the majority (which Justice Black did not join) carefully pointed out that labor unrest attributable to those practices would disrupt not merely the Alliance's insurance business itself, but also its various other business activities—some of which were, and all of which (the NLRB had found) "have a close, intimate, and substantial relation to," interstate commerce.<sup>140</sup> To Black, however, this careful distinction among the business activities of the Polish National Alliance was wholly superfluous. Although he concurred that the NLRA was applicable, he did so on the precedent-breaking premise that the insurance business itself is commerce and is interstate commerce when conducted across state lines.

Black elaborated on his reasoning in another insurance case decided the same day. *United States v. South-Eastern Underwriters Association* involved the Sherman Act, and Justices Rutledge, Douglas, and Murphy joined Black to make his view predominate among the seven Justices participating in that case.<sup>141</sup> Black's reasoning por-

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137. There is also this further criterion, which may materially assist the decision. Does the proposed measure abridge a preexisting right of any State, or of any individual? If it does not, there is a strong presumption in favour of its constitutionality, & slighter relations to any declared object of the Constitution may be permitted to turn the scale.

Alexander Hamilton, Opinion on the United States Bank, in 8 THE PAPERS OF ALEXANDER HAMILTON 97, 107 (Syrett ed. 1965).

138. *Paul v. Virginia*, 8 Wall. (75 U.S.) 168 (1869).

139. *Polish National Alliance v. NLRB*, 322 U.S. 643 (1944).

140. *Polish National Alliance*, 322 U.S. at 645-647.

141. 322 U.S. 533 (1944).



tended far more than the immediate nationwide uproar over insurance regulation that was its immediate effect.<sup>142</sup>

To try distinguishing among the many acts performed in the course of a business, Black said, would be to attempt “a metaphysical separation.”<sup>143</sup> For nearly eight decades the Supreme Court had held “that insurance policies are mere personal contracts subject to the laws of the state where executed. But this . . . rests upon a distinction between what has been called ‘local’ and what ‘interstate,’” and Black deprecated that distinction as “a type of mechanical criterion.”<sup>144</sup> Certainly by the 1940s, no Justice—and no one else who understood the Necessary and Proper Clause—conceived that characterizing something as “local” instead of “interstate” could prevent Congress from reaching it insofar as it might be regulated “for carrying into execution” an enumerated power, but that was not enough for Justice Black. He insisted that “the entire transaction, of which that contract is but a part, . . . may be a chain of events which becomes interstate commerce.”<sup>145</sup>

Thus, instead of the Necessary and Proper Clause, Black invoked the Commerce Clause itself.<sup>146</sup> To reason otherwise, he maintained, would be to treat “the Congressional power over commerce among the states as a ‘technical legal conception.’”<sup>147</sup> He said the criterion must not be the “mechanical” distinction between intrastate activities and interstate commerce, “but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated”;<sup>148</sup> and on this question there should be “differences in judgment” from “different members of the Court,” because the question “must depend upon considered evaluation of competing Constitutional objectives.”<sup>149</sup>

Chief Justice Stone in dissent, joined by Justice Frankfurter (who had written for the majority in *Polish National Alliance*), answered with

142. The holding in *South-Eastern Underwriters Association* imperiled the insurance regulatory system of every state. Congress responded with the McCarran Act, upheld in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 406 (1946), consenting to state regulation and taxation of the insurance industry notwithstanding it might be deemed interstate commerce.

143. *South-Eastern Underwriters Ass'n*, 322 U.S. at 537.

144. *Id.* at 546.

145. *Id.* at 547.

146. By thus treating restraint of any part of the insurance business as a restraint of interstate commerce itself, Justice Black made the Sherman Act applicable to the conspiracy to fix premium rates, rig agents' commissions, and monopolize insurance marketing. *Id.* at 549.

147. *Id.* at 547.

148. *Id.* at 548.

149. *Id.* at 549 n.31.

a lucid articulation of the essential constitutional distinction that Black had chosen to ignore.<sup>150</sup> Even more telling, however, was the scathing excoriation published three months later by the most widely respected constitutional law scholar of that day, Harvard's Thomas Reed Powell: "When a judge with the neat intellectual skill of Mr. Justice Black proves lame and peccable in reasoning, it is an argument *pro homine* rather than *ad hominem* to suggest that the trouble lies in the illegitimacy of the design."<sup>151</sup>

Black had said of insurance that "most persons, speaking from common knowledge, would instantly say that of course such a business is engaged in trade and commerce";<sup>152</sup> but Powell replied,

Many if not most persons, speaking from common knowledge, would all too instantly say a lot of things that a trained lawyer would know were based on technical ignorance rather than on technical knowledge. The classic statement on the difference between common and uncommon knowledge is in the answer given to King James by Lord Coke when he said that "causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study

150. "These principles," Stone emphasized, "are not peculiar to insurance contracts. They are equally applicable to other types of contracts" and a multitude of other activities:

The mere formation of a contract to sell and deliver cotton or coal or crude rubber is not in itself an interstate transaction and does not involve any act of interstate commerce because cotton, coal and crude rubber are subjects of interstate or foreign commerce, or because in fact performance of the contract may not be effected without some precedent or subsequent movement interstate of the commodities sold, or because there may be incidental use of the facilities of interstate commerce or transportation in the formation of the contract. . . .

Undoubtedly contracts . . . may become the implements for restraints in marketing, . . . and when so used may for that reason be within the Sherman Act. . . . But it is quite another matter to say that the contracts are themselves interstate commerce or that restraints in competition as to their terms or conditions are within the Sherman Act, in the absence of a showing that the purpose or effect is to restrain competition in the marketing of goods or services to which the contracts relate. . . .

The practice of law [for example] is not commerce, . . . and it does not become so because a law firm attracts clients from without the state or sends its members or juniors to other states to argue cases, or because its clients use the interstate mails to pay their fees.

*South-Eastern Underwriters Ass'n*, at 569-70, 573 (Stone, C.J., dissenting).

151. Thomas Reed Powell, *Insurance as Commerce*, 57 HARV. L. REV. 937, 1008 (1944).

152. *South-Eastern Underwriters Ass'n*, 322 U.S. at 542-43.

and experience, before that a man can attain to the cognizance of it."<sup>153</sup>

. . . The common knowledge of persons untrained in the law is a precarious mentor of legal postulates and differentiations. . . . Granted that in dealing with novel issues there are more open spaces in constitutional law than in the more tightly articulated private law, there is still appropriate in public law an instinct of lawyership which the experts of a high profession should strive to respect and to possess.<sup>154</sup>

What Justice Black "really seems to be doing," Powell fumed, is beclouding all long recognized distinctions, condemning them by calling them "mechanical," and rejecting them for a sort of free-for-all test or lack of test of "whether, in each case, the competing demands of the state and national interests involved can be accommodated." . . .

. . .  
It may be seriously questioned whether there is wisdom in applying the word "test" to such a vague conception as the accommodation of the competing demands of state and national interests. The phrase does well enough to summarize the varied particularities incident to the judicial umpiring of the federal system; but a blanket summary is not a test. Among the applications embraced by the summary there are subordinate analyses and judgments and lines of demarcation that afford a frame of reference amounting to a recognizable structural system and confining judicial judgment and discretion within measurable bounds . . .<sup>155</sup>

In the constitutional law casebooks, however, this passionate controversy has been utterly ignored. Dowling's third edition, published two years after the *Polish National Alliance* decision, mentioned *South-Eastern Underwriters Association* only in passing, and deprecated the Justices' disagreement as based "primarily on grounds of statutory interpretation"<sup>156</sup>—although Dowling did note (without elaboration) that it "stirred up a new set of problems centering on the commerce clause."<sup>157</sup> Rottschaefers' 1948 casebook mentioned it not at all, except as one in a long string of citations in a note after *Gibbons*

153. Powell's quotation was from *Prohibitions del Roy*, 12 Co. 63, 65, 77 Eng. Rep. 1342, 1343 (1607).

154. Powell, *supra* note 151, at 987-88.

155. *Id.* at 994-95.

156. NOEL T. DOWLING, *CASES ON CONSTITUTIONAL LAW* 292 (3d ed. 1946).

157. *Id.* at 618. Dowling used *South-Eastern Underwriters Association* merely as the occasion for noting Congress's consent to continued state regulation of insurance by the McCarran Act, later upheld in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946).

*v. Ogden*.<sup>158</sup> Dodd's fourth edition in 1949 printed portions of Black's opinion, but none of Stone's dissent or Powell's scathing critique. Moreover, Dodd's placement of the case relative to others included in his subchapter on the scope of national power over interstate commerce suggests that already, just three years after Chief Justice Stone's sudden death,<sup>159</sup> the academics were once again hopelessly conflating the issues under the Commerce and Necessary and Proper Clauses.

By the 1960s, what Professor Powell decried as Black's "free-for-all . . . accommodation of the competing demands of state and national interests" had become the orthodox approach to federalism issues. The casebooks not only acquiesced, but actually led, in what Noel Dowling in 1959 described, in his sixth edition preface, as the "trend towards treating the distribution of powers between the Nation and the States as essentially a political question."<sup>160</sup> Nobody mentioned, and it was soon forgotten, that the crucial event in this revolution was not the fancied 1937 "switch in time that saved nine," but rather Justice Black's 1944 abrogation of the newly recovered classic distinction between the Commerce Clause and the Necessary and Proper Clause.

It soon became fashionable to maintain that the time for federalism in the United States had passed.<sup>161</sup> However, many still value the freedom, and the opportunity for initiative, facilitated by federalism's decentralization of political discretion. The benefits of federalism cannot be effectively preserved by ad hoc accommodation of "the

158. HENRY ROTTSCHAEFER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 272 (1948).

159. On April 22, 1946, while announcing his dissent in *Girouard v. United States*, 318 U.S. 61 (1946), Stone suffered a cerebral hemorrhage. Justice Black, as senior Associate Justice, (ironically) recessed the last session of Stone's tenure, and the Chief was taken home, where that evening he died. Stone was past seventy-three, and nine years of contending with Black and the other "wild horses" appointed by FDR had taken a toll. *Prudential Insurance Co. v. Benjamin*, the case that would ratify Congress's undoing of the most immediate consequence of Black's 4-3 revolution in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), had been argued March 8 and 11 and was still under advisement when Stone died. 328 U.S. 408 (1946).

160. NOEL T. DOWLING, *CASES ON CONSTITUTIONAL LAW* xiv (6th ed. 1959).

161. For example, one ex-New Deal "brain truster" wrote in 1974 that "Federalism, as such, belongs to a temporary historical era. . . . In the end it must find its resolution in union." REXFORD G. TUGWELL, *THE EMERGING CONSTITUTION* 125 (1974).

The Union no longer possesses only enumerated powers; it possesses all powers—de facto if not de jure—if they are necessary. They will be acquired by administration, or, if it is more convenient, by judicial invention. . . .

. . . This situation may go on being called federalism, partly from habit, but largely to mist over the extension of central power.

*Id.* at 122.

competing demands of the state and national interests.”<sup>162</sup> It requires (to use the words of Thomas Reed Powell), “subordinate analyses and judgments and lines of demarcation that afford a frame of reference amounting to a recognizable structural system and confining judicial judgment and discretion within measurable bounds.”<sup>163</sup> It requires, in other words, some discernible, cogent, and functional federalism “law.”

#### IV. THE FEDERALISM REVIVAL CHALLENGING CASEBOOKS TODAY

The Supreme Court has begun trying to reinvigorate the constitutional law of federalism. However, it has had to do so with little sophisticated help from the bar and almost none from the law professoriat; the casebooks have done little to help prepare students to participate in the years of development and refinement ahead in the law of federalism. Unsurprisingly, therefore, the results of the Justices’ labors in federalism law so far are not very clear or cogent.

*United States v. Lopez* provides several examples in the compass of a single case.<sup>164</sup> For one, Chief Justice Rehnquist’s taxonomy of the “commerce power”—recited now as an incantation in virtually every lower discussion of “commerce power” issues<sup>165</sup>—is positively dysfunctional. The precedents involving “persons or things in interstate commerce” are certainly Commerce Clause cases; but the “instrumentalities” cases (which Rehnquist placed with them in his second *Lopez* category) are Necessary and Proper Clause cases. So also are the “affecting” cases which Rehnquist set apart in category three—as well as some of the “channel” cases, which constitute his category one. It is as if a zoologist were to describe vertebrates as comprising three groups: herbivores, mammals and primates. Classification like this does not illuminate; it obfuscates. It reflects and perpetuates deficient analysis. It obscures the very similarities and differences that are crucial not only to understanding but also to the utility of classification itself.

The *Lopez* majority’s emphasis on “substantiality” is important and well-founded,<sup>166</sup> but the Justices have not yet focused the issue

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162. This is the phrase Justice Black used in *South-Eastern Underwriters Association*, 322 U.S. at 548.

163. Powell, *supra* note 151, at 988.

164. 514 U.S. 549 (1995).

165. *Id.* at 552-59.

166. See, e.g., *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (cited in *Lopez*); *Wickard v. Filburn*, 317 U.S. 111 (1942) (cited in *Lopez*). See also

well. There is a crucial difference between a *particular provision of law* that substantially affects interstate commerce (even though it applies to a local activity), and a local *activity* that substantially affects interstate commerce (even though the particular provision of law applied to it does nothing for interstate commerce at all). The latter gives no basis for a credible constitutional rationale;<sup>167</sup> the former certainly does—but not by virtue of the Commerce Clause.

Recognizing “substantiality” as a Necessary and Proper Clause issue—one that bears on the suitability of means to an end—should suggest that the “substantiality” of a particular regulation’s impact on interstate commerce is just as crucial in the “instrumentality” cases (included within Rehnquist’s second *Lopez* category) as it is for laws regulating manufactures, for example (included within the third category): the mere fact that, for example, automobiles commonly serve as “instrumentalities” of interstate commerce cannot give Congress plenary power over cars<sup>168</sup>—or power even to make armed carjacking a federal crime.<sup>169</sup>

On the other hand, once “substantiality” is recognized as a Necessary and Proper Clause issue and not a Commerce Clause issue, it should be apparent that Rehnquist spoke too restrictively when he said in *Lopez* that “[w]here *economic activity* substantially affects

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Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968). The word “substantial” is not necessarily definitive of the concept; see *Hodel v. Virginia*, 452 U.S. 264 (1981). However, the word “significant” Justice Breyer substituted in his *Lopez* dissent seems (at least in connotation) too disparaging of the requirement. 514 U.S. at 615-16 (Breyer, J., dissenting).

167. Nonetheless, only *five days* after the *Lopez* decision, the Justices *per curiam* and without dissent, upheld a RICO conviction for investing the proceeds of certain crimes in the operations of a mine. *United States v. Robertson*, 514 U.S. 669 (1995). In several respects the mine operations either were in, or affected, interstate commerce. However, apparently no one thought to ask what interstate commerce policy was served by the particular law being applied, which prohibited investment in those operations only if the invested funds derived from certain crimes.

Prohibiting the investment of proceeds from certain activities might help to deter those activities; and if Congress had power to *criminalize those activities* (and did so), the investment prohibition could be justified as helping to effectuate *that* power. On that rationale, however, it would be silly (even though not unconstitutional) to limit the investment prohibition to investments in activities that are “in or affecting interstate commerce,” because prohibiting *any* investment of such proceeds would be an even better means of deterring the crimes. On the other hand, no end for *interstate commerce itself* is served by the investment prohibition RICO actually imposes.

168. Of course Congress can, for example, prohibit interstate shipment of cars that are not designed or equipped as it desires, regardless of why it desires them to be so designed and equipped. That is a function of its plenary power over interstate shipping (commerce)—which in no way depends on whether cars are “instrumentalities” of interstate commerce.

169. Contrast the Court of Appeals cases upholding the federal carjacking statute (the Anti Car Theft Act of 1992, 18 U.S.C. § 2119 (1994)) in, for example, *United States v. Bishop*, 66 F.3d 569 (3d Cir. 1995) and *United States v. Oliver*, 60 F.3d 547 (9th Cir. 1995).

interstate commerce, legislation regulating that activity will be sustained."<sup>170</sup> The arguable limitation to matters "economic" in character inheres only in the Commerce Clause end, not in the means: certainly Congress can regulate even *non-economic* acts if doing so substantially serves its interstate commerce policy ends.<sup>171</sup>

At the end of the last term, two years after *Lopez*, seven Justices agreed in imposing a "congruence and proportionality" restriction upon Congress's power under the Fourteenth Amendment's Enforcement Clause.<sup>172</sup> Of course, that Enforcement Clause (and those in other amendments) was expressly conceived, and has always been construed, in strict analogy to the Necessary and Proper Clause.<sup>173</sup> It therefore

170. 514 U.S. at 560 (emphasis added).

171. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (discrimination under Title II of the Civil Rights Act of 1964); *Katzenbach v. McClung*, 379 U.S. 294 (same) (1964).

172. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). Justice Kennedy wrote the majority opinion; Chief Justice Rehnquist and Justices Stevens, Thomas, and Ginsburg joined in all of that opinion; and Justice Scalia joined in most of it, including the part referred to here. Although Justice O'Connor dissented on other points, she expressly affirmed the majority's "congruence and proportionality" rule, which she quoted. The dissenting opinions of Justices Souter and Breyer did not address this point.

173. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438-444 (1968); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) ("[T]he *McCulloch v. Maryland* standard is the measure of what constitutes 'appropriate legislation' under sec. 5 of the Fourteenth Amendment"); see also, e.g., *Lambert v. Yellowley*, 272 U.S. 581 (1926).

In 1966, Archibald Cox claimed the cases since 1937 "dealing with congressional power to regulate interstate commerce" as the "chief legal antecedents" of the majority's *second* rationale in *Katzenbach v. Morgan*, 384 U.S. 641 (1966). See Archibald Cox, *The Supreme Court, 1965 Term—Foreward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 107 (1966). By that rationale, a rationally based congressional conclusion that conditioning voting on English literacy violates "equal protection" concludes the constitutional issue despite judicial precedent to the contrary. But when that so-called "*Morgan* power" was put forward to support lowering the voting age by statute, I pointed out Cox's error: those cases did not represent deference to Congress' estimate of its power under the Commerce Clause (which would be like deference to its view of the Equal Protection Clause), but rather illustrated the deference always accorded Congress' selection of *means* (even if extraneous) toward ends the judiciary deems within some enumerated power. They were therefore the "chief legal antecedents" not of its second, but only of *Morgan's first* rationale. See David E. Engdahl, *Constitutionality of the Voting Age Statute*, 39 GEO. WASH. L. REV. 1, 15-21 (1970).

The voting-age statute passed Congress on the presumed strength of the "*Morgan* power" thesis; but when it was tested, apparently Justice Harlan's *Morgan* critique and my own, *supra*, prevailed, and *none* of the Justices in *Oregon v. Mitchell*, 400 U.S. 112 (1970), employed *Morgan's* second rationale. (Not even its author, Justice Brennan, did so; instead, he tendered a very different notion in its name.)

Nonetheless, Constitutional Law casebooks for over two decades struggled to make some variation of *Morgan's* second rationale seem credible. Thus, when the Supreme Court in 1990 took a disputed view of the Free Exercise Clause, there was immediate and widespread support for Congress's invocation of the so-called "*Morgan* power" by the so-called Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(a) (1994). The Court's forceful repudiation of the "*Morgan*

would seem that a major step has already been taken—by a vote of seven Justices—toward further curtailing runaway “affecting commerce” jurisprudence. Unless for the first time in history someone should contrive a material distinction between the Enforcement and Necessary and Proper Clauses, it would seem that Congress’s power under the latter (e.g., to make laws regulating local activities) should be held limited to laws that are congruent and proportional to the enumerated power objective (e.g., congruent and proportional to the goal for interstate commerce at which they are aimed). It will be interesting to see how many constitutional law casebooks apprise students of this possibility.

The *Lopez* majority’s emphasis on the “commercial” focus of the Commerce Clause was appropriate. However, the Justices do not yet seem ready to reconsider the deviant line of cases begun a century ago that treated plainly *noncommercial* acts as if they were “commerce” merely because state lines were crossed.<sup>174</sup> Indeed, two of the five Justices in the majority intimated the contrary by asserting an “immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point.”<sup>175</sup>

Some casebooks prompt students to consider whether congressional “purpose” should matter in exercising the “commerce power.” No casebook even intimates, however, that the answer might depend on the distinction emphasized here. Congress’s power under the Commerce Clause itself is plenary, so that “purpose” cannot matter; that is why the Lottery Act,<sup>176</sup> the Child Labor Act,<sup>177</sup> and the interstate shipping prohibition of the Fair Labor Standards Act<sup>178</sup> were valid. However, when the law applies to something that is *not itself* interstate commerce, it is Congress’s power under the Necessary and Proper Clause that is being used instead, and *that* clause has a

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power” in *City of Boerne v. Flores* 117 S. Ct. 2157 (1997), seems to me to demonstrate the Justices’ sharpened awareness of the distinction between construing the terms of the Constitution and deferring to congressional judgment as to means—whether under an Enforcement Clause, or under the Necessary and Proper Clause which is their analog.

174. See, e.g., *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U.S. 204 (1894); see also *Caminetti v. United States*, 242 U.S. 470 (1917); *Thornton v. United States*, 271 U.S. 414 (1926); *United States v. Simpson*, 252 U.S. 465 (1920).

175. *Lopez*, 514 U.S. at 574 (Kennedy, J., joined by O’Connor, J., concurring).

176. The Court’s holding in *Champion v. Ames*, 188 U.S. 321 (1903), was sound despite the majority opinion’s confused rationale.

177. A majority held this Act invalid in *Hammer v. Dagenhart*, 247 U.S. 251 (1918); but that holding, of course, was wrong, and the dissent was correct. See *United States v. Darby*, 312 U.S. 100 (1941).

178. See *Darby*, 312 U.S. at 112-17.



“purpose” requirement—“for carrying into Execution”<sup>179</sup>—built in. That is why the Sherman Act,<sup>180</sup> the production controls of the 1938 Agricultural Adjustment Act,<sup>181</sup> the factory wage and hour provisions of the Fair Labor Standards Act,<sup>182</sup> and the race discrimination prohibition in the 1964 Civil Rights Act,<sup>183</sup> for example, all depended entirely on the purpose of advancing Congress’s will for interstate commerce (regardless whether other purposes simultaneously were served).

The dissenters in *Lopez* posited “a merely implicit congressional judgment”<sup>184</sup> about affecting interstate commerce. They loosed their imaginations to speculate about what Congress “could have thought,”<sup>185</sup> asserting that “rational possibility is the touchstone”<sup>186</sup> of “the scope of the commerce power as this Court has understood that power over the last half-century.”<sup>187</sup> They were wrong however in calling this “a paradigm of judicial restraint.”<sup>188</sup> The rational-basis review employed in other contexts is different, and one must resist the subversion of legal analysis that easily results from using the same words.

When, for example, a classification is made by a law that the government otherwise has power to make, unless the distinction is invidious or affects some constitutionally favored interest the law will be upheld “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. . . . Where there are ‘plausible reasons’ . . . ‘our inquiry is at an end.’ . . . This standard of review is a paradigm of judicial restraint.”<sup>189</sup> But where *the very existence of the power* is at issue, such a rule is a paradigm not of restraint but of judicial arrogation. The principle of enumerated powers precludes any presumption of validity for a federal measure not unmistakably premised on some enumerated power, and to premise anything on the Necessary and Proper Clause requires a sufficient telic

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179. U.S. CONST., art. I, § 8, cl. 18.

180. See, e.g., *Addyston Pipe & Steel Co. v. United States*, 75 U.S. 211 (1899).

181. See *Wickard v. Filburn*, 317 U.S. 111 (1942).

182. See *Darby*, 312 U.S. at 117-23.

183. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

184. 514 U.S. at 603 (Souter, J., dissenting).

185. *Id.* at 619 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ.).

186. *Id.* at 614 (Souter, J., dissenting).

187. *Id.* at 615 (Breyer, J. joined by Stevens, Souter, and Ginsburg, JJ.).

188. *Id.* at 604 (Souter, J., dissenting).

189. *Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307 (1993).

link. From the beginning it has been deemed "*the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government,*"<sup>190</sup> and therefore that *judgment by Congress* is the indispensable requisite of this power. It is that actual judgment by Congress, not some judicial conjecture, that must be found rationally based. The presence or absence of formal findings is an unreliable indication of whether the requisite congressional judgment actually has been made;<sup>191</sup> however, even in the 1940s and 1950s a "plain statement" rule regarding the Necessary and Proper Clause was employed.<sup>192</sup>

The judiciary must inquire whether the particular provision of law (incorporating a national bank, for example, or regulating local activities in some way) "*is really calculated to effect any of the objects entrusted to the [federal] government.*"<sup>193</sup> For the court to require that Congress have calculated aright—that Congress's judgment be not only rational, but correct—would be "to tread on legislative ground."<sup>194</sup> By the same token, however, for the judiciary to postulate telic connections where Congress has not manifested its own calculus of means to end, would no less certainly be to tread on legislative ground. It is *Congress's* prerogative—or rather, it is *Congress's* duty—to exercise that judgment.

Getting to the nub of it, the Constitution entitles the people to have their electorally answerable *political* organs *actually and openly* inquire, debate, compromise, and resolve whether and how far it is necessary to reach matters otherwise beyond the national government's scope, *in order to* effectuate enumerated federal powers. Requiring

190. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819) (emphasis added).

191. Express findings themselves, of course, can be a sham. For example, the gun control provisions enacted as Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1202(a), 82 Stat. 236 (codified at 18 U.S.C. §§ 1201-1203, repealed by Pub. L. No. 99-308, § 104(b), 100 Stat. 459 (1986)), recite a conclusional finding that firearms possession by dishonorably discharged veterans (as well as felons, mental incompetents, and illegal aliens) "constitutes . . . a burden on commerce or threat affecting the free flow of commerce." However, these provisions were introduced as a floor amendment in the Senate and received very little floor discussion, no attention at any hearings, and no committee attention. The amendment passed the Senate when a vote was abruptly called only a week after its introduction. See 114 CONG. REC. 14772-14775 (1968). In the House, Title VII was barely mentioned when the Omnibus bill was discussed, see 114 CONG. REC. 16286, 16298 (1968). Its enactment almost surely was attributable more to outrage over the shootings of Martin Luther King and Robert Kennedy in the preceding days, than to any rational inquiry or judgment about guns, veterans, aliens, felons, and interstate commerce.

192. See note 136 *supra*.

193. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (emphasis added).

194. *Id.* at 423. This was the mistake made by the majority in *Hepburn v. Griswold*, 8 Wall. (75 U.S.) 603 (1870), overruled in *Legal Tender Cases*, 12 Wall. (79 U.S.) 457 (1871).

Congress actually to make a rationally based telic judgment when it regulates things otherwise beyond its reach, provides some modest assurance that the political branches will perform with fair diligence the work they are constituted to do. When judges indulgently speculate about telic links that Congress might or might not have perceived and acted upon, they subvert the Constitution by discharging Congress from its responsibility to deliberate seriously about the restraint in national lawmaking on which a viable federalism depends. The considerations underlying the “rational basis test” employed in “due process” and “equal protection” contexts are just not analogous at all.

The preceding paragraphs have centered on the *Lopez* case because of the prominence that case enjoys—and because it involves the particular federalism issues limned here from the Blackness of 1944. There are other illustrations, however, of how deficient and tentative the seeming resurgence of federalism law still is. For example, only three months before *Lopez*, a majority held the Federal Arbitration Act applicable to an Alabama homeowner’s contract with a termite exterminator, deeming it sufficient to obviate the constitutional issue that the exterminator did business in other states, too, and “the termite-treating and house-repairing material used . . . came from outside Alabama”!<sup>195</sup> There were concurring and dissenting opinions, but none addressed this point; yet the herpes theory that federal power forever infects anything that contacts interstate commerce is surely too absurd to survive exposure!<sup>196</sup>

There is a nonsense opinion from 1948<sup>197</sup> (unsurprisingly by Justice Black) which, by its total lack of rationale in a case on comparable facts, gives colorable credence to this herpes theory when

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195. *Allied Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995).

196. An equivalent “virus” theory persists—for lack of critical reflection by lawyers, professors, and judges—with regard to federal grant funds. See, e.g., the cases discussed in David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 72-75 (1994). One particularly significant and constantly utilized statute that appears to rest upon this stupid notion is the “federal program bribery provision,” 18 U.S.C. § 666 (1994), critiqued in George D. Brown, *Stealth Statute—Corruption, The Spending Power, and the Rise of 18 U.S.C. § 666*, 73 NOTRE DAME L. REV. 247 (1998).

197. *United States v. Sullivan*, 332 U.S. 689 (1948). In *Sullivan* the Court held that the Federal Food, Drug, and Cosmetic Act could constitutionally be applied to an act of misbranding drugs which had previously crossed state lines, even though a subsequent intrastate transaction had intervened and even though there was absolutely no suggestion that the local misconduct had (or could possibly have had) any effect upon interstate commerce at all. *Id.* at 695-96.

Congress subsequently amended the Act to make unambiguous its application in comparable circumstances; and when it did so it provided in the legislative history of the amendment some credible Necessary and Proper Clause rationales. There was none of that, however, in the law or its history as they stood at the time of the *Sullivan* decision; and there was no hint of any such rationale in the Court’s opinion in *Sullivan*.

subjected to no intelligent reflection at all. Almost every one of us, and almost everything in the modern marketplace, has crossed a state line sometime. Can that entail federal omnicompetence? Balderdash. Certainly *some particular* regulations applying to goods after they cease being in interstate commerce can be justified under the Necessary and Proper Clause by sufficient telic links to some policy of Congress for interstate commerce; the case Justice Black mistakenly claimed as support for his 1948 opinion<sup>198</sup> is just one of many easy illustrations. But to think the mere fact of prior interstate transit, per se, entails present federal power, is a ridiculous failure of understanding that merits only guffaws.

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198. *McDermott v. Wisconsin*, 228 U.S. 115 (1913). In *McDermott*, the federal law prohibited the interstate shipment of syrup not bearing certain labeling on each can inside the crate, and also contained a provision permitting the Government to enforce that regulation by inspection of the cans after unpacking, even long after the interstate commerce was completed. The Court held that this enforcement provision was constitutional under the Necessary and Proper Clause, and that a state law interfering with that chosen means of enforcement was preempted. *Id.* at 131. The inspection provision was a means of enforcing the rule regarding the labeling required during interstate commerce, and the fact that the rule regarding the labels on the individual cans inside the shipping crates during interstate shipment was itself calculated to protect consumers (on the assumption that changing those labels would probably remain after shipment), was irrelevant: since Congress's power over interstate commerce itself is plenary, it can control the labeling during shipment for whatever reasons it might choose (or for no discernible reason at all). *Id.*

The situation in the *Sullivan* case was entirely different. There, an act of misbranding occurring after shipment was held reachable, not because it was thought to be a means of preventing misbranding in (or the shipment of misbranded goods in) interstate commerce, but simply because it was deemed helpful toward the nice but extraneous (i.e., nonenumerated power) end at which the Act's regulation of interstate commerce itself was aimed: consumer protection. Cf. *United States v. Urbuteit*, 335 U.S. 355, 358 (1948) ("The problem is a practical one of consumer protection, not dialectics.") The Necessary and Proper Clause, however, simply does not work as constitutional justification for means to such *extraneous* ends.

Some recent statutes<sup>199</sup> and several lower court opinions<sup>200</sup> uncritically assume this herpes theory. Other recent statutes evidence an equally preposterous, hocus pocus notion of Congress's "commerce power," as if murmuring mystic incantations about "total incidence"<sup>201</sup> or "nexus"<sup>202</sup> or "jurisdictional element"<sup>203</sup> or "affecting commerce" should serve in lieu of identifying enumerated-power ends and seriously assessing particular regulations as means.<sup>204</sup>

The Chief Justice emphasized once again in his 1997 *Year-End Report of the Federal Judiciary* the very serious practical damage done by the increasing "federalization" of crime, in terms of case backlogs, oppressive judicial workloads, and the distraction of energy and attention from "the traditional role of the federal judiciary."<sup>205</sup> A significant part of the remedy, however, is in the judiciary's own hand: many of the objectionable statutes have been enacted within the past ten years (and most within the past twenty), and many could not survive if subjected to the kind of federalism law scrutiny suggested here. As another federal judge wrote a short time ago,

199. *E.g.*, the Anti Car Theft Act of 1992, 18 U.S.C. § 2119 (1994).

Sometimes the influence of this ridiculous herpes theory induces Congress pointlessly to restrict an important statute's reach. For example, Congress need not have restricted the 1964 Civil Rights Act to restaurants that serve food products from out of state, because race discrimination by restaurants surely has the same impact on interstate business travel, for example, regardless of where the food served might come from. *See Katzenbach v. McClung*, 379 U.S. 294 (1964).

200. *See, e.g.*, *United States v. Lewis*, 100 F.3d 49 (7th Cir. 1996) ("A single journey across state lines, however remote from the defendant's possession, is enough to establish the constitutionally minimal tie of a given weapon to interstate commerce."). Other cases under the felon firearm possession statute—*e.g.*, *United States v. Hanna*, 55 F.3d 1456 (9th Cir. 1995); *United States v. Sorentino*, 72 F.3d 294 (2d Cir. 1995)—attribute this herpes rationale to *Scarborough v. United States*, 431 U.S. 563 (1977). However, the Court in *Scarborough* addressed only a statutory construction issue, and did not address at all the constitutional question—which had seemed so troubling in *United States v. Bass*, 404 U.S. 336 (1971)—that the Justices had strained the statute in order to avoid it.

201. *See Perez v. United States*, 402 U.S. 146, 154 (1971).

202. *See Scarborough v. United States*, 431 U.S. 563, 564 (1977).

203. *See United States v. Lopez*, 514 U.S. 549, 561 (1995).

204. *See* the proceeds investment provision of RICO discussed footnote 166 *supra*, and the statutes involved in, *e.g.*, *United States v. Harris*, 108 F.3d 1107 (9th Cir. 1997); *United States v. Leslie*, 103 F.3d 1093 (1997); *United States v. Clayton*, 108 F.3d 1114 (9th Cir. 1997). *See* also the application of the Hobbs Act, 18 U.S.C. § 1951(a) (1994), to the facts in *United States v. Harrington*, 108 F.3d 1460 (D.C. Cir. 1997), and the application of the arson statute, 18 U.S.C. § 844(j) (1994), to the facts in, *e.g.*, *United States v. Stillwell*, 900 F.2d 1104 (7th Cir. 1990), and *United States v. Sherlin*, 67 F.3d 1208 (6th Cir. 1995).

The rote phrase "in or affecting [interstate] commerce" has been used for years as a jurisdictional conjuration in statutes having various purposes but no genuine commerce objectives.

205. *See* THE THIRD BRANCH, NEWSLETTER OF THE FEDERAL COURTS, (Federal Justice Center, Wash. D.C.), Jan. 1988, at 1.

At every meeting of federal judges that I attend there is the complaint that the Congress is broadening federal jurisdiction to the point that we are unable to do our jobs. The historically unique and discrete jurisdiction of the Federal Courts is being distorted. The constant lament is that the constitutional concept of Federalism is being eviscerated by the Congress. The Congress is able to do this, however, only because we in the judicial branch are willing to interpret the Commerce Clause of the Constitution so broadly.<sup>206</sup>

On the other hand, the frequent talismanic invocation of the Tenth Amendment in discussions of federalism is evidence of the ever-present danger of falling back into the error of dual federalism.<sup>207</sup> Indeed, it sometimes has seemed that Justice O'Connor has already taken the plunge. Although her opinion in *New York v. United States*<sup>208</sup> is cogent in other respects, she invoked the dual-federalism vision by positing domains of state and federal power as "mirror images of each other,"<sup>209</sup> with the competence of each being a limit to the other, so the limits of both could be discerned by examining either, "just as a cup may be half empty or half full."<sup>210</sup> A competent understanding of the Necessary and Proper Clause defies such simplistic imagery. O'Connor also enthusiastically embraced<sup>211</sup> *United States v. Butler*,<sup>212</sup> the 1936 case in which the Court nominally endorsed the classic Hamiltonian view of Congress's power to spend and then, befuddled by the dual-federalism premises articulated by Justice Roberts in his opinion for the Court, decided the case on Madison's anti-Hamiltonian view instead.<sup>213</sup>

206. *United States v. Cortner*, 834 F. Supp. 242, 244 (M.D. Tenn. 1993) (Wiseman, D.J.).

207. The Tenth Amendment is very important. Its importance, however, is the emphasis it places on the principle of enumerated powers. Of course, the power conferred by the Necessary and Proper Clause is one of those powers enumerated as being delegated to Congress, and the Tenth Amendment in *no way restricts* that or any other power delegated to the United States. The *scope and limitations* of the several powers delegated to the United States are questions which the Tenth Amendment simply, and quite plainly, does not address at all.

208. 505 U.S. 144 (1992).

209. *Id.* at 156. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *Id.*

210. *Id.* at 159.

211. *Id.* at 155-59.

212. 297 U.S. 1 (1936).

213. See David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 35-38 (1994).

## IV. CONCLUSION

Dual federalism is a mistaken view of the Constitution that even Justice Roberts outgrew. It already has proved incapable not only of dissuading those who are predisposed toward generalized central authority, but also of sustaining credibility among those who, like Chief Justice Stone, have brains that impel them toward critical analysis. Dual federalism can provide no effective protection should the devil turn.<sup>214</sup> On the other hand, the premise of latter-day orthodoxy that consigns the protection of federalism to politics is also unsustainable. If judges—or students—cut through the forest of appellate opinions and examine the only United States Constitution that anyone is sworn to uphold,<sup>215</sup> neither of these opposite errors can endure. The real virtue of a written constitution, after all, is that once in a while people actually read it with enough acumen to notice the cogent paths it offers out of the dead ends into which the parades of cases sometimes march.

Security for the federal system depends upon broadening the road of competent understanding between the chasm of centralized omnicompetence and dual federalism's abyss. Several Supreme Court Justices have significantly begun undertaking this reconstruction. They have resumed the work led by Chief Justice Stone until the Blackening in 1944. Their commitment should alert the rest of the profession that, where federalism is concerned, it is time to begin thinking like lawyers again.

Federalism is a part of the constitutional skeleton, a framework of structure and resistance upon and against which the muscles of politics flex to do useful work. To abandon the structure itself to mere politics is to alter the organism fundamentally. There are acceptable processes for accomplishing such fundamental change; but neither pragmatic accommodation, nor analytical failing on the part of those who make law their profession; is among them. Not even social progress is well-served when lawyers do their technical work badly.

It is a matter not of politics but of professional competence. Law students need to develop constructive analytical skills here no less than in fields of civil rights, land use, or international business. Unfortunately, what seems almost characteristic of modern practice where

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214. See ROBERT BOLT, *A MAN FOR ALL SEASONS* 37-38 (1962).

215. As to the effrontery of the contrary assertions in *Cooper v. Aaron*, 358 U.S. 1 (1958), see David E. Engdahl, *John Marshall's 'Jeffersonian' Concept of Judicial Review*, 42 DUKE L.J. 279 (1992).

federalism is involved is a failure even to perceive crucial issues. Conditioning students not only to notice issues of federalism law, but also to competently analyze them and contribute constructively to this field's development, is a challenge to which the constitutional law casebooks have not yet sufficiently responded.