THE NECESSARY AND PROPER CLAUSE AS AN INTRINSIC RESTRAINT ON FEDERAL LAWMAKING POWER

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I. INTRODUCTION

I want to emphasize a relatively unnoticed yet crucial change that I think is taking place–the return of the Necessary and Proper Clause[1] as a distinct ground of constitutional analysis and an intrinsic restraint on federal lawmaking power.

The Necessary and Proper Clause gives Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution" Congress's other powers and the powers of the other branches of the federal government.[2] This is an *enumerated* power; the term "implied powers" is a misnomer.

For example, the Necessary and Proper Clause enables Congress to create offices and departments to help the President carry out his Article II powers. Congress cannot encumber or interfere with the President, but it can make laws to help carry into execution the independent "executive Power."[3] It is also the Necessary and Proper Clause–not some exaggerated inference from the Article I Tribunals clause,[4] nor the mere allusion to congressional power made in the Article III Exceptions Clause[5]–that is the principal source of Congress's power to enact laws regarding the federal courts.[6]

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1. U.S. CONST. art. I, § 8, cl. 18.

2. *Id.*

3. U.S. CONST art. II, § 1, cl. 1.

4. U.S. CONST. art. I, § 8, cl. 9 ("To constitute Tribunals inferior to the supreme Court").

5. U.S. CONST. art. III, § 2, cl. 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make.").

6. *See* David E. Engdahl, *Intrinsic Limits of Congress's Power Regarding the Judicial*

As regards the other two branches, the Clause acts as a ratchet to enhance, but not diminish, each branch's discretion. Thus, although Congress cannot impede, divest, or interfere with the other branches, it can make laws to structure the executive and judiciary and to help in other ways to carry into execution the executive and judicial powers.

As applied to Congress's own powers, however, the Clause is not a ratchet; instead, it compounds the discretion given to Congress by the other grants of legislative power. Congress can outlaw mail theft, for example, as a means of promoting the postal system.[7] It also can enact a preference for federal tax debts over claims of other creditors as a means of carrying into execution Congress's power to collect taxes,[8] even though establishing priority among creditors is otherwise beyond Congress's power.

In her dissenting opinion in the 1985 *Garcia* case, Justice O'Connor, joined by Chief Justice Rehnquist and Justice Powell, said the following about the Necessary and Proper Clause: "It is through this reasoning"–that is, through the Clause's "telic," means-to-end paradigm–"that an intrastate activity 'affecting' interstate commerce can be reached through the commerce power."[9] Justice Thomas made a similar observation in 1995.[10] This recognition marks the restoration of a classic and crucial distinction.

Branch, 1999 BYU L. REV. no. 1 (examining the proposition that the Necessary and Proper Clause is both the basis of, and an intrinsic limit on, Congress's power over the judicial branch).

7. *See* U.S. CONST. art. I, § 8. *See also* Tinder v. United States, 345 U.S. 565, 567-68 (1953) (reviewing the history of the federal mail theft statutes).

8. *See* U.S. CONST. art. I, § 8. *See also* United States v. Key, 397 U.S. 322, 324 (1970) (reviewing the history of statutes dealing with the priority of federal tax debts).

9. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 584-85 (1985) (O'Connor, J., dissenting) (quoting United States v. Darby, 312 U.S. 100, 124 (1941)). Justice O'Connor's observation might have been prompted by the manuscript I sent to her (and to Justices Rehnquist, Powell, and Blackmun) some weeks after the March 1984 argument of *Garcia*, and before it was set for re-argument the next term. The manuscript was also sent to all nine Justices as well as to all counsel in the *Garcia* case in August, after the re-argument was ordered. It later was published as *Sense and Nonsense About State Immunity*, 2 CONST. COMMENTARY 93 (1985), and was cited on a different point in the O'Connor dissent. *See Garcia*, 469 U.S. at 587. The correspondence herein referred to is now on file with the *Seattle University Law Review*.

10. *See* United States v. Lopez, 514 U.S. 549, 588 (1995) (Thomas, J., concurring). The Necessary and Proper Clause recently has begun receiving serious attention from some constitutional scholars. *See, e.g.*, Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745 (1997); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996); Gary Lawson & Patricia B. Granger, *The 'Proper' Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

II. JUSTICE STONE RECOVERS THE CLASSIC LEGAL ANALYSIS

The classic cases distinguished the plenary power of Congress over, for example, interstate commerce[11] from its limited power over matters that are not themselves within Article I. As to the latter-that is, as to matters outside of Congress's enumerated powers-Congress has no plenary power, yet it can make laws with regard to such extraneous matters as long as the particular law helps carry into execution Congress's will regarding an enumerated concern.

For decades before the New Deal, however, "dual federalism" confounded these principles. Dual federalism supposed the existence of distinct subject matter realms, and used states' "reserved powers" to delimit what Congress could do.[12] The Court refused to permit Congress to trespass on state turf unless the Court saw a telic relation that it considered to be sufficiently "direct."[13] Thus, the Court curtailed the rule established in *McCulloch v. Maryland*[14] of judicial deference to congressional judgments concerning telic relations.[15] At the same time, dual federalism used the telic paradigm to limit Congress's plenary powers. The Court declared that Congress could not forbid the interstate shipment of child labor products, for example, because the aim was not to facilitate

11. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 196 (1824).

12. The presumption that state and federal powers are mutually exclusive underlay, for example, the dual federalists' objection to letting Congress exclude goods from interstate shipment because of the circumstances of their manufacture. They argued that allowing Congress to do so would enable it to control manufacturing "to the practical exclusion of the authority of the States." Hammer v. Dagenhart, 247 U.S. 251, 272 (1918) (invalidating a federal statute prohibiting the interstate transportation of goods produced with child labor because it exceeded the limits of Congress's power under the Commerce Clause). It also explains the inability of the dual federalists 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 believed that whenever the influence of the federal will can "reach" a particular subject matter, as, for example, by conditioning funds, "its exertion cannot be displaced by state action." United States v. Butler, 297 U.S. 1, 74 (1936). The flaw in this reasoning is that it assumes that the Supremacy Clause, U.S. CONST. art. VI, dictates that the federal will must be vindicated even when it pertains to a matter outside of the enumerated powers.

13. *See* 2 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 743, 745 (1910). This was the same era during which Justices took it upon themselves to displace legislative judgments regarding economic policy under the guise of "substantive due process." *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

14. 17 U.S. (4 Wheat.) 316 (1819).

15. *See id.* at 420-23.

interstate commerce.[16] Thus, the Necessary and Proper Clause, designed to validate the use of unenumerated means, instead was twisted to prohibit the pursuit of unenumerated ends.

A majority began to overcome the mistakes of dual federalism in 1937. At the time of *Jones & Laughlin*[17] the process was still incomplete,[18] but by 1941 the remaining conservatives on the Court—Chief Justice Hughes, Justice Roberts, and most notably then-Justice Harlan Fiske Stone—had achieved a better understanding of federalism than even they had enjoyed before, and far better than most of President Roosevelt's appointees ever would.

In *United States v. Darby*,[19] Justice Stone wrote for a unanimous court[20] in reaffirming the classic rule of plenary federal power over interstate commerce.[21] On that ground, the Court upheld the shipping prohibition terms of the Fair Labor Standards Act, repudiating *Hammer v. Dagenhart*[22] in the process.[23] The Court also upheld, on quite different grounds and in a separate part of the opinion, the wage and hour terms of the Act, relying not on the Commerce Clause itself, but instead citing *McCulloch v. Maryland*[24]—the quintessential

16. *See Hammer*, 247 U.S. at 273-74.

17. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

18. The Court stated that if the National Labor Relations Act were given the scope suggested by its preamble, its history, and the sweep of its provisions,

> [T]he Act would necessarily fall by reason of the limitation upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. 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, 301 U.S. at 29-30 (citation omitted). The Court went on to observe 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." *Id.* It then declared "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 explicit findings and instead construed the Act as requiring the NLRB to find the requisite impact on interstate commerce on a case-by-case basis. *See id.* at 32.

19. 312 U.S. 100, 115-16 (1941).

20. Justice McReynolds—who certainly would not have agreed—retired two days before the decision in *Darby* was announced.

21. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196-97 (1824).

22. 247 U.S. 251 (1918).

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

24. 17 U.S. (4 Wheat.) 316 (1819).

elucidation of the Necessary and Proper Clause.[25]

Contrary to what less careful readers suppose, Justice Stone did not write that the Commerce Clause gives Congress power over "activities affecting" interstate commerce. "Activity" is a vague word used at many levels of generality. Raising a family, for example, is an activity, but it consists of a number of more specific activities like feeding children, counseling adolescents, and financing college. Moreover, each of these slightly less generalized activities can be detailed even more specifically. Although it might be credible to say that the highly generalized activity of raising a family affects interstate commerce, it is a far stretch to say that the more specific activity of changing a diaper does.

Justice Stone did not say in *Darby* that Congress's power embraces the general activity of manufacturing, or even all of the various activities of Darby Lumber Company. Rather, he specified a *particular* activity, which he identified as "the employment, under other than the prescribed labor standards, of employees engaged in the production of goods for interstate commerce."[26] It was only with regard to that particular activity that the wage and hour terms of the Fair Labor Standards Act were held to be within the reach of Congress's power. To be even more precise, the *particular terms* statutorily prescribed to govern that particular activity were found to so affect interstate commerce as to conduce to "a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."[27]

This "particularity" feature is plain on the face of the Necessary and Proper Clause, which only gives Congress the power to make "[l]aws . . . for carrying into Execution" the other enumerated powers.[28] Where a particular statutory provision fulfills this telic requirement, it does not matter how local the activity is to which the provision applies. Conversely, no matter how great an activity's effect on interstate commerce, its effect alone cannot legitimate a particular statutory provision that is not calculated to carry into execution

25. *See Darby*, 312 U.S. at 118-19.
26. *Id.* at 117.
27. *Id.* at 118.
28. U.S. CONST. art. I, § 8, cl. 18.

Congress's will regarding an enumerated end. It is the telic connection of a particular statutory provision that is crucial, not any interstate effect of the activity to which the statute applies. This crucial point is easily overlooked when the effects doctrine[29] is attributed to the Commerce Clause,[30] because the power given by the Commerce Clause itself is plenary and, therefore, not contingent on a telic relation to some enumerated concern.

While Justice Stone was laboring to set this straight, however, the Supreme Court was being loaded with men for whom jurisprudence was an act of political will, and in 1944 Hugo Black accomplished a coup.[31]

III. JUSTICE BLACK DISCARDS THE LEGAL ANALYSIS

The decision in *United States v. South-Eastern Underwriters Association*[32] did much more than turn the world of insurance regulation temporarily upside down.[33] Until then, insurance transactions had been viewed as "local," but Justice Black and his scant majority[34] deprecated the "distinction between what has been called 'local' and what has been called 'interstate'" as "a type of mechanical criterion."[35] Distinguishing among the acts comprising a business, he said, was attempting "a metaphysical separation."[36] Justice Black asserted that "the entire transaction, of which that contract is but a part . . . may be a chain of events which becomes interstate commerce."[37]

Thus, instead of the Necessary and Proper Clause, Justice Black invoked the Commerce Clause, saying that the criterion

29. *See Darby*, 312 U.S. at 117.

30. U.S. Const. art. I, § 8, cl. 3.

31. Justice Black's "putsch," discussed briefly in the next several paragraphs, is treated more fully in the author's recent article, *Casebooks and Constitutional Competency*, 21 SEATTLE U. L. REV. 741 (1998).

32. 322 U.S. 533 (1944) (holding for the first time that the Commerce Clause grants to Congress the power to regulate insurance transactions streching across state lines).

33. The holding in *South-Eastern Underwriters* imperiled the insurance regulatory system of every state. Congress responded to the decision by enacting the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, upheld in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946). The McCarran-Ferguson Act explicitly authorizes state regulation and taxation of the insurance industry, notwithstanding the fact that the Supreme Court had just declared that the business of insurance constitutes interstate commerce.

34. The decision was 4-3. *See South-Eastern Underwriters*, 322 U.S. at 533.

35. *South-Eastern Underwriters*, 322 U.S. at 546.

36. *Id.* at 537.

37. *Id.* at 547.

by which to judge whether Congress can act should not be a "technical legal conception"–the "mechanical" distinction between interstate and intrastate activities–but rather "whether, in each case, the competing demands of the state and national interests involved can be accommodated."[38] Moreover, said Justice Black, judicial minds should differ over the accommodation appropriate, because the question "must depend upon considered evaluation of competing Constitutional [sic] objectives."[39]

Chief Justice Stone replied in dissent with a lucid exposition of the constitutional distinction that Justice Black, joined only by Justices Murphy, Rutledge, and Douglas, chose to ignore.[40] The aging Chief Justice fought on for two more years until he suffered a stroke on the bench, and Justice Black, by then the senior Associate Justice, gaveled Stone's tenure to a close. That night, when Chief Justice Stone died, the hope for an early revival of the classic analysis of American federalism law died with him.

Shortly after *South-Eastern Underwriters* was decided, the *Harvard Law Review* published a blistering critique–a scathing excoriation of Justice Black's opinion–written by Thomas Reed Powell, one of the most prominent constitutional scholars of

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38. *Id.* at 548.

39. *Id.* at 549 n.31.

40. *See Id.* at 568-69 (Stone, C.J., dissenting). "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....
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> 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.

Id. at 569-73.

that time.[41] To Justice Black's assertion that "most persons, speaking from common knowledge, would instantly say that of course such a business is engaged in trade and commerce,"[42] Powell replied that "[m]any 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.[43]

What Justice Black "really seems to be doing," Powell wrote, 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." . . . [That phrase might] summarize the varied particularities incident to . . . umpiring . . . the federal system; but a blanket summary is not a test . . . . [T]here 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.[44]

IV. THE CURRENT STRUGGLE TO RECOVER THE CLASSIC ANALYSIS

Chief Justice Stone uncovered and began to explore the classic distinction between the Commerce and Necessary and Proper Clauses, a distinction that is fundamental to the law of federalism. The constitutional law casebooks, however, have utterly ignored it. Not a single casebook has ever followed up on the passionate controversy of 1944.[45] By the 1950s, Justice Black's free-for-all manner of accommodating competing state and national interests had become the standard approach to federalism issues. Indeed, the casebooks actually led what Columbia's Noel Dowling described in 1959 as the "trend towards treating the distribution of powers between the Nation and the States as essentially a political question."[46] Today, at

41. *See* Thomas Reed Powell, *Insurance as Commerce*, 57 HARV. L. REV. 937 (1944).
42. *South-Eastern Underwriters*, 322 U.S. at 542-43.
43. Powell, *supra* note 41, at 987.
44. *Id.* at 994-95 (citations omitted).
45. *See* Engdahl, *supra* note 6, at 775-76.
46. Noel T. Dowling, *Cases on Constitutional Law*, Preface at xiv (6th ed., Foundation

last, some Justices are beginning to revive the constitutional law of federalism. Nonetheless, more critical analysis is needed.

Consider, for example, *United States v. Lopez*.[47] Chief Justice Rehnquist's taxonomy of the commerce power[48]–now intoned as a ceremonial incantation by every inferior court–is positively dysfunctional. The cases involving "persons or things in interstate commerce"[49] certainly are Commerce Clause cases, but the "instrumentalities" cases,[50] which Chief Justice Rehnquist put in the same category, are really Necessary and Proper Clause cases. The same is true for some of the "channel" cases,[51] which Chief Justice Rehnquist separated out as category one, and all of the "affecting" cases,[52] which he segregated as category three. Chief Justice Rehnquist's attempt at categorization is akin to a zoologist describing vertebrates as comprised of three groups–herbivores, mammals, and primates. Such confused classification obscures the very distinctions that are essential to understanding and utility.

The *Lopez* majority's emphasis on the "substantiality" of effects on interstate commerce is important and well-founded,[53]

Press, 1959).

47. 514 U.S. 549 (1995) (holding that the Gun-Free School Zone Act of 1990 was unconstitutional because it exceeded Congress's authority).

48. [W]e have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.

Id. at 558-59 (citations omitted). Rehnquist borrowed this taxonomy from the opinion of Justice Douglas for the Court in *Perez v. United States*, 402 U.S. 146, 150 (1971).

49. *Id.* at 558 ("Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.").

50. *See id.*

51. *See id.* ("Congress may regulate the use of the channels of interstate commerce.")

52. *See id.* at 558-59 ("Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e. those activities that substantially affect interstate commerce.") (citation omitted).

53. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937); Wickard v. Filburn, 317 U.S. 111, 125 (1942). *See also* Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968).

The word "substantial" is not necessarily definitive of the concept. Several other words and phrases have occasionally been used, such as the following: "obvious relation to," "natural relation to," and "fairly applicable to" are all phrases that were used by Hamilton in his 1791 *Opinion on the United States Bank*, 8 THE PAPERS OF

but it needs better focus. There is a difference between applying to a local activity *a particular rule of law that substantially affects interstate commerce* and applying to *a local activity that substantially affects interstate commerce* a particular rule of law that has no effect upon commerce at all. The latter has no constitutional basis. The former does–but that basis is *not* the Commerce Clause.

Recognizing that "substantiality" is a Necessary and Proper Clause issue impels attention to the requisites of "necessity" and "propriety," and this requires greater respect for some other federalism issues. The word "proper," for example, connotes regard for the Constitution's decentralization of political discretion, and thus supports some applications of a "state immunity" rule.[54]

Recognizing the classic "affecting commerce" cases as applications of the Necessary and Proper Clause makes it possible to discover connections that otherwise might be missed. For example, in *City of Boerne v. Flores*,[55] seven of the Justices endorsed a "congruence and proportionality" test[56] for laws under the Fourteenth Amendment Enforcement Clause.[57] Because the Enforcement Clause was crafted in explicit analogy

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ALEXANDER HAMILTON 98, 100,107 (Harold C. Syrett ed., 1965) [heinafter *Opinion*]; "in fact conducive to" was a phrase used by Chief Justice Marshall in *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1804); "plainly adapted to," "appropriate," and "really calculated to" were phrases used by Chief Justice Marshall in *McCulloch*, 17 U.S. (4 Wheat.) 316, 421,423; and "reasonably adapted to" was a phrase used in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1964). Justice Breyer's use of the word "significant" in his *Lopez* dissent, *United States v. Lopez*, 514 U.S. 549, 615-616 (1995), however, seems (at least in connotation) far too disparaging of the substantiality requirement to be included among these other usages and phrases.

54. This proposition is traceable from David E. Engdahl, *Sense and Nonsense About State Immunity*, 2 CONST. COMMENTARY 93, 100-01, 115, 119 (1985), to *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 585-87 (1985) (O'Connor, J., joined by Rehnquist and Powell, JJ., dissenting), and then to Justice Scalia's opinion for the Court in *Printz v. United States*, 117 S. Ct. 2365, 2379 (1997). *See also* Lawson & Granger, *supra* note 10, at 267, 297-326, 330-33. Its roots, however, extend to Justice Marshall's opinion for the Court in *McCulloch*, 17 U.S. (4 Wheat) 316 (1819), and to the rationale of Hamilton in *Opinion*, *supra* note 53, at 107.

55. 117 S. Ct. 2157 (1997).

56. *Id.* at 2164 (1997). Justice Kennedy wrote the majority opinion; Chief Justice Rehnquist and Justices Stevens, Thomas, and Ginsburg joined in the entire 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. *See id.* at 2176. The dissenting opinions of Justices Souter and Breyer did not address this point.

57. U.S. CONST. art. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

to the Necessary and Proper Clause,[58] there is now a strong argument that "congruence and proportionality" are requisites for "affecting commerce" cases, too. That would be a dramatic departure from what most teachers and students of the past generation have mistaken the "rational basis test" to mean in the Commerce Clause context.

The dissenters in *Lopez* referred to "a merely implicit

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58. *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438-44 (1968); Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) ("the *McCulloch v. Maryland* standard is the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment"). *See also* Lambert v. Yellowley, 272 U.S. 581, 596-97 (1926).

In *Katzenbach v. Morgan*, the majority opinion employed two distinct rationales to uphold a federal law against English literacy tests for state voting. The first rationale began with the premise that literacy tests do not violate equal protection, but reasoned that Congress nonetheless could prohibit them as a rational means of preventing discriminations that would be unconstitutional (for example, in access to public services), by assuring the non-English minority some political clout. *Katzenbach*, 384 U.S. at 652-54. The second rationale, in contrast, posited a rationally based congressional judgment on the question of whether literacy tests violate equal protection and held that this congressional judgment must determine the constitutional question notwithstanding the contrary judicial precedent. *Katzenbach*, 384 U.S. at 654-56.

In 1966, Archibald Cox claimed as the "chief legal antecedents" of *Morgan*'s second rationale the well-known cases since 1937 "dealing with congressional power to regulate interstate commerce." *See* Archibald Cox, *Constitutional Adjudication and the Promotion of Human Rights*, Foreword to *The Supreme Court: 1965*, 80 HARV. L. REV. 91, 107 (1966). But when the so-called "*Morgan* power" was put forward to support the constitutionality of lowering the voting age by statute, I pointed out Cox's error: those cases do not represent deference to Congress's estimate of its power under the Commerce Clause, which would be the equivalent of deference to its view of the Equal Protection Clause, but rather illustrated the deference that has always been accorded to Congress's selection of *means* (even if extraneous) toward ends that the judiciary has deemed to fall within an enumerated power. Thus, the post-1937 Commerce Clause cases were the "chief legal antecedents" only of *Morgan*'s first rationale, not of its second. *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. When the power was put to the test, however, the view espoused by Justice Harlan in his *Morgan* dissent and by myself, *see id.*, apparently prevailed because *none* of the Justices in *Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding several provisions of the Voting Rights Act of 1965 but not the provision that purported to lower the voting age in state elections), employed *Morgan*'s second rationale—not even its author, Justice Brennan, who tendered a very different notion in its name.

Nonetheless, constitutional law casebooks for more than two decades struggled to make some variation of *Morgan*'s second rationale seem credible. Consequently, when the Supreme Court took a disputed view of the Free Exercise Clause in *Employment Division v. Smith*, 494 U.S. 872 (1990), there was immediate and widespread support for Congress's invocation of the so-called "*Morgan* power" in the so-called Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(a). The Court's forceful repudiation of the *Morgan* power in *Boerne* seems to demonstrate the Justices' sharpened awareness of the distinction between allowing Congress definitively to construe the terms of the Constitution and deferring to congressional judgment about the proper means to effect enumerated ends.

congressional judgment"[59] about interstate commerce effects, speculating on what Congress "could have thought,"[60] and saying that "rational possibility is the touchstone."[61] But where, as here, a telic tie to some enumerated end is the essential requisite of the power itself, such conjecture constitutes not a paradigm of judicial restraint,[62] but rather an act of judicial arrogation.[63]

Since before *McCulloch v. Maryland*,[64] 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."[65] When Congress rationally makes such a judgment, the judgment should be honored by the courts even if it is wrong; for a court to step in and displace it would be to tread improperly on legislative ground. However, a court likewise improperly enters the legislative domain when it posits a telic connection that is not demonstrably the premise upon which Congress acted. It is not for the judiciary to supply indispensable telic findings where Congress evidently has not even made a telic inquiry; a "plain statement" rule was enforced for the Necessary and Proper Clause even in the 1940s and 1950s.[66]

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59. *Lopez*, 514 U.S. at 603 (Souter, J., dissenting).

60. *Id.* at 619 (Breyer, J., dissenting).

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

62. *But cf. id.* at 604 (Souter, J., dissenting) ("[T]oday's decision tugs the Court off course, leading it to suggest opportunities for further developments that would be at odds with the rule of restraint to which the Court still wisely states adherence.").

63. In the due process and equal protection contexts, on the other hand, the measures at issue are premised on the vast "police power" of the state or some concededly enumerated federal power; measures are, therefore, valid unless they fail the relevant means-to-end test. The conceded presence of a basis of power warrants the use of a presumption that puts the burden on the attacker, and likewise warrants holding that, "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification . . . [or where] there are 'plausible reasons' . . . 'our inquiry is at an end' . . . . This standard of review is a paradigm of judicial restraint." FCC v. Beach Communications, Inc., 508 U.S. 307, 313-14 (1993).

In contrast, however, the principle of enumerated powers negates any presumption of validity for federal measures that are not plainly premised on a concededly enumerated power. Consequently, in order to uphold measures under the Necessary and Proper Clause, the telic connection to some enumerated concern must be established and cannot simply be presumed.

64. 17 U.S. (4 Wheat.) 316 (1819).

65. *Id.* at 420. *See also* United States v. Fisher, 6 U.S. (2 Cranch) 358, 396 (1805) ("Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the [C]onstitution.").

66. As Justice Jackson pointed out in 1953, the rule that the judiciary should defer "to

Although some of the current Justices seem to be keeping the distinction between Commerce Clause and Necessary and Proper Clause issues fairly well in mind, others are notably inconsistent. This inconsistency sometimes produces bizarre results. One example is the *Camps Newfound/Owatonna* case in which the majority purported to apply dormant Commerce Clause doctrine,[67] but, as Justice Thomas pointed out in dissent, really applied an untenable "dormant Necessary and Proper Clause" notion instead.[68]

V. SOME FEDERALISM ISSUES BEYOND THE NECESSARY AND PROPER CLAUSE

It is important to note that not everything about federalism turns on the Necessary and Proper Clause, as the following examples illustrate:

- Most of the Justices in *Lopez* stressed the "commercial" focus of the Commerce Clause. They now should be pressed to reconsider the deviant line of cases beginning a century ago that treat plainly *non*-commercial acts–like walking or driving one's own car–as if they were "commerce" just

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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 449.

Even Justice Black acknowledged this. Explaining his refusal to join the majority's Necessary and Proper Clause rationale in *Polish National Alliance v. NLRB*, 322 U.S. 643 (1944), Justice Black declared that the requisite congressional (or NLRB) judgment was not sufficiently apparent to him, and observed the following:

> [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."

Id. at 652-53 (Black, J., concurring) (citations omitted).

For other applications of a "plain statement" rule, see, for example, *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Will v. Michigan Deptartment 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).

67. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 583-95 (1997) (holding that a Maine tax exemption statute which differentiated among charitable corporations on the basis of services provided to Maine residents was unconstitutional because it violated the dormant commerce clause).

68. *Id.* at 609.

because state lines were crossed.[69]

- We need to expose the unfounded premise on which (1) the Federal Arbitration Act was held to reach a termite extermination contract because the chemicals originated out of state;[70] (2) an arson statute was held applicable to the burning of a dormitory because the college used out-of-state food services;[71] (3) a carjacking statute was found to reach cars because they had crossed state lines;[72] (4) people were punished under federal statutes for possessing firearms that had moved interstate years before;[73] and (5) embezzlement from recipients of federal grants was made a federal crime.[74] All of these depend on the "herpes" theory that some lingering federal power infects whatever has passed through the federal dominion–a premise that is simply ridiculous.[75]

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69. *See, e.g.*, Covington & Cincinnati Bridge Co. v. Kentucky, 154 U.S. 204 (1894) (building a bridge from Ohio to Kentucky). *See also* Caminetti v. United States, 242 U.S. 470 (1917) (transporting women and girls interstate for prostitution); Thornton v. United States, 271 U.S. 414 (1926) (ranging of cattle across state line); United States v. Simpson, 252 U.S. 465 (1920) (interstate transportation of whiskey).

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

71. *See* United States v. Sherlin, 67 F.3d 1208 (6th Cir. 1995). *See also* United States v. Stilwell, 900 F.2d 1104 (7th Cir. 1990) (applying Commerce Clause where private residence received natural gas from out of state).

72. *See* United States v. Watson, 815 F.Supp. 827 (E.D. Pa. 1993). *See also* United States v. Bishop, 66 F.3d 569 (3d Cir. 1995); United States v. Oliver, 60 F.3d 547 (9th Cir. 1995). *But see* United States v. Cortner, 834 F. Supp. 827 (M.D. Tenn. 1993).

73. *See, e.g.*, United States v. Lewis, 100 F.3d 49, 52 (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."). Some cases under the felon firearm possession statute–for example, *United States v. Hanna*, 55 F.3d 1456 (9th Cir. 1995), and *United States v. Sorentino*, 72 F.3d 294, 296 (2d Cir. 1995)–attribute this "herpes" theory of federal power to *Scarborough v. United States*, 431 U.S. 563 (1977). However, the Court in *Scarborough* only decided a statutory construction issue, and did not address the constitutional question at all. Nevertheless, rather than trouble over the constitutional question, the Courts of Appeals treat it as having been decided *sub silentio* in *Scarborough*.

74. *See* 18 U.S.C. § 666 (1997). This statute has been persuasively criticized 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).

75. One nonsense opinion from 1948, written by Justice Black, is barely colorable authority for this rationale. In *United States v. Sullivan*, 332 U.S. 689 (1948), the Court held that the Federal Food, Drug, and Cosmetic Act could constitutionally be applied to the misbranding of drugs that 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 any effect upon interstate commerce at all.

The only authority claimed for the *Sullivan* holding was *McDermott v. Wisconsin*, 228 U.S. 115 (1913), but *McDermott* was in fact an entirely different case. In *McDermott* a federal law prohibited interstate shipment of syrup that did not bear specified labeling on each can inside the crate, and also provided for the enforcement of that regulation by inspection of the cans after unpacking, even long after the interstate commerce was completed. *Id.* at 128-31, 136. Such inspection could hardly aid enforcement of the labels-during-interstate-commerce rule if the labels had been removed or changed. The

- There is no safety to be found in a talismanic invocation of the Tenth Amendment.[76] Efforts to make that Amendment do anything more than underscore the principle of enumerated powers[77] end up subverting cogent analysis and help to revive dual federalism's errors. Justice O'Connor made that mistake in *New York v. United States* with her metaphor about state and federal power being "mirror images of each other," the limits of both being discoverable by examining either, "just as a cup may be half empty or half full."[78]

VI. CONCLUSION

Dual federalism is a mistaken view of the Constitution that even Justice Roberts outgrew. However, Justice Black's consignment of federalism to the political process is also unsustainable. If judges and students cut through the forest of

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Court held that this enforcement provision was constitutional under the Necessary and Proper Clause, and that a state law interfering with the chosen means of enforcement, as by requiring removal of the interstate labels, was preempted. *See id.* at 137. What mattered was that the inspection provision was a means of enforcing the rule regarding the labeling required *during interstate commerce.* The fact that the rule regarding the labels on the individual cans was itself calculated to protect consumers, on the assumption that the labels would remain after shipment, was irrelevant; because Congress's power over interstate commerce itself is plenary, it can control the labeling during interstate shipment for whatever reasons it might choose, or for no discernible reason at all.

The *Sullivan* situation was entirely different. There an act of misbranding that occurred after shipment was held reachable, not because it was thought to be a means of preventing the shipment of misbranded goods in interstate commerce, but simply because it was deemed helpful toward the nice but extraneous (i.e., non-enumerated) end at which the Act's regulation of interstate commerce was aimed–consumer protection. *See Sullivan,* 332 U.S. at 696-97. The *Sullivan* Court completely missed the distinction. *See id.* at 697-98.

Another case that is just as unsustainable as *Sullivan* is *United States v. Urbuteit,* 335 U.S. 355, 358 (1948) ("The problem is a practical one of consumer protection, not dialectics"). Notwithstanding the bare *ipse dixits* of *Sullivan* and *Urbuteit,* the Necessary and Proper Clause simply does not provide a constitutional justification for utilizing means directed to such constitutionally extraneous ends.

For an extended critique of the "herpes" theory in the particular context of federal grants and spending, see David E. Engdahl, *The Spending Power,* 44 DUKE L.J. 1, 72-75 (1994).

76. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

77. The Tenth Amendment is very important. Its importance, however, is in 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 powers that *are* delegated to the United States are questions that the Tenth Amendment simply, and quite plainly, does not address at all.

78. 505 U.S. 144, 156, 159 (1992).

opinions to examine the only United States Constitution anyone ever has been sworn to uphold, neither of these errors can long endure.

The security of our federal system depends upon broadening the path of understanding between the chasm of centralized omnicompetence and dual federalism's abyss. Justice Harlan Fiske Stone struggled to restore that road until New Deal politics overgrew it in 1944. Today, at last, our justices are beginning to clear the path again. The profession should take notice that when it comes to federalism issues, it is time to start thinking like lawyers again.