

## When Things Went Terribly, Terribly Wrong Part II

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Looking back in 2009 at the wave of neoliberal American consultants that swept through Central and Eastern Europe and the concurrent turn to formalism and doctrinalism that seized the academy in the mid-to-late 1990s, I observed that “it would not be entirely wrong” to conclude that “the collapse of the Soviet Union set jurisprudence back a century.”<sup>1</sup> Mark Lilla’s recent piece in *The New Republic* mines a similar vein in decrying “the intellectual vacuum” left in the wake of the end of the Cold War.<sup>2</sup>

Never since the end of World War II, and perhaps since the Russian Revolution, has political thinking in the West been so shallow and clueless. We all sense that ominous changes are taking place in our societies, and in other societies whose destinies will very much shape our own. Yet we lack adequate concepts or even a vocabulary for describing the world we find ourselves in. The connection between words and things has snapped. The end of ideology has not meant the lifting of clouds. It has brought a fog so thick that we can no longer read what is right before us.

Today, the neoliberal worldview that dominates the West and much of the globe is an amalgam of free market fundamentalism (recall the unregulated derivatives that brought down the global economy in 2008), global corporatism (think “inversions”), unrestrained managerialism (i.e., the Common Core), and atomistic individualism (thus, Obamacare is “socialism”). Lilla concludes that ours a “libertarian age.”

That is not because democracy is on the march (it is regressing in many places), or because the bounty of the free market has reached everyone (we have a new class of paupers), or because we are now all free to do as we wish (since wishes inevitably conflict). No, ours is a libertarian age by default: whatever ideas or beliefs or feelings muted the demand for individual autonomy in the past have atrophied. There were no public debates on this and no votes were taken. Since the

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<sup>1</sup> Steven L. Winter, “When Things Went Terribly, Terribly Wrong,” in *On Philosophy in American Law* 36 (Cambridge Univ. Press, Francis J. Mootz, III, ed. 2009).

<sup>2</sup> Mark Lilla, “The Truth About Our Libertarian Age: Why the dogma of democracy doesn’t always make the world better,” *The New Republic*, June 17, 2014 (available online at <http://www.newrepublic.com/article/118043/our-libertarian-age-dogma-democracy-dogma-decline>).

cold war ended we have simply found ourselves in a world in which every advance of the principle of freedom in one sphere advances it in the others, whether we wish it to or not. The only freedom we are losing is the freedom to choose our freedoms.

This paper considers the connection between this *Zeitgeist* and the internal sociology of knowledge (or ignorance) that characterizes the practice of legal scholarship.

Legal scholarship has for decades been marked by a repetition compulsion that ranges from constant reinvention of the wheel to the occasional—though unaccountably rare—eruption of plagiarism scandals at the highest level of the profession. Some ten or twelve years ago, I was in Prague on my way to dinner with an old and respected friend. As we crossed the Charles Bridge, I was unburdening to him the painful experience of having a former colleague and his co-author appropriate as their own my work on the metaphorical structure of narratives.<sup>3</sup> “Let me tell you what happened to me!” my usually unflappable friend interjected. “One of my junior colleagues comes into my office and says: ‘I’ve written an article on [topic X]. I know you are an expert on that subject. Could you read and comment on my paper?’” As my friend began to read it, he immediately recognized the argument as one he had laid out in a recent paper. “My own piece,” he exclaimed to me loudly amid the throng of tourists. “He was asking me to comment on my own piece!”

I share this story because it is so extreme as to be unfathomable. It is one thing to rip off the work of a lesser known scholar and pass it off as one’s own. But it is quite another matter to appropriate the work of a famous author in his field of expertise and expect that nobody will notice. *That* can only happen in a profession which lacks a canon common to all students of the field. Only in such a field could one expect that the average

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<sup>3</sup> For detail and documentation, see Steven L. Winter, “Making the Familiar Conventional Again,” 99 *Michigan Law Review* 1607 (2001) (hereinafter: “Familiar”).

reader—whether colleague or law review editor—would fail to notice the obvious ground that was being retread. Yet, there are all too many pieces that can only charitably be referred to as recycling.

If plagiarism were the only problem, we might chalk it up to a lack of academic integrity or bemoan the status competition that feeds such behavior. (Indeed, if the New York Times is to be believed, the problem of plagiarism is especially acute at the highest levels of the profession.<sup>4</sup>) But, as I have previously observed, “[i]t is not just a matter of the proprieties of scholarship.”<sup>5</sup> Familiarity with and mastery of prior scholarship is necessary to the intellectual development of any field of study:

Prior discussions help clarify and refine issues, identify flawed arguments and unpromising lines of inquiry, or reformulate old questions in new and more productive ways. A scholar who takes up an area of inquiry without reckoning with the existing literature runs the very serious risk of missing the real issues or, at the least, reinventing the wheel. Thus, we might say that the first corollary of Santayana’s famous dictum is that those who don’t contend with the literature are doomed to repeat it.<sup>6</sup>

A field marked by the repetition and recycling of a handful of ideas is one mired in an unproductive, maladaptive stasis. The world does not stand still; law, as any other discipline, must address new and more complex challenges. But, it is simply not possible to make anything like “progress” in legal thought when those trained in the field are not familiar with—and, therefore, cannot build on—the insights of the past.

While many factors contribute to this state of affairs, one easily remediable factor is the lack of a common canon that could serve as a *lingua franca* for the profession. I have (with the input of a few friends) compiled such a list which is appended to this

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<sup>4</sup> Sara Rimer, “When Plagiarism’s Shadow Falls on Admired Scholars,” *The New York Times*, Nov. 24, 2004, B9.

<sup>5</sup> “Familiar,” *supra* note 3, at 1614-15.

<sup>6</sup> *Id.*

paper.<sup>7</sup> Most of the articles and books on my list can be characterized as classics, though I assume that among any group of well-read law professors there will be disagreements with respect to both omissions and inclusions. I will be drawing on that list in the balance of this paper as I elaborate my claims concerning the problems of legal scholarship. My principal point is that, if we lack adequate concepts or a vocabulary for describing and dealing with the increasingly complex contemporary world, one reason is that we have failed to build on the lessons of our predecessors.

In his most recent book, Judge Posner complains that neither judges nor law more generally deal well with complexity.<sup>8</sup> He closes with the rather salient example of “civil recourse theory” which maintains that tort law is about “empowering people who have been wrongly injured” and rests essentially on common moral intuitions of right and wrong.<sup>9</sup> The atavism of this “theory” is stunning; as Posner says, “[i]t is not enough to say that we all know a wrong when we see one. . . .”<sup>10</sup> But, it is all the more astonishing when one considers civil recourse theory in light of the sophisticated contributions of economic theory from Coase’s pivotal insight that what tort law views as injury and injuring behavior are better understood as reciprocal inflictions of social costs,<sup>11</sup> through Calabresi’s groundbreaking *Thoughts on Risk Distribution and the Law of Torts*<sup>12</sup> (which

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<sup>7</sup> For a similar effort, see Martha Minow, “Archetypal Legal Scholarship: A Field Guide,” 63 *Journal of Legal Education* 65 (2013).

<sup>8</sup> Richard A. Posner, *Reflections on Judging* (Harvard Univ. Press, 2013).

<sup>9</sup> *Id.* at 359-66 (quoting Professor Zipursky).

<sup>10</sup> *Id.* at 364.

<sup>11</sup> Ronald H. Coase, “The Problem of Social Cost,” 3 *Journal of Law & Economics* 1 (1960) (reprinted in Coase, *The Firm, the Market, and the Law* 95 (Univ. of Chicago Press, 1988)).

<sup>12</sup> Guido Calabresi, “Some Thoughts on Risk Distribution and the Law of Torts,” 70 *Yale Law Journal* 499 (1961); see also Guido Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (Yale Univ. Press, 1970).

Posner does not cite) focusing on the use of tort law to minimize accidents and accident-avoidance costs (points he does note), through Posner's own work on the subject.<sup>13</sup>

Posner's point about the failure of law to deal adequately with complexity is well-taken, even profound. But his treatment of the issue disappoints because it fails to reckon with and build on the existing literature. Posner starts promisingly by defining complexity as a characteristic of systems: "A question is complex when it is difficult by virtue of involving complicated interconnections or interactions—in other words, when it is a question about a system rather than a monad."<sup>14</sup> He finds most of the academic legal literature on complexity unhelpful because of its solipsistic focus on the complexity of *law*.<sup>15</sup> (We might, with all intended irony, call this "the internal point of view.") Posner notes three exceptions: two articles from 1997 and Lon Fuller's classic *The Forms and Limits of Adjudication*,<sup>16</sup> which he singles out as "remarkably prescient."<sup>17</sup> But he does not discuss any of these pieces, leaving us to guess at their relevance.

Those familiar with Fuller's article will share my puzzlement. One would have thought that *Forms and Limits* would be the starting point of any discussion of the law's capacity (or incapacity) for dealing with complexity. Fuller's principal point, after all, was that adjudication is ill-suited to dealing with "polycentric" problems—that is, complex problems involving systemic interconnections that, therefore, are not amenable to linear reason. A polycentric problem, Fuller explained, is like a spider web:

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<sup>13</sup> William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* (Harvard Univ. Press, 1987).

<sup>14</sup> *Reflections*, *supra* note 8, at 54-55.

<sup>15</sup> *Id.* at 59 (citing Peter H. Schuck, "Legal Complexity: Some Causes, Consequences, and Cures," 42 *Duke Law Journal* 1 (1992) which treats legal complexity in terms of density, technicality, differentiation, and indeterminacy).

<sup>16</sup> Lon L. Fuller, "The Forms & Limits of Adjudication," 92 *Harvard Law Review* 353 (1978) (originally circulated in 1957).

<sup>17</sup> *Reflections*, *supra* note 8, 59, n. 8.

A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strand to snap. This is a “polycentric” situation because it is “many centered”—each crossing of strands is a distinct center for distributing tensions.<sup>18</sup>

Fuller argued that adjudicators confronted with such problems inevitably simplify and objectify the issue before them in order to make it suitable for adjudication.<sup>19</sup>

When Posner says that Fuller was “prescient,” he means only that Fuller was correct in noting that courts do not deal well with systemic complexity. But, Posner and Fuller are not—in fact—making the same point. Posner, who now identifies as a legal realist,<sup>20</sup> argues that courts need to do a better job of dealing with the systemic complexity of contemporary life. Fuller, who was defending the traditional approach to adjudication, argued that they *cannot* and *should not*. Fuller defined adjudication as “a process of decision that grants to the affected party a form of participation that consists in the opportunity to present proofs and reasoned arguments.”<sup>21</sup> He argued that polycentric problems are “not appropriate raw material for a process of decision that is institutionally committed to acting on the basis of reasoned argument.”<sup>22</sup> He concluded that courts should not try to solve polycentric problems because the attempt to deal with such complexity inevitably “impairs the integrity of adjudication.”<sup>23</sup> Fuller’s point, in other words, is in direct conflict with Posner’s.

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<sup>18</sup> Fuller, *supra* note 16, at 395.

<sup>19</sup> *Id.* at 401-02.

<sup>20</sup> *Reflections*, *supra* note 8, at 5-6, 353.

<sup>21</sup> Fuller, *supra* note 16, at 369.

<sup>22</sup> *Id.* at 371.

<sup>23</sup> *Id.* at 382, 401.

Instead of engaging with Fuller, Posner proceeds to decry the needless intricacies of the Bluebook,<sup>24</sup> to disparage the verbosity of formalist judges,<sup>25</sup> and to defend the use of the Internet to flesh out the record on appeal.<sup>26</sup> This is unfortunate. Posner is both a proponent of the economic analysis in law and a self-declared pragmatist.<sup>27</sup> As such, he is uniquely positioned to say something about how law and adjudication might better deal with complex social problems.

So, consider what Posner might have said had he attended to Fuller's article (and some of the subsequent literature that responds to it). He might have pointed out that Fuller's conclusion—that law should not attempt to deal with polycentric problems—is wrong on three counts: *first*, because Fuller limits law and adjudication to an unrealistically formal and unsustainable view of rationality; *second*, because Fuller's own argument concedes that every legal problem is unavoidably polycentric; and, *third*, because the federal courts already possess ample procedural mechanisms for dealing with complexity in adjudication. Consider each point in turn.

(1) Fuller's three contrast cases—of social ordering through elections, self-interested bargaining, and affective relations—are designed to show that only adjudication can meet the “burden of rationality” that he himself calls “a too exigent rationality” that “demands an immediate and explicit reason for every step taken.”<sup>28</sup> But Fuller's conception of rationality is artificially restrictive. Fuller gives the example of the potato farmer who barter his excess with the onion farmer next door. He maintains that

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<sup>24</sup> *Reflections*, *supra* note 8, at 96-104.

<sup>25</sup> *Id.* at 116-20.

<sup>26</sup> *Id.* at 131-48.

<sup>27</sup> Richard A. Posner, *The Problems of Jurisprudence* 26 (Harvard Univ. Press, 1990); *Reflections*, *supra* note 8, at 5.

<sup>28</sup> Fuller, *supra* note 16, at 366-67, 371.

there is no test of rationality that can be applied to the result of the trade considered in abstraction from the interests of the parties. Indeed, the trade of potatoes for onions, which is a rational act by one trader, might be considered irrational if indulged in by his opposite number, who has a storehouse full of onions and only a bushel of potatoes. If we asked one party to the contract. “Can you defend that contract?” he might answer, “Why, yes. It was good for me and it was good for him.” If we then said, “But that is not what we meant. We meant, can you defend it on general grounds?” he might well reply that he did not know what we were talking about.<sup>29</sup>

But this is wrong. The educated farmer would simply say that the trade was Pareto optimal—which surely meets any test of generality, objectivity, and rationality that anyone could care to point to.<sup>30</sup>

The point, to be clear, is not that economics should be the go-to methodology for judges (or any other decisionmaker). I have elsewhere criticized the reductionism of the rational actor model precisely because it fails to understand that human beings “are remarkably complex psychosocial systems.”<sup>31</sup> The point, rather, is that Fuller draws a false distinction between the rationality of adjudication and the presumed arationalism of other aspects of social life that supposedly rely on emotivism, self-interest, or intuition.<sup>32</sup> And this mistake, in turn, leads him to an absurdly narrow view of legal reason as defined by principles supporting claims of right and accusations of guilt.<sup>33</sup> The consequence is a view of adjudication that would preclude it from harnessing modes of analysis—in-

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<sup>29</sup> *Id.*

<sup>30</sup> *Cf.* Jan G. Deutsch, “Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science,” 20 *Stanford Law Review* 169, 193-95 (1968) (critiquing Herbert Wechsler’s concept of “neutral principles”).

<sup>31</sup> Steven L. Winter, “Law, Culture, and Humility,” in *Law and Humanities: An Introduction* 98, 105 (Cambridge Univ. Press, Austin Sarat, Mathew D. Anderson, & Catherine O. Frank eds., 2010). Indeed, even Posner concedes that “the explanatory power of the rational actor thesis is overstated.” *Reflections, supra* note 8, at \_\_\_\_.

<sup>32</sup> For another counterexample in the context of affective relations, see Steven L. Winter, “Foreword: On Building Houses,” 69 *Texas Law Review* 1595, 1613-19 (1991).

<sup>33</sup> Fuller, *supra* note 16, at 368-69. To be precise, Fuller argued that this is not an accurate description of adjudication, but an implication of its commitment to give all affected parties the opportunity to participate through the presentation of reasoned arguments and proofs. *Id.* (“It is not so much that adjudicators decide only issues presented by claims of right or accusations. The point is rather that whatever they decide, or whatever is submitted to them for decision, tends to be converted into a claim of right or an accusation of fault or guilt.”).

cluding economics (despite its shortcomings)—that offer more sophisticated tools for thinking about systems and social complexity.

(2) Fuller’s bottom-line is that polycentric problems are not suitable for adjudication. Yet, he effectively concedes that all legal problems are polycentric. Fuller gives the example of a negligence case involving a railroad crossing:

A decision may act as a precedent, often an awkward one, in some situation not foreseen by the arbiter. Again, suppose a court in a suit between one litigant and a railway holds that it is an act of negligence for the railway not to construct an underpass at a particular crossing. There may be nothing to distinguish this crossing from other crossings on the line. As a matter of statistical probability it may be clear that constructing underpasses along the whole line would cost more lives (through accidents in blasting, for example) than would be lost if the only safety measure were the familiar “Stop, Look & Listen” sign. If so, then, what seems to be a decision simply declaring the rights and duties of two parties is in fact an inept solution for a polycentric problem, some elements of which cannot be brought before the court in a simple suit by one injured party against a defendant railway. In lesser measure, concealed polycentric elements are probably present in almost all problems resolved by adjudication.<sup>34</sup>

The first thing to note about this passage is that Fuller only needed to introduce the concept of precedent to convert a perfectly ordinary tort hypothetical into a polycentric problem. For, once one acknowledges the effect of precedent, every case becomes polycentric in a sense fatal to Fuller’s argument: Every decision will necessarily affect future parties not present before the court and, thus, unable to participate through reasoned arguments and proofs. True, those absent parties may in the next case seek to have the precedent overturned. But they will already be handicapped by an adverse ruling which has established the principle that governs the admissibility and effects of their reasoned arguments and proofs.<sup>35</sup> And, in seeking to overturn that principle, they will neces-

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<sup>34</sup> *Id.* at 397-98.

<sup>35</sup> *Cf.* Louis Henkin, “The Supreme Court, 1967 Term—Foreword: On Drawing Lines,” 82 *Harvard Law Review* 63, 64 (1968):

The lines and distinctions of doctrine tell why cases on either side should be decided differently, and promise that future cases will be decided accordingly. The line drawn, then, is the symbol of rationality in the judicial process. The line also guides. It guides the

sarily be arguing at a significant disadvantage given the force of stare decisis and the reliance that other (also absent) parties may already have placed on the prior decision. For this very reason, Fuller made the otherwise counterintuitive argument that, the more strictly precedents are interpreted, the more problematic adjudication becomes.<sup>36</sup>

Though Fuller explicitly conceded that “covert polycentric elements [are] almost always present in even the most simple-appearing cases,” he tried to sidestep the problem with the usual legal legerdemain. It is, he insisted, “a matter of degree” and, so, a question of judgment: “It is a question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached.”<sup>37</sup> But Fuller had nothing to say—offering neither principles nor standards—for *how* one might go about making that determination. Nor could he. For the underlying problem is inherent the Legal Process understanding of adjudication, as Alexander Bickel noted: “The matrix paradox of all paradoxes . . . is . . . that the Court may only decide concrete cases and may not pronounce general principles at large; but it may decide a constitutional issue only on the basis of general principle.”<sup>38</sup>

The second thing to note about the passage discussing the railroad crossing hypothetical is that the polycentric effects of the initial ruling will occur even without further litigation. Most interactions in contemporary life, Abram Chayes points out, “are con-

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Supreme Court itself, which will often apply it without reconsideration. It guides the hundreds of courts that take care that the Court’s law is faithfully executed.

<sup>36</sup> Fuller, *supra* note 16, at 398. Conversely, he argued that, the more liberal the interpretation of precedents, the better the judicial process is able “to absorb these covert polycentric elements” and accommodate “legal doctrine to the complex aspects of a problem . . . as these aspects reveal themselves in successive cases.” *Id.*

<sup>37</sup> *Id.* at 397-98.

<sup>38</sup> Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 247 (Yale Univ. Press, 1962).

ducted on a routine or bureaucratized basis.”<sup>39</sup> Thus, we can expect (and Fuller’s hypothetical expects) that counsel for the railroad will inform the Board and the CEO of the railroad’s potential liability for accidents at other of its crossings. But the downstream effects of the first decision will ripple across a variety of professional and industry-wide networks. The railroad’s general counsel will surely share the new ruling with other railway lawyers at professional meetings or at a continuing education conferences. (Today, there would be a listserv for this very purpose.) This will lead to similar actions or increased litigation as railroads seek to avoid liability at their many railway crossings.

If polycentricity is unavoidable here, it is inescapable everywhere. Accordingly, the idea that adjudication should be limited to only those problems capable of resolution by the application of legal principle is both dangerous and delusional. It is dangerous because, as Fuller says, it will lead to inept and incomplete resolutions of complex problems. And it is delusional because, as Chayes explains, polycentric effects cannot be avoided:

The interests of absentees . . . become more pressing as social and economic activity is increasingly organized through large aggregates of people. An order nominally addressed to an individual litigant . . . has obvious and visible impact on persons not individually before the court. . . . A suit against an individual to collect a tax, if it results in a determination of the constitutional invalidity of the taxing statute, has the same result for absentees as a grant or denial of an injunction. Statutory construction . . . may have a similar extended impact, again even if the relief is not equitable in form. Officials will almost inevitably act in accordance with the judicial interpretation in the countless similar situations cast up by a sprawling bureaucratic program.<sup>40</sup>

The complexity of adjudication is not some new, twenty-first century phenomenon. It has been with us at least since the Sherman Act of 1890.<sup>41</sup> Chayes identifies a variety of cases—including “securities fraud and other aspects of the conduct of corpo-

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<sup>39</sup> Abram Chayes, “The Role of the Judge in Public Law Litigation,” 89 *Harvard Law Review* 1281, 1291 (1976).

<sup>40</sup> *Id.* at 1294-95.

<sup>41</sup> 15 U.S.C. § 1 (2013).

rate business, bankruptcy and reorganizations, union governance, consumer fraud, housing discrimination, electoral reapportionment, environmental management”—in which courts have historically faced complex social issues.<sup>42</sup> Yet, surprisingly little of this experience has penetrated either the conventional understanding of adjudication or how we teach procedure in law school (a point I return to below).

(3) Posner suggests that, when faced with complexity, judges should make greater use of their power to appoint experts under Rule 706 of the Federal Rules of Evidence.<sup>43</sup> This suggestion is constructive; but there is so much more one could say. The federal courts have authority under Rule 706 and Rules 23 and 53 of the Federal Rules of Civil Procedure to marshal quite substantial institutional resources to deal with complexity.<sup>44</sup> There is a large literature on this point,<sup>45</sup> of which the Chayes piece is the earliest and still among the best. Chayes, in fact, provides a remarkably accurate account of the capacity of the public law litigation to sort through complex social and institutional problems.<sup>46</sup> Chief among its advantages is the ability to tap “energies and resources outside” the judiciary in a non-bureaucratic manner. “It does not work through a rigid, multi-layered hierarchy of numerous officials, but through a smallish representative task force, assembled

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<sup>42</sup> Chayes, *supra* note 39, at 1284.

<sup>43</sup> *Reflections*, *supra* note 8, at 297-301.

<sup>44</sup> Wayne D. Brazil, “Special Masters In Complex Cases: Extending the Judiciary or Reshaping Adjudication?” 53 *Univ. of Chicago Law Review* 394, 394 (1986) (“Masters can bring significant new skills and flexibility to bear on cases whose complexity threatens to overwhelm our traditional system.”).

<sup>45</sup> For some of the more sympathetic discussions, see Theodore Eisenberg & Stephen C. Yeazell, “The Ordinary and the Extraordinary in Institutional Litigation,” 93 *Harvard Law Review* 465 (1980); Judith Resnik, “Managerial Judges,” 96 *Harvard Law Review* 376 (1982); Susan Strum, “Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons,” 138 *Univ. of Pennsylvania Law Review* 805 (1990). For commentary by some of the important real-world actors, see William Wayne Justice, “The Two Faces of Judicial Activism,” 61 *George Washington Law Review* 1 (1992); Jack B. Weinstein, “Litigation Seeking Changes in Public Behavior and Institutions—Some Views on Participation,” 13 *Univ. of California Davis Law Review* 231 (1980); Vincent M. Nathan, “The Use of Masters in Institutional Reform Litigation,” 10 *Toledo Law Review* 419 (1979); Curtis J. Berger, “Away From the Courthouse and Into the Field: The Odyssey of a Special Master,” 78 *Columbia Law Review* 707 (1978). See generally ABA Section on Litigation, 1985 *National Institute on New Techniques for Resolving Complex Litigation*.

<sup>46</sup> Chayes, *supra* note 39, at 1296-1302.

ad hoc, and easily dismantled when the problem is finally resolved.”<sup>47</sup>

Chayes observes that many of the Court’s decisions on standing, the availability of equitable relief, and class actions can be understood as an attempt to rein in these more systemic forms of adjudication.<sup>48</sup> But it may also be true that the Court’s antipathy to these cases reflects a fear of complexity. Writing in the same period as Chayes, Joseph Vining suggested that the Court’s decisions on standing represented a more deep-seated defense mechanism. “[H]ow like the octopus,” Vining observed, “the legal mind is when constructing cases.”

Inside the self-constructed home everything does not depend on everything else and entities do not dissolve conceptually into some other entity or some larger unity. The court can swim out into the great sea around and dart back when frightened by its dark vastness. . . . Fear may make it too difficult to admit, except by allusion, that one is swimming in the sea and that one’s behavior is a reaction to it. Denial is a normal defense of the human mind against great fear; the legal mind is not peculiar in this regard.<sup>49</sup>

Thirty-five years later, Posner makes the quite similar claim that the increased formalism of the last two decades represents a flight from complexity.<sup>50</sup> *Plus ça change, plus c’est la même chose.*

Recently, the federal district court judge who served as chief mediator in the Detroit bankruptcy case spoke to our Faculty about his experiences. He talked about the chronology of the case and discussed some of the more public aspects of the negotiation.

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<sup>47</sup> *Id.* at 1308-09.

<sup>48</sup> *See id.* at 1304-05:

From one perspective, the Burger Court may be seen to be embarked on some such program for the restoration of the traditional forms of adjudication. Its decisions on standing, class actions, and public interest attorneys’ fees, among others, achieve a certain coherence in this light. . . . One suspects that at bottom its procedural stance betokens a lack of sympathy with the substantive results and with the idea of the district courts as a vehicle of social and economic reform. The Court’s distaste for reformist outcomes is barely veiled. . . in two recent cases, *Warth v. Seldin*, [422 U.S. 490 (1975)], challenging exclusionary zoning in the suburbs of Rochester, and *Rizzo v. Goode*, [423 U.S. 362 (1976)], attacking police brutality in the city of Philadelphia.

<sup>49</sup> Joseph Vining, *Legal Identity: The Coming of Age of Public Law* 94 & n.\* (Yale Univ. Press, 1978).

<sup>50</sup> *Reflections*, *supra* note 8, at 8.

He noted the 1967 riots and the collapse of the public school system as two of the social phenomenon leading to the hollowing out of the city, the loss of the tax base, and the current fiscal sinkhole. I asked the last question. “You are working in a different capacity as a mediator in this large structural reorganization context. What are you learning there that you might take back with you when you return to the bench to hear regular Article III cases?”

“That’s a good question,” he replied. “*Absolutely nothing*. When I sit as a judge I just apply the law. Nothing more.”<sup>51</sup> He elaborated, more-or-less following Fuller, that when judges do anything else they lose legitimacy.

I followed up privately afterwards. “You went traditionalist on me real fast. Isn’t there more to it than that?” I continued: “The excess doesn’t go away. If, but for cases like *Rizzo v. Goode*,<sup>52</sup> the federal courts had dealt with the problem of police violence, the Detroit riots might never had happened. If but for *Milliken*,<sup>53</sup> the courts had dealt with the racial isolation in the Detroit schools, DPS would not look like it does now.” He responded with a disquisition on the limited role of federal courts in a democracy. “People vote for their representatives to deal with these kind of issues,” he said. “Courts shouldn’t interfere; they should leave it to the representative democratic process.”

“But,” I pointed out, “you are dealing with all of the extended the consequences and ramifications of those problems in federal bankruptcy right now. And that will have to be approved by an Article III court. When you are negotiating away the pensions and

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<sup>51</sup> Cf. Richard A. Posner, *How Judges Think* 78–81 (Harvard University Press, 2008) (“Neither [Roberts] nor any other knowledgeable person actually believed or believes that the rules that judges in our system apply . . . are given to them the way that the rules of baseball are given to umpires.”).

<sup>52</sup> 423 U.S. 362 (1976).

<sup>53</sup> *Milliken v. Bradley*, 418 U.S. 717 (1974) (disallowing busing across district lines among the 53 school districts in the metropolitan Detroit area).

futures of all those retirees, who represents them then?”

“You have a point,” he replied.

The point, at the risk of belaboring the obvious, is that the federal courts often plead that they are unsuitable or inappropriate fora for dealing with complex societal problems. But, when the downstream social consequences come to them in highly complex, polycentric forms such as bankruptcy, they proceed unreflectively without regard to democratic political process and without the least concern either for their capacity to handle complexity or for the ability of all those affected to participate through reasoned arguments and proofs.<sup>54</sup>

We can do better.

Ultimately, responsibility lies with the law schools, which fail to train lawyers to deal with complexity. Casebooks still concentrate on the enunciation of doctrine in appellate opinions and, outside the use of economics and rational choice theory in some of the standard law school courses (which, I assume, mostly takes place at elite law schools because I haven't seen much of it at the schools where I have taught), there is very little in the curriculum that equips students to think systematically about complex social problems. Seventy years ago, Lasswell and MacDougal argued that legal education should

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<sup>54</sup> To drive the point home, consider that the mediator initiated the so-called “grand bargain” in which the quite remarkable collection of the Detroit Institute of Arts, which is owned by the City, would not be included among Detroit's assets. The consideration for this was a pledge of approximately \$661 million from foundations, the State of Michigan, and the DIA itself that will be used to reduce cuts faced by pensioners. Nathan Bomey & Matt Helms, “Detroit Pensioners Back Grand Bargain in Bankruptcy Vote, Creditors Object,” *Detroit Free Press*, July 22, 2014. Many Detroiters think that the DIA's full value should have been available to offset the drastic cuts to city services that will inevitably ensue as a result of the bankruptcy reorganization. Others think that the DIA is an incalculable and irreplaceable civic resource that can help anchor Detroit's revival. I happen to be in the latter category. Still, this policy decision was not made by the people's representatives through the ordinary democratic process; it was designed and effectuated by a life-tenured federal judge—this same federal judge—serving at the request of the bankruptcy judge to whom he had assigned the case.

train students to deal with policy questions in a coherent and sophisticated manner.<sup>55</sup> I am familiar with only one casebook that seriously aspires to this goal, Mark Tushnet's and Liza Heinzerling's superb *Regulatory State* book.<sup>56</sup> Not only does their book canvas a broad array of secondary material from a range of disciplines and theoretical perspectives, but it provides students with a variety of conceptual tools with which to think about complex legal, policy, and doctrinal issues in a systematic and sophisticated way. In the area of procedure, Cover, Fiss, and Resnik's *Procedure* and its successors are the most thoughtful efforts to treat the area with the depth and systematicity that it requires.<sup>57</sup> (Not coincidentally, all of these books include an excerpt from Fuller; though Heinzerling & Tushnet fails to include Chayes.)

To be frank, I cannot see how we can train lawyers for the 21<sup>st</sup> Century without equipping them to face complexity by teaching them to think about legal and social problems in systems-theoretic terms. In addition to Fuller, Chayes, Coase, Calabresi, and Posner, every student should be reading Hohfeld,<sup>58</sup> Hale,<sup>59</sup> Llewellyn,<sup>60</sup> Tussman and

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<sup>55</sup> Harold D. Lasswell & Myres S. McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest," 52 *Yale Law Journal* 203 (1943). See also Roberto Mangabeira Unger, *What Should Legal Analysis Become?* (Verso, 1996).

<sup>56</sup> Lisa Heinzerling & Mark V. Tushnet, *The Regulatory and Administrative State: Materials, Cases, Comments* (Oxford Univ. Press, 2006). Not by accident, the book includes two particularly thoughtful and instructive dissents by Judge Posner in *DePass v. United States*, 721 F.2d 203 (7<sup>th</sup> Cir. 1983), and *United States v. Marshall*, 908 F.2d 1312 (7<sup>th</sup> Cir. 1990).

<sup>57</sup> Robert M. Cover, Owen M. Fiss & Judith Resnik, *Procedure* (Foundation Press, 1988); Owen M. Fiss & Judith Resnik, *Adjudication and Its Alternatives: An Introduction to Procedure* (Foundation Press, 2003). The book co-authored by Dean Minow preserves many of the elements of the Cover, Fiss, and Resnik materials. See Stephen N. Subrin, Martha L. Minow, Mark S. Brodin, Thomas O. Main, & Alexandra D. Lahav, *Civil Procedure: Doctrine, Practice, and Context* (Wolters, Kluwer, 4th ed. 2012).

<sup>58</sup> Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," 23 *Yale Law Journal* 16 (1913).

<sup>59</sup> Robert Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," 38 *Political Science Quarterly* 470 (1923).

<sup>60</sup> Particularly Karl N. Llewellyn, "The Constitution as an Institution," 34 *Columbia Law Review* 1 (1934), and "Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed," 3 *Vanderbilt Law Review* 395 (1950).

tenBroek,<sup>61</sup> Michelman,<sup>62</sup> and Radin<sup>63</sup> (among others) as exemplars of how to think in a systematic and sophisticated way about legal problems. (Not coincidentally, Heinzerling & Tushnet includes excerpts from three of this latter group.) Posner advocates that law students be required to take courses in statistics and in at least one technical field elsewhere in the university such as mathematics, economics, psychology, engineering, or environmental science.<sup>64</sup> While I wholeheartedly agree with this suggestion, I think that primary responsibility lies with law faculties and that we need to change how we teach law both in the first year and across the curriculum.

Posner proposes that we make room in the curriculum for this additional training by cutting or shortening Constitutional Law: “Dominated as it is by the most political court in the land, constitutional law occupies far too large a role in legal education.”<sup>65</sup> But, constitutional law is probably the one area of law *most* in need of a revamped pedagogy that emphasizes the complexity of legal issues and the need to build systematically on the past. I take up this point in the remainder of these comments.

Posner devotes just a single page to the mess that the Court has made in the election area, pointing out the naïveté of its approach to the effects of campaign finance on the electoral process and decrying the Court’s tolerance both of political gerrymandering and of voter suppression by means of photo ID requirements.<sup>66</sup> The latter comment has

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<sup>61</sup> Joseph Tussman and Jacobus tenBroek, “The Equal Protection of the Laws,” 37 *California Law Review* 341 (1949).

<sup>62</sup> Frank I. Michelman, “Property, Utility and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law,” 80 *Harvard Law Review* 1165 (1967).

<sup>63</sup> Margaret Jane Radin, “Market Inalienability,” 100 *Harvard Law Review* 1849 (1987).

<sup>64</sup> *Reflections*, *supra* note 8, at 347.

<sup>65</sup> *Id.* at 347-48.

<sup>66</sup> *Id.* at 84-85 (discussing *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) and *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008)). The principal cases on the political gerrymander (or, more accurately, overlooking the political gerrymander) are *Vieth v. Jubliert*, 541 U.S. 267 (2004), and *League of United Latin American Citizens v. Perry*, 548 U. S. 399 (2006).

garnered the lion's share of attention, which is understandable considering that Posner wrote the opinion for the court below. But, it might not have drawn all the attention had Posner spent more time analyzing the complexities of each of these areas and shown how these cases should have come out differently. And there is much that could have been discussed. Modern campaigns increasingly involve highly sophisticated computer-generated strategies in targeting and mobilizing voters.<sup>67</sup> Similarly, redistricting can now be done by advanced computer programs capable of pinpointing the party affiliations and voting histories of individuals—not just household-by-household, but within each household—and drawing the lines accordingly.<sup>68</sup> Both the complexities of campaign finance and its effects on our politics—not least of which is the inordinate amount of time that politicians must spend fundraising rather than governing and the concomitant dependencies that engenders—raise problems not accounted for by the Court's simplistic equation of money with speech. And, given the dynamics of mass culture and the shrewd disinformation campaigns made possible by today's technology,<sup>69</sup> the Court's confident assumption that unlimited campaign spending by corporations will be a positive source of information for voters doesn't even pass the straight-face test.<sup>70</sup>

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<sup>67</sup> A good introductory primer is Robert Draper, "Can the Republicans Be Saved from Obsolescence," *The New York Times Magazine*, February 14, 2013, MM 14.

<sup>68</sup> "Gerrymandering is not hard. The core technique is to jam voters likely to favor your opponents into a few throwaway districts where the other side will win lopsided victories. . . . Professionals use proprietary software to draw districts, but free software like Dave's Redistricting App lets you do it from your couch." Sam Wang, "The Great Gerrymander of 2012," *The New York Times*, February 3, 2013, Opinion: p.1. Quite possibly, computer models might also help crack the judicially manageable standards problem raised in *Vieth. Id.* ("Using statistical tools that are common in . . . neuroscience, I have found strong evidence that this historic aberration arises from partisan disenfranchisement. . . . we need to adopt a statistically robust judicial standard for partisan gerrymandering.").

<sup>69</sup> See, e.g., Justin Gillis, "Scientists Sound Alarm on Climate," *The New York Times*, March 18, 2014, D1 ("Global warming has been much harder to understand, not least because of a disinformation campaign financed by elements of the fossil-fuel industry.").

<sup>70</sup> *Citizens United*, 558 U.S. at 364 ("On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials."). See Steven L. Winter, "Citizens Disunited," 27 *Georgia State Univ. Law*

But worse than this naïveté (if it is naïveté and not studied indifference) is the Court’s recent resurrection of a long-ago discredited libertarian logic that comes straight out of the *Lochner* Era playbook. Consider two examples:

(1) In *Privileges of Labor Unions in the Struggle for Life*,<sup>71</sup> Walter Wheeler Cook applied Hohfeld’s scheme of fundamental jural relations to critique the decision in *Hitchman Coal & Coke Co. v. Mitchell*.<sup>72</sup> In *Hitchman Coal*, the Court held that an employer whose employment contract specified that no worker could belong to the United Mine Workers was entitled to an injunction against attempts to induce its workers to leave its employ and join the union. This was so even though the Court recognized both that “the working man is [as] free to join the union” as the “employer is free to make non-membership in a union a condition of employment” and that “the employment was ‘at will,’ and terminable by either party at any time.”<sup>73</sup> Cook pointed out that the employer’s *privilege* to insist on non-union hires cannot be converted into a *right* to exclude others—including the at will employee himself—from deciding that they would rather join the union than work for the Hitchman Coal Company.<sup>74</sup> Nor can that privilege credibly be conflated with a *duty* on the part of the government to enforce by injunction the mutually terminable contract of employment once the worker has decided to exercise *his* privilege to change his mind. In short, the Court held that the “right” to insist on hiring only non-union workers also encompassed a right to force them to continue as employees even

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*Review* 1133, 1135 (2011) (“while the Court’s opinion in *Citizens United* is long on free speech rhetoric, it is painfully short on empirical data, social context, and constitutional vision”).

<sup>71</sup> Walter Wheeler Cook, “Privileges of Labor Unions in the Struggle for Life,” *27 Yale Law Journal* 779 (1918).

<sup>72</sup> 245 U.S. 229 (1917).

<sup>73</sup> *Id.* at 251.

<sup>74</sup> Cook, *supra* note 71, at 789-90 (“[I]t is at once obvious that the *right* (claim) to protection of the resulting “*status*” [as an non-unionized employee] is a different thing from the *privilege* to enter into the relations giving rise to the (so-called) “*status*.”) (emphasis in original).

after they had a change of heart.

In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,<sup>75</sup> the Court struck down a law that provided matching funds to a publicly-financed candidate when a privately-financed candidate exceeded preset spending amounts. The Court found that the provision of matching funds was a “penalty” that “burdened” the free speech rights of the privately-financed candidate. It explained that

the more money spent on that candidate’s behalf or in opposition to a publicly funded candidate, the more money the publicly funded candidate receives from the State. And just as with the privately financed candidate, the effect of a dollar spent on election speech is a guaranteed financial payout to the publicly funded candidate the group opposes.<sup>76</sup>

But, of course, that is the very point of a matching funds scheme—to promote debate by leveling the playing field so that the publicly-funded candidate can respond to privately-funded speech. This can only be construed as a “penalty” if the legal *privilege* to spend money on one’s election speech entails not just that the government has *no-right* to forbid it, but also a correlative *duty* on the government not to assist others.<sup>77</sup> To put it another way, the *Bennett* Court converted a privilege of wealth (to spend as much as you want on a campaign) into an enforceable right to outspend others.<sup>78</sup>

(2) Written during the heyday of *laissez faire*, Hale’s *Coercion and Distribution in a Supposedly Non-Coercive State* argued that it made no sense to speak of government “interference” with property rights because the government is an active participant in es-

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<sup>75</sup> 564 U.S. \_\_\_, 131 S. Ct. 2806 (2011).

<sup>76</sup> 131 S.Ct. at 2818-20.

<sup>77</sup> Although not on all fours, much the same can be said about *Burwell v. Hobby Lobby*, 573 U.S. \_\_\_, 134 S.Ct. 2751 (2014). There, the employer’s free exercise right against government interference became an *immunity* that imposed an affirmative *liability* on the government and a *power* that inflicted a *disability* on employees with different views with respect to birth control.

<sup>78</sup> In more colloquial terms, the Court held that rich people have the right not only to spend all the money they want on election campaigns, but also the right to the relative advantage that their greater wealth provides and that the State cannot interfere with either of these prerogatives.

tablishing, promoting, and maintaining the system of property rights.<sup>79</sup> By the same token, the payment an employer makes to his or her workers is not “voluntary” because it is the necessary cost of obtaining the service that they could otherwise withhold.<sup>80</sup> He explained that, while ordinary language users might continue to use terms such as “interference” and “coercion” in their unreflective senses, it makes little sense to predicate policy on those intuitions because the sense that something counts as “interference” or as “coercion” depends entirely upon the circular bit of reasoning that the behavior is legally or morally forbidden.<sup>81</sup> It follows that it makes no sense to distinguish between acts and omissions. “If I start an automobile in motion [and] subsequently . . . fail to perform the act of stopping it when ‘reasonable care’ would require me to do so, the victim of my failure to act can recover damages for my nonperformance.”<sup>82</sup> Nor, he pointed out, would it matter if I bargained with the victim in advance to pay me to exercise due care when driving (a pre-Coase example of a Coasean bargain). My failure to act would, from a legal and economic point of view, be the “act” of breach of contract. But, from a lay point of view, the

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<sup>79</sup> See Hale, *supra* note 59, at 471 (“What is the government doing when it “protects a property right”? Passively, it is abstaining from interference with the owner when he deals with the thing owned; actively, it is forcing the non-owner to desist from handling it, unless the owner consents.”).

<sup>80</sup> *Id.* at 474 (“But whatever they get beyond this [subsistence] minimum is obtained . . . by his fear that they will exercise the threat to work elsewhere or not at all. If obtained through this fear, it is a case where he submits by so much to their wills. It is not a ‘voluntary’ payment, but a payment as the price of escape from damaging behavior of others.”). Note that the logic here is identical to that of Coase, *supra* note 11, with respect to injury and injuring behavior as mutual inflictions of costs.

<sup>81</sup> Hale, *supra* note 59, at 476:

If an act is called “coercion” when, and only when, one submits to demands in order to prevent another from violating a legal duty, then every legal system by very definition forbids the private exercise of coercion—it is not coercion unless the law does forbid it. And no action which the law forbids, and which could be used as a means of influencing another, can fail to be coercion—again by definition. . . . And if an act is called “coercion” when, and only when, one submits to demands in order to prevent another from violating a *moral* duty, we get right back to the use of the term to express our conclusion as to the justifiability of the use of the pressure in question; with the ensuing circular reasoning of condemning an act because we have already designated it “coercive.”

<sup>82</sup> *Id.* at 475. A formalist might respond that the duty of care arises from the *act* of driving the car. But a realist or economist would respond that both characterizations—i.e., the “action” of operating the car or the “inaction” of failing to apply the brakes—are descriptively true. Standing alone, neither explains *why* liability should attach.

bargain itself would be considered “coercive” because premised on a threat to fail to perform a legally or morally required act.<sup>83</sup>

Applying quite similar logic, Roscoe Pound argued against the act/omission distinction in tort law. Modern law begins by forbidding culpable acts of aggression; but, in a complex society, one must be able to conduct one’s affairs without fear of harm:

The savage must move stealthily, avoid the sky line, and go armed. The civilized man assumes that no one will attack him and so moves among his fellow men openly and unarmed, going about his business in a minute division of labor. Otherwise there could be no division of labor beyond the differentiation of men of fighting age, as we see in primitive society. . . . Just as we may not go effectively about on a minute division of labor if we must constantly be on guard against the aggressions or the want of forethought of our neighbor, so our complex social order based on division of labor may not function effectively if each of us must stay his activities through fear of [certain forms of inaction]. There is danger to the general security not only in what men do and the way in which they do it, but also in what they fail to do. . . .<sup>84</sup>

In other words, Pound argued that complex social systems require the stability of a general expectation of freedom from harm regardless of its source in action or inaction. The relevant question is only one of effect, and its determination turns on questions of policy rather than on a formal or metaphysical distinctions.

Which makes it all the more surprising to learn—nearly a hundred years later—that the Framers had secretly written the act/omission distinction into the Constitution. In *National Federation of Independent Business v. Sibelius*, Chief Justice Roberts explained that: “To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing some-

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<sup>83</sup> *Id.* at 476:

But even were the fact recognized that payment were demanded as the price of *not abstaining*, . . . the demands would still be called threats. The reason . . . is partly because to abstain is contrary to legal duty, partly because it is adjudged to be contrary to moral duty. Popular speech in this case seems to apply the term coercion to demands made as a price of not violating a legal or moral duty.

<sup>84</sup> Roscoe Pound, *An Introduction to the Philosophy of Law* 85-88 (Yale Univ. Press, 1922) (originally delivered as the Storrs Lecture in 1921).

thing and doing nothing would not have been lost on the Framers, who were ‘practical statesmen,’ not metaphysical philosophers.’<sup>85</sup>

Note three things about this statement. *First*, it deconstructs itself: The Framers were practical men, not metaphysicians; accordingly, they would have been more concerned with the action/inaction distinction than with the practical economic effects of the relevant behavior. *Second*, the “practical statesmen” characterization in the Chief’s statement is a quote from a 1905 Supreme Court opinion<sup>86</sup>—that is, from the very year *Lochner* was decided,<sup>87</sup> almost two decades before Hale and Pound wrote and nearly four decades before the decision in *Wickard v. Filburn*.<sup>88</sup> *Third*, the statement is in direct conflict both with precedent and with any rational understanding of economics. As the Court observed in *Wickard*: “Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be ‘production,’ nor can consideration of its economic effects be foreclosed by calling them ‘indirect.’”<sup>89</sup> Was Filburn’s cultivation of wheat in excess of the quota “action” or “inaction”? In one sense, it was action—i.e., the forbidden planting and harvesting of wheat. From another perspective, it was inaction—i.e., a failure to go into the market to buy wheat.<sup>90</sup> Did Filburn’s cultivation of wheat for home use represent a decrease in the demand (thus, depressing prices) or an increase in the supply of wheat available for consumption (thus, depressing prices)? The

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<sup>85</sup> National Federation of Independent Business v. Sibelius, 567 U.S. \_\_\_, 132 S.Ct. 2566, 2589 (2012) (Opinion of Roberts, C.J.); see also *id.* at 2468 (Scalia, J., concurring and dissenting) (“Ultimately the dissent is driven to saying that there is really no difference between action and inaction, . . . a proposition that has never recommended itself, neither to the law nor to common sense.”).

<sup>86</sup> *Sibelius*, 132 S.Ct. at 2589 (quoting *South Carolina v. United States*, 199 U.S. 437, 449 (1905)).

<sup>87</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>88</sup> 317 US 111 (1942).

<sup>89</sup> *Id.* at 124.

<sup>90</sup> Thus, the *Wickard* Court described the statute as “forcing some farmers into the market to buy what they could provide for themselves.” *Id.* at 129.

answer to each of these questions is “both” and “it doesn’t matter because the effect is precisely the same.”

Finally, consider briefly the so-called “new” originalism. Its academic proponents claim that it differs from the “old” originalism because it answers the criticisms of originalism as articulated in influential articles by Paul Brest<sup>91</sup> and H. Jefferson Powell<sup>92</sup> by: (1) focusing not on the original intent of the Framers, but on the original public meaning of the text as it would have been understood by those who voted to ratify the Constitution; and (2) by distinguishing constitutional *interpretation*—that is, determination of the semantic meaning of the words of the text—from constitutional *construction*—that is, decision regarding the legal effect of the text as it is to be applied to new circumstance not anticipated by the ratifiers.<sup>93</sup>

Perhaps it is just me, but I fail to see anything “new” in this version of originalism. Consider the latter claim: What is the difference between the interpretation and construction distinction and Sanford Kadish’s distinction between the “intension” and “extension” of a constitutional provision?<sup>94</sup> For that matter, what is new about the distinction between originalism and the so-called “Living Constitution” and Kadish’s distinction between fixity and flexibility in constitutional meaning?<sup>95</sup> So, too, with respect to the shift from original intent to public meaning: The idea that the Constitution should be under-

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<sup>91</sup> Paul Brest, “The Misconceived Quest for the Original Understanding,” 60 *Boston University Law Review* 204 (1980).

<sup>92</sup> H. Jefferson Powell, “The Original Understanding of Original Intent,” 98 *Harvard Law Review* 885 (1985).

<sup>93</sup> See Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Univ. of Kansas Press, 1999); Randy E. Barnett, *Restoring The Lost Constitution: The Presumption of Liberty* (Princeton Univ. Press, 2004); Robert W. Bennett & Lawrence B. Solum, *Constitutional Originalism: A Debate* (Cornell Univ. Press, 2011);

<sup>94</sup> Sanford Kadish, “Methodology and Criteria in Due Process Adjudication — A Survey and Criticism,” 66 *Yale Law Journal* 319, 341-42 (1957).

<sup>95</sup> *Id.* at 334-44.

stood according to the ordinary meaning of the words as the ratifying public would have understood them was first articulated by Chief Justice Marshall in *McCulloch v. Maryland*,<sup>96</sup> and can be found in subsequent opinions.<sup>97</sup> In any event, this shift of semantic focus resolves none of the critiques of originalism. Thus, Brest quoted Quinten Skinner in warning of the difficulties of ascertaining the meaning of something written centuries ago:

We must classify in order to understand, and we can only classify the unfamiliar in terms of the familiar. The perpetual danger, in our attempts to enlarge our historical understanding, is thus that our expectations about what someone must be saying or doing will themselves determine that we understand the agent to be doing something which he would not—or even could not—himself have accepted as an account of what he was doing.<sup>98</sup>

Nothing in the shift from Framers’ intent to original public meaning responds to or obviates this interpretive problem. So, too, nothing in the shift from intent to public meaning resolves the problem first noted by Chief Justice Marshall that all words have both broad and narrow meanings.<sup>99</sup> “New” originalists, no less than the older variety, have a strong

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<sup>96</sup> 17 U.S. 316, 407 (1819) (“A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public.”).

<sup>97</sup> *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting) (“the whole aim of construction, as applied to a provision of the Constitution, is . . . to ascertain and give effect to the intent of its framers *and the people who adopted it.*”) (emphasis added).

<sup>98</sup> Brest, *supra* note 91, at 216 (quoting Quinten Skinner, “Meaning and Understanding in the History of Ideas,” 8 *History & Theory* 3, 6 (1969)). In terms of contemporary linguistics, this problem arises from the role of framing in constructing semantic meaning. See Steven L. Winter, “Frame Semantics and the ‘Internal Point of View,’” in *Current Legal Issues Colloquium: Law and Language* 115 (Oxford Univ. Press, Michael Freeman & Fiona Smith eds., 2013).

<sup>99</sup> *McCulloch*, 17 U.S. at 414 (“Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense.”). For a more extensive treatment of the issue in light of contemporary linguistics, see my *A Clearing in the Forest: Law, Life, and Mind* (Univ. of Chicago Press, 2001). The basic problem with Barnett’s methodology is twofold: First, as others have noted, he assumes that it is only the narrow meaning that counts. See Robert J. Pushaw, Jr. & Grant S. Nelson, “Essay: A Critique of the Narrow Interpretation of the Commerce Clause,” 96 *Northwestern Univ. Law Review* 695 (2002). Second, he does not understand that when one searches the contemporaneous uses of a term, one is going to find that in the vast majority of the cases it is used in its prototypical sense—well, because that is the import of the empirically documented phenomenon of prototype effects—but that this says nothing about the range of meanings that an ordinary language speaker would naturally understand the term to connote. Prototype effects work better as touchstones for inclusion than

tendency to find what they want to see both when they review the historical record and when they assess semantic meaning—as, for example, the scope of the term “regulate.”<sup>100</sup> Thus, Randy Barnett maintains “that the term ‘commerce’ was consistently used in the narrow sense and that there is no surviving example of it being used in either source in any broader sense.”<sup>101</sup> He concludes, therefore, that Justice Thomas was essentially correct when he argued in that “the term ‘commerce’ was used in contradistinction to productive activities such as manufacturing and agriculture. Alexander Hamilton, for example, repeatedly treated commerce, agriculture, and manufacturing as three separate endeavors.”<sup>102</sup> (Though one might ask: Does the fact that he repeatedly used the three terms together in a single phrase indicate that he thought they were three things or one set of integrally related things?) Barnett goes further, alleging that in “none of the sixty-three appearances of the term ‘commerce’ in The Federalist Papers” did Hamilton ever use the term “to unambiguously refer to any activity beyond trade or exchange.”<sup>103</sup> He notes Hamilton’s rhetorical question in Federalist 35: “Will not the merchant understand and be disposed to cultivate, as far as may be proper, the interests of the mechanic and manufacturing arts to which his commerce is so nearly allied?”<sup>104</sup> But he does not note that, on the immediately preceding page, Hamilton argued more directly that “discerning citizens are well aware that the mechanic and manufacturing arts furnish the materials of mercantile enterprise and industry” and that, therefore,

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as rules of exclusion. Standing alone, the fact that a car is certainly a “vehicle” covered by a rule prohibiting vehicles in the park tells us little about how we should handle a bicycle, a moped, or a child’s electric automobile. See *Clearing in the Forest*, *supra*, at 70-92, 197-204.

<sup>100</sup> Compare *Sibelius*, 132 S.Ct. at 2589 (“The Framers gave Congress the power to *regulate* commerce, not to *compel* it”) with *Wickard*, 317 U.S. at 128 (“The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon.”); and with *United States v. Darby*, 312 U.S. 100, 113 (1942) (“the prohibition of such shipment by Congress is indubitably a regulation of the commerce.”).

<sup>101</sup> Randy E. Barnett, “The Original Meaning of the Commerce Clause,” 68 *Univ. of Chicago Law Review* 101, 103 (2001).

<sup>102</sup> *United States v. Lopez*, 514 U.S. 549, 586 (1995) (Thomas, J., concurring).

<sup>103</sup> Barnett, *supra* note 101, at 115.

<sup>104</sup> *Id.* at 116.

“[m]any of them indeed are immediately connected with the operation of commerce.”<sup>105</sup> Perhaps more on point is Hamilton’s statement on the very first page of his famous 1791 *Report on the Subject of Manufactures*, where he quite plainly included manufacturing as a subset of commerce:

The expediency of encouraging manufactures in the United States, which was not long since deemed very questionable, appears at this time to be pretty generally admitted. The harassments, which have obstructed the progress of our external trade, have led to serious reflections on the necessity of enlarging the sphere of our domestic commerce. . . .<sup>106</sup>

We might say in conclusion that the second corollary of Santayana’s famous dictum is that those who turn a blind eye to history are bound to bloviate about it.

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<sup>105</sup> Alexander Hamilton, “The Federalist No. 35” in *Writings* 318 (Library of America, Joanne B. Freeman ed., 2001). In No. 35, Hamilton is not discussing the scope of the Commerce Clause, but the representation of different classes of interests in the national government; his point is that the interests of the manufacturing class will be represented by representatives of the merchant class because their interests are so closely connected.

<sup>106</sup> Alexander Hamilton, “Report on the Subject of Manufactures” in *id.* at 647.

## Appendix



## FACULTY READING GROUP

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\* There are more common citations for the main points of the argument. But as with items 52 and 53 above, I have opted for the earlier piece rather than the somewhat better known follow-ons.

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