2014

Sharing the Necessary and Proper Clause

William Baude

Follow this and additional works at: https://chicagounbound.uchicago.edu/public_law_and_legal_theory

Part of the Law Commons

Chicago Unbound includes both works in progress and final versions of articles. Please be aware that a more recent version of this article may be available on Chicago Unbound, SSRN or elsewhere.

Recommended Citation


This Working Paper is brought to you for free and open access by the Working Papers at Chicago Unbound. It has been accepted for inclusion in Public Law and Legal Theory Working Papers by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
SHARING THE NECESSARY AND PROPER CLAUSE

William Baude

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

November 2014

This paper can be downloaded without charge at the Public Law and Legal Theory Working Paper Series: http://www.law.uchicago.edu/academics/publiclaw/index.html and The Social Science Research Network Electronic Paper Collection.
SHARING THE NECESSARY AND PROPER CLAUSE

William Baude*

Few constitutional clauses have been the focus of so many hopes and fears as the Necessary and Proper Clause.

In his Foreword, Professor John Manning puts forward a powerful vision of the clause, challenging the current approach of the Supreme Court. Focusing on the text, Manning suggests that it “has the unmistakable feel of an ‘empty standard,’” and is therefore a source of great interpretive discretion.1 Manning further argues that the text gives that interpretive discretion to Congress. Many of the congressional-power decisions of the Roberts and Rehnquist Courts might fail under this critique.2

 Constitutional text is a natural focal point for those who challenge current judicial practice, and Manning is right to ask whether the Court’s doctrines have transgressed or misread the text. But Manning’s proposed reading of the text is not the only one. To choose between them, we need additional sources or theories of meaning, and at least some of them will point to a different assessment than Manning’s.

In this Response, I argue that historical practice, *McCulloch v. Maryland*,3 and the text itself all permit, though may not require, a less deferential judicial interpretation than Manning advocates.

I. CONGRESS’S HISTORICAL ROLE

One way to think about the Necessary and Proper Clause is historically — focusing on the principles that were understood to limit it at the Founding and how those principles were worked out in practice afterward. For instance, in a recent article, I argued that the clause should not be construed to include what I called “great powers,” which must be expressly enumerated rather than implied.4 I suggested that this theory is a current part of our constitutional practice, including

* Neubauer Family Assistant Professor of Law, University of Chicago Law School. Thanks to Sam Bray, Jud Campbell, Josh Chafetz, Chad Flanders, Michael McConnell, Richard Re, Mark Shawhan, and David Strauss for quick and insightful advice, and to the Editors of the *Harvard Law Review* for helpful editorial suggestions.


2 See id. at 30–48, 78–83. Manning also discusses statutory interpretation, which I lack the space to address here.

3 17 U.S. (4 Wheat.) 316 (1819).

many of the cases that Manning criticizes, but the theory draws on neglected or ill-understood arguments from the Founding and the nineteenth century, and so it is fair to call it “revisionist.”

Manning suggests that the “revisionist” theories should also lead to a deferential reading. That may well be right. There is nothing in the “revisionist” account that is inconsistent with a strong role for Congress. There is much to be said for giving Congress the lead in interpreting the Necessary and Proper Clause. It has the sanction of history. And if you read the constitutional debates from that period, they are often impressive.

Sometimes the arguments for congressional power prevailed; sometimes they did not. But it is important to note that Congress did not take charge by treating the clause as an “empty standard.” Rather, members of Congress engaged in substantive legal debates about the scope of the clause as a matter of text, history, structure, and policy. And while Congress’s views were important, that substantive debate was ultimately a shared enterprise.

It was Representative James Madison who articulated the “great powers” limits to the Necessary and Proper Clause decades before John Marshall mentioned them in McCulloch v. Maryland. Madison argued that it was unconstitutional to create the bank of the United States as a corporation because doing so was “a great and important power” that was not expressly enumerated and therefore could not be implied.

It was Representative Philip Barbour who marshalled arguments against the “Bonus Bill” designed to fund internal improvements to infrastructure. Barbour’s arguments ranged over various federal

---


6 Manning, supra note 1, at 57–60. The leading “revisionist” theory, which mine builds off of, is put forth in Gary Lawson, Geoffrey P. Miller, Robert G. Natelson & Guy I. Seidman, The Origins of the Necessary and Proper Clause (2010).

7 On whether those debates are, or could be, impressive today, consider J. Mitchell Pickerill, Constitutional Deliberations in Congress (2004), and its review, Keith E. Whittington, James Madison Has Left the Building, 72 U. Chi. L. Rev. 1137 (2005).

8 Manning, supra note 1, at 6, 53, 54. To be clear, because Manning is writing the Supreme Court Foreword, I do not mean to blame him for omitting a discussion of how Congress might implement the Clause; but readers should not infer from its omission that there is nothing to say.

9 See 17 U.S. (4 Wheat.) 316, 409 (1819).


powers including the Necessary and Proper Clause and the debate started by the bill has been called “one of the most intense and important constitutional controversies in the history of the Republic.”

And it was Representative Thaddeus Stevens who aired concerns about Congress’s power to create a railroad corporation that would exercise eminent domain power in the states. Stevens was not concerned about Congress’s power in the Territories, where the Necessary and Proper Clause was not in play.

While Congress sometimes took the lead in expounding the scope of the Necessary and Proper Clause, it did not go it alone. For instance, the President was involved over and over again — President George Washington deliberated with his cabinet on the constitutionality of the national bank; President Andrew Jackson resurrected the constitutional objections in his veto message twenty-one years later; then-President Madison vetoed the “Bonus Bill” on constitutional grounds; and President James Monroe and others subsequently exercised internal-improvements vetoes on constitutional grounds.

States have interpreted the clause too, sometimes with important effects. The Kentucky and Virginia Resolutions opposed the Alien and Sedition Acts, in substantial part on federalism grounds. Those resolutions have been described as “a public rallying point . . . ‘an integral part of the Republican national campaign in 1800,’ a campaign that the Republicans won decisively.” Of course there were other famous state resolutions about federalism that were more ill-fated.

---

13 See Baude, supra note 4, at 1779 (citing sources).
14 Id.
18 James Monroe, Views of the President of the United States on the Subject of Internal Improvements (May 4, 1822), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, supra note 16, at 144; see also Baude, supra note 4, at 1769–70.
History suggests that Manning is quite right that judicial supremacy is not the original, best, or only approach to the clause. But the historical practice is also not one of congressional supremacy; it is one where different officials have made substantive legal arguments as part of the shared project of interpreting the limits of Congressional power.

II. McCulloch

The courts have shared the task of interpreting the Necessary and Proper Clause too. Take, for instance, the decision in McCulloch v. Maryland, which upheld the bank that Representative Madison had opposed. McCulloch is now viewed as a canonical statement about the scope of Congress’s powers under the Necessary and Proper Clause. (Even Justice Thomas does not maintain that it was wrongly decided.)

But McCulloch is subject to revisionism too: McCulloch is often taught as a very nationalist opinion, and it was — but not entirely. At the Founding there was a broad spectrum of possible positions about the Necessary and Proper Clause. In McCulloch, the Court adopted a generally broad and deferential test, and specifically rejected many of the narrow readings, such as the argument that “necessary” meant “indispensable” or even “most direct and simple,” or the argument that the clause should be read as diminishing Congress’s powers compared to what they would have been without the clause. By doing so, the Court picked a point toward the nationalist end of the spectrum.

But it did not go all the way to the end. That is demonstrated by the Court’s reassurances that the means chosen by Congress must be “plainly adapted to [their] end,” must “consist with the letter and spirit of the constitution,” and must be “implied as incidental” rather than “a great substantive and independent power.” While those limitations are probably less important than the broad deference adopted by the rest of the opinion, they are still potentially important.

It is worth noting that these limitations echoed similar theories that had been debated in Congress and the executive branch. The previous bank debates between Representative Madison and the various members of Washington’s cabinet had also taken as common ground that

---

22 For a survey of early judicial review, see Keith E. Whittington, Judicial Review of Congress Before the Civil War, 97 GEO. L.J. 1257 (2009).
24 17 U.S. (4 Wheat.) 316, 413 (1819).
25 Id. at 419–21.
26 Id. at 421.
27 Id. at 411.
the Necessary and Proper Clause extended only to incidental powers, and not potentially great ones.28

While Manning says that the “great powers” test “was not central to McCulloch’s analysis,”29 it is also worth noting that these limitations provide important support for the McCulloch Court’s otherwise broad reading of the clause. The outer limits provide a backstop against what would otherwise be a potentially unacceptable consequence of the broad deference.

For instance, even arch-nationalist Charles Black once conceded that the Constitution would not allow Congress to require state governors to be confirmed by the U.S. Senate.30 I suspect that most people would make a similar concession. So long as that is true, the limiting principles provide support for an interpretation of the clause that is broader in other ways: If the clause cannot be interpreted to allow certain extreme exercises of power, and if the limiting principles are abandoned, then the clause would instead have to be interpreted to have a tighter connection between means and ends, a review of legislative purpose, or something else.

Hence, while Manning repeatedly notes that his theory of judicial deference has roots in McCulloch,31 he is right to acknowledge that the Court’s less deferential review does too.32 I would emphasize the point: McCulloch contains both a deferential standard and limiting principles. The post–New Deal Court emphasized the deferential standard; the Court’s more recent decisions have also emphasized the limiting principles.

So the most widely accepted case about the Necessary and Proper Clause does not tell us whether to prefer the current era of Alden v. Maine, Printz v. United States, and Free Enterprise Fund v. Public Company Accounting Oversight Board33 or the earlier era of Buckley v. Valeo, Northern Pipeline Construction Co. v. Marathon Pipe Line Co., and INS v. Chadha.34 It may well be that the more recent decisions do reflect a difference in emphasis, in attitude, even in substantive interpretive methodology.35 It may also be that some of them are

28 See sources cited supra notes 10–12, 15; see also Baude, supra note 4, at 1751–53.
29 Manning, supra note 1, at 59 n.349.
30 Charles L. Black, Jr., Foreword: The Myth and Reality of Federalism, 9 U. TOL. L. REV. 615, 616 (1978) (“The subjection of state Governors to confirmation by the United States Senate would have been evidently instrumental to national interest, in the days of the civil rights struggle, but no one even thought of such a step.”). On Black as an arch-nationalist, see Charles L. Black, Jr., On Worrying About the Constitution, 55 U. COLO. L. REV. 469, 471–72, 485–86 (1984).
31 Manning, supra note 1, at 9–11, 14, 20, 66.
32 Id. at 42, 54–55.
33 Criticized in id. at 33–39, 43–48.
34 Defended in id. at 31, 79.
35 See generally id. at 50–48.
wrongly decided, by whatever the correct methodology is. But those possibilities are not settled, or even indicated, by *McCulloch*.

### III. DOES THE TEXT CHALLENGE THIS HISTORY?

I have recounted the tradition of the Necessary and Proper Clause in a slightly different way than Manning has, but I am not sure that he would really disagree with the account. While he repeatedly invokes *McCulloch*, the core of his argument is not that the Roberts Court is misreading that case, but rather that the Court is misreading the text of the Necessary and Proper Clause. That is an important charge, but I am not sure that it sticks.

Manning’s textual argument has two essential moves. First, the Necessary and Proper Clause is an “empty standard,” meaning that somebody must exercise significant interpretive discretion. Second, the text of the clause indicates that Congress should be the one to exercise that discretion. For now, let’s accept the first move, and ask whether the text necessarily yields the second.

At the outset it is helpful to remember the historical context of the clause. In *The Federalist* both Hamilton and Madison defended the clause as doing nothing more than restating what would have been rightly implied from Congress’s other enumerated powers. Hamilton called it “declaratory,” “chargeable with tautology or redundancy,” and “at least perfectly harmless.” Madison said that it was the same as if “the Constitution [had] been silent on this head.” And while it has been pointed out that one should use *The Federalist* with “no small degree of caution,” it is nonetheless “a valuable resource for making sense of other evidence of meaning.” This suggests that we should not lightly assume that the text of the clause commits us to a historically contested form of judicial deference.

And indeed, the text can be read in multiple ways. Consider first the “vertical” Necessary and Proper Clause, which authorizes Congress to enact “all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.” Manning places some weight on

---

36 On whether the Clause is really an empty standard, see infra Part IV.
38 *The Federalist* No. 44, supra note 37, at 234–35 (James Madison).
40 *Id.* at 1360. For other evidence consistent with *The Federalist*’s view, see Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183, 185–87 (2003); *see also* Madison, Statement on the Bank, supra note 10, at 42.
41 U.S. Const. art. I, § 8, cl. 18.
the fact that the clause “identifies Congress as the recipient of that power,” though he admits that it is not a decisive point.42

I would go further: The fact that one entity possesses a power tells us nothing about whether that entity should receive any deference in interpreting that power. To be sure, those who exercise power will usually take the first cut at interpreting their own authority, but that tells us nothing about who gets the final say.

For instance, one could reverse Manning’s logic to argue that states should be given deference in interpreting the scope of the Tenth Amendment since they are identified as possessors of the reserved power.43 But because the Tenth Amendment is the flipside of the Necessary and Proper Clause, both views cannot be correct. We need some other argument to decide whose views control.

In between these polar views of deference is the more conventional view, also permitted by the text, that the scope of the Necessary and Proper Clause is simply an ordinary question of constitutional interpretation, subject to the ordinary standard of judicial review. Here is Madison again:

If it be asked what is to be the consequence, in case the Congress shall misconstrue [the Necessary and Proper Clause], and exercise powers not warranted by its true meaning, I answer, the same as if they should misconstrue or enlarge any other power vested in them; as if the general power had been reduced to particulars, and any one of these were to be violated; the same, in short, as if the State legislatures should violate the irrespective constitutional authorities. In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts . . . .

Maybe Madison is wrong, but I do not see how the text says so.

Manning also argues that the specification of Congress is especially relevant because the Necessary and Proper Clause “is a kind of master clause — one that is directed explicitly at the allocation of [constitu-

42 Manning, supra note 1, at 62.
44 The Federalist No. 44, supra note 37, at 235 (emphases added). Madison went on to say “and in the last resort a remedy must be obtained from the people who can, by the election of more faithful representatives, annul the acts of the usurpers.” Id. This can be seen as a nod toward what we would now call the “political safeguards of federalism.” See Manning, supra note 1, at 67 n.398 (citing sources). But notice that Madison lists it as an adjunct to judicial review, not a replacement. Accord Bradford R. Clark, Essay, Putting the Safeguards Back into the Political Safeguards of Federalism, 80 TEX. L. REV. 327, 339–41 (2003).
tional] decisionmaking authority." Yet one could just as easily see
the clause as servant, rather than master, including only incidental
powers to effectuate the others. As a "servant clause," it would au-
 thorize Congress to implement other constitutional powers without al-
tering the broad outline of congressional or judicial power. The histor-
ical statements about the clause being tautologous and redundant and
excluding great powers seem to point to this more modest reading.

The question of whether the Necessary and Proper Clause is to be
a master clause or a servant clause arises again in Manning’s supple-
mentary textual argument about the separation of powers. The "horiz-
onal" component of the clause authorizes Congress “to make all
Laws which shall be necessary and proper for carrying into Execution
. . . all other Powers vested by this Constitution . . . in any Department
or Officer [of the U.S. government.]” Manning reads it this way: “as
long as Congress acts constitutionally, the clause gives it express
priority over the coordinate branches as implementer-in-chief.”

But, again, that is not the only reading. One can instead read the
requirement that the law be “proper for carrying into execution” the
executive power as a requirement that the law be in aid or support of
the President’s constitutional judgment about what is proper. As Pro-
fessors Sai Prakash and Michael Ramsey have put it: “Since it is de-
rivative of the President’s power, it must be exercised in coordination
with, and not in opposition to, the President.”

The text can be read to impose similar limits on the scope of Con-
gress’s power to make laws “necessary and proper for carrying into
Execution” the power of the federal courts. While the clause has long
been read to establish Congress’s power to create procedural rules, the
text does not seem to take a position on whether those rules can be
valid when in opposition to the Supreme Court’s own judgment about
how to implement the judicial power. Again my point is not that
these more limited readings of the horizontal Necessary and Proper

45 Manning, supra note 1, at 63.
46 U.S. CONST. art. I, § 8, cl. 18.
47 Manning, supra note 1, at 65.
48 Saikrishna B. Prakash & Michael D. Ramsey, The Executive Power over Foreign Affairs,

Supreme Court, rather than Congress, has ultimate power to set procedures in original jurisdic-
tion cases). For restrictions on the powers of lower courts, as with restrictions on the powers of
statutory officers, Congress’s implementing powers might be bolstered by the fact that it is the
one that creates them.
Clause are necessarily right. But they are plausible, and the text itself does not tell us how to choose between them. Ultimately, the text of the Necessary and Proper Clause just does not speak with enough specificity to address the question Manning is interested in. The Court, Manning, and I all agree that ultimately judgments under the clause must be shared: The clause has limits that the Court should enforce. Congress has power to make its own choices within those limits.

Manning’s disagreement with the Court rests on his proposed standard of review — that the Court should displace Congress’s judgments only when the latter are “unreasonable.” But the choice of that reasonableness standard, as opposed to any other possible standard of review, is more fine-grained than the text. From the text we can infer that Congress has the power to enact, and the Court has the power to judge. It does not say how broad, or how stringently.

IV. MUDDLING THROUGH

Manning concludes: “The Constitution came out unfinished. It includes a great many specific clauses that structure, limit, and prescribe procedures for the exercise of the powers it confers. But it also leaves a lot blank.”

True. I would submit that one of those things that the Constitution leaves blank is how the Court should review Congress’s exercises of power under the Necessary and Proper Clause. Ultimately, there is no textual bar to simply muddling through interbranch and intergovernmental disputes about constitutional meaning the way we have done for centuries.

At the same time, I am not sure that the process of muddling through is inevitably as formless as Manning sometimes hints it is. Let’s return briefly to Manning’s first charge, that the clause is an “empty standard.” Many theories of interpretation have the power to put flesh on the bones of the constitutional text. One example, as I’ve mentioned, is a historical approach. Behind the text lie background principles of law that can inform the meaning of its vague provisions, such as the scope of legislative, executive, and judicial power. And beyond the Founding era, subsequent historical practice, like judicial

---

52 Manning, supra note 1, at 79.
53 Id. at 83.
precedent, can also serve to “liquidate” or fix the meaning of open-textured constitutional phrases.

Manning has put it aptly in previous writing: “the most important factor in assessing the [Necessary and Proper C]lause’s present meaning may be, in Madison’s words, the way it came to be ‘liquidated’ over time.” Liquidation (think “liquidated damages”) was a term for settling the meaning of a contested or vague legal provision through practice. As the founding generation and its successors wrestled with and ultimately coordinated on the text’s meaning, liquidation could give clarity or stability that the bare text might lack.

We just don’t know yet how much that inquiry will yield, and what the answers will be. Much of the post-Founding discussion relevant to these questions will probably be found in congressional and executive materials, not case law, and nobody has yet systematically perused those materials with the relevant “revisionist” lens. And historical inquiry might also tell us how much clarity to demand when the Court is engaged in judicial review.

Of course, there are other substantive methods of constitutional interpretation too, and those could also provide alternative answers to the questions of congressional power or judicial review. But in any event, completing the unfinished Necessary and Proper Clause may just remain a shared project of Congress, the courts, and others.

---

57 Accord Manning, supra note 1, at 80 (“Perhaps support for some of the Court’s holdings remains to be found in parts of the historical record it has yet to explore.”).
58 One such example, eminent domain, was the focus of Baude, supra note 4. The fact that much of the analysis happened outside the courts is a response to Manning’s observation that the concept of great powers does not appear in many Supreme Court cases. Manning, supra note 1, at 59 n.349.
Readers with comments may address them to:

Professor William Baude  
University of Chicago Law School  
1111 East 60th Street  
Chicago, IL 60637  
baude@uchicago.edu
## The University of Chicago Law School
### Public Law and Legal Theory Working Paper Series


<table>
<thead>
<tr>
<th>Number</th>
<th>Title</th>
<th>Authors</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>402</td>
<td>M. Todd Henderson, Voice versus Exit in Health Care Policy</td>
<td>October 2012</td>
<td></td>
</tr>
<tr>
<td>403</td>
<td>Aziz Z. Huq, Enforcing (but Not Defending) ”Unconstitutional” Laws</td>
<td>October 2012</td>
<td></td>
</tr>
<tr>
<td>404</td>
<td>Lee Anne Fennell, Resource Access Costs</td>
<td>October 2012</td>
<td></td>
</tr>
<tr>
<td>405</td>
<td>Brian Leiter, Legal Realisms, Old and New</td>
<td>October 2012</td>
<td></td>
</tr>
<tr>
<td>407</td>
<td>Brian Leiter and Alex Langlinais, The Methodology of Legal Philosophy</td>
<td>November 2012</td>
<td></td>
</tr>
<tr>
<td>408</td>
<td>Alison L. LaCroix, The Lawyer’s Library in the Early American Republic</td>
<td>November 2012</td>
<td></td>
</tr>
<tr>
<td>409</td>
<td>Alison L. LaCroix, Eavesdropping on the Vox Populi</td>
<td>November 2012</td>
<td></td>
</tr>
<tr>
<td>410</td>
<td>Alison L. LaCroix, On Being “Bound Thereby,”</td>
<td>November 2012</td>
<td></td>
</tr>
<tr>
<td>411</td>
<td>Alison L. LaCroix, What If Madison had Won? Imagining a Constitution World of Legislative Supremacy</td>
<td>November 2012</td>
<td></td>
</tr>
<tr>
<td>413</td>
<td>Alison LaCroix, Historical Gloss: A Primer</td>
<td>January 2013</td>
<td></td>
</tr>
<tr>
<td>414</td>
<td>Jennifer Nou, Agency Self-Insulation under Presidential Review</td>
<td>January 2013</td>
<td></td>
</tr>
<tr>
<td>415</td>
<td>Aziz Z. Huq, Removal as a Political Question</td>
<td>February 2013</td>
<td></td>
</tr>
<tr>
<td>416</td>
<td>Adam B. Cox and Thomas J. Miles, Policing Immigration</td>
<td>February 2013</td>
<td></td>
</tr>
<tr>
<td>417</td>
<td>Anup Malani and Jonathan S. Masur, Raising the Stakes in Patent Cases</td>
<td>February 2013</td>
<td></td>
</tr>
<tr>
<td>418</td>
<td>Ariel Porat and Lior Strahilevits, Personalizing Default Rules and Disclosure with Big Data</td>
<td>February 2013</td>
<td></td>
</tr>
<tr>
<td>419</td>
<td>Douglas G. Baird and Anthony J. Casey, Bankruptcy Step Zero</td>
<td>February 2013</td>
<td></td>
</tr>
<tr>
<td>420</td>
<td>Alison L. LaCroix, The Interbellum Constitution and the Spending Power</td>
<td>March 2013</td>
<td></td>
</tr>
<tr>
<td>421</td>
<td>Lior Jacob Strahilevitz, Toward a Positive Theory of Privacy Law</td>
<td>March 2013</td>
<td></td>
</tr>
<tr>
<td>422</td>
<td>Eric A. Posner and Adrian Vermeule, Inside or Outside the System?</td>
<td>March 2013</td>
<td></td>
</tr>
<tr>
<td>423</td>
<td>Nicholas G. Stephanopoulos, The Consequences of Consequentialist Criteria</td>
<td>March 2013</td>
<td></td>
</tr>
<tr>
<td>426</td>
<td>Lee Anne Fennell, Property in Housing</td>
<td>April 2013</td>
<td></td>
</tr>
<tr>
<td>427</td>
<td>Lee Anne Fennell, Crowdsourcing Land Use</td>
<td>April 2013</td>
<td></td>
</tr>
<tr>
<td>429</td>
<td>Daniel Abebe and Aziz Z. Huq, Foreign Affairs Federalism: A Revisionist Approach</td>
<td>May 2013</td>
<td></td>
</tr>
<tr>
<td>430</td>
<td>Albert W. Alschuler, <em>Lafler</em> and <em>Frye</em>: Two Small Band-Aids for a Festering Wound</td>
<td>June 2013</td>
<td></td>
</tr>
<tr>
<td>432</td>
<td>Aziz Z. Huq, Tiers of Scrutiny in Enumerated Powers Jurisprudence</td>
<td>June 2013</td>
<td></td>
</tr>
</tbody>
</table>
438. Brian Leiter, Nietzsche against the Philosophical Canon, April 2013
441. Daniel Abebe, One Voice or Many? The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs, September 2013
442. Brian Leiter, Why Legal Positivism (Again)? September 2013
443. Nicholas Stephanopoulos, Elections and Alignment, September 2013
444. Elizabeth Chorvat, Taxation and Liquidity: Evidence from Retirement Savings, September 2013
445. Elizabeth Chorvat, Looking Through' Corporate Expatriations for Buried Intangibles, September 2013
448. Lee Anne Fennell and Eduardo M. Peñalver, Exactions Creep, December 2013
449. Lee Anne Fennell, Forcings, December 2013
451. Nicholas Stephanopoulos, The South after Shelby County, October 2013
453. Tom Ginsburg, Political Constraints on International Courts, December 2013
454. Roger Allan Ford, Patent Invalidity versus Noninfringement, December 2013
459. John Rappaport, Second-Order Regulation of Law Enforcement, April 2014
460. Nuno Garoupa and Tom Ginsburg, Judicial Roles in Nonjudicial Functions, February 2014
461. Aziz Huq, Standing for the Structural Constitution, February 2014
462. Jennifer Nou, Sub-regulating Elections, February 2014
468. Tom Ginsburg and Alberto Simpser, Introduction, chapter 1 of Constitutions in Authoritarian Regimes, April 2014
469. Aziz Z. Huq, Habeas and the Roberts Court, April 2014
471. Aziz Z. Huq, Coasean Bargaining over the Structural Constitution, April 2014
472. Tom Ginsburg and James Melton, Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty, May 2014
475. William Baude, Zombie Federalism, April 2014
479. William H. J. Hubbard, Nuisance Suits, June 2014
480. Saul Levmore and Ariel Porat, Credible Threats, July 2014
481. Brian Leiter, The Case Against Free Speech, June 2014
482. Brian Leiter, Marx, Law, Ideology, Legal Positivism, July 2014
483. John Rappaport, Unbundling Criminal Trial Rights, August 2014
484. Daniel Abebe, Egypt, Ethiopia, and the Nile: The Economics of International Water Law, August 2014
487. William H. J. Hubbard, The Discovery Sombrero, and Other Metaphors for Litigation, September 2014
488. Genevieve Lakier, The Invention of Low-Value Speech, September 2014
490. Thomas J. Miles and Adam B. Cox, Does Immigration Enforcement Reduce Crime? Evidence from 'Secure Communities', October 2014
491. Ariel Porat and Omri Yaddin, Valuable Lies, October 2014
492. Laura M. Weinrib, Civil Liberties outside the Courts, October 2014
494. Nicholas Stephanopoulos, Aligning Campaign Finance Law, October 2014
495. John Bronsteen, Christopher Buccafusco and Jonathan S. Masur, Well-Being and Public Policy, November 2014
496. Lee Anne Fennell, Agglomerama, December 2014
500. Adam M. Samaha and Lior Jacob Strahilevitz, Don't Ask, Must Tell—and Other Combinations, January 2015
504. Richard H. McAdams, Vengeance, Complicity and Criminal Law in Othello, February 2015
506. William Baude, Sharing the Necessary and Proper Clause, November 2014
507. William Baude, State Regulation and the Necessary and Proper Clause, December 2014
508. William Baude, Foreword: The Supreme Court's Shadow Docket, January 2015
509. Lee Fennell, Slicing Spontaneity, February 2015