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Legal Frameworks

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Legal frameworks are a critical element in basic legal analysis. They set out the questions courts ask when addressing a particular issue, and law students need to learn the applicable framework before proceeding with any type of rigorous legal analysis. But students need to do much more than simply learn, or memorize, the current framework that applies to the particular issue under analysis. They must develop the skill to construct the relevant framework from primary source materials (e.g., court decisions) themselves.

This skill is critical because a legal framework is not simply presented to lawyers in practice. Most often, they must painstakingly derive the framework from indeterminate and ambiguous judicial precedent. In addition, a legal framework is not static. Legal frameworks change as courts address new situations. Sometimes they change in radical ways, but most often they change in subtle ways that require sophisticated assessment to discern, understand, and incorporate. Thus, a legal framework is a complex moving target that calls for one to engage in constant, on-going construction and deconstruction. Teaching novice law students this skill is essential because, as explained below, legal frameworks define the field of play for many forms of legal analysis such as cross-case reasoning.¹

In addition to identifying the particular questions that courts ask, a well-constructed legal framework sets out the questions in the order the courts will address them in reaching their decision on the particular issue. One can view a legal framework as a decision flowchart, a concept that many law students find helpful. Of course, students must initially be

able to recognize the issue presented -- another basic skill that they need to develop (i.e., issue spotting). But once they have identified the relevant issue, they must be able to construct the questions a court will address in analyzing the issue and recognize the order in which a court will address these questions.

Students derive an important subsidiary benefit in learning to construct a legal framework. Namely, they learn the language of the courts in addressing a particular issue; they become aware of terms of art in a particular area. This knowledge allows them to tailor and phrase arguments in a way that is recognizable to the courts, making it easier for the decision-maker to digest and consider the argument. For example, in the area of personal jurisdiction, it is helpful to know that the courts ask whether the defendant has “purposefully availed” himself of the forum. “Purposeful availment” is a phrase that a student is unlikely to come up with and use on his or her own. Through the process of constructing a legal framework, however, students become familiar with this phrase, and as they work in the area, such phrasing becomes natural. In this way, students learn the language of the law.

The primary source material for beginning law students constructing legal frameworks is appellate court opinions. This reflects the traditional teaching method used in first-year law school courses. Professors assign readings that most often focus on appellate decisions included in a casebook or similar material. Students read these materials before engaging with the professor and fellow students in some form of class discussion. Through this traditional case dialogue approach to law teaching, students learn the law and the skill of legal reasoning.²

This teaching method can, and has been, criticized.³ However, it remains prevalent, especially in traditional first-year law school courses such as Torts, Contracts, Property, Civil Procedure, and Constitutional Law.⁴ And although it may focus too narrowly on case law as a primary material for constructing legal frameworks, this method does allow students to develop the skill of constructing such frameworks. The hope is that students will be able to transfer this skill as they move on to construct legal frameworks for issues that rely on sources of law other than prior cases, such as constitutional, statutory, and regulatory provisions. But again, current legal education emphasizes case opinions and decisions as the primary source material for constructing legal frameworks.

A beneficial by-product of this use of court decisions in constructing legal frameworks is the opportunity for students to appreciate the concept and power of precedent. The construction of the law is somewhat like biological evolution.⁵ (It, of course, is not akin to the concept of the blind watchmaker because judges are conscious and deliberate in making decisions.⁶) Past decisions determine the way forward in many areas of law. There is certainly a path-dependency aspect to legal decisions and the law. The legal decision-maker proceeds down an already established path that leads to the next step forward, with no real option to step backward.⁷

Students need to appreciate the importance of this path-dependency in defining the law. Constructing legal frameworks based on a reading and discussion of prior judicial decisions provides an opportunity to develop this appreciation. Students who gain this appreciation carry with them a key insight that will benefit them in terms of developing the skill of legal reasoning.

The value of legal frameworks extends from this insight concerning case precedent. Precedent allows one to define the bounds within which appropriate legal analysis takes place. A legal framework identifies and articulates these bounds. Defining and knowing the bounds for legal analysis makes the process of analysis more efficient: one is less likely to stray off course into irrelevancy if bounds are recognized and respected. In other words, there is much less wasted effort as a result of constructing a legal framework.

Additionally, a legal framework increases the likelihood of successful legal argument. Because a legal framework is constructed from prior court decisions and uses the language of the courts, judges are more likely to understand and digest an argument made within the appropriate legal framework. The advocate is able to present his or her analysis within the bounds that the courts have set, speaking their own language to them. This approach assists a judge in both making and explaining a decision, and, thereby, increases the likelihood that a judge will view the argument favorably.⁸

Because legal frameworks are important and provide significant benefits in the process of legal analysis, it is important to teach law students how to construct these frameworks. Students must struggle to become comfortable with the intellectual discomfort entailed in constructing a legal framework based on case precedent.

To start this difficult learning process, it is helpful to provide students with several examples of the construction of legal frameworks. The examples could come from any area or issue of law that has generated a line of cases, court decisions, and explanations of the

decisions. The following examples focus on three issues: personal jurisdiction, Congress' commerce power authority, and dormant commerce clause limits on state regulation.

In my Civil Procedure course, personal jurisdiction is a five-week unit, comprising fifteen class sessions. The core of the unit consists of an examination of a dozen United States Supreme Court decisions that address the issue of personal jurisdiction.⁹ I have two primary goals in teaching this line of cases: 1) develop students' ability to construct legal frameworks from case precedent by working together to construct such a framework in a particular area; and 2) develop students' ability to engage in cross-case legal reasoning¹⁰ through the comparison of cases within the legal framework we construct. The discussion here will focus on the first goal.

In addressing the personal jurisdiction issue, a court must decide if it has authority over the defendant before it. In other words, the court must determine if it may render a valid and binding judgment that affects the defendant in the case.

The line of cases begins with Pennoyer v. Neff, an 1877 decision by the United States Supreme Court.¹¹ In Pennoyer, the Court interpreted the newly adopted Fourteenth Amendment Due Process Clause¹² to require physical presence of the defendant or the defendant's property in the forum state in order for the court to exercise jurisdiction over the defendant. The Court focused on the concept of sovereign territory and the limits inherent in territorial boundaries, and implicitly rejected a focus on a broader concept of fairness. The Court indicated that, if a defendant's property has been properly attached by a plaintiff, a court has jurisdiction whether or not the defendant is fully aware of the suit or is capable of

mounting a defense. Through class discussion, students begin to realize that the Court's opinion reflects a formalistic approach based on territorial boundaries. With this realization they construct a legal framework that asks only whether a defendant or his property is physically present in the forum court's jurisdictional territory.

As the national economy and new technologies changed American society and individual lives, the Court began to alter the Pennoyer legal framework. In a 1927 case, Hess v. Pawloski, that addressed automobile travel across state lines, the Court allowed jurisdiction over a defendant not physically present in the forum state.¹³ The Court upheld the fiction of a driver's consent for the appointment of an agent to receive service of process, and effectively, to jurisdiction in the forum state once he drives into the state. The Court, in addition to relying on the fiction of consent, noted some factors that made jurisdiction in this case fair. The applicable state statute limited jurisdiction to actions arising from the driver's conduct in the state; required notice to defendant via registered mail; and provided for continuances to allow defendant to prepare and present an effective defense. In class, the student's discuss whether fairness factors are relevant and whether they are part of revised legal framework in this area.

In a 1945 decision, International Shoe Company v. Washington, the Court rejected fictions like the one relied on in the interstate driver case to find defendants essentially "present" in the forum state.¹⁴ Instead, the Court focused on the defendant's level of activity in the forum state, explaining that the defendant must have certain minimum contacts with the forum such that jurisdiction does not offend "traditional notions of fair play and substantial justice."¹⁵ The Court did not require defendant's physical presence for jurisdiction. However,

the federal system and state boundaries still mattered – jurisdiction must be reasonable in the context of our federal system of government. In addition, the Court stated that an estimate of inconveniences of the litigation in the particular forum is relevant. The students struggle with these concepts and begin to construct a new “minimum contacts” legal framework for cases in which defendant’s activities in the forum gave rise to the suit.

In a series of subsequent decisions, the Court develops and elaborates the minimum contacts analysis. One could view the Court as developing two branches of inquiry. For the first branch, often referred to as the “purposeful availment” branch¹⁶, the Court requires purposeful activity by the defendant in the forum state.¹⁷ However, in what are labeled “stream of commerce cases,”¹⁸ the members of the Court have not been able to reach a majority interpretation of “purposeful availment.” One group finds that the placement of a product in the stream of commerce (i.e., a distribution system) constitutes purposeful availment in a state where the defendant’s product is found and causes injury.¹⁹ Another group of Justices asserts that there must be something more than the stream of commerce sweeping defendant’s product to the forum state. For them, purposeful availment requires a “plus factor” such as advertising in the forum state or designing the product for use in the forum.²⁰ The Court’s split on the meaning of purposeful availment creates a difficult ambiguity for law students, but the cases make clear that this is a relevant question in the analysis of the personal jurisdiction issue. This question is a component of the legal framework. The cases also make clear that “purposeful availment” is a term of art that is part of the language used by the courts in this area.

The second branch of the minimum contacts test, sometimes referred to as the “reasonableness branch,”²¹ involves an ambiguity that is different in kind from the ambiguity within the first branch. The ambiguity here is whether the second branch serves any significant function in the analysis. Although the Supreme Court regularly discusses it, the Court seldom bases a decision on it.

According to the Supreme Court, a court must assess several factors in order to determine if jurisdiction over the defendant is reasonable. The primary factor is the burden placed on the defendant by having to present a defense in the forum. Due process considerations instruct that the defendant must have a reasonable opportunity to present his or her defense. However, in assessing reasonableness, the courts also consider the plaintiff’s interest in the forum, the state’s interest, judicial efficiency, and the states’ shared interest in achieving justice.²²

These considerations could be part of the legal framework. However, the Court in several cases appears to merely articulate this second branch while giving it no, or minimal, consequence in reaching a decision.²³ The Court did reach a consensus decision in one difficult stream of commerce case that involved a foreign defendant by considering the factors within the second branch.²⁴ However, even in cases involving foreign defendants, it is not clear how often, and to what extent, these considerations become operational or meaningful.²⁵

This situation confuses students. Many conclude that the second branch is part of the legal framework in this area because the courts ask the reasonableness questions, but see it

as a weak component that does not come into play in most cases. Some students view this component as relatively strong in that it may affect the answers to the purposeful availment question, but the courts rarely articulate this interplay between the two branches. Overall, students tend to include the reasonableness assessment in the framework, albeit as a weak element.

The Court has decided other cases that add elements to the legal framework. In a few cases, the Court has addressed the situation in which the defendant's activities giving rise to the suit did not occur in the forum state.²⁶ These cases have been labeled "general jurisdiction" cases,²⁷ and they are treated differently from "specific jurisdiction" cases in which the defendant's activities in the forum gave rise to the suit. For general jurisdiction cases, the Court requires more than minimum contacts in order to assert jurisdiction over a defendant. The Court requires systematic and continuous activity by the defendant in the forum.²⁸ Because of these general jurisdiction case decisions, an important preliminary question within the legal framework is whether the suit arose from defendant's activities in the forum.

The Court has also decided cases that define the scope of operation of the legal framework in this area. In a 1977 case, Shaffer v. Heitner, the Court essentially reversed the 1877 case studied at the beginning of the unit, holding that the attachment of a defendant's property in the forum state was not automatically sufficient to establish jurisdiction.²⁹ Due process requires minimum contacts between defendant and the forum in order to allow a court jurisdiction even in a case in which defendant's property has been attached.³⁰ In another case, Burnham v. Superior Court of California, a group of Justices indicated that physical presence of the defendant in the forum, as evidenced by service of process on the

defendant in the forum, automatically provided jurisdiction for the forum's courts.³¹ This case makes clear that concepts of physical presence and formal territoriality that lay at the core of the earliest decisions in this area remain alive and relevant. In the context of the minimum contacts analysis, these concepts likely manifest themselves in the purposeful availment question. Although this decision may technically lie outside the focused minimum contacts legal framework, the concepts it reflects provide law students with insights that are helpful in constructing the framework and in analyzing new cases within the framework.

As students read and discuss this line of cases they construct the legal framework that applies after one determines that a statute or rule authorizes the court to exercise jurisdiction over the defendant.³² A court proceeds with the constitutional Due Process analysis as follows:

1. Does the case arise from or relate to the defendant's activities in the forum state?
 - a. If the answer is no, did the defendant have systematic and continuous contacts with the forum state, allowing the court to exercise general jurisdiction over the defendant?
 - b. If the answer is yes, the court must proceed to the minimum contacts analysis by asking two primary questions:
 1. Did the defendant purposefully avail himself of the forum?; and

2. Would the exercise of jurisdiction over the defendant be reasonable and adequately convenient?

In answering the second question a court assesses several factors:

- The burden placed on the defendant by having to litigate in the forum (this is the primary factor)
- The plaintiff's interest in the forum
- The forum state's interest in the litigation
- Judicial efficiency
- The states' shared interest in achieving justice

The set of questions constitute a legal framework. The construction of the framework provides and defines the boundaries for the analysis of personal jurisdiction, and, in turn, informs the novice law student of the relevant questions that call for rigorous analysis through factual comparisons among precedent cases, policy considerations, and other methods of reasoning that lead to reasonable and coherent conclusions. The framework is the scaffold that supports the formulation of effective arguments. It is the playing field upon which analysis and argument take place.

The resulting framework, with its short list of questions, appears simple. But this appearance is deceptive. The process of constructing the framework raises difficult questions about its structure and coherence. Beginning with the Burger King case,³³ for example, the Court is not clear whether the two questions within the minimum contacts test are independent of one another or interrelated. The Court indicates that there may be a sliding

scale relationship. For example, it may be that a high degree of reasonableness would overcome a low level of purposeful availment in the forum by the defendant. Some members of the Court appear to reject this idea, seemingly reaching a decision of no jurisdiction as soon as purposeful availment is found to be lacking or very weak.³⁴

This ambiguous situation raises a serious question for students: How is this concept, and the ambiguity that surrounds it, reflected in the framework? Answering this question is a struggle for students. That struggle reveals the complexity that lies behind a seemingly simple legal framework. This complexity presents an opportunity for new arguments within, and about, a legal framework. Thus, the construction of a basic and somewhat settled legal framework allows for rich class discussion that opens students' eyes to the value of complexity in formulating creative arguments within the framework itself.

Another example of the construction of a legal framework is provided by the definition of Congress' authority under the commerce clause which provides, in relevant part, that Congress has the power "to regulate Commerce.....among the several states."³⁵ As with personal jurisdiction, there is a useful line of case decisions in this area. My Constitutional Law class examines six U.S. Supreme Court decisions in chronological order,³⁶ ending just before the Court's latest ruling in this area.³⁷

The examination of these cases through close reading and class discussion allows the students to construct a legal framework that includes two seemingly separate lines of questions. The courts address these questions when examining Congress' attempt to regulate intrastate, or local, activities. Each of the two lines of questions, as outlined below,

provides a separate route to a conclusion about the constitutionality of a federal statute under Congress' commerce power authority.

The first line of inquiry proceeds as follows:

1. Does the federal law regulate an activity (vs. inactivity)?³⁸

(If no, Congress is unlikely to have commerce power authority to regulate in this area.)

2. If yes, is the regulated activity local or intrastate in nature?³⁹

(If no, Congress is likely to have commerce power authority to regulate the interstate activity directly, without reliance on the Necessary and Proper Clause.)

3. If yes, is the regulated local activity commercial or economic in nature?⁴⁰

(If no, Congress is not likely to have commerce power authority to regulate the local activity, but see the second line of inquiry below.)

4. If yes, does the regulated local activity have a substantial effect on an aspect of interstate commerce?⁴¹

(If no, Congress is not likely to have commerce power authority to regulate the local activity, but see the second line of inquiry below.)

(If yes, Congress is likely to have commerce power authority to regulate the local activity.)

The separate second line of inquiry poses the same beginning two questions as the first line, and then proceeds as follows:

3. If yes, is the regulated local activity a component of a larger legislative scheme that regulates interstate commerce/ economic activity?⁴²

(Note that this line does not inquire into the economic nature of the regulated activity itself.)

(If no, Congress is not likely to have commerce power authority to regulate the local activity, but see the first line of inquiry above.)

4. If yes, is the regulation of the local activity necessary to secure the effectiveness of the larger legislative scheme?⁴³

(If no, Congress is unlikely to have commerce power authority to regulate the local activity – but see the first line of inquiry above.)

5. If yes, is the regulation of the local activity appropriate in that it is a plainly adapted means to achieve a legitimate end pursuant to Congress' power to regulate interstate commerce?⁴⁴

(If no, Congress is unlikely to have commerce power authority to regulate the local activity, but see the first line of inquiry above.)

6. If yes, is the regulation of the local activity proper in that it does not violate any other constitutional principle such as federalism /state sovereignty?⁴⁵

(If no, Congress is unlikely to have commerce power authority to regulate the local activity.)

(If yes, Congress is likely to have commerce power authority to regulate the local activity.)

The questions posed within the two lines of inquiry constitute a legal framework. Beginning law students struggle to develop this framework through case reading and discussion. However, once they have constructed it, they can use it to analyze and assess new cases. The Sebelius case provides students an opportunity to do this.

In Sebelius, the U.S. Supreme Court addressed a challenge to the requirement in the federal Affordable Care Act that individuals purchase health insurance.⁴⁶ As part of their challenge, the plaintiffs asserted that Congress did not have commerce power authority to enact the individual mandate. Having developed the relevant legal framework, students can examine the facts of Sebelius and predict the Court's analysis and decision. Students quickly focus on the first question in each of the framework's two lines of inquiry – Does the federal law regulate activity? They realize that this case involves Congress mandating individuals do something they have, as yet, failed to do – purchase health insurance. If this failure is viewed as activity, the students realize that Congress is likely to have authority under either line of inquiry because this activity is economic in nature and has substantial effects on interstate

commerce, and because regulation of this activity is an essential component of a larger legislative scheme that regulates interstate commerce.

Once students read the Court's opinions in Sebelius, they are comforted that the majority, dissent, and concurring opinions speak in terms of, and ask questions from, the legal framework they have developed.⁴⁷ They also are satisfied that the Court focuses on the activity/inactivity distinction as they have predicted. Thus, the legal framework does a great deal of work for the students in helping them to understand both the language and the reasoning of the Court, even if they may not agree with the result, namely, that failure to purchase insurance is not activity. They have developed a tool that not only allows them to formulate coherent arguments within the bounds of case precedent, but also allows them to understand a new case decision.

In addition, students can perceive, and begin to comprehend, explanations of, or changes to, the legal framework. For example, the majority opinion in Sebelius provides insight into the last question in the second line of inquiry. The majority explains that the individual mandate is not "proper" under the Necessary and Proper Clause which provides the foundation for the line of inquiry.⁴⁸ Even though the mandate does not violate the Constitution by commandeering state agents, as the dissent points out, it is still not proper because it is not a measure "derivative of, and in service to, a granted power"⁴⁹ – here the commerce power. Thus, the majority explains how the word "proper" should be interpreted for purposes of answering the last question in the framework.⁵⁰

A further example of an explanation of the second line of inquiry is provided by Justice Scalia's separate opinion.⁵¹ (Justice Scalia had previously provided a seemingly expansive area of operation for the second line of inquiry in his concurring opinion in Raich⁵²— a case in which the Court held that Congress had commerce power authority to regulate marijuana grown in small amount for one's own use). In Sebelius, Justice Scalia addresses the fourth question by explaining that the mandate is not a necessary component of the larger legislative scheme that regulates interstate commerce authority. Distinguishing Raich, he asserts that the individual mandate was not the only practicable way of reducing health insurance premiums and securing insurer profitability. In his view, Congress could have used other measures to achieve its goals. Thus, the answer to the fourth question in the legal framework -- asking whether the challenged regulation is necessary to secure the effectiveness of a larger legislative scheme -- is "no," and Congress does not have authority to enact the regulation pursuant to its commerce power.⁵³ By studying and discussing Justice Scalia's opinion, students gain a deeper understanding of a part of the legal framework they have constructed.

A third, and final, example of the construction of a legal framework is provided by another area of constitutional law -- dormant commerce clause doctrine. In this area, the courts protect both Congress' commerce power and interstate commerce itself from state or local regulation that interferes with interstate commerce.⁵⁴

A line of cases in this area provides students with the raw material to construct a legal framework.⁵⁵ In deciding these cases, the courts appear to raise a set of questions that they address roughly in the order provided here:

1. Does the state or local law discriminate against out-of-state persons and/or interstate commerce, or is it an evenhanded measure that has only incidental effects on interstate commerce?⁵⁶

a. If the state or local measure is discriminatory, the measure is per se invalid, unless one of the following two questions is answered in the affirmative:

i. Is the state or local government acting as a market participant through its action rather than as a market regulator?⁵⁷

(If no, the measure is likely invalid, but see the next question.)

(If yes, the measure is valid.)

ii. Does the discriminatory state or local measure favor only a public entity that performs a traditional government function?⁵⁸

(If the answer is no, the measure is likely invalid, but see the previous question.)

(If the answer is yes, the measure is examined under the Pike balancing test articulated in the question below.)⁵⁹

2. If the answer to the initial question (question 1. only) is no, in that the measure is evenhanded with only incidental effects on interstate commerce, the measure is examined under a balancing test that asks the following question:

Does the evenhanded measure impose burdens on interstate commerce that are clearly excessive in relation to the measure's putative local benefits?⁶⁰

(If the answer is yes, the measure is invalid.)

(If the answer is no, the measure is valid.)

The questions above constitute a legal framework. However, the courts have not provided a comprehensive analysis, or even clarity, in this area. The courts appear to be uncomfortable with their role in this area – protecting, and perhaps utilizing, a power of Congress in the face of congressional inaction. The discomfort has given rise to messy legal doctrine that the courts fail to explain fully and clearly.⁶¹

Because of this lack of clarity, students struggle with constructing a legal framework in this area. However, it is an exercise in sophisticated, close-case reading that may yield significant educational benefits. Students become acutely aware of the ambiguity in this area of law. They also can realize the implications of this ambiguity for other constitutional law issues. For example, by the time my students turn to the dormant commerce clause line of cases, they have already studied the Garcia decision, in which the Court found the “traditional government functions” test to be incoherent.⁶² As they construct the legal framework in this area, they see the Court rely on this test (see question 1.a.ii. above). Students can ask

themselves whether the Court has effectively overruled Garcia. They can also search for an explanation for the Court's use of the test in one area, but not another, in light of the constitutional text and federalism principles. The bottom line is that the construction of the legal framework in this area allows students to confront the frustrations of legal ambiguity and begin to appreciate such ambiguity for the insights and opportunities it provides for constructing arguments within the bounds of precedent.

As mentioned above, constructing legal frameworks introduces students to the language of the law. To bring this benefit of legal frameworks home in the dormant commerce clause area, I have students read the oral arguments before the Supreme Court in the United Haulers case.⁶³ The students can relate the dialogue between the advocate and the Court to their legal framework. They realize that the advocates speak in the language of the Court's framework (e.g., traditional governmental functions). Even the ambiguous framework in this area sets the boundary for effective arguments. Students also realize that they have a fairly robust tool that provides them with insights and a new perspective for comprehending cases and constructing arguments in a particular area of law.

Because one constructs legal frameworks from a line of case precedent, these frameworks are inherently unstable. They will change as new cases are decided. Thus, law students eventually realize that there are times to argue outside the bounds set by the frameworks that they have constructed. The trick is to develop the skill to realize when such out-of-bounds arguments are not simply a waste of time and words.

One way to develop this skill is to explore practical and policy considerations that may support a change to an established legal framework. For example, in the area of personal jurisdiction the question of whether a court's jurisdiction is reasonable and adequately convenient may be affected by developments in travel and communication. As it becomes easier for defendants to travel to a distant forum and to communicate with witnesses, attorneys, and courts who are located in the distant forum, the need to ask this question may fade, if not disappear. Such developments may lead to a significant change in the legal framework, possibly leading the astute advocate to minimize the time and words spent arguing about the reasonableness and convenience of the forum. This possibility of change would be especially strong when, as now, the courts seem to pay little attention to this question, especially in cases involving domestic defendants.⁶⁴

In contrast, the question of whether the defendant purposefully availed himself of the forum does not appear to be subject to change based on the practical considerations noted above. This question appears to arise from principles of federalism – a basic component of the design of the U.S. political structure. Because it is based on principle, rather than social conditions, it may be less subject to change. This resistance to change is especially likely because it appears that the courts take the relevant principle very seriously, often deciding cases based on the answer to the question arising from the principle.⁶⁵ The astute advocate, therefore, would likely spend a good deal of time and words in addressing this question.

The Lopez case in the commerce power area provides a second example of recognizing room for, or likelihood of, change in a legal framework⁶⁶. In Lopez, students see the Court seemingly add a new question to the legal framework. In previous cases, the courts

had simply asked whether a federal statute regulated a local activity that had substantial effects on interstate commerce in order to determine whether Congress had authority to enact the statute. But principles of federalism seemed to be growing in salience, especially for conservative members of the Supreme Court leading up to Lopez. These principles had given rise to concerns about federal overreach in several areas.⁶⁷

Some asserted that the previous legal framework gave Congress virtually unlimited authority under the commerce power. The time was ripe for the Court, with its somewhat conservative majority, to define a more robust limit on the commerce power. This opened a door to an argument that went outside the bounds of the existing framework. Justice Rehnquist, in his majority opinion, accepted such an argument, adding the question of whether the local activity is economic in nature. This new threshold, categorical test seemed to foreclose commerce power authority over non-economic local activities, even if they had a substantial effect on interstate commerce. (But see the second line of inquiry under the commerce power legal framework described above.) Lopez illustrates the opportunity to construct arguments outside an existing legal framework if attitudes have developed or shifted in a way that makes courts receptive to such an argument.

The skill needed to recognize this receptivity is difficult to teach, but class discussions allow law teachers an opportunity to plant the seed for this development. The instructor must deliberately and actively work with the novice student, with the goal of developing the practical judgment possessed by an expert attorney. It is difficult work, but it can give rise to some of the most interesting and enlightening class discussions.

While changes in technology and social conditions, along with changes in attitudes and political principles, appear to open the door to arguments that arise outside a current legal framework, compelling individual case facts do not. The Worldwide Volkswagen case in the personal jurisdiction area provides an example.⁶⁸ Despite the fact that the plaintiffs were seriously injured in the forum state, hospitalized there, and relatively immobile, the Court decided the case by addressing only the defendant's purposeful availment, finding that the defendants had not availed themselves of the forum. The Court seemingly refused to shift the framework's initial focus on purposeful availment to an overall assessment of reasonableness that would allow for a serious weighing of the plaintiffs' interest in the forum state.

The Raich case in the commerce power area provides another example.⁶⁹ Both of the plaintiffs suffered from serious medical conditions and were in severe pain. They found their only relief by consuming marijuana under a doctor's treatment. A doctor for one plaintiff believed that forgoing cannabis treatments would certainly cause that plaintiff excruciating pain and could prove fatal.

Federal law made the plaintiffs' use of marijuana illegal. Federal officials actively targeted one plaintiff's home, seizing and destroying six cannabis plants. The plaintiffs brought suit in federal court, challenging the federal law.

The Supreme Court recognized the plaintiffs' sympathetic situation to some extent, but still diligently applied the legal framework to find that Congress had authority to pass a law that criminalized an individual's growing and consuming her own marijuana. In applying the legal framework, the Court refused to find that the plaintiffs' activity was non-economic in

nature or that the law as it related to the plaintiffs was not a necessary element of a larger legislative scheme that regulated interstate commerce and thus beyond Congress' commerce power authority. The Court refused to stray outside the framework in a way that allowed recognition of the plaintiffs' rather compelling need to use marijuana for pain relief.

Such judicial loyalty to a legal framework in the face of sympathetic facts fuels critiques of the courts – both their reasoning and results. This criticism is often the starting point for critical legal analysis.⁷⁰ In following a framework, the courts can appear insensitive to the facts of a particular case, inflexible, and even biased.

But it is important to recognize that the construction, along with the rigorous application and consideration of a legal framework is the necessary first step in effective critiques of judicial opinions and the law: the framework opens the door for the legal critique. Novice law students can realize this role of a legal framework through open and patient class discussions. But before a deep, sophisticated critique can occur, students must construct the relevant framework. The skill of constructing a legal framework lies at the core of rigorous analyses and discussions.

In summary, legal frameworks serve several important functions in connection with educating novice lawyers. The primary function is to define the boundaries for constructing relevant and effective legal arguments. By using case precedent to recognize the questions that the courts ask in addressing a particular issue, and the order in which the courts ask the relevant questions, a law student defines the boundaries for legal analysis and argument.

Recognizing and staying within the bounds of precedent allows a law student to be efficient in analyzing a particular issue and effective in making legal arguments.

An important secondary function of legal frameworks is to allow novice lawyers to know when they are departing from case precedent. Thus, legal frameworks provide a starting point for critique of current law and for the construction of creative, sophisticated arguments for change. By constructing and knowing a particular legal framework, a student can begin to recognize how new considerations and arguments may justify a departure from the previously accepted approach. This allows for deeper insights into, and enhanced discussion of, the legal precedent.

This recognition also allows a student to begin to develop the skill of practical judgment concerning the likely effectiveness of arguments that rely on factors that exist outside the current legal framework. The student can begin to assess if the time is right for such an argument, asking if the argument is sustained by more than sympathetic or otherwise compelling facts. Have social conditions changed in a way that supports an argument outside the current framework? Have attitudes, principles, or policies shifted in a way that supports the argument? These questions arise in reference to a particular legal framework, thus indicating the importance of knowing and understanding the framework.

Another secondary function of legal frameworks is to introduce students to the role and value of case precedent. By using a line of cases to construct a useful legal framework, students come to appreciate precedent. It is the raw material for the scaffold that will support effective analyses and arguments.

And, as mentioned above, the construction of legal frameworks introduces students to the language of law. Courts and lawyers employ many terms of art in posing the questions that constitute a legal framework. By recognizing and using these terms (e.g., “purposeful avilment”) in their work to construct frameworks, novice law students learn a new language. By developing this language, students gain the capacity to frame their arguments in terms that are understandable and effective for a legal audience.

In conclusion, the construction of legal frameworks from a line of precedent cases provides law students with important educational benefits. Legal educators need to teach this fundamental skill even if it simply reflects a long tradition in law teaching and is nothing new. This basic aspect of legal education should not be lost. It should, rather, be improved. However, the traditional Socratic, or case-dialogue, method of law teaching is likely not the most effective way to develop the skill of constructing legal frameworks.⁷¹ In fact, there are indications that legal educators can use supplemental or alternative methods to achieve more significant learning gains in this area – the larger subject of this book.⁷² In exploring new teaching methodologies and approaches, however, we should not lose sight of this basic learning goal for novice law students.

¹ See DOROTHY H. EVENSEN ET AL., *DEVELOPING AN ASSESSMENT OF FIRST-YEAR LAW STUDENTS' CRITICAL CASE READING AND REASONING ABILITY: PHASE 2*, at 4 (Law School Admissions Council Grants Report 08-02, Mar. 2008), available at [http://www.lsac.org/docs/default-source/research-\(lsac-resources\)/gr-08-02.pdf](http://www.lsac.org/docs/default-source/research-(lsac-resources)/gr-08-02.pdf) (defining “cross-case reasoning” as “[the ability] (a) to construct accurate representations of multiple, closely related cases, (b) to detect indeterminacies of interpretation arising between or among them, and (c) to distinguish more from less purpose-relevant questions about their relationships to each other.”). For a discussion of cross-case and other similar forms of reasoning, see David J. Herring & Collin Lynch, *Teaching Skills of Legal Analysis: Does the Emperor Have Any Clothes?*, 18 LEGAL WRITING 85 (2012).

² See e.g. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 50-54 (Jossey-Bass 2007) (hereinafter *Carnegie Report*); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 531 (2d ed., 1985).

³ For a summary of critiques of Socratic dialogue and case methods, see John Elson, *The Regulation of Legal Education: The Potential for Implementing the MacCrate Report's Recommendation for Curricular Reform*, 1 CLINICAL L. REV. 363, 384-85 (1994). See also Andrew S. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91, 123 (1968) (describing the Socratic teacher as “turn[ing] into an enemy to be feared and avoided if possible.”); Anthony J. Mohr & Kathryn J. Rodgers, *Legal Education: Some Student Reflections*, 25 J. LEGAL EDUC. 403, 410-412 (1973) (a forum of student perspectives, among them suggestions that the Socratic method promotes incivility).

⁴ ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 99 (2007) available at http://cleaweb.org/Resources/Documents/best_practices-full.pdf (citing Andrew Petter, *A Closet Within the House; Learning Objectives and the Law School Curriculum*, in ESSAYS ON LEGAL EDUCATION (Neil Gold ed., 1982)). See also, e.g., WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW, 77-78 (2007) quoting and comparing KARL LLEWELLYN, THE BRAMBLE BUSH 116 (1996); Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 (1) SEATTLE U. L. REV. 1, 28 (1996-1997).

⁵ See Donald E. Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 39 (1985) (discussing and summarizing approaches to legal evolution and analogies between biological evolution and the law).

⁶ RICHARD DAWKINS, THE BLIND WATCHMAKER 4-5 (1987), ([i]f [natural selection] can be said to play the role of watchmaker in nature, it is the blind watchmaker...) For the definition of cross-case reasoning, see sources cited *supra* note 1.

⁷ See generally e.g. Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601(2001); but see e.g. Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 907 (2004-2005) (taking a moderate view of precedent in constitutional law and suggesting that there is a limited path dependency of precedent in constitutional adjudication.).

⁸ See Judge Ruggerio Aldisert's discussions of stating the issues and perfecting the argument in crafting appellate briefs. RUGGERIO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS & ORAL ARGUMENT 141, 241-43 (1992); see also Aldisert's discussion of logic for lawyers and canons of logic in crafting the brief, *id.* at 292-294.

⁹ See generally JACK H. FRIEDENTHAL ET. AL. CIVIL PROCEDURE: CASES AND MATERIALS 75-199 (11th ed., 2013).

¹⁰ For the definition of cross-case reasoning, see sources cited *supra* note 1.

¹¹ 95 U.S. (5 Otto.) 714 (1877).

¹² U.S. CONST. amend. XIV, § 1.

¹³ 274 U.S. 352 (1927).

¹⁴ 14 326 U.S. 310 (1945).

¹⁵ *Id.* at 316 (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

¹⁶ For examples of the use of the label, *see e.g.* Stanley E. Cox, *Would That Burnham Had Not Come to Be Done Insane - A Critique of Recent Supreme Court Personal Jurisdiction Reasoning, an Explanation of Why Transient Presence Jurisdiction Is Unconstitutional, and Some Thought about Divorce Jurisdiction in a Minimum Contacts World*, 58 TENN. L. REV. 497, 550 (1990-1991); Michael B. Mushlin, *The New Quasi in Rem Jurisdiction: New York's Revival of A Doctrine Whose Time Has Passed*, 55 BROOK. L. REV. 1059, 1115 n. 237 (1990).

¹⁷ *See* World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1979); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985); Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102, 122 (1987); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. ___, 131 S. Ct. 2780, 2787 (2011).

¹⁸ For examples of the use of the phrase, *see generally e.g.* Harvard Law Review Association, *Due Process Limits on Personal Jurisdiction*, 101 HARV. L. REV. 260, 261 (1987); Martin F. Noonan, *Civil Procedure - Personal Jurisdiction: Evolution and Current Interpretation of the Stream of Commerce Test in the Third Circuit*, 40 VILL. L. REV. 779 (1995).

¹⁹ *See Asahi*, 480 U.S. 102, *J. McIntyre*, 131 S. Ct. 2780.

²⁰ *Id.*

²¹ For examples of the use of the label, *see* Paul Eric Clay, *Quest for A Bright Line Personal Jurisdiction Rule in Contract Disputes-Burger King Corp. v. Rudzewicz*, 105 S.ct. 2174 (1985), 61 WASH. L. REV. 703, 708 n.35 (1986)(citing J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 125 n.9 (1985)); *see also* Howard B. Stravitz, *Sayonara to Fair Play and Substantial Justice?*, 63 S.C. L. REV. 745, 756 (2012)(discussing “second-branch reasonableness factors”).

²² *E.g. Rudzewicz*, 471 U.S. at 477; *Asahi*, 480 U.S. at 115-116.

²³ *See e.g.*, *WWVW*, 444 U.S. at 293-94; *Rudzewicz*, 471 U.S. at 486-87.

²⁴ *See Asahi*, 480 U.S. at 112-13.

²⁵ *See McIntyre*, 131 S. Ct. at 2794 (Ginsburg, J. dissenting).

²⁶ *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *Helicópteros Nacionales de Colombia, SA v. Hall*, 466 U.S. 408 (1984) ; *Goodyear Dunlop Tires Operations S.A. v. Brown*, 564 U.S. ___, 131 S.Ct. 2846 (2011).

²⁷ *See e.g.* Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdictions*, 2001 U. CHI. LEGAL F. 171, 191 n. 80 (2001); Charles W. "Rocky" Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807 (2004).

²⁸ *Helicopteros*, 466 U.S. at 416-17 ; *Goodyear*, 131 S.Ct. at 2851.

²⁹ 433 U.S. 186 (1977).

³⁰ *Id.*

³¹ 495 U.S. 604 (1990).

³² See e.g. 4A CHARLES ALAN WRIGHT ET. AL., FEDERAL PRACTICE AND PROCEDURE § 1069.3 (3d ed.); William E. Frazier, Jr., *When the International Shoe Doesn't Fit: Online Auctions and the Jurisdictional Problems That Follow*, 25 T. JEFFERSON L. REV. 493, 494-99 (2003).

³³ 471 U.S. 462.

³⁴ See *Asahi*, 480 U.S. 102, 103 (O'Connor, J., plurality opinion)(note that Justice Scalia only joins Part II-A of Justice O'Connor's opinion which addresses a lack of purposeful availment. He fails to join Part II-B which addresses the reasonableness factors); *J. McIntyre*, 131 S. Ct. 2780 (2011) (Kennedy, J., plurality opinion). In *J. McIntyre*, Kennedy authored the opinion of court in which Scalia, Thomas, and the Chief Justice joined. Breyer filed concurring opinion and was joined by Alito; Ginsburg filed a dissenting opinion and was joined by Sotomayor and Kagan. So the opinion would either be cited as : *J. McIntyre*, 131 S. Ct. 2780, 2791 (2011) (Breyer, J. concurring) or *J. McIntyre*, 131 S. Ct. 2780, 2794 (2011) (Ginsburg, J. dissenting) depending on which you wanted to cite.

³⁵ U.S. CONST. art. I, § 8.

³⁶ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1(1824); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); *Gonzalez v. Raich*, 545 U.S. 1, (2004).

³⁷ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

³⁸ *Lopez*, 514 U.S. at 558-59.

³⁹ *Lopez*, 514 U.S. at 558-59; *Raich*, 545 U.S. at 35 (Scalia, J., concurring).

⁴⁰ *Lopez*, 514 U.S. at 559-60; *Morrison* 529 U.S. at 609-10.

⁴¹ *Wickard*, 317 U.S. at 119 ; *Heart of Atlanta*, 379 U.S. at 251 ; *Raich*, 545 U.S. at 2.

⁴² *Raich*, 545 U.S. at 37 (Scalia, J. concurring).

⁴³ *Id.* at 40 (Scalia, J. concurring).

⁴⁴ *Id.* at 37 (Scalia, J. concurring).

⁴⁵ *Id.* at 41 (Scalia, J. concurring).

⁴⁶ 132 S. Ct. 2566 (2012).

⁴⁷ *Id.*

⁴⁸ *Id.* at 2592.

⁴⁹ *Id.* at 2573.

⁵⁰ *Id.* at 2592.

⁵¹ *Id.* at 2642. (Scalia, J. dissenting).

⁵² 545 U.S. at 37 (2004) (Scalia, J., concurring).

⁵³ *Sebelius*, 132 S. Ct. at 2592.

⁵⁴ See e.g. CHARLES SHANOR, *AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RECONSTRUCTION* 364 (5th ed. 2013); Edward A. Zelinsky, *The False Modesty of Department of Revenue v. Davis*: 29 VA. TAX REV. 407, 412 (2009-2010).

⁵⁵ *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984); *United Haulers v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007).

⁵⁶ *Philadelphia*, 437 U.S. at 621-28; *Kassel*, 450 U.S. at 670-72.

⁵⁷ *Wunnicke*, 467 U.S. at 93-100.

⁵⁸ *United Haulers*, 550 U.S. at 340-345.

⁵⁹ *Pike*, 397 U.S. at 142.

⁶⁰ *Kassel*, 450 U.S. at 670-71; *United Haulers*, 550 U.S. at 346.

⁶¹ See e.g. Julian Cyril Zebot, *Awakening a Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce*, 86 MINN. L. REV. 1063 (2001-2002).

⁶² *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985).

⁶³ Transcript of Oral Arguments, *United Haulers v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S.Ct. 1786 (2007) (No. 05-1345) available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/05-1345.pdf.

⁶⁴ Dawson J. Price, *Leaving Feedback: An Analysis of Ebay, Online Auctions, and Personal Jurisdiction*, 2014 U. ILL. L. REV. 231, 237 (2014).

⁶⁵ See e.g. Niloufer Selvadurai, *The Proper Basis for Exercising Jurisdiction in Internet Disputes: Strengthening State Boundaries or Moving Towards Unification?*, 13 PITT. J. TECH. L. & POL'Y i, 5 (2012-2013).

⁶⁶ *Lopez*, 514 U.S. 549.

⁶⁷ For example, Congress' use of the spending power. See *South Dakota v. Dole*, 483 U.S. 203 (1987); Congress' use of state officials to implement federal law. See *Printz v. United States*, 521 U.S. 898 (1997).

⁶⁸ *WWWW*, 444 U.S. 286.

⁶⁹ *Raich*, 545 U.S. at 37.

⁷⁰ For example, critical race analysis; gender analysis. See Dennis Patterson, *Langdell's Legacy*, 90 NW. U. L. REV. 196 (1995-1996).

⁷¹ See sources cited *supra* note 1.

⁷² See David J. Herring & Collin Lynch, *Teaching Skills of Legal Analysis: Does the Emperor Have Any Clothes?* 18 LEGAL WRITING 85 (2012); David J. Herring & Collin Lynch, *Enhancing Traditional Law*

Teaching to Produce Measurable Gains, U. OF PITTSBURGH LEGAL STUDIES RESEARCH PAPER SERIES, No. 2012-16 (June 14, 2012); David J. Herring & Collin Lynch, Research Paper, Measuring Law Student Learning Outcomes: 2013 Lawyering Class, UNM SCHOOL OF LAW LEGAL STUDIES RESEARCH PAPER SERIES, No. 2014-09 (Jan. 23, 2014).