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### ARTICLE

## ORIGINALISM AND THE GENERAL CONCURRENCE: HOW ORIGINALISTS CAN ACCOMMODATE ENTRENCHED PRECEDENTS WHILE REINING IN COMMERCE CLAUSE DOCTRINE

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### Executive Summary

*With changes in the makeup of the Supreme Court and new cases challenging the scope of federal authority getting litigated every year, the prospect of the Court revisiting its Commerce Clause jurisprudence is becoming a realistic possibility. But overturning decades of precedent outright could be disruptive. Is there a way for the Court to respect both precedent and the original understanding of the Commerce Clause? This Article proposes charting such a course. By preserving the key post-New Deal understanding that the Commerce Clause allows for the regulation of production, Congress can continue to have regulatory authority over important economic areas—on which the operation of the administrative state relies. But by incorporating a test similar to that of personal jurisdiction’s stream-of-commerce test, courts can shield local activity from*

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*federal regulation—giving renewed meaning to a foundational liberty-protecting provision.*

*This Article begins by examining the historical development of Commerce Clause jurisprudence, providing a context for understanding the tensions within this area of law. It then utilizes an approach developed by Professors McGinnis and Rappaport for determining on a neutral basis whether a precedent has become so entrenched as to preclude its overruling. This Article then applies that approach to Commerce Clause jurisprudence. Informed by those results, it offers a familiar way for courts to give more meaning to the Commerce Clause’s protections.*

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## INTRODUCTION

There is no denying that the scope of Congress’s authority under the Commerce Clause<sup>1</sup> has greatly expanded since the mid-1930s.<sup>2</sup> The Commerce Clause gives Congress the power to regulate interstate commerce. Traditionally, the federal government could regulate only the exchange of goods between states and flow of goods from one state’s market to another. But in the 1940s, the Supreme Court refined its understanding of the Commerce Clause and allowed for any activity that affects interstate commerce—no matter how remote—to fall within Congress’s regulatory authority. This expansive understanding forms the legal basis for much of our modern administrative state and, hence, has become a flashpoint in the debate on the proper role of the federal government.

Then, in *United States v. Lopez*,<sup>3</sup> the Court began to reassert the clause’s limitations on Congress’s regulatory power.<sup>4</sup> *Lopez* held

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<sup>1</sup> See U.S. CONST. art. I, § 8, cl. 3 (“To regulated Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”).

<sup>2</sup> See generally Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 554 (2012) [hereinafter *NFIB*] (opinion of Roberts, C.J.) (acknowledging that “Congress’s authority under the Commerce Clause has of course expanded with the growth of the national economy”); Cantor v. Detroit Edison Co., 428 U.S. 579, 605-06 (1976) (Blackmun, J., concurring in the judgment) (indicating that the Court “has recognized a greatly expanded Commerce Clause power”); Craig L. Jackson, *The Limiting Principle Strategy and Challenges to the New Deal Commerce Clause*, 15 U. PA. J. CONST. L. 11, 14 (2012) (explaining that the Commerce Clause’s “meaning was expanded significantly following the realignment of the Supreme Court during Roosevelt’s second term”).

<sup>3</sup> 514 U.S. 549 (1995).

<sup>4</sup> Jackson, *supra* note 2, at 19.

unconstitutional the Gun Free School Zones Act,<sup>5</sup> which made it unlawful to possess a gun in or near a school, because such possession did not constitute economic activity.<sup>6</sup> The *Lopez* case marked the first time since the 1930s that the Court struck down a federal law as exceeding Congress's commerce power.

Post *Lopez*, there was a tenable argument that the decision signaled a "turning point" in which the Court would invite reconsideration of its lenient, rational-basis level review<sup>7</sup> of Congress's exploits under the commerce power.<sup>8</sup> However, a few years later in *Gonzales v. Raich*, the Court upheld the application of federal drug laws to homegrown marijuana, which was allowed under state law for medicinal purpose and not intended for sale.<sup>9</sup> In particular, the unwillingness of Justices Scalia and Kennedy, both members of the *Lopez* majority, to reexamine the validity of post-New Deal commerce doctrine, through their joining of the *Raich* majority, signaled that the Court was not yet ready to begin readopting more traditional approaches to the clause.<sup>10</sup>

However, with the recent passing of Justice Scalia, the subsequent appointment of Justice Gorsuch, the retirement of Justice Kennedy, and the possibility that Justice Ginsburg and Justice Breyer will leave the Court in the coming years, big changes could be in store for commerce doctrine. Justice Thomas has made known his desire to revisit the Court's understanding of Congress's commerce power.<sup>11</sup> Chief Justice Roberts and Justice Alito appear willing to entertain a narrowing of the commerce

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<sup>5</sup> 18 U.S.C. § 922(q)(1)(A) (1990).

<sup>6</sup> *Lopez*, 514 U.S. at 567.

<sup>7</sup> Under rational basis review, the Court does not subject regulation to serious scrutiny, but merely asks whether the law has a rational purpose. See 16B AM. JUR. 2d *Constitutional Law* § 859 (2016) (explaining that "rational basis review requires only that the classification be rational but does not require that it be the fairest or best means that could have been used").

<sup>8</sup> Steven G. Calabresi, "A Government of Limited & Enumerated Powers": In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 753 (1995).

<sup>9</sup> 545 U.S. 1 (2005).

<sup>10</sup> See Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507, 550 (2006) (asserting that *Raich* represented a major step backward for efforts to limit Congress's Commerce Power).

<sup>11</sup> See, e.g., *NFIB*, 567 U.S. 519, 707-08 (2012) (Thomas, J., dissenting) (arguing that the substantial effects test used under the Commerce Clause is inconsistent with the original meaning of the Constitution).

doctrine.<sup>12</sup> And Justice Gorsuch has expressed strong concern about the overreach of federal power—even though possible remedies would upend basic doctrines of modern administrative law.<sup>13</sup>

Originalism holds that the Constitution’s text should be understood as it was at the time of its adoption.<sup>14</sup> For Commerce Clause doctrine, originalism would mandate that only trade of tangible goods between two or more states could be federally regulated.<sup>15</sup> By removing many areas of economic activity, such as manufacturing, from the ambit of federal control, a strict originalist approach could “plunge America’s legal and economic system into chaos” by forbidding the federal government much of its current regulatory authority.<sup>16</sup> Given these potential consequences, it would be too much to assume that a majority of the Court would erase over half-a-century of precedent in one fell swoop.<sup>17</sup> These practical concerns appear to leave advocates of a federal government truly limited in its regulatory powers without a workable but logically consistent argument.

Two scholars, however, provide an answer that looks primarily to originalism, but accommodates key precedents. John McGinnis and Michael Rappaport have asserted that while originalism should be the norm of constitutional interpretation, the Court can still affirm non-originalist

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<sup>12</sup> See *infra* subsection IV.C.2 (discussing *NFIB*’s narrow reading of the Necessary and Proper Clause); see also *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc) (discussing how the Commerce Clause at minimum requires that activity affect interstate commerce).

<sup>13</sup> See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151-58 (10th Cir. 2016) (Gorsuch, J., concurring) (questioning the basis for *Chevron* deference—where courts read agency interpretations of statutes with great deference); *United States v. Hinckley*, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, J., concurring) (expressing concern that the Sex Offender Registration and Notification Act impermissibly delegates unfettered discretion to the Attorney General in contravention of Article I’s non-delegation restrictions).

<sup>14</sup> Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text*, 81 U. CHI. L. REV. 1385, 1385-86 (2014) (arguing that the text of the Constitution should be its sole source of interpretation).

<sup>15</sup> See *infra* notes 26-27 and accompanying text.

<sup>16</sup> Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 NW. U. L. REV. 695, 715-18 (2002).

<sup>17</sup> See Lee Epstein et al., *The Decision to Depart (or Not) from Constitutional Precedent: An Empirical Study of the Roberts Court*, 90 N.Y.U. L. REV. 1115, 1146-47 (2015) (noting the Roberts Court’s general unwillingness to overtly overrule precedent).

precedents<sup>18</sup> that enjoy supermajoritarian support or strong reliance.<sup>19</sup> Supermajoritarianism is inherent in our Constitutional order: it is how the Constitution was adopted and amended.<sup>20</sup> Therefore, if societal consensus has settled around a non-originalist precedent or if society relies on a precedent so heavily that overturning it could impose massive costs, the Court may reaffirm.<sup>21</sup>

As Justice Story said, the Constitution's meaning should not fluctuate. To the contrary, "[i]t is to have a fixed, uniform, permanent construction . . . not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and forever."<sup>22</sup> The Court, as guardian of the Constitution, should not hesitate to "temper [its] Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause."<sup>23</sup> As this Article will argue, McGinnis and Rappaport's approach shows how the Court can restrict the scope of Congress's commerce power without annihilating federal regulatory authority.

Part I frames the issue by examining the historical understanding of what constituted "commerce" at the founding. The first section reviews seminal cases that have expounded on the clause and then examines the history and precedent surrounding the Necessary and Proper Clause, which has often bolstered the commerce power. Part I's analysis will demonstrate that current doctrine has deviated from the text and history of the Commerce Clause, but that an immediate return to the original understanding could be disruptive. As a result, Part II examines McGinnis and Rappaport's theory, which advocates for the original understanding to control unless an erroneous precedent enjoys supermajoritarian support or substantial reliance. Part III applies McGinnis and Rappaport's theory to Commerce Clause jurisprudence, showing that greater restrictions on the commerce power are needed because allowing Congress to regulate remote, local activities neither enjoys supermajoritarian consensus nor is necessary

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<sup>18</sup> That is, precedents where the Court relied on premises based on something other than the original understanding of the Constitution.

<sup>19</sup> John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 *Nw. U. L. Rev.* 383, 385 (2007).

<sup>20</sup> *See id.* at 385-89 (describing the adoption of the Constitution).

<sup>21</sup> *See infra* Part II.

<sup>22</sup> 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 145 (1833).

<sup>23</sup> *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

to prevent catastrophic results.

Part IV then lays out a manageable and familiar commerce test. The result of this Article's approach is the resurrection of the Commerce Clause's demarcation between national and local commerce. In arriving at this conclusion, this Article shows that a commerce test consistent with history and precedent is devisable. The approach proposed here recognizes Congress's authority to regulate most modern commercial transactions, while still honoring the bedrock principle that the federal government is one of limited powers.

### **I. THE COMMERCE CLAUSE DISTINGUISHES NATIONAL FROM LOCAL COMMERCIAL ACTIVITIES**

By giving Congress the power to regulate only commercial transactions in the national market, the Commerce Clause was meant to promote federalism by denying the federal government the capacity to regulate local matters.<sup>24</sup> However, a strictly originalist reading of the Commerce Clause would preclude the federal government from regulating all production activities, including manufacturing, mining, and agriculture, along with all purely intrastate commercial transactions. Forbidding federal regulation of production of goods and services would have serious implications, including the virtual nullification of employment regulations, like Title VII, and the regulatory authority of important agencies, like the FDA.

For all of the ink spilled and trees felled on the Commerce Clause, its text is quite short. It provides that Congress may "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."<sup>25</sup> The focus of this discussion is Congress's authority to regulate commerce "among the several States." That Congress can regulate the exchange of goods across state lines is universally accepted. The problem arises over what constitutes "commerce" and whether purely intrastate activities that somehow affect interstate commerce can be regulated.

This Part will set the doctrinal stage by examining the framing era's narrow concept of the term "commerce" and how courts up until the mid-

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<sup>24</sup> See *United States v. Morrison*, 529 U.S. 598, 617 (2000) (providing that the Constitution requires a distinction as to what is fully national and what is fully local).

<sup>25</sup> U.S. CONST. art. I, § 8, cl. 3.

1930s applied that understanding. Then follows an examination of the shift in how “commerce” was defined. A discussion of the Necessary and Proper Clause and its role in Commerce Clause jurisprudence follows. Finally, the restrictiveness of both clauses’ original understandings leads to the conclusion that attempting to roll back Commerce Clause jurisprudence to 1788 could be untenable.

### A. *The Definition of “Commerce”*

The founding generation understood the term “commerce” to mean only “trade or exchange of goods.”<sup>26</sup> Unlike today, where “commerce” is used to refer to any “gainful activity,” the founding generation would not have seen production activities, such as manufacturing, mining, and agriculture, as being part of commerce.<sup>27</sup> The writings of the framers and the purpose behind the creation of the Commerce Clause also confirm its intended narrow scope. Many feared a centralized government that could assume powers unto itself.<sup>28</sup> To assuage these concerns, proponents of the Constitution pointed to the many areas of life where the federal government would have no authority, including personal property not related to

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<sup>26</sup> Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 104, 112 (2001) (explaining that Commerce may be limited to trade and exchange of goods, which would exclude production). Founding era dictionaries described “commerce” as “exchange of one thing for another, interchange of anything; trade; traffick.” Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 702 (1996) (quoting SAMUEL JOHNSON, *DICTIONARY OF THE ENGLISH LANGUAGE* (1755)); see also *Lopez*, 514 U.S. at 585 (Thomas, J., concurring) (“[C]ommerce’ consisted of selling, buying, and bartering, as well as transportation for these purposes.”); Richard Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1393 (1987) (discussing how “commerce,” as used in the Constitution’s text, could not refer to manufacturing or agriculture).

<sup>27</sup> Barnett, *supra* note 26, at 144; see also *Lopez*, 514 U.S. at 587 (Thomas, J., concurring) (noting that production is distinct from commerce); *United States v. E.C. Knight Co.*, 156 U.S. 1, 13 (1895) (stating, “The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce”); Grant S. Nelson & Robert J. Pushaw, *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 101 (1999) (conceding that “commerce” includes only exchange of goods).

<sup>28</sup> See, e.g., *LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN* 6 (1787) (decrying the idea of a centralized government that consolidates power at the expense of the states).

commerce, agriculture, and other business enterprises.<sup>29</sup> Therefore, it was clear to the founding generation that “interstate commerce” meant exchange of goods across state lines, not business transactions in general.

The purpose of the Commerce Clause was to prevent the state protectionism that had doomed the Articles of Confederation.<sup>30</sup> Under the Articles, the Continental Congress had no authority to prohibit states from engaging in protectionist measures, such as tariffs and prohibitions on trade with other states.<sup>31</sup> Giving Congress full authority over interstate and international commerce allowed it to keep states from interfering with the free flow of commerce.<sup>32</sup> Thus, when interpreting the Commerce Clause, it is important to remember that its primary purpose was to protect the free exchange of interstate commerce, not to regulate it.<sup>33</sup>

### B. *The History of Commerce Clause Precedent*

Historical examination shows that the post-New Deal Court’s shift regarding what Congress can regulate via the Commerce Clause truly broke

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<sup>29</sup> See Robert G. Natelson, *Tempering the Commerce Power*, 68 MONT. L. REV. 95, 117 (2007) (“During the ratification process, federalist spokesmen listed all sorts of activities the new federal government would not be able to regulate within state boundaries: local government, real property, the law of testate and intestate succession, personal property outside of commerce, agriculture and other business enterprises, domestic relations, most civil disputes, most criminal matters, religion, education, and social services.”); see also THE FEDERALIST No. 17, at 118 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[T]he supervision of agriculture and of other concerns of similar nature . . . which are proper to be provided for by local legislation, can never be desirable cares of general [federal] jurisdiction.”).

<sup>30</sup> See Barnett, *supra* note 26, at 133-34 (noting how the framers wanted to facilitate trade between the states); see also John O. McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 93 (2004) (discussing the need for Congress to protect the flow of interstate commerce against the parochial concerns of individual states).

<sup>31</sup> See Brannon P. Denning, *Confederation Era Discrimination Against Interstate Commerce and the Legacy of the Dormant Commerce Clause Doctrine*, 94 KY. L. REV. 37, 39-40 (2005) (describing the problem of discriminatory practices used by states against trade with other states and the resulting burden on interstate commerce).

<sup>32</sup> See *id.* (discussing the desire to protect interstate commerce).

<sup>33</sup> See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937) (“The fundamental principle is that the power to regulate commerce is the power to enact ‘all appropriate legislation’ for its ‘protection or advancement.’”).

with tradition.<sup>34</sup> Essentially, the jurisprudence can be divided into two categories. The first deals with “channels” and “instrumentalities” of interstate commerce.<sup>35</sup> Channels and instrumentalities consist of the various ways that commerce flows from seller to buyer such as highways, railroads, and ships. When regulating channels and instrumentalities, Congress is acting directly according to the original purpose of the Commerce Clause by protecting the stream of interstate commerce.<sup>36</sup>

The second category is “the power to regulate those activities having a substantial relation to interstate commerce.”<sup>37</sup> This category is where the Court has struggled to articulate how and when Congress can regulate activity, particularly intrastate activity.<sup>38</sup> A further complication comes from the degree to which “substantial effects” cases relied on channels and instrumentalities cases.<sup>39</sup> To compensate for this complexity, this Section will focus on the doctrinal history and highlight where Congress had greater or lesser regulatory authority. The end result will show the major break with history that took place in the early 1940s by allowing Congress to regulate the most remote, local activities.

### 1. The Expansiveness of Pre-1937 Commerce Power

Consistent with the framers’ views, the Court’s earliest cases affirmed that the main purpose of the Commerce Clause was not to give the federal government the police power but to protect the flow of interstate commerce.<sup>40</sup> The first case to interpret the Commerce Clause was *Gibbons v. Ogden*,<sup>41</sup> which dealt with the grant of a steamship monopoly by New

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<sup>34</sup> See Epstein, *supra* note 26, at 1400 (discussing the New Deal Court’s doctrinal transformation); see also Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 573 (1995) (discussing the limited view of early Commerce Clause precedent).

<sup>35</sup> Channels and instrumentalities are often considered two separate categories. But, for the purposes of this Article, they are treated as one. *United States v. Lopez*, 514 U.S. 549, 558 (1995).

<sup>36</sup> See *supra* notes 30-33 and accompanying text.

<sup>37</sup> *Lopez*, 514 U.S. at 558-59.

<sup>38</sup> *Id.*

<sup>39</sup> See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937) (relying on channels and instrumentalities cases).

<sup>40</sup> Regan, *supra* note 34, at 573.

<sup>41</sup> 22 U.S. 1 (1824).

York.<sup>42</sup> New Jersey, unhappy with the monopoly, took retaliatory action, sparking a heated conflict that threatened to disrupt the flow of commerce.<sup>43</sup> To resolve the dispute, Chief Justice Marshall found that a federal law regulating navigation preempted the New York law.<sup>44</sup> In asserting Congress's power to protect the stream of interstate commerce, Marshall stated that regulating interstate commerce meant regulating traffic in commerce that affected "more States than one."<sup>45</sup>

Because Marshall emphasized that federal regulation could prohibit activities within a state that interfere with the flow of interstate commerce, many have concluded that Marshall blessed the modern belief that Congress can regulate absolutely anything that in some way creates impacts beyond the state's boundaries.<sup>46</sup> However, arriving at such a conclusion ignores the context of *Gibbons*. The case dealt purely with protecting the flow of goods through the channels and instrumentalities of commerce.<sup>47</sup> Further, the idea that *Gibbons* gives Congress authority equivalent to a police power is unsupported by Marshall's own words. Although Congress can regulate commercial activities within states' "jurisdictional lines," he emphasizes that the "completely internal commerce of a State [is] reserved for the State itself."<sup>48</sup> Marshall then went on to say that "[c]ommerce among the States must, *of necessity*, be commerce *with the States*."<sup>49</sup> Therefore, regulatory authority at minimum requires a direct connection with the stream of

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<sup>42</sup> Epstein, *supra* note 26, at 1401.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Gibbons*, 22 U.S. at 194.

<sup>46</sup> See Epstein, *supra* note 26, at 1401-02 (discussing Professor Lawrence Tribe's view).

<sup>47</sup> See Regan, *supra* note 34, at 573 (noting how *Gibbons* affirmed the federal government's constitutional "interest in unfettered transportation"). Indeed, the Court's early opinions continued to recognize that Congress's broad authority over the channels and instrumentalities of commerce extended to intrastate activities that were part of the stream of interstate commerce. See, e.g., *Swift & Co. v. United States*, 196 U.S. 375, 397-98 (1905) (finding that because stockyards are part of the flow of livestock through interstate commerce, they are subject to federal regulation); *The Daniel Ball*, 77 U.S. 557, 565 (1870) (holding that a ship, which traveled only within one state, still fell within the commerce power because it could be used to transport goods moving in the stream of interstate commerce).

<sup>48</sup> *Gibbons*, 22 U.S. at 195.

<sup>49</sup> *Id.* at 196 (emphasis added).

interstate commerce.<sup>50</sup>

With the arrival of the Gilded Age and concerns about the power of trusts, the Court repeatedly sustained federal antitrust laws against challenges because the anti-competitive actions were attempts to restrain and control the flow of interstate commerce by making products scarcer.<sup>51</sup> The direct impact on interstate commerce allowed Congress to regulate the formation of trusts.<sup>52</sup> Further, in the *Shreveport Rate Case*, the Court reaffirmed Congress's power to reach intrastate activity affecting the flow of interstate commerce.<sup>53</sup> *Shreveport Rate* involved discriminatory pricing, where higher rates were imposed on interstate commerce, as compared to intrastate commerce.<sup>54</sup> To eliminate the discrimination, the federal government sought to regulate the intrastate rate.<sup>55</sup> The Court held that Congress could validly regulate the intrastate rates because of their hindering "effect on interstate commerce."<sup>56</sup> Thus, where intrastate activities directly affect the flow of interstate commerce, Congress possesses authority to regulate those intrastate activities.<sup>57</sup>

Congress's broad authority over channels and instrumentalities of commerce has been well accepted.<sup>58</sup> But Congress also had authority to

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<sup>50</sup> See Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 CHI. L. REV. 1090, 1140 (2000) (discussing the need for a formal or logical connection between an activity and interstate commerce); see also *The Passenger Cases*, 48 U.S. 283, 401 (1849) (recognizing that passenger travel fell within Congress's regulatory authority because of its connection to the channels and instrumentalities of commerce).

<sup>51</sup> See Cushman, *supra* note 50, at 1094-95 (discussing the Court's antitrust jurisprudence).

<sup>52</sup> See, e.g., *United States v. Joint-Traffic Ass'n*, 171 U.S. 505, 568 (1898) (noting the direct effect that trust collusions have on interstate commerce); *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 313 (1897) (discussing the direct effect that a trust formation has on interstate commerce); see also *United States v. E.C. Knight Co.*, 156 U.S. 1, 16 (1895) (noting that federal law can prevent actions that "deprive the public of the advantages which flow from free competition").

<sup>53</sup> *Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342 (1914).

<sup>54</sup> *Id.* at 346-48.

<sup>55</sup> *Id.*

<sup>56</sup> Cushman, *supra* note 50, at 1130; see also *Hannibal & St. Johns R.R. Co. v. Husen*, 95 U.S. 465, 470 (1877) ("Transportation is essential to commerce, or rather it is commerce itself . . ."); Regan, *supra* note 34, at 574 (noting that *Shreveport Rate* and *Daniel Ball* dealt only with channels and instrumentalities of commerce).

<sup>57</sup> See *Mobile Cty. v. Kimball*, 102 U.S. 691, 697 (1880) (stating that Congress has broad authority to protect the stream of interstate commerce by adopting "measures to promote its growth and insure its safety").

<sup>58</sup> Indeed, if anything, the pre-New Deal Court expanded Congress's ability to regulate channels and instrumentalities of commerce. See Epstein, *supra* note 26, at 1418 (citing

regulate the types of goods that were entering the stream of commerce.<sup>59</sup> The Court also recognized that a contract for a non-resident to perform a *service* across state lines was interstate commerce.<sup>60</sup>

Perhaps one of the greatest commerce powers that Congress possessed was the ability to prohibit goods from entering the stream of interstate commerce.<sup>61</sup> For example, in the *Lottery Case*, the Court concluded that Congress had authority to prohibit the sale of lottery tickets across state lines.<sup>62</sup> The Court later upheld the application of the Food & Drugs Act to a shipment of eggs that were intended for baking, not sale to consumers.<sup>63</sup> Despite the argument that Congress was without authority to regulate “raw material” that was “not shipped for sale” to consumers, the Court unanimously affirmed Congress’s authority to prohibit shipment of eggs that did not comply with the Food & Drugs Act.<sup>64</sup> The Court highlighted the government’s interest in pure foods and confirmed that items sold to manufacturers “are destined for sale” and qualify as interstate commerce.<sup>65</sup> Thus, while Congress could not regulate production, it could control whether and how goods produced within one state would see the light of day in another.

## 2. Limits the Traditional Doctrine Imposed

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Wis. R.R. Comm’n v. Chi., Burlington & Quincy R.R., 257 U.S. 563 (1922)); *see also* United States v. N.Y. Cent. R. Co., 272 U.S. 457, 464 (1926) (holding that “commingling of interstate and intrastate commerce” gives Congress the authority to regulate).

<sup>59</sup> *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 242 (1899) (finding that Congress could regulate sales of yet-to-be manufactured goods because the contract for delivery across state lines was interstate commerce).

<sup>60</sup> York Mfg. Co. v. Colley, 247 U.S. 21, 24-25 (1918).

<sup>61</sup> *See* Champion v. Ames (The Lottery Case), 188 U.S. 321, 359 (1903) (citing Congress’s ability to preclude the operation of trust contracts under antitrust laws).

<sup>62</sup> *See id.* at 356 (stating that “the power of Congress to regulate commerce among the states is plenary”).

<sup>63</sup> Hipolite Egg Co. v. United States, 220 U.S. 45, 50-51 (1911).

<sup>64</sup> *Id.* at 52, 58.

<sup>65</sup> *Id.* at 54. An additional problem in the case was whether Congress could seize the eggs after they had traveled through commerce. *See id.* at 57 (highlighting the argument that the eggs should have been seized in transit, not after they became “part of the general mass of property” within a state). However, because Congress has the power to “prevent trade in [adulterated items] between the states,” it also could seize the substandard commerce at any point, including after exiting the stream of commerce. *Id.* at 58.

Older commerce doctrine left more breathing room for congressional regulation than is conventionally believed. However, the Court was not always clear and consistent. Despite its holdings in the *Lottery Case* and *Hipolite Egg Co.*, the Court in *Hammer v. Dagenhart* held that Congress could not use the prohibitory power to prevent goods made by child labor from traveling through interstate commerce.<sup>66</sup> Through the late-nineteenth and early-twentieth centuries, the Court used the “direct-indirect test.”<sup>67</sup> The test looked at whether the activity had a direct effect on interstate commerce.<sup>68</sup> If there was a direct effect, then Congress could validly regulate the activity.<sup>69</sup> But where the effect of a local activity was only indirect, the Commerce Clause did not grant regulatory authority.<sup>70</sup>

Perhaps the biggest impediment to Congress’s authority was the notion that Congress could not regulate agriculture, mining, or manufacturing.<sup>71</sup> Further, Congress’s regulatory authority ceased when a

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<sup>66</sup> 247 U.S. 251, 267 (1918). However, citing the *Lottery Case*, Justice Holmes dissented and argued that the federal government should have been free to use its prohibitory power here because “Congress is given power to regulate such commerce in unqualified terms.” *Id.* at 277-78.

<sup>67</sup> Note, *Production and Commerce Among the States: Carter v. Carter Coal Co.*, 50 HARV. L. REV. 307, 312 (1936).

<sup>68</sup> See, e.g., *Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Co. v. Bay*, 200 U.S. 179, 185-86 (1906) (finding no direct impact on interstate commerce).

<sup>69</sup> See, e.g., cases cited *supra* note 52.

<sup>70</sup> See *United States v. E.C. Knight Co.*, 156 U.S. 1, 16-17 (1895) (finding that a monopoly covering only a few local operations did not directly affect interstate commerce). Even well into the 1930s, the Court continued to hold unanimously that Congress could not reach the slaughtering of chickens destined for intrastate consumers based on the indirect effect the sales would have on aggregate commerce. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542-43, 548 (1935) (emphasizing that “the distinction between direct and indirect effects . . . must be recognized as a fundamental one, essential to the maintenance of our constitutional system”). Indeed, Chief Justice Hughes, writing for the Court, argued that the direct-indirect test must be maintained. Otherwise, if Congress can “reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government.” *Id.* at 546.

<sup>71</sup> See Epstein, *supra* note 26, at 1398 (discussing how Congress could not reach production activities); Berger, *supra* note 26, at 702-03 (arguing that agriculture is not covered by the Commerce Clause); see also *Hammer*, 247 U.S. at 275-76 (refusing to allow Congress to reach mining and manufacturing because production activities were inherently local and belonged exclusively to the states).

good exited interstate commerce.<sup>72</sup> Once commerce moved from a national to a local market, “its interstate character” melded “into the domestic stocks of the state which are beyond the powers of Congress.”<sup>73</sup>

The final triumph of traditional commerce doctrine came with the *Carter Coal* case, where the Court held that merely because an article might be destined for sale in another state, Congress does not have the power to regulate its production.<sup>74</sup> The Court insisted that “[p]roduction is not commerce; but a step in the preparation for commerce.”<sup>75</sup> However, Chief Justice Hughes argued that the Court should have sustained the regulation because most of the coal was destined for interstate commerce.<sup>76</sup> But, he also reiterated that Congress could not gain control over activities indirectly affecting commerce without “subvert[ing] the fundamental principle[s] of the Constitution.”<sup>77</sup> Chief Justice Hughes would play a critical role in transitioning the Court away from the traditional commerce doctrine.<sup>78</sup>

### 3. The 1937 Changes and Attempts to Delineate Interstate Versus Local Activity

1937 marked a watershed year in the Court’s history; the Court recognized that regulation of manufacturing could be reached directly

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<sup>72</sup> Although *Hipolite Egg Co.* had held that Congress could reach prohibited articles that had slipped through interstate commerce, Congress still had no authority to continue regulating products that legitimately passed through the stream of commerce after their exit. See *A.L.A. Schechter Poultry Corp.*, 296 U.S. at 543 (discussing how once a good leaves the stream of interstate commerce and “come[s] to a permanent rest within the state,” the good is then beyond the reach of federal regulation).

<sup>73</sup> *United States v. A.L.A. Schechter Poultry Corp.*, 76 F.2d 617, 625 (2d Cir. 1935) (L. Hand, J., concurring), *aff’d in part, rev’d in part*, 295 U.S. 495 (1935).

<sup>74</sup> See *Carter v. Carter Coal Co.*, 298 U.S. 238, 301 (1936) (“Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind . . . .” (quoting *Coe v. Town of Errol*, 116 U.S. 517, 526 (1886))).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 320 (Hughes, C.J., concurring in part and dissenting in part).

<sup>77</sup> *Id.* at 318.

<sup>78</sup> For a fascinating discussion on Chief Justice Hughes’ view of the Commerce Clause and his misgivings about the Court’s eventual disregard of the traditional commerce doctrine, see Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1960-67 (1994).

through the Commerce Clause.<sup>79</sup> In *NLRB v. Jones & Laughlin Steel Corp.*, Chief Justice Hughes, writing for the Court, upheld a collective bargaining regulation directed at factory workers.<sup>80</sup> Although the Court acknowledged that manufacturing was intrastate in nature, Congress nonetheless had the power to regulate it if there was “such a *close and substantial relation to interstate commerce* that their control is essential or appropriate to protect that commerce from burdens and obstructions.”<sup>81</sup> While this recognition was a step beyond the traditional commerce doctrine that precluded regulation of manufacturing, Chief Justice Hughes was careful to tie the authority to the stream of interstate commerce.<sup>82</sup> Because the products were destined for the stream of interstate commerce,<sup>83</sup> Congress could validly regulate the factory.<sup>84</sup>

While *Jones & Laughlin Steel* marked a turning point in the Court’s history, the opinion itself was far from a total break with the past. The Court continued to apply the direct-indirect test, justifying its holding on the direct impact of manufacturing on the stream of interstate commerce.<sup>85</sup> Indeed, the Court recognized that the federal action must respect “our dual system of government” and not extend “to embrace effects upon interstate commerce *so indirect and remote* that to embrace them . . . would effectually obliterate the distinction between *what is national* and *what is local* and create a completely centralized government.”<sup>86</sup> Thus, because of the opinion’s recognition of the need to delineate direct from indirect effects, *Jones & Laughlin Steel* looks more like the *Lottery Case* and *Hipolite Egg Co.* than

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<sup>79</sup> See Epstein, *supra* note 26, at 1421 (discussing the change in the understanding regarding the “stream of commerce”).

<sup>80</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 22-24 (1937).

<sup>81</sup> *Id.* at 37 (emphasis added).

<sup>82</sup> See *id.* at 36-37 (citing the *Daniel Ball* and *Kimball*).

<sup>83</sup> Indeed, the statute itself included a jurisdictional nexus, directing the regulations only at factories “affecting commerce.” *Id.* at 24; see also *United States v. Lopez*, 514 U.S. 549, 562 (1995) (noting the requirement for a “nexus to interstate commerce”).

<sup>84</sup> *Jones & Laughlin Steel Corp.*, 301 U.S. at 43.

<sup>85</sup> See *id.* at 41 (“We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern.”).

<sup>86</sup> *Id.* at 37 (emphasis added).

the Court's later cases.<sup>87</sup>

Throughout the remainder of the 1930s, the Court continued applying the direct-indirect test, with the added recognition that production activities targeting interstate commerce could be considered to have a direct effect.<sup>88</sup> The Court recognized that when producers and sellers target both interstate and intrastate markets, availing one's products to the interstate market then gave the federal government authority to regulate all of the business's sales and production.<sup>89</sup> However, the Court's balanced approach of holding that producers who target interstate commerce could be regulated, while still recognizing a distinct class of purely intrastate activity, would not last long. By the late 1930s, new Justices had flooded the Court ready to engraft New Deal thinking into constitutional jurisprudence.<sup>90</sup>

The first cracks in the direct-indirect test appeared in 1939 when the Court began robustly applying channels and instrumentalities doctrine to sales of products.<sup>91</sup> This proved problematic. Channels and instrumentalities cases had used broad language describing Congress's wide latitude to protect the flow of interstate commerce.<sup>92</sup> Hence, it was a misunderstanding to read cases like *Shreveport Rate* as stating a broader proposition that Congress had a general commerce authority to regulate any intrastate activity when there was no interference with the flow of commerce.<sup>93</sup> Nonetheless, by 1939, the Court was finding that because sales of intrastate goods were competing with sales of goods in interstate commerce, Congress

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<sup>87</sup> Compare *Hammer v. Dagenhart*, 247 U.S. 251, 277-78 (1918) (Holmes, J., dissenting) (applying the *Lottery Case*), with *Natelson*, *supra* note 29, at 124 (discussing the Court's ultimate break with traditional doctrine in 1942).

<sup>88</sup> See *Cushman*, *supra* note 50, at 1136 (discussing *Mulford v. Smith*, 307 U.S. 38 (1939), and *Currin v. Wallace*, 306 U.S. 1 (1939)).

<sup>89</sup> See, e.g., *Currin*, 306 U.S. at 11 ("The fact that intrastate and interstate transactions are commingled on the tobacco market does not frustrate or restrict the congressional power to protect and control what is committed to its own care.").

<sup>90</sup> See Epstein, *supra* note 26, at 1451-52 (discussing the Court's transition); see also *Cushman*, *supra* note 50, at 1136-37 (noting the change in jurisprudential thinking).

<sup>91</sup> See *Cushman*, *supra* note 50, at 1136 (discussing cases regarding the Agricultural Adjustment Act of 1938 and highlighting the Court's use of *Shreveport Rate*'s intrastate competition doctrine).

<sup>92</sup> See *id.* at 1130 (noting that then-Justice Hughes had based his reasoning squarely in channels and instrumentalities jurisprudence).

<sup>93</sup> *Id.*

could reach and regulate sales of all goods of a given type.<sup>94</sup> Then, in 1942, the Court held that a dairy seller, who did not offer interstate dairy products, could be regulated because his intrastate milk competed with milk in interstate commerce.<sup>95</sup> As the Court drifted from the understanding that production directed at the stream of interstate commerce could be regulated, to a more lenient standard giving Congress the power to regulate all products that have interstate markets, the stage was set for the Court's final repudiation of any real limitations on Congress's commerce power.

#### 4. *Wickard* and the Total Break with the Past

By growing surplus wheat that he planned to use for his own consumption, Roscoe Filburn did not comply with a mandate under the Agricultural Adjustment Act.<sup>96</sup> In hearing Filburn's Commerce Clause challenge, the Court faced a pivotal question: Did Congress have the authority under the Commerce Clause to regulate consumption of homegrown wheat that would not enter any stream of commerce, local or national? After all, the framers had repeatedly promised that personal property and agriculture could never be reached by federal regulation.<sup>97</sup>

Justice Jackson, the author of *Wickard v. Filburn*,<sup>98</sup> was not naive to the importance of this case. While Jackson firmly believed that production could be regulated, he thought the homegrown wheat could "neither [be] interstate nor commerce."<sup>99</sup> Jackson had initially drafted two opinions, each remanding the case for further factual findings.<sup>100</sup> His concerns stemmed

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<sup>94</sup> See *id.* at 1136 (discussing *United States v. Rock Royal Co-Operative*, 307 U.S. 533 (1939); *H.P. Hood & Sons v. United States*, 307 U.S. 588 (1939)).

<sup>95</sup> *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942). Another facet of change was that the Court began to take Congress's findings of impact on interstate commerce "at face value." Epstein, *supra* note 26, at 1451. This leniency would pave the way for the Court to retreat from "its position as a check upon Congressional action under the commerce clause." *Recent Decisions: Constitutional Law—Effect of Competition of Intrastate Commerce on Interstate Commerce as Justifying Regulation of Former*, 42 COLUM. L. REV. 694, 699 (1942).

<sup>96</sup> Cushman, *supra* note 50, at 1138.

<sup>97</sup> See Natelson, *supra* note 29, at 117 (discussing the history of the ratification debate).

<sup>98</sup> 317 U.S. 111 (1942).

<sup>99</sup> Cushman, *supra* note 50, at 1138 (quoting private correspondence from Justice Jackson to Chief Justice Stone).

<sup>100</sup> See *id.* ("The constitutional issue involved is of the greatest magnitude, and we are of opinion that we should not pass upon it in the present state of the record, without the

from basic constitutional order. As he wrote to Chief Justice Stone:

The Constitution drew a line between state and federal power and here the Congress wants to cross that line admittedly. I suppose that before we give it our approval there must be some finding that it is warranted by facts and conditions. Otherwise, the federal compact was pretty meaningless if Congress is to be sole judge of the extent of its own commerce power.<sup>101</sup>

In the final draft of his opinion that would have remanded the case, Jackson concluded that the factual findings were insufficient to answer the concern of whether Congress's action would "effectively obliterate the distinction between what is national (and what is local) and create a completely centralized government."<sup>102</sup> Despite the opinion's garnering five votes, it was decided that *Wickard* would be slated for re-argument the following fall.<sup>103</sup> Over the summer, Jackson pondered the crossroads at which the Court stood. Because the direct-indirect test had come to be a measure of purely economic effect, Jackson believed that crafting a judicial test would be impossible.<sup>104</sup> Thus, since economic policy is for the legislature, not the courts, Jackson concluded that courts should defer to Congress's determination that an activity affected interstate commerce.<sup>105</sup>

Jackson's majority opinion in *Wickard* is now the current formulation for when a law is sustainable under the Commerce Clause: whether Congress can rationally conclude, in the aggregate, that a given activity substantially affects interstate commerce.<sup>106</sup> The *Wickard* test provides rational-basis level review<sup>107</sup> and looks to aggregate activity. Even though the economic effect of farmer Filburn's homegrown wheat

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benefit of findings and consideration by the court below or a full presentation of the controlling economic facts relied upon.").

<sup>101</sup> *Id.* at 1140.

<sup>102</sup> *Id.* (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1141-42.

<sup>105</sup> *See id.* at 1143 ("It is perhaps time that we recognize that the introduction of economic determinism into constitutional law of interstate commerce marked the end of judicial control of the scope of federal activity.").

<sup>106</sup> 317 U.S. 111, 124 (1942).

<sup>107</sup> *See supra* note 7 (defining rational basis review).

consumption was negligible, if enough people likewise grew their own wheat, the economic effects would start to add up.<sup>108</sup> Hence, Congress can reach individual cases to protect against aggregate effects.

It cannot be denied that *Wickard* stands as a repudiation of the Commerce Clause's original public meaning.<sup>109</sup> Jackson himself later conceded that *Wickard* essentially obliterated any restraint on the federal government's regulatory authority, writing: "I suspect what we would say is that in any case where Congress thinks there is an effect on interstate commerce, the Court will accept that judgment."<sup>110</sup> It would be decades before the Court once again recognized a limit on the commerce power, as applied against individuals, in *Lopez*.

Today, the basic framework of *Wickard*'s substantial effects test remains.<sup>111</sup> The Court has, however, clarified that the activity must be an "economic activity."<sup>112</sup> Thus, the Court has increasingly affirmed that the Commerce Clause does not give Congress the police power "to regulate an individual from cradle to grave."<sup>113</sup> But these recently recognized limitations are nothing compared to the level of protections for personal liberty granted under the traditional doctrine.

As is now obvious, Commerce Clause jurisprudence has moved far beyond the clause's original meaning. However, an added complexity to the doctrine is the Necessary and Proper Clause. Indeed, many of the decisions discussed above utilized that clause to reach intrastate activity.<sup>114</sup> Since the Necessary and Proper Clause is often used to justify intrusions beyond the scope of the Commerce Clause alone, it too deserves some attention.<sup>115</sup>

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<sup>108</sup> *Wickard*, 317 U.S. at 127.

<sup>109</sup> See *United States v. Lopez*, 514 U.S. 549, 601 (1995) (Thomas, J., concurring) (discussing how far afield *Wickard*'s "substantial effects test" is from the original understanding of the Commerce Clause); Epstein, *supra* note 26, at 1450 (noting that in *Wickard*, "the entire issue of enumerated powers and state autonomy disappeared from view"); Natelson, *supra* note 29, at 124-25 (discussing the aggregation principle).

<sup>110</sup> Cushman, *supra* note 50, at 1146 (quoting a letter from Justice Jackson).

<sup>111</sup> See *Gonzales v. Raich*, 545 U.S. 1, 17-19 (2005) (discussing and applying *Wickard*).

<sup>112</sup> *Lopez*, 514 U.S. at 560.

<sup>113</sup> *NFIB*, 567 U.S. 519, 558 (2012) (opinion of Roberts, C.J.).

<sup>114</sup> See, e.g., *Hipolite Egg Co. v. United States*, 220 U.S. 45, 58-59 (1911) (recognizing that the seizure of illegally shipped eggs after they left the stream of commerce was allowable under the Necessary and Proper Clause to further Congress's end of keeping them out of interstate commerce).

<sup>115</sup> See, e.g., *NFIB*, 567 U.S. at 548 (summarizing the argument that forcing individuals to enter the healthcare market was allowable under the Necessary and Proper Clause).

C. *The Necessary and Proper Clause as Vesting Congress with Incidental Authority to Enforce the Commerce Clause*

Congress often uses the Necessary and Proper Clause to reach intrastate activities that interfere with its regulation of interstate commerce.<sup>116</sup> The clause simply states that Congress may “make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers.”<sup>117</sup> Because of the clause’s perceived expansive power, it has been used to justify extensions of Commerce Clause jurisprudence.<sup>118</sup> Understanding the history of the Necessary and Proper Clause is important in knowing how the framing generation envisioned its use. As the following discussion will show, the operation of the Necessary and Proper Clause is too narrow to support the Court’s holdings in cases like *Wickard* and *Raich*.

According to its original understanding, the Necessary and Proper Clause only gives Congress the ability to execute its enumerated powers, not to create new ones.<sup>119</sup> Essentially, the Necessary and Proper Clause acts

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<sup>116</sup> See, e.g., *Raich*, 545 U.S. at 38 (Scalia, J., concurring) (stating that the clause “empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation”); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) (holding that Congress could regulate intrastate milk markets because of their effects on interstate commerce).

<sup>117</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>118</sup> See Jackson, *supra* note 2, at 13 (discussing how the New Deal era Court used the clause to reach intrastate activities); see also Somin, *supra* note 10, at 530-31 (criticizing Justice Scalia’s understanding of how the clause validates congressional regulation of homegrown marijuana in his *Raich* concurrence). Examples of Congress citing the aggregate effects of an activity and need to reach intrastate activities through the Commerce and Necessary and Proper Clauses are legion. See, e.g., H.R. REP. NO. 110-113, at 2 (2007) (finding that hate crimes substantially affect interstate commerce); S. REP. NO. 103-117, at 31 (1993) (stating that both the Commerce and Necessary and Proper Clauses allow Congress to restrict the blocking of abortion clinics because of the impact on interstate commerce); S. REP. NO. 90-724, at 9 (1967) (asserting that Congress should have authority to license clinical laboratories that receive specimens through interstate commerce because of the lack of uniformity among the states).

<sup>119</sup> See Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 185 (2003) (emphasizing how the Framers “insisted that the Necessary and Proper Clause was not an additional freestanding grant of power, but merely made explicit what was already implicit in the grant of each enumerated power”); Natelson, *supra* note 29, at 101 (citing arguments in ratification debates stating that the clause “gives no new power, but declares that those already given are to be executed by proper laws”);

as a grant of incidental authority, a power equivalent to a principal-agent relationship.<sup>120</sup> Understanding the clause in an agency-fiduciary context, with the sovereign People as principal and the federal government as agent, begets two significant implications. First, it provides a mechanism for interpreting the clause—it can be read against the backdrop of eighteenth century agency law.<sup>121</sup> Second, it places limits on how the federal government can operate by recognizing that the principal, the sovereign People, have retained rights for themselves that Congress cannot appropriate.<sup>122</sup>

The idea that the Necessary and Proper Clause functions like similar clauses in fiduciary documents is not new—the notion pervaded early-American thinking. Edmund Randolph, one of the clause’s drafters, said that it was meant to include the agency law “doctrine of implied incidental powers” within the Constitution.<sup>123</sup> This incorporation of agency principles would ensure that Congress had full authority to undertake whatever was needed to execute its enumerated powers.<sup>124</sup> However, the incidental authority would be objectively limited; Congress would need to show that exercise of power under the clause was incidental—that is merely “the

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Somin, *supra* note 10, at 534 (discussing Chief Justice Marshall’s understanding of the clause); *see also* *McCulloch v. Maryland*, 17 U.S. 316, 423 (1819) (“Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted [sic] to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.”); Barnett, *supra* note 119, at 215 (citing Chief Justice Marshall’s writings).

<sup>120</sup> See Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RESERVE L. REV. 243, 322 (2004) (discussing how the “overwhelming weight of evidence” from the founding era shows that the “purpose was to serve as a rule of construction,” giving the government incidental powers to carry out its enumerated rights); *see also* Barnett, *supra* note 119, at 217-18 (describing the principal-agent relationship inherent in the clause).

<sup>121</sup> Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, 79 GEO. WASH. L. REV. 1, 3-4 (2010).

<sup>122</sup> Barnett, *supra* note 119, at 217-18.

<sup>123</sup> Natelson, *supra* note 120, at 272; *see also* Gary Lawson & Patricia Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 282 (1993) (discussing Randolph’s affirmation that Congress could not use the clause to assert authority beyond its enumerated powers).

<sup>124</sup> See Natelson, *supra* note 120, at 252 (noting how the inclusion of incidental powers was a distinguishing feature from the Articles of Confederation, which did not grant congress incidental authority).

natural means of executing a power.”<sup>125</sup> And, since the grant of incidental authority was objective, Congress would not have discretion to determine “the scope of [its] agency” authority.<sup>126</sup> For if Congress went beyond its given authority, it was “within the province of the Judiciary to annul the law.”<sup>127</sup>

Because the clause grants only incidental authority, Congress is limited to enforcing its enumerated powers, as necessary and proper.<sup>128</sup> Therefore, Congress must exercise care not to impose itself into areas where it has no authority.<sup>129</sup> This conclusion is consistent with views of those who advocated for the Constitution’s adoption. Alexander Hamilton, a framer known for his more expansive views of federal power, assured that the Necessary and Proper Clause was “only declaratory of a truth” that Congress had the power to authorize whatever incidental actions were needed to effectuate its “certain specified powers.”<sup>130</sup> While the “national legislature [may] pass all *necessary* and *proper* laws,” it must base its authority to act “in the specific powers” granted via Article I.<sup>131</sup>

Far from disparaging this limited view of the Necessary and Proper power, Chief Justice Marshall’s opinion in *McCulloch v. Maryland*<sup>132</sup> heartily affirms that legitimate action under the clause will only be

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<sup>125</sup> *Id.* at 282.

<sup>126</sup> Barnett, *supra* note 119, at 218; *see also* Lawson & Granger, *supra* note 123, at 276 (“[T]he clause does not explicitly designate Congress as the sole judge of the necessity and propriety of executory laws.”); Miller, *supra* note 121, at 7-10 (showing how the clause failed to include discretionary language which would have given Congress the ability to decide if something was necessary and proper).

<sup>127</sup> 2 ANNALS OF CONG. 1988 (1791) (statement of Representative Smith).

<sup>128</sup> *See* Gary Lawson et al., *The Fiduciary Foundation of Federal Equal Protection*, 94 B.U. L. REV. 415, 431 (2014) (providing that Marshall was referring to incidental authority in *McCulloch*).

<sup>129</sup> *See* JOSEPH GALES, THE DEBATES & PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 1947 (1834) (James Madison) (“[T]he natural and obvious force of the terms and the context, be limited to means necessary to the end, and incident to the nature of the specified powers.”).

<sup>130</sup> THE FEDERALIST NO. 33, at 202 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* Natelson, *supra* note 120, at 247 (explaining the clause’s function as a grant of implied incidental authority).

<sup>131</sup> THE FEDERALIST NO. 33, *supra* note 130, at 203 (Alexander Hamilton) (emphasis added).

<sup>132</sup> 17 U.S. 316 (1819).

incidental in nature.<sup>133</sup> *McCulloch* dealt with whether Congress had the authority to charter a national bank.<sup>134</sup> The Court, through Marshall's opinion, held that Congress had such authority per the Necessary and Proper Clause.<sup>135</sup> But Marshall used basic agency-law notions to reach his conclusion.

In *McCulloch*, Marshall dedicates seven pages<sup>136</sup> to discussing how the power of chartering a bank is subordinate to "those expressly enumerated in the Constitution," before ever mentioning the Necessary and Proper Clause.<sup>137</sup> However, if the clause was just a flexible, open-ended grant of power, then this extended discussion of why Congress's action was anchored in an enumerated Article I power was useless. But when the clause is understood as an agency-law rule of construction, granting merely incidental authority, such a discussion was necessary to prove that the action was legitimate.<sup>138</sup> Incidental authority cannot be justified on its own terms; it must be in furtherance of expressly granted power.<sup>139</sup> Only after establishing that an action is subordinate to an enumerated power, does Marshall then move to a discussion of whether it is necessary or proper.<sup>140</sup>

Further, even though an action falls within incidental authority, it is not necessarily legitimate. As Marshall states, the law must be "calculated

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<sup>133</sup> See Lawson et al., *supra* note 128, at 432-33 ("Marshall recognized the Necessary and Proper Clause for what it was: a variation of a clause, very commonly found in agency agreements, that communicated to the reader that the parties were not opting out of the usual rules of incidental authority.").

<sup>134</sup> *McCulloch*, 17 U.S. at 401.

<sup>135</sup> See *id.* at 416-17 (explaining that because Congress had authority to engage in activities to prevent counterfeiting, coin money, and raise money to support governmental operations, the power to establish a bank was a subordinate power).

<sup>136</sup> *Id.* at 413-21.

<sup>137</sup> Lawson et al., *supra* note 128, at 432.

<sup>138</sup> See *id.* at 433 (discussing the usual rules of incidental authority in the context of *McCulloch*); see also, Miller, *supra* note 121, at 16 (noting that agency law required close fit between means and ends when the term "necessary" is used).

<sup>139</sup> Natelson, *supra* note 120, at 277-80; cf. THE FEDERALIST NO. 33, *supra* note 130, at 203-04 (Alexander Hamilton) ("The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded.").

<sup>140</sup> In contrast, *Wickard* approaches the Necessary and Proper Clause as an open-ended grant of authority where Congress's action requires no showing of an objective fit between the enumerated power and the action taken. See *Wickard v. Filburn*, 317 U.S. 111, 129 (1942) (citing *McCulloch* as part of its justification for granting Congress rational-basis level authority to decide whether intrastate activity substantially affects interstate commerce).

to effect any of the objects intrusted [sic] to the government.”<sup>141</sup> Determining the scope of authority under the clause requires an understanding of the structural limitations placed on the federal government’s power.<sup>142</sup> Thus, a law that undermines constitutional structure cannot survive as necessary and proper.<sup>143</sup>

The result of interpreting the Necessary and Proper Clause according to its original public meaning and how it was understood in *McCulloch* is that Congress in no way has the discretion to decide the scope of its authority. While courts will not question whether Congress’s action is the best choice, they must nonetheless subject actions taken under incidental authority to real scrutiny.<sup>144</sup> Therefore, under an originalist approach, cases granting Congress rational-basis level review of its actions through the Necessary and Proper Clause are wrongly decided.<sup>145</sup>

#### D. *The Resulting Vacuum of Federal Authority*

Returning to the original understanding of the Commerce Clause and Necessary and Proper Clause would effectively require the “dismantling of large portions of the modern federal government.”<sup>146</sup> Many popular federal programs relating to wage, labor, and antidiscrimination in

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<sup>141</sup> *McCulloch*, 17 U.S. at 423.

<sup>142</sup> See Berger, *supra* note 26, at 696-97 (quoting *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring)); see also THE FEDERALIST NO. 33, *supra* note 130, at 202 (Alexander Hamilton) (stating that structural limitations will set the boundaries for operation under the clause); cf. McGinnis & Somin, *supra* note 30, at 90 (discussing the important role of courts in enforcing the Constitution’s structural provisions).

<sup>143</sup> See *NFIB*, 567 U.S. 519, 559 (2012) (opinion of Roberts, C.J.) (“[W]e have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution.”).

<sup>144</sup> See *McCulloch*, 17 U.S. at 423 (stating that while courts will not “inquire into the degree of [a law’s] necessity,” they must still ensure that Congress does not “under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted [sic] to the government”).

<sup>145</sup> See Natelson, *supra* note 120, at 322 (“[E]nforcing the original meaning of the Necessary and Proper Clause would require a higher standard of judicial review than courts currently apply to federal spending and economic legislation.”).

<sup>146</sup> Epstein, *supra* note 26, at 1455; see also Jackson, *supra* note 2, at 18 (discussing the possible effects of rolling back post-1937 commerce jurisprudence).

employment would be called into question.<sup>147</sup> But at its core, *Wickard* is a problematic interpretation of both the Commerce Clause and the Necessary and Proper Clause. It goes beyond the original understanding of the Commerce Clause by allowing government regulation to reach agriculture and other production activities.<sup>148</sup> And, *Wickard*'s Necessary and Proper Clause reasoning grants Congress the authority to determine the scope of its own power, undermining basic constitutional notions of a federal government with specific and limited powers.<sup>149</sup> Overruling *Wickard* should be an easy case for an originalist.

The problem becomes what replaces *Wickard*. Pure originalism would automatically preclude regulation of production. Further, as the late 1930s cases showed, the Court struggled to maintain a sharp distinction between direct-indirect effects on interstate commerce.<sup>150</sup> Instead of taking an approach that looked to a manufacturer's or seller's intent about entering the interstate market, direct-indirect decisions focused on aggregate economic impact.<sup>151</sup> In particular, *Wrightwood Dairy*'s finding that purely intrastate milk sales directly affected interstate commerce basically scuttled the direct-indirect test by locking future courts into making judgments about economic impact.<sup>152</sup> Thus, it is little wonder that Justice Jackson felt that the post-*Wrightwood Dairy* direct-indirect test was unworkable.<sup>153</sup>

It would appear that there is no principled way of enforcing a more faithful understanding of the Commerce Clause without effectively dismantling the modern administrative state.<sup>154</sup> Strict originalism would

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<sup>147</sup> See Epstein, *supra* note 26, at 1455 (noting "the enormous reliance interests that have been created" by such programs).

<sup>148</sup> See Barnett, *supra* note 26, at 112 (discussing how production was not considered commerce).

<sup>149</sup> See Lawson & Granger, *supra* note 123, at 332 ("[A] law regulating the production of wheat for home consumption is plainly not 'proper for carrying into Execution' the federal commerce power.").

<sup>150</sup> See *supra* notes 90-95 and accompanying text.

<sup>151</sup> See *Carter v. Carter Coal Co.*, 298 U.S. 238, 303 (1936) (refusing to adopt a rule that would have looked to the manufacturer's intentions to introduce something into interstate commerce). *But see* *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295, 309-10 (1925) (holding that the intent to restrain interstate commerce allowed for federal regulation).

<sup>152</sup> *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 124-25 (1942).

<sup>153</sup> See *supra* notes 104-05 and accompanying text.

<sup>154</sup> Epstein, *supra* note 26, at 1455; see also Diane P. Wood, *Our 18th Century Constitution in the 21st Century World*, 80 N.Y.U. L. REV. 1079, 1102-03 (2005) (discussing the potential impact of returning to a stricter reading of the Commerce Clause).

effectively nullify laws such as Title VII and the federal minimum wage, at least as they relate to producers and manufacturers.<sup>155</sup> Further, because services are not goods or merchandise, entire service industries would also not be reachable by federal economic regulation.<sup>156</sup> Even the FDA's ability to regulate the safe production of food and drugs would be called into doubt.<sup>157</sup> Hence, Congress's authority to continue regulating important economic activities would be jeopardized.

However, adopting McGinnis and Rappaport's theory of entrenched precedents can help yield a principled way of accommodating the national regulatory role of the federal government while still delineating and protecting purely local activity. Such a theory would avoid the harsh consequences of rolling back commerce jurisprudence while respecting the basic federalist structure of the Constitution.

## II. MCGINNIS AND RAPPAPORT'S THEORY OF ORIGINALISM AND PRECEDENT

McGinnis and Rappaport argue that the supermajoritarian process creates better constitutional results because it promotes societal consensus in producing "long-term [governing] provisions."<sup>158</sup> Thus, they propose that when well-established precedent conflicts with the Constitution's original public meaning, the Court can still uphold the precedent if it is consistent with supermajoritarian consensus or necessary to avoid enormous societal costs.<sup>159</sup> McGinnis and Rappaport are not the first to recognize the benefits of a supermajoritarian system; the Constitution itself was designed to ensure against a tyranny of the majority by requiring coalition building.<sup>160</sup> As today's bitterly partisan environment shows, narrow political majorities do not hesitate to disparage and negate the views of their opponents. The

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<sup>155</sup> *Cf., e.g.,* *Hammer v. Dagenhart*, 247 U.S. 251, 275-76 (1918) (precluding the operation of federal child labor laws against mines and factories), *overruled in part by* *United States v. Darby*, 312 U.S. 100 (1941).

<sup>156</sup> Barnett, *supra* note 26, at 127 n.130.

<sup>157</sup> *See id.* at 144 (discussing how the Commerce Clause's text and history do not support a prohibitory power over domestic commerce).

<sup>158</sup> John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 *GEO. L.J.* 1693, 1699 (2010).

<sup>159</sup> *See infra* notes 168-79 and accompanying text.

<sup>160</sup> *See* THE FEDERALIST NO. 10 (James Madison) (discussing how factions would cancel-out each other and concurrence would be necessary to bring about constitutional change).

supermajoritarian process forces the majority to include minorities, thereby moderating political agendas and protecting minority interests.<sup>161</sup> Thus, judicial interpretations that subvert the Constitution's supermajoritarian protections<sup>162</sup> by allowing bare majorities to control the effects of the Constitution are inherently problematic.<sup>163</sup>

Because the Constitution is framed in a way that requires societal consensus for constitutional change, the Court should enforce the original understanding of the Constitution's text.<sup>164</sup> If the Court refrained from "updating" the Constitution, then citizens would be more involved in the process of constitutional amendment and that process would once again become the norm.<sup>165</sup> Further, allowing five unelected judges to change substantive constitutional meaning creates uncertainty and removes the protection of fixed constitutional rights.<sup>166</sup> Originalism addresses these concerns by affording a methodology that cabins judicial interpretation, thereby promoting social consensus building.

While originalism provides the benefit of fixed constitutional principles, requiring societal consensus to make changes, it is not without costs. One cost is the lack of protection for *stare decisis* and the degree to which society has become reliant on erroneous precedents.<sup>167</sup> However, McGinnis and Rappaport have developed an approach that promotes originalism, while protecting important precedents.

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<sup>161</sup> McGinnis & Rappaport, *supra* note 158, at 1708.

<sup>162</sup> See U.S. CONST. art. V (providing the procedure for constitutional amendment).

<sup>163</sup> See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 129 (1942) (allowing Congress, by majority action, to decide whether the Commerce Clause's protection of local activity against federal interference applies).

<sup>164</sup> See McGinnis & Rappaport, *supra* note 158, at 1728 (discussing how the Court frustrates the proper working of the constitutional process by substantively changing how the Constitution is enforced); see also *United States v. Nichols*, 784 F.3d 666, 670 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc) (explaining that the Constitution was carefully designed to limit the concentration of political power to maximize the protection of individual liberty).

<sup>165</sup> See McGinnis & Rappaport, *supra* note 158, at 1742-43; see also *Carter v. Carter Coal Co.*, 298 U.S. 238, 318 (1936) (Hughes, C.J., concurring in part and dissenting in part) ("[I]t is not for the Court to amend the Constitution by judicial decision.").

<sup>166</sup> See McGinnis & Rappaport, *supra* note 158, at 1739.

<sup>167</sup> See, e.g., Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 190-91 (1996) (advocating for the overruling of all non-originalist commerce precedent); see also Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 36 (2009) (discussing the logical inconsistency in attempting to reconcile precedent with originalism).

McGinnis and Rappaport's theory of precedent offers two ways to affirm Commerce Clause precedents that conflict with the Constitution's original understanding. The first method determines if a precedent is "entrenched."<sup>168</sup> It looks to whether supermajoritarian consensus has solidified around a precedent. The precedent becomes entrenched if its principle is "so strongly supported that [it] would be enacted by constitutional amendment if [it] were overturned by the courts."<sup>169</sup> Thus, if a judge concludes that a precedent would likely be codified as a constitutional amendment if it were overruled, it can be upheld.

Judges are competent to determine whether a precedent is entrenched. The test is simple, asking whether the issue at the heart of the precedent is either settled by societal consensus or controversial. Judges can also err on the side of upholding a precedent that, from a Gods-eye perspective, would not achieve amendment status for reasons "unrelated to the public's support for the principle."<sup>170</sup> That an amendment might get derailed because of political wrangling or systemic inertia should be of no concern.<sup>171</sup> So long as strong popular consensus exists to make an amendment plausible, the precedent can be affirmed.<sup>172</sup>

The scope of entrenchment is narrow. The entrenchment includes only "the principle that enjoys the consensus of a constitutional amendment"—not reasoning, dicta, or controversial assertions.<sup>173</sup> Also, entrenched precedents are not necessarily precedents that have been repeatedly reaffirmed by the Court. If a precedent is still controversial, despite re-affirmance, then it has not become entrenched and must be justified on originalist grounds.<sup>174</sup> Entrenchment also applies only to current precedents. When faced with questions of first impression, courts should

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<sup>168</sup> John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 837 (2009).

<sup>169</sup> *Id.* at 837.

<sup>170</sup> *Id.* at 839.

<sup>171</sup> *Id.*

<sup>172</sup> McGinnis and Rappaport cite *Brown v. Board of Education*, 347 U.S. 483 (1954), as paradigmatic of an entrenched precedent. Because the precedent is widely accepted and no appreciable political divide exists on the desirability of its holding, it should be retained due to its supermajoritarian support. McGinnis & Rappaport, *supra* note 158, at 837-39.

<sup>173</sup> *Id.* at 840.

<sup>174</sup> See *id.* at 841 (citing *Roe v. Wade*, 410 U.S. 113 (1973), as an example of a precedent that, while reaffirmed, is not entrenched because the level of controversy surrounding it would preclude it from becoming a constitutional amendment).

look to originalism.<sup>175</sup>

An alternative way of upholding erroneous precedent is if overruling the precedent would create enormous costs.<sup>176</sup> Such costs occur when reliance on a precedent has become so heavy that overruling it would cause extremely deleterious effects. Good examples of these precedents are the cases that upheld Social Security or the validity of paper money.<sup>177</sup> Even if those cases were wrongly decided as an original matter, overruling them would create such “fear, uncertainty, and chaos that . . . would far exceed any benefits from returning to the original meaning.”<sup>178</sup> Importantly, McGinnis and Rappaport note that if the Court began rolling back Commerce Clause precedents in a way that “would require the immediate elimination of a vast number of government programs,” such precedents would also fall into this category.<sup>179</sup>

McGinnis and Rappaport’s approach combines the benefits of originalism by asserting that constitutional protections should not be altered via judicial interpretation, while still providing a mechanism for affirming precedents on which civil order is now built.<sup>180</sup> It forces judges to analyze whether to accept or reject precedent based on objective, external factors rather than ideology.<sup>181</sup> As the past century shows, the federal government has grown exponentially.<sup>182</sup> This growth has undermined the federalist national-local distinction embedded in the Commerce Clause.<sup>183</sup> It also

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<sup>175</sup> *Id.* at 834.

<sup>176</sup> *Id.* at 836.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 837.

<sup>180</sup> They also provide a third method to protect “corrective precedents,” which corrected “supermajoritarian failures”—the exclusion of racial minorities and women. *Id.* at 841. Aside from a few commerce precedents used to extend the Civil Rights Act, *see infra* note 213, this category is most useful in protecting Fourteenth Amendment precedent.

<sup>181</sup> McGinnis & Rappaport, *supra* note 168, at 839.

<sup>182</sup> *See* Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 FLA. L. REV. 1, 21-22 (2011) (discussing the growth in federal regulatory power since the founding).

<sup>183</sup> *See* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 588 (1985) (O’Connor, J., dissenting) (explaining how structural provisions like the Commerce Clause are meant to protect against Congress’s “underdeveloped capacity for self-restraint”); *see also* *New York v. United States*, 505 U.S. 144, 187 (1992) (“[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.”).

raises concerns about whether sufficient checks are in place to protect individual liberty and autonomy.<sup>184</sup> As the next Part demonstrates, courts must develop some means of enforcing the structural protection granted to purely local activity.<sup>185</sup>

### III. APPLYING MCGINNIS AND RAPPAPORT'S THEORY DEMONSTRATES A NEED TO PLACE REAL RESTRICTIONS ON CONGRESS'S COMMERCE POWER

Under McGinnis and Rappaport's approach, as applied in this Article, Congress may continue to regulate production activities directly linked to interstate commerce. But the Court can draw a distinction between purely intrastate activities and activities involving interstate commerce. In addition to raising the concern about the potential effects of a full-blown return to the original understanding,<sup>186</sup> McGinnis and Rappaport have commented favorably on the Court's more recent approaches. Specifically, they argue that *Lopez* is correctly decided because it "did not disturb the precedent that gave Congress plenary power over core economic matters, like regulation of manufacturing, labor, and production."<sup>187</sup> *Lopez* avoided the "substantial disruption" that would have occurred if the Court took a strictly originalist approach.<sup>188</sup> And, *Lopez* was consistent with the "consensus that the federal government should have at least some powers over economic matters that an originalist reading of the Commerce Clause might well deny."<sup>189</sup> While *Lopez* did not disturb modern views of economic regulation, McGinnis and Rappaport recognized that "there is no similar consensus to allow the federal government control over the noncommercial matters."<sup>190</sup> Thus, *Lopez's* trimming back the post-New

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<sup>184</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) ("In the tension between federal and state power lies the promise of liberty.").

<sup>185</sup> See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (stating that Congress cannot be allowed to gain control over purely local activity, lest the dual system of government be effectively obliterated); McGinnis & Somin, *supra* note 30, at 114 (highlighting *Morrison* as a step in the right direction).

<sup>186</sup> See *supra* note 179 and accompanying text.

<sup>187</sup> McGinnis & Rappaport, *supra* note 168, at 852.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

Deal idea of plenary federal regulatory power was proper.<sup>191</sup>

While McGinnis and Rappaport's *Lopez* discussion does not provide a fully developed approach to the Commerce Clause, it highlights the touchstones of their theory on precedent. There was no supermajoritarian consensus supporting plenary federal regulatory power and the decision in *Lopez* did not impose potentially catastrophic changes. Hence, the Commerce Clause's original meaning, allowing only for regulation of economic activities, was never displaced. As discussed below, McGinnis and Rappaport's theory shows that only the idea of commerce being limited to sale of goods has been displaced. This Article will conclude that the clause's delineation between national and local commerce should be reasserted.

A. Wickard's *Holding Could Not Become Codified as a Constitutional Amendment*

The role of the federal government in the lives of ordinary Americans is a perennial political question. It is far from settled that the federal government has the authority to regulate absolutely anything.<sup>192</sup> When asked whether there is too much federal regulation of *all* business and industry, not just small businesses, about forty percent to fifty percent of Americans say there is too much.<sup>193</sup> In 2009, fifty-seven percent of respondents said that the "government is taking on too much responsibility for solving the nation's problems" and forty-five percent said that the government is "over-regulating business."<sup>194</sup> Likewise, a recent Gallup poll

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<sup>191</sup> *Id.*

<sup>192</sup> McGinnis & Rappaport, *supra* note 168, at 852; *see also* Gonzales v. Raich, 545 U.S. 1, 45 (2005) (O'Connor, J., dissenting) (stating that the Constitution "does not tolerate reasoning" that would give Congress "authority under the Commerce Clause to a general police power"); McGinnis & Somin, *supra* note 30, at 112 (arguing that a stricter reading of the clause protects states' ability to address local issues, allowing citizens to enjoy more tailored approaches).

<sup>193</sup> POLLINGREPORT.COM, <http://www.pollingreport.com/business.htm> (last visited Apr. 29, 2016).

<sup>194</sup> Frank Newport, *Americans More Likely to Say Government Is Doing Too Much*, GALLUP (Sept. 21, 2009), <http://www.gallup.com/poll/123101/americans-likely-say-government-doing-toomuch.aspx>. The same fifty-seven percent figure showed up again in 2010 when respondents were asked if there was too much regulation of business. Frank Newport, *Americans Leary of Too Much Gov't Regulation of Business*, GALLUP (Feb. 2, 2010), <http://www.gallup.com/poll/125468/americans-leary-govt-regulation-business.aspx>.

showed that thirty-five percent of Americans want a “less active” federal government.<sup>195</sup> And more recently, sixty-four percent of respondents said that state and local governments are better equipped to handle problems, including sixty-one percent of women and forty-eight percent of Democrats.<sup>196</sup>

As numbers like these indicate, the notion that the federal government should be able to regulate absolutely anything is not an entrenched principle enjoying supermajoritarian consensus. But *Wickard* allows the federal government to regulate any activity that Congress rationally concludes, in the aggregate, substantially affects interstate commerce. As Justice Jackson himself conceded, that formulation basically means the federal government can regulate anything and the Court will accept Congress’s justifications.<sup>197</sup>

If the question of *Wickard*’s failure to delineate between interstate and intrastate commerce came squarely before the Court, it would be a good candidate for overruling under McGinnis and Rappaport’s approach. As the above polling data shows, anywhere from a majority to a plurality of Americans are wary of federal regulation. If an amendment codifying the scope of Congress’s regulatory authority under *Wickard* was proffered today, it would not have the consensus needed for passage and would likely fail. Further, as Part I demonstrates, *Wickard* is inconsistent with the Constitution’s text and history. With neither supermajoritarian consensus nor support from the Commerce Clause’s original public meaning, *Wickard* should not be retained.

But the tricky question of what would replace *Wickard* arises. Returning to the original understanding of the Commerce Clause would likely spell the end of many federal programs and policies on which Americans now rely—such as the FDA and Title VII, to name just a few. But *Wickard* is not the precedent needed to sustain such programs. Instead,

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<sup>195</sup> Jeffrey M. Jones, *Americans Remain Divided on Preference for Gov’t Activity*, GALLUP (Sept. 29, 2014), <http://www.gallup.com/poll/177422/americans-remain-divided-preference-gov-activity.aspx>.

<sup>196</sup> Nancy Cook, *Americans Give Up on Washington*, ATLANTIC (Mar. 9, 2015), <http://www.theatlantic.com/business/archive/2015/03/americans-give-up-on-washington/425319/>.

<sup>197</sup> See Cushman, *supra* note 110 and accompanying text (arguing that in any case where Congress believes there is an effect on interstate commerce, the Court will accept that judgment).

the pivotal case for upholding those regulations is *Jones & Laughlin Steel*. Thus, so long as *Jones & Laughlin Steel* remains in place, overruling *Wickard* would not impose sever societal costs.

B. *Jones & Laughlin Steel's Allowing Congress to Regulate  
Production Activities Is Sustainable Under McGinnis and  
Rappaport's Approach*

Most people today consider “commerce” to be business activities in general, not just the trade of goods.<sup>198</sup> However, under a pure originalist approach to the Commerce Clause, manufacturers and service providers would be exempt from federal regulation. Not only would this break with today’s understanding of what is considered commercial; it could also potentially require the dismantling of many federal regulatory programs. Both results are unnecessary under McGinnis and Rappaport’s intermediate approach.

*Jones & Laughlin Steel* is the linchpin between the idea of a Commerce Clause distinguishing national from local, while allowing Congress to reach production and service. The case can be affirmed under both of McGinnis and Rappaport’s precedent justifications. First, many popular programs rely on Congress’s ability to reach production activities. Overruling *Jones & Laughlin Steel* would nullify federal minimum wage laws, occupational safety standards, Title VII, and other employment programs, at least as they relate to the agriculture, manufacturing, and service industries. But considering the broad acceptance of these programs and the general notion that Congress can regulate production, a judge could conclude that *Jones & Laughlin Steel*’s holding enjoys supermajoritarian consensus.

Second, even if there was doubt about whether *Jones & Laughlin Steel* enjoys consensus, undermining or overruling it could have enormous

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<sup>198</sup> See *Commerce*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/commerce> (defining “commerce” as “*activities that relate to the buying or selling of goods and services*” (emphasis added)); see also *United States v. Lopez*, 514 U.S. 549, 587-88 (1995) (Thomas, J., concurring) (discussing the difference between the founding generation’s understanding of “commerce” and today’s understanding); Barnett, *supra* note 26, at 104; cf. McGinnis & Rappaport, *supra* note 158, at 1743-45 (discussing how the political situation in 1936 likely would have led to constitutional amendments expanding Congress’s commerce power).

costs. Not only would employment regulations cease to apply to some of the largest segments of the workforce, but also any federal regulatory scheme targeting production would be annulled. Thus, various product-safety standards would be called into question. Because of society's reliance on *Jones & Laughlin Steel's* allowing the commerce power to reach production destined for interstate markets and the potentially massive disruption that would be caused by its undoing, the precedent should be upheld.

While society may have come to rely on Congress's power to reach production, the Commerce Clause should not be relegated to constitutional surplusage. *Jones & Laughlin Steel* itself went to great pains to affirm that the Commerce Clause still enforced a distinction between national and local activity.<sup>199</sup> Thus, courts should recognize a distinction between purely local activity that is not directed at multistate markets and interstate commerce.

An immediate objection to overturning *Wickard* would be the resurrection of the direct-indirect test. While *Jones & Laughlin Steel* utilized that test, nothing would preclude the Court from finding a new, more workable test.<sup>200</sup> Like the Constitution itself, McGinnis and Rappaport's approach establishes only guiding principles, not a full-fledged methodology. Courts are still free to create rules and tests through precedent that will effectuate those principles.<sup>201</sup> Thus, the Court is free to devise a new test, so long as the test remains within the confines of the Constitution and entrenched precedent. The final Part will lay out a means by which to strike *Jones & Laughlin Steel's* balance, providing for federal regulatory authority but exempting purely local activity.

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<sup>199</sup> See *supra* notes 85-87 (noting *Jones & Laughlin Steel's* consistency with earlier cases).

<sup>200</sup> The most problematic feature of the direct-indirect test, as it had become by the time of *Wrightwood Dairy*, was that it required the Court to make economic judgments about whether a given activity would substantially affect interstate commerce. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942). It was the reticence to decide aggregate economic impacts that led the Court to abandon the test. See *supra* notes 150-53 and accompanying text.

<sup>201</sup> See McGinnis & Rappaport, *supra* note 168, at 809-24 (discussing and approving of the use of precedent in the American system). Further the mere fact that a precedent's principle has become entrenched does not mean that every last syllable in the opinion should be applied. See *supra* note 173 and accompanying text (discussing the scope of entrenchment).

#### IV. UTILIZING PERSONAL JURISDICTION'S STREAM OF COMMERCE TEST WOULD PROVIDE A MEANINGFUL WAY TO EFFECTUATE A DISTINCTION BETWEEN INTRASTATE AND INTERSTATE COMMERCE

McGinnis and Rappaport's precedent theory has shown that *Wickard* cannot be sustained. There is no consensus supporting the obliteration of the "distinction between what is national and what is local."<sup>202</sup> McGinnis and Rappaport's theory highlights the confines within which commerce jurisprudence can operate, namely the text and history of the Commerce Clause itself along with the added ability to regulate production of goods and services that will enter interstate commerce, per *Jones & Laughlin Steel*. Within these parameters, a test that is both respectful of the intentions behind the Commerce Clause, but cognizant of the modern economy's needs, can be constructed.

By overruling *Wickard*'s substantial effects test and replacing it with a test examining whether a producer or seller is either targeting interstate commerce or is a part of interstate commerce, the Court can once again give real meaning to the Commerce Clause's protection of purely intrastate activity without declaring "a vast number of government programs" unconstitutional.<sup>203</sup> The net effects of this approach would be comparatively minimal but quite meaningful. In today's global economy, the vast majority of commercial transactions take place on a national or international scale. Thus, under the approach proposed here, Congress would continue to have power over most economic matters. But the recognition that Congress's commerce power has real limits would affirm "the federal balance the Framers designed and that [the] Court is obliged to enforce."<sup>204</sup> Moreover, adoption of such a test would give small, local businesses the choice to refrain from targeting the stream of interstate commerce and thereby avoid burdensome federal regulation.

This Part will map out how the Court could begin to rethink commerce jurisprudence under this balanced approach. First, regardless of the path the Court takes, Congress would still have robust authority to regulate the channels and instrumentalities of commerce. Second, under this approach, Congress could continue to regulate the production and service

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<sup>202</sup> NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

<sup>203</sup> McGinnis & Rappaport, *supra* note 168, at 837.

<sup>204</sup> United States v. Lopez, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring).

businesses that target the stream of interstate commerce. However, the Court would place limitations on Congress's commerce power, utilizing a modified version of personal jurisdiction's stream of commerce test and the original understanding of the Necessary and Proper Clause.

A. *Congress Would Still Have Broad Authority to Regulate Channels and Instrumentalities of Commerce Under the Traditional Doctrine*

Congress has always enjoyed broad authority in regulating the channels and instrumentalities of interstate commerce.<sup>205</sup> Services relating to channels and instrumentalities have traditionally fallen within the Commerce Clause.<sup>206</sup> And, Congress's robust authority extends through the Necessary and Proper Clause to intrastate activities that interfere with the flow of interstate commerce.<sup>207</sup> Thus, under the approach this Article proposes, Congress's robust authority to regulate the channels and instrumentalities of commerce is maintained.

The distinction, resulting from overruling *Wickard*'s rational-basis type review, would be that the government would bear the burden of showing that the end sought ensures protection of the stream of commerce against an activity that "interferes with, obstructs, or prevents" the flow.<sup>208</sup> But this is not a heavy burden, given the Court's traditionally lenient view of Congress's power to protect the stream of interstate commerce.<sup>209</sup>

Congress's breadth of authority over protecting the flow of commerce would have important implications for a key civil rights case. In 1964, the Court upheld the enforcement of the Civil Rights Act's

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<sup>205</sup> See *supra* note 47 and accompanying text (discussing early court opinions that recognize Congress's broad authority over the channels and instrumentalities of commerce).

<sup>206</sup> See *Hannibal & St. Johns R.R. Co. v. Husen*, 95 U.S. 465, 470 (1877) ("Transportation is essential to commerce, or rather it is commerce itself; and every obstacle to it, or burden laid upon it by legislative authority, is regulation.").

<sup>207</sup> See *Cushman*, *supra* note 50, at 1130 (explaining how *Shreveport Rate*'s decision to let Congress regulate intrastate railroad rates was based on the need to protect the flow of interstate commerce); see also *The Daniel Ball*, 77 U.S. 557, 564 (1870) (noting that Congress may advance legislation to protect interstate commerce).

<sup>208</sup> *United States v. Coombs*, 37 U.S. 72, 78 (1838).

<sup>209</sup> See *supra* note 47 and accompanying text (discussing the cases that represent an expansive view of Congress' authority under the Commerce Clause).

prohibition of race-based discrimination by hotels against an intrastate motel operation.<sup>210</sup> Although the case was an easy one under *Wickard*'s substantial effects test,<sup>211</sup> the regulation could still be upheld under the traditional channels and instrumentalities doctrine.<sup>212</sup> Thus, key precedents like *Heart of Atlanta Motel* would be secure.<sup>213</sup>

B. *That Congress Can Regulate Business Transactions Generally,  
Not Just Exchange of Goods, Has Become Entrenched*

Today, “commerce” is generally considered to include any “gainful activity.”<sup>214</sup> Although this fact would not matter to a purely originalist

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<sup>210</sup> *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 243-44 (1964).

<sup>211</sup> *See id.* at 258 (noting the ease of finding that a local activity affects interstate commerce).

<sup>212</sup> *See id.* at 256 (citing the *Passenger Cases* for the proposition that Congress has the authority to regulate activities involving interstate transportation); *see also id.* at 252-53 (discussing Congress’s extensive findings regarding the great difficulties posed to African-Americans in finding lodgings during interstate travel and the resulting impact on their ability to engage in interstate travel); *see also* *United States v. N.Y. Cent. R. Co.*, 272 U.S. 457, 464 (1926) (discussing Congress’s broad authority to regulate intrastate activities that are so “interwoven” with interstate channels and instrumentalities of commerce that “the regulation of [one] is so incidental to and inseparable from the regulation” of the other).

<sup>213</sup> The often-associated case of *Katzenbach v. McClung*, 379 U.S. 294 (1964), which enforced the Civil Rights Act against a local restaurant that refused to serve minorities, raises different considerations. Unlike hotels, which specifically target long-distance travelers, a given restaurant might be targeting only local patrons. Further, although the district court found that the restaurant’s food came from outside the state, the restaurant bought the food through a local supplier. *Id.* at 297. Though the theory proposed here would allow Congress to regulate the distributor for buying through the stream of interstate commerce, *see infra* subsection IV.C.1, if the restaurant purchased only locally and targeted an intrastate market, the commerce power would not extend to it. *Cf.* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935) (noting that there must be a point in time where products cease to be interstate commerce). However, because of the high regard given to the Court’s civil-rights era decisions, the Court could well conclude that societal consensus supports *McClung*’s holding, giving Congress continued authority to prohibit race-based discrimination by businesses in general. Alternatively, McGinnis and Rappaport provide a method for affirming important civil rights cases that corrected the “imperfections in the supermajoritarian process,” namely the exclusion of racial minorities and women. McGinnis & Rappaport, *supra* note 168, at 841. Both *Heart of Atlanta* and *McClung* could very well be considered such corrective precedents.

<sup>214</sup> Barnett, *supra* note 26, at 104; *see also* McGinnis & Rappaport, *supra* note 168, at 852 (stating that Congress’s commerce authority is generally viewed to cover any “economic matters”).

analysis, it is critical to McGinnis and Rappaport's entrenched precedent approach. Thus, given the current understanding that "commerce" refers to any economic activity, the Court could find that cases like *Jones & Laughlin Steel*—extending Congress's regulatory authority to the mining, manufacturing, agricultural, and service industries—can be upheld as entrenched precedents.<sup>215</sup>

The Court can also affirm that Congress can use its prohibitory power as a mechanism for regulating goods and services that enter interstate commerce.<sup>216</sup> Doing so would require the Court to look no further than its own traditional jurisprudence.<sup>217</sup> And because Congress has strong authority to prohibit goods from entering interstate commerce, the Necessary and Proper Clause would also give Congress the power to enforce compliance with its regulations.<sup>218</sup> Thus, any regulation with "some obvious, simple, and direct relation" to the legitimate end of prohibiting goods that do not comply with federal standards from entering the stream of interstate commerce would be upheld.<sup>219</sup>

### *C. That Congress Can Regulate Absolutely Anything Has Not Become Entrenched and Needs Replacement*

The question of what role the federal government should play in the

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<sup>215</sup> MERRIAM-WEBSTER, *supra* note 198; *see also* McGinnis & Rappaport, *supra* note 168, at 852 (noting how today's understanding of what constitutes commerce allows Congress to regulate more matters than a purely originalist reading).

<sup>216</sup> *United States v. Darby*, 312 U.S. 100, 115 (1941) (finding that Congress could forbid from interstate commerce goods produced by companies that failed to comply with federal employment regulations).

<sup>217</sup> *See Gonzales v. Oregon*, 546 U.S. 243, 298 (2006) (Scalia, J., dissenting) ("From an early time in our national history, the Federal Government has used its enumerated powers, such as its power to regulate interstate commerce, for the purpose of protecting public morality . . ."); *Hipolite Egg Co. v. United States*, 220 U.S. 45, 58 (1911) (stating that the power to regulate interstate commerce includes "the right to bar" certain items from the stream of interstate commerce); *see also* *The Lottery Case*, 188 U.S. 321, 359-60 (1903) (noting that because the "power to regulate interstate commerce is . . . full and complete," Congress may prohibit items and contracts from interstate commerce as it sees fit).

<sup>218</sup> *See, e.g., Hipolite Egg Co.*, 220 U.S. at 58 (citing *McCulloch* as allowing Congress to authorize seizure of non-compliant articles after they had passed through the stream of interstate commerce).

<sup>219</sup> *Sabri v. United States*, 541 U.S. 600, 612-13 (2004) (Thomas, J., concurring in the judgment).

regulation of businesses, especially small businesses, is very much a contested point.<sup>220</sup> Thus, *Wickard's* allowing the federal government to regulate virtually any remote activity having some economic impact is not entrenched. Adopting the more recent understanding of what comprises "commerce," by itself, would give Congress authority to continue regulating most economic transactions. But recognizing that the clause has real power would not just be a hollow genuflection to federalism. It would place actual constraints on Congress's authority in a manner that better reflects the principles of limited government and recognizes that Congress does not enjoy a national police power.

First, this Section will show how the Court can replace *Wickard* and implement a test to determine if a business is engaging in interstate commerce. Despite the cries that formalistic tests do not work, the Court has developed and implemented a test regarding whether a court has personal jurisdiction over a defendant, based on the defendant's use of the stream of interstate commerce.<sup>221</sup> Because courts routinely apply this personal jurisdiction test, the Court could adopt a modified version of it to decide whether there is a direct effect on interstate commerce. Second, this Section argues that Congress cannot use the Necessary and Proper Clause to reach purely local activity. Instead, Congress's power is limited to regulating direct engagement in interstate commerce.

### 1. Regulation of Commercial Activities Utilizing Stream of Interstate Commerce

Given that *Wickard* is wrongly decided on originalist grounds and that it does not enjoy the public support necessary to plausibly become a constitutional amendment, the Court should overrule it. Of course, this conclusion leads to the problem of deciding if something is interstate or intrastate commerce. An inability to adopt a workable test would mean that the costs of overruling *Wickard* could overshadow any supermajoritarian benefits. The direct-indirect test, as understood by *Wickard*, proved unworkable mostly because the Court was left to speculate about whether

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<sup>220</sup> See *supra* notes 193-96 and accompanying text (discussing polling data regarding federal regulation).

<sup>221</sup> See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980) (asking whether the defendant intended to deliver products into the stream of commerce leading to the forum state).

activity directly affected commerce from an abstract economic perspective.<sup>222</sup> Indeed, the Court refused to look at the seller's intentions to engage in interstate commerce and instead relied on categorical decisions regarding if something directly or indirectly affected commerce.<sup>223</sup>

However, adopting a test measuring whether the seller intends to engage in interstate commerce eliminates Justice Jackson's concerns about formalistic categories or the Court's incompetence in judging economic relationships.<sup>224</sup> Courts would simply ask if a given business is engaging in buying or selling through interstate commerce. And the test this Article proposes is one that courts are quite familiar with—they already use it when deciding if there is personal jurisdiction over a business defendant.

In *World-Wide Volkswagen Corp. v. Woodson*,<sup>225</sup> the Court held that if a seller targets a forum state through the stream of interstate commerce, the seller can be held liable to a judgment *in personam*. In other words, by “purposefully avail[ing] itself of the privilege of conducting activities within the forum State,” the seller waives its ability to be free of an adverse judgment in that state's court.<sup>226</sup>

The very same logic could apply to whether regulations under the commerce power extend to a business. Thus, this Article proposes importing personal jurisdiction's stream-of-commerce logic into determining if a given enterprise is engaged in interstate or intrastate commerce. Through choosing to engage in interstate commerce, by either directing products or services “into the stream of commerce with the expectation that they will be purchased by consumers”<sup>227</sup> from another state or by purchasing products or services from the stream of interstate commerce, a business could be said to have purposefully availed itself to

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<sup>222</sup> See *supra* notes 104-05 and accompanying text (discussing the direct-indirect test's development).

<sup>223</sup> See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 304-05 (1936) (stating that mining, agriculture, and manufacturing are inherently intrastate activities and refusing to adopt a rule that would test whether the producer intended to sell the goods into interstate commerce).

<sup>224</sup> See *Cushman*, *supra* note 50, at 1141 (quoting a memorandum from Justice Jackson to his law clerk about what path the Court should take in *Wickard*).

<sup>225</sup> 444 U.S. 286, 297-98 (1980).

<sup>226</sup> *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

<sup>227</sup> *World-Wide Volkswagen*, 444 U.S. at 298.

federal regulation.<sup>228</sup> Hence, importing personal jurisdiction's stream-of-commerce test has the two-fold advantage of both putting real limitations on the commerce power, while providing a test that federal judges are already used to.

But instead of asking if a particular state was targeted, as personal jurisdiction's test does, the test offered here would simply ask whether the business has targeted the stream of interstate commerce generally. While hard cases will always abound at the margins, most businesses in general, and virtually all large corporations, would likely continue to be subject to federal regulation.<sup>229</sup> Any business that engages in providing or procuring goods or services from multistate or multinational markets utilizes the stream of commerce. For example, both a restaurant company with a chain of locations in multiple states and a manufacturing plant purchasing raw materials from another state have engaged directly in interstate commerce.<sup>230</sup>

The businesses that would benefit from this reading of the Commerce Clause would be small, local businesses. And it is here that line-drawing problems will begin to appear, especially given that many small businesses have an Internet presence. There is also the question of what happens to a small business that does not intend to engage in interstate commerce, but ends up acquiring out-of-state patrons. While these problems are unavoidable, line drawing is no excuse for courts to refrain from enforcing the Constitution's structural provisions.<sup>231</sup> Indeed, line-drawing

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<sup>228</sup> By looking to the intent of the seller, this test resembles the traditional approach taken in the antitrust cases regarding whether a business intended to directly affect interstate commerce. Cushman, *supra* note 50, at 1096.

<sup>229</sup> And, because this theory upholds *Darby's* broad understanding of Congress's prohibitory power, Congress can continue regulating various aspects of a business's operations once the business chooses to engage in interstate commerce. *See supra* notes 216-18 and accompanying text. However, since this test is not rational-basis level scrutiny, Congress would bear the burden of showing that its means chosen are "appropriate" and "plainly adapted" to achieving a legitimate end. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

<sup>230</sup> *Cf. World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) (looking at whether a business's advertising is reasonably calculated to reach another state).

<sup>231</sup> *See Calabresi, supra* note 8, at 804-06 (noting that Commerce Clause line-drawing and fact-finding problems would be "no more difficult than they are in the context of determining what constitutes an impermissible endorsement of religion or when an abortion law violates the doctrinally recognized right to privacy or when unprotected obscenity becomes protected pornography").

issues are far from abnormal in the area of personal jurisdiction.<sup>232</sup>

However, just as with the due process protections of personal jurisdiction, the perfect should not be the enemy of the good for Commerce Clause jurisprudence.<sup>233</sup> Some courts have recognized that there is a “sliding scale” between a business where all or most of its transactions are done through the Internet and a business that passively maintains a website for advertisement.<sup>234</sup> Under this approach, a web-based business targeting a national or global market is engaging in interstate commerce. However, a local brick-and-mortar business with a website is more likely to be engaging in intrastate commerce. As with personal jurisdiction, courts could weigh whether a business has purposely availed itself to a multistate market through its Internet presence.

Another potentially problematic issue is what happens if out-of-state patrons partake of a business’s goods or services. This is not a new problem for determining whether an activity has a direct or indirect effect on commerce. But here too, under the test this Article proposes, the question of whether a seller is purposely availing its products and services to an intrastate versus an interstate market could be assessed by the facts of the case.<sup>235</sup> If a restaurant is located immediately off an interstate highway and has advertisements posted on the highway, it is rather obviously targeting an interstate market.<sup>236</sup> Meanwhile, a small-town diner that principally

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<sup>232</sup> See, e.g., Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the “Interwebs”*, 100 CORNELL L. REV. 1129, 1133 (2015) (discussing the lack of clear direction in whether and how an Internet presence creates purposeful benefit to another state).

<sup>233</sup> See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring) (finding that “[a]ctivities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. . . . [But to] find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system” (citation omitted)).

<sup>234</sup> *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

<sup>235</sup> Indeed, this inquiry is not all that different from an important theme that Chief Justice Hughes mentions a number of times in *Jones & Laughlin Steel*, namely that when an activity has such a “close and substantial relation” with interstate commerce, the business subjects itself to Congress’s control. 301 U.S. 1, 37 (1937); see also Friedman, *supra* note 78, at 1966-67 (discussing Chief Justice Hughes’s concern that later cases like *Darby* were pushing the bounds of “close and substantial relation” too far).

<sup>236</sup> *Jones & Laughlin Steel*, 301 U.S. at 38 (finding that “the close and intimate effect which brings the [business] within the reach of federal power may be due to activities”).

serves a local populace, but sometimes has out-of-town visitors stop in for a bite to eat would be intrastate. Even though some patrons may be from out-of-state, if the facts showed that the diner sought to serve an intrastate market, then it has not purposely availed itself to an interstate market.<sup>237</sup>

In time, courts would develop methods for determining whether a small business seeks to engage in interstate commerce by looking factors such as: where the business advertises; whether the business regularly purchases supplies from out-of-state vendors; if the business has a history of serving a more localized community; if the business allows for ordering or purchasing through its website; and whether the business is located in a place that is more likely to service an interstate market.<sup>238</sup> Further, the task of courts in deciding whether a business participates in interstate commerce would be made easier by Congress's exclusion of small businesses from legislation. Indeed, major regulatory regimes often exempt small businesses.<sup>239</sup> Such statutory exemptions would help keep many problematic cases from ever coming into being.

As McGinnis and Rappaport's theory shows, the balance struck by *Jones & Laughlin Steel* should be the standard.<sup>240</sup> There, the Court recognized that any business directing itself at the stream of interstate commerce could be regulated. But it continued to examine Congress's commerce power "in the light of our dual system of government" to keep from "effectually obliterate[ing] the distinction between what is national

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<sup>237</sup> Cf. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 890-91 (2011) (Breyer, J., concurring) (discussing how a decision finding personal jurisdiction over a defendant must be based on something more than the defendant having reason to know that its products "might" be sold to someone from any of the fifty states); see also *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 242 (1899) (noting how a company has directed its products at interstate commerce).

<sup>238</sup> Cf. Calabresi, *supra* note 8, at 804-06 (arguing that the Court's fear about incompetence in handling Commerce Clause cases is unfounded given its dormant Commerce Clause jurisprudence and its regular exercise of judicial review).

<sup>239</sup> See, e.g., 26 U.S.C. § 4980H (c)(2)(A) (exempting businesses with less than fifty employees from the ACA's employer mandate); 29 U.S.C. § 203(s)(1)(A)(ii) (exempting businesses with sales of less than \$500,000 from the FLSA); 29 U.S.C. § 2611(4)(A)(i) (exempting businesses with less than fifty employees from the Family & Medical Leave Act); 42 U.S.C. § 2000e(b) (defining an "employer" under Title VII as having "fifteen or more employees" that "affect[s] commerce").

<sup>240</sup> See *supra* Section III.B (discussing how *Jones & Laughlin Steel* balanced the idea of a Commerce Clause distinguishing national from local, while allowing Congress to reach production and services).

and what is local and creat[ing] a completely centralized government.”<sup>241</sup> By looking at whether a business chooses to engage in interstate commerce, the test advocated here would allow courts to effectively police the scope of government regulation without precluding most federal regulatory authority.

In sum, under this approach, the vast majority of businesses would continue to be subject to the various federal regulations dependent upon Congress’s broad commerce power. Once a business purposefully avails itself to an interstate or international market, it comes within the reach of federal regulation. Only small businesses, targeting insular local markets, would be exempt from federal regulations. While many small business owners would be relieved of various wage and employment provisions, along with other federal regulations, this result is nothing close to the “immediate elimination of a vast number of government programs” that McGinnis and Rappaport find unacceptable or that critics of a stricter interpretation of the Commerce Clause fear.<sup>242</sup> Because this test returns some of the benefits of the Commerce Clause’s structural protections—which have not been overridden by a supermajoritarian concurrence—without enormous costs, it should be adopted.

## 2. Regulation of Activities Through the Necessary and Proper Clause

*Wickard*’s holding that allows regulation of any activity affecting interstate commerce also cannot be justified on the basis of the Necessary and Proper Clause. As discussed above,<sup>243</sup> the Necessary and Proper Clause vests Congress with only incidental authority. Congress cannot use the clause to expand its powers, but only to further the operation of its enumerated powers.<sup>244</sup> Action under the clause must involve “exercises of authority derivative of, and in service to, a granted power.”<sup>245</sup> In other

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<sup>241</sup> *Jones & Laughlin Steel*, 301 U.S. at 37.

<sup>242</sup> McGinnis & Rappaport, *supra* note 168, at 837.

<sup>243</sup> See *supra* Section I.C (discussing the scope of Congress’s authority under the Necessary and Proper Clause).

<sup>244</sup> See THE FEDERALIST No. 33, at 202 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that structural limitations will set the boundaries for operation under the Necessary and Proper Clause).

<sup>245</sup> *NFIB*, 567 U.S. 519, 560 (2012) (opinion of Roberts, C.J.).

words, the action must be “narrow in scope” and “incidental” to the exercise of commerce authority.<sup>246</sup> Just because an action may be “necessary,” it will not be “proper” if it effectively creates a “substantive and independent power.”<sup>247</sup>

The approach of Chief Justice Roberts in *NFIB* gets the doctrine right as an original matter.<sup>248</sup> Like Chief Justice Marshall in *McCulloch*, he highlights the agency-law notion of incidental authority as an underlying assumption of the Necessary and Proper Clause.<sup>249</sup> The powers flowing from the clause must be incidental to the enumerated powers given in Article I.

Thus, while the Necessary and Proper Clause could allow for the regulation of intrastate economic activities directed at interstate commerce or of activities that harm the flow of interstate commerce, it would not give Congress the authority to regulate activities that indirectly affect interstate commerce.<sup>250</sup> This understanding is consistent with *Shreveport Rate*, *Jones & Laughlin Steel*, *Hipolite Egg*, and *Darby*. However, it stands in opposition to *Wickard* and *Raich*, which involved purely intrastate activities not directed at the stream of interstate commerce. The intrastate train rates in *Shreveport Rate* harmed the flow of interstate commerce. And the products in *Jones & Laughlin Steel*, *Hipolite Egg*, and *Darby* were directed at an interstate market. Meanwhile, *Wickard* and *Raich* dealt only with home consumption. Finding authority to regulate in those cases “is to find it almost everywhere” and thus puts “an end to our federal system.”<sup>251</sup>

Finally, as for non-economic activities, although Congress has the authority to regulate and proscribe activities that affect the channels and instrumentalities of commerce, it cannot regulate non-economic activities

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<sup>246</sup> *Id.* (citation omitted).

<sup>247</sup> *Id.* at 561 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 411 (1819)).

<sup>248</sup> See *supra* notes 119-45 and accompanying text (discussing the different interpretations of the Necessary and Proper Clause).

<sup>249</sup> See John T. Valauri, *Originalism and the Necessary and Proper Clause*, 39 OHIO N.U. L. REV. 773, 786-87 (2013) (comparing Chief Justice Roberts’s opinion with *McCulloch* and noting its incorporation of “agency law concepts and fiduciary principles of the founding era”).

<sup>250</sup> Congress has the power to prevent activities that threaten the flow of commerce, *United States v. Coombs*, 37 U.S. 72, 78 (1838), and to prohibit certain products from entering the flow of commerce. *Hipolite Egg Co. v. United States*, 220 U.S. 45, 57 (1911). Thus, it can erect regulations that give effect to these powers.

<sup>251</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring).

that simply affect economic forces.<sup>252</sup> This dichotomy is not because the original public meaning of the Necessary and Proper Clause is somehow weaker than the Court's understanding in *McCulloch*. Indeed, when an action is incidental to an enumerated power, the Court is "very deferential" to whether the regulation is "necessary."<sup>253</sup> The problem with regulating non-economic activity, which does not interfere with the flow of commerce, is that the Commerce Clause is inherently directed at economic activity.<sup>254</sup> Therefore, attempts to regulate non-economic activity are not covered by the Commerce Clause, giving no derivative authority to operate through the Necessary and Proper Clause.

### CONCLUSION

As Justice Thomas has recognized, giving "the original understanding and our first century and a half of case law" more of a role to play in modern commerce jurisprudence "does not necessarily require a wholesale abandonment of our more recent opinions."<sup>255</sup> By overruling *Wickard* and replacing it with a test that asks whether an enterprising activity has targeted the interstate market, with the government bearing the burden showing the purposeful avilment, the Court could strike a balance between the federalism protections embodied in the Commerce Clause and the abundance of precedents that have sprung up since the late 1930s.

The result of the Court taking this approach is unlikely to lead to a massive upheaval in terms of federal regulatory power. Most challenges to federal authority would be as-applied, not facial. And, of course, the Court always has the power to construe statutes so as to avoid Commerce Clause concerns.<sup>256</sup> However, asserting that the Commerce Clause grants real

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<sup>252</sup> See Natelson, *supra* note 29, at 99 (discussing the narrowness of framing-era understanding of what "commerce" constituted).

<sup>253</sup> *NFIB*, 567 U.S. 519, 559 (2012) (opinion of Roberts, C.J.).

<sup>254</sup> See *United States v. Morrison*, 529 U.S. 598, 613 (2000) (noting that, "[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature").

<sup>255</sup> *United States v. Lopez*, 514 U.S. 549, 601 (1995) (Thomas, J., concurring).

<sup>256</sup> See, e.g., *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (construing a statute in light of *Lopez* and *Morrison*); see also *United States v. Jones*, 529 U.S. 848, 857-58 (2000) (finding that an owner-occupied residence is not used "in commerce," preventing federal prosecution for arson and avoiding the question of whether Congress used the Commerce Clause to gain police power); *Howard v.*

protection is far from trivial—it goes to the heart of our system of government.

In setting out to form a more perfect union, We the People created a government of limited powers. Yet, over the centuries, that government has been allowed to gain more power than originally envisioned. As the vanguard of this great enterprise, the Court must protect the People’s sovereignty by respecting their will. The default for determining that will is the original public meaning of the Constitution’s text, as amended. But if the Court has been mistaken about key constitutional provisions, it can look to both the sentiment of the People and their reliance on the precedent to decide between original public meaning and *stare decisis*. By doing so, the Court respects the basic premise of our system—that sovereignty ultimately resides with the People.

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Ill. Cent. R. Co., 207 U.S. 463, 541 (1908) (Holmes, J., dissenting) (noting that a statute whose terms applied to “every common carrier engaged in trade or commerce” could have been read as only applying to common carriers involved in interstate commerce).