

TEMPERING THE COMMERCE POWER

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ABSTRACT

The Supreme Court's modern interpretation of the Necessary and Proper Clause in the realm of interstate commerce is textually problematic, unfaithful to the Constitution's original meaning, and contains positive incentives for Congress to over-regulate. The Necessary and Proper Clause was intended to embody the common law doctrine of principals and incidents, and the Court should employ that doctrine as its interpretive benchmark. The common law doctrine contains less, although some, bias toward over-regulation, and it is flexible enough to adapt to changing social conditions. Adherence to the common law doctrine would markedly improve Commerce Power jurisprudence and reduce incentives for harmful congressional behavior.

In a future case, we ought to temper our 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.

—Justice Clarence Thomas¹

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1. *U.S. v. Lopez*, 514 U.S. 549, 584 (1995).

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2. *Bibliographical Note:* This footnote collects alphabetically the secondary sources cited more than once in this Article. The sources used are as follows:

- 2 Annals of Cong. (1789) (available at <http://memory.loc.gov/ammem/amlaw/lwac.html>).
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 E. Allan Farnsworth, *Contracts* vol. 1–3 (3d ed., Aspen Publishers 2004).
 Alexander Hamilton, John Jay & James Madison, *The Federalist* (George W. Carey & James McClellan eds., Liberty Fund 2001) (available at http://oll.libertyfund.org:81/EBooks/Hamilton_0084.pdf) [hereinafter *The Federalist*].
 Giles Jacob, *A New Law-Dictionary* (8th ed., Woodfall & Strahan 1762).
 John Marshall's *Defense of McCulloch v. Maryland* (Gerald Gunther ed., Stanford U. Press 1969) [hereinafter *Marshall, Defense*].
 Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 Case W. Res. L. Rev. 243 (2004) [hereinafter *Natelson, Necessary and Proper*].
 Robert G. Natelson, *The Constitution and the Public Trust*, 52 Buff. L. Rev. 1077 (2004) [hereinafter *Natelson, Public Trust*].
 Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 St. John's L. Rev. 789 (2006) [hereinafter *Natelson, Commerce*].
 William Rastall, *Les Termes de la Ley* (H. Lintot 1742).
The Student's Law-Dictionary (Nutt & Gosling 1740).
 Charles Viner, *A General Abridgment of Law and Equity* vol. 1–23 (George Strahan 1742).

I. INTRODUCTION: THE TALE OF THE OVERLY AMBITIOUS AGENT

After many years of hard work, John and Jane have built up a prosperous and lucrative ranching operation in Montana.³ They decide to travel abroad for several years. They hire John's mother's younger brother Sam to manage the ranch in their absence.

When they return, they find the business running a negative cash flow, deeply in debt, and badly in need of maintenance and capital improvement. Sam has bled money from the ranch and used the cash to buy a farm machinery dealership and several local retail businesses, including a drug store, a grocery, a hardware store, a clothier, and an office supply store. Sam has no particular aptitude for running those businesses, and he is operating none of them well. Some of them are lurching toward bankruptcy. Still, he has become a popular figure around town because his control of so many mercantile enterprises has enabled him to bestow product discounts and other benefits on favored people—at John and Jane's expense.

Upset at the danger to their hard-won earnings, John and Jane confront Sam: "Whatever gave you the idea you had authority to buy all these other businesses?" they demand.

"That's easy," smiles Sam. "Look at my power of attorney. It grants me authority 'to regulate the ranch and to exercise incidental powers necessary and proper for that purpose.'"

"What," retorts Jane, "has a big farm machinery dealership got to do with running our ranch?"

"Look," says Sam, "we sometimes buy machinery and parts for machinery. Don't you see that the dealership has a substantial effect on the ranch?"

John counters, "Okay, what 'substantial effect' is there on our business from a drug store, a grocery, a hardware store, and all those other white elephants you've acquired—other than that they are sucking us dry?"

Sam looks sullen: "Well, individually, not much. But we do some trade with all of them, and all of them together—well, that's a big impact. Are you saying that as a ranch manager I have to just keep my eyes on the manure and never look up to see what

3. As Montanans know, the phrase "prosperous and lucrative ranching operation" borders on the oxymoronic. However, the story in the text is only a parable.

might be happening around us and what effect it might have on the ranch?"

Jane turns to John, teeth clenched: "We ought to sue him," she says.

"Can't do that," Sam interjects. "Supreme Court says so. I've got 'managerial discretion.' All you can do is refuse to renew my contract. But I warn you: that wouldn't be a real popular move around here right now."

II. CONGRESS AS ATTORNEY IN FACT

A modern judge or law professor might be able to rationalize why this tale of abuse of fiduciary duty does not describe current federal practice under the Constitution's Commerce Power. But to the Constitution's framers or ratifiers, the analogy would seem right on target. Most of them had spent time in the private practice of law, and they knew how agency agreements and other fiduciary arrangements worked in practice.⁴ They believed in a fiduciary model of government,⁵ and they consciously modeled the Constitution's delegated powers on the language of powers of attorney and other agency documents.⁶ Indeed, James Iredell—federalist leader at the North Carolina ratifying convention and future Supreme Court justice—explicitly described the Constitution as

a great power of attorney, under which no power can be exercised but what is expressly [sic]⁷ given. Did any man ever hear . . . that the attorney should not exercise more power than was there given him? Suppose, for instance, a man had lands in the counties of Anson and Caswell, and he should give another a power of attorney to sell his lands in Anson, would the other have any authority to sell the lands in Caswell?—or could he, without absurdity, say, " 'Tis true you have not expressly authorized me to sell the lands in Caswell; but as you had lands there, and did not say I should not, I thought I might as well sell those lands as the other."⁸

The "great power of attorney" granted Congress both express and implied power to regulate commerce. The express grant was

4. The discussion in this section relies in part on my previous work. Natelson, *Necessary and Proper*, *supra* n. 2, at 270–71 (describing the professional backgrounds of members of the Constitutional Convention's Committee of Detail).

5. Natelson, *Public Trust*, *supra* n. 2 (describing in detail the Founders' commitment to fiduciary government).

6. See generally Natelson, *Necessary and Proper*, *supra* n. 2 (discussing in detail the background of the Necessary and Proper Clause).

7. Iredell at this point was either misreported or had forgotten the implied powers under the Necessary and Proper Clause, but this is not relevant to his main point.

8. *Elliot's Debates*, *supra* n. 2, at vol. 4, 148–49.

the Commerce Clause.⁹ Some scholars have insisted that this provision was intended to confer capacity to govern a very broad scope of economic, or even non-economic, activities, because in Founding-era usage the word “commerce” sometimes had a very wide meaning.¹⁰ In fact, however, the evidence is overwhelming that the intended meaning of “commerce” in the express grant was rather narrow. It embraced no more than the buying and selling of goods and services and certain related activities, such as navigation, commercial paper, insurance, money, and finance—essentially the body of jurisprudence called the law merchant or *lex mercatoria*.¹¹

The Constitution supplemented the express grant of power over commerce with an apparent grant of authority to make laws “necessary and proper” to carry the express powers into execution.¹² Wording of this kind was prevalent in eighteenth-century powers of attorney and other documents bestowing powers on fiduciaries.¹³ The purpose of the language was to communicate to

9. U.S. Const. art. I, § 8, cl. 3 (Congress shall have power “[t]o regulate Commerce . . . among the several States.”).

10. The argument for a wide constitutional meaning of “commerce” was first set forth in Walton H. Hamilton & Douglass Adair, *The Power to Govern: The Constitution—Then and Now* (W.W. Norton & Co. 1937) (arguing that “commerce” included the entire economy). See also William Winslow Crosskey, *Politics and the Constitution in the History of the United States* vol. 1, 69, 109 (U. of Chi. Press 1953) (elaborating the same argument); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 Iowa L. Rev. 1 (1999) (adopting the same argument); Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 Nw. U. L. Rev. 695 (2002) (adopting the same argument); Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 Ark. L. Rev. 1185 (2003) (adopting the same argument); Akhil Reed Amar, *America’s Constitution: A Biography* 107–08 (Random House 2005) (claiming that “commerce” included even non-economic activities).

11. The evidence for the *legal* meaning of “commerce” at the time is examined in Natelson, *Commerce*, *supra* n. 2 (surveying all appearances of “commerce” in reported English cases of the sixteenth, seventeenth, and eighteenth centuries, and in various secondary sources, and finding that it almost always meant “mercantile activities” only).

The evidence for the *lay* meaning of “commerce” is collected in Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001) (examining the use of the word in the debates over the Constitution) and Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847 (2003) (examining use of the word in the popular press).

12. U.S. Const. art. I, § 8, cl. 18 (Congress shall have power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

13. Natelson, *Necessary and Proper*, *supra* n. 2, at 274–76 (setting forth numerous illustrations). Since the publication of that article, I have identified many other examples.

the reader the existence of implied powers incidental to the principal powers listed expressly in the instrument. In the words of Edward Coke, such language was "to declare and express to laymen which [sic] have no knowledge of the law, what the law requires in such cases."¹⁴ The *substantive* effect of such clauses, however, was nil. As Coke and others stated it, "*expressio eorum quae tacite insunt nihil operatur*"¹⁵—"the expression of those things that are silently inherent has no legal effect." Unless incidental authority was excluded explicitly (as in the Articles of Confederation),¹⁶ a

E.g. MacKreth v. Fox (H.L. 1791) 4 Bro. P.C. 258, 267, 2 Eng. Rep. 175, 181 (summarizing a private trust deed with similar language); Charles Nalson Cole, *A Collection of Laws* 434 (Woodfall & Strahan 1761) (setting forth a statute granting commissioners of works "necessary or proper" powers); An Act for Dividing and Inclosing Several Common Fields and Grounds within the Manor of Fillingham, in the County of Lincoln 4 (granting commissioners "necessary or proper" powers) (London 1759); An Act for Dividing and Inclosing the Open and Common Field, Common Meadows, Common Pastures, Common Grounds, and Commonable Lands, with the Hamlet and Liberties of Princethorp in the Township and Parish of Stretton upon Dunsmore, in the County of Warwick 20 (London 1762) (granting "convenient or necessary" powers) (on file with the author); *Statutes at Large from the Fifth Year of the Reign of King George the Third to the Tenth Year of the Reign of King George the Third, Inclusive* vol. 10, 16 (Strahan & Woodfall 1771) (granting commissioners the power to make "proper" installations as they may deem "necessary").

In addition, orders from the House of Lords to lower courts frequently contained "necessary and proper" language. *E.g. John Earl of Buckingham v. Drury* (H.L. 1762) 3 Bro. P.C. 492, 505, 1 Eng. Rep. 1454, 1462 ("[A]nd that the said court do give all necessary and proper directions for carrying this judgment into execution."); *West v. Erisey* (H.L. 1727) 1 Bro. P.C. 225, 233, 1 Eng. Rep. 530, 536 ("[A]nd the Court of Exchequer was to give all necessary and proper directions for the making this judgment effectual").

14. *Boroughe's Case* (K.B. 1596) 4 Co. Rep. 72b, 73b, 76 Eng. Rep. 1043, 1044-45 (reporter's commentary).

The 3d point (the great doubt of the case) which was resolved was, that in this case the patentee ought to demand the rent upon the land; and their principal reason was grounded upon a rule in law, *sc.* that the expression of a clause which the law implies, works nothing, *expressio eorum quae tacite insunt nihil operatur et expressa non prosunt quae non expressa proderunt* [the expression of those things that are silently inherent has no legal effect and the expressions produce nothing that wouldn't have been produced without them]; and yet, as Littleton saith, it is well done to put in such clauses to declare and express to laymen which have no knowledge of the law, what the law requires in such cases . . .

Id. (citations omitted). See also *Shelley's Case* (C.P. 1581) 1 Co. Rep. 93b, 104b, 76 Eng. Rep. 206, 235 (expressing similar sentiments).

15. *Boroughe's Case*, 4 Co. Rep. at 72b, 76 Eng. Rep. at 1044 (reporter's commentary). See *e.g. Case of Mines* (Exch. 1568) 1 Pl. Com. 310, 317, 75 Eng. Rep. 472, 483 (stating that the King had incidental power to dig gold and silver ore he owned and "the clause of licence is but matter of curtesy, and serves only to give notice to the possessor of the soil, and is not of necessity to be had"); *The King v. Mayor of Durham* (K.B. 1757) 1 Keny. 512, 523, 96 Eng. Rep. 1074, 1078 (reporting counsel as agreeing that "corporations have an incidental power of making by-laws" and "where a charter gives a general power, it is superfluous").

16. Art. of Confederation art. II (1781) ("Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.") (emphasis added).

naked grant of express authority passed incidental authority just as well.¹⁷ In sum, “necessary and proper” language of this sort served as a rule of construction, and no more.

The role of the Necessary and Proper Clause in the Constitution was to be the same as the role of similar language in other agency documents. We know this from the surviving records of the federal convention’s Committee of Detail,¹⁸ which drafted the Clause, and from separate comments by committee member Edmund Randolph.¹⁹ We know it also from the debate over ratification. Advocates of the Constitution used much ink and air expounding to the ratifying public the merely informative role of the Necessary and Proper Clause.²⁰ For example, Iredell’s colleague and ally, Archibald Maclaine, explained the clause to his fellow North Carolinians this way: “This clause specifies that they shall make laws to carry into execution *all the powers vested* by this Constitution; consequently, they can make no laws to execute any other power. This clause gives no new power, but declares that those already given are to be executed by proper laws.”²¹

Thirty-three years later, Virginia judge Spencer Roane, son-in-law of arch-antifederalist Patrick Henry, pseudonymously attacked Chief Justice John Marshall’s construction of the Necessary and Proper Clause in *McCulloch v. Maryland*.²² One of Roane’s central arguments was that the Clause, correctly understood, was merely a rule of construction that added no power to

17. Natelson, *Necessary and Proper*, *supra* n. 2, at 283–84.

18. Edmund Randolph wrote the first draft of the Clause, which addressed potential conflicts between state and federal powers thus: “All laws of a particular state, repugnant hereto, shall be void, and in the decision thereon, which shall be vested in the supreme judiciary, all incidents without which the general principles [sic] cannot be satisfied shall be considered, as involved in the general principle [sic].” *The Records of the Federal Convention of 1787* vol. 2, 144 (Max Farrand ed., Oxford U. Press 1937). John Rutledge then revised this draft. Either Rutledge or Randolph lined out the original wording, and Rutledge replaced it with the phrase: “and a right to make all Laws necessary to carry the foregoing Powers into Execu[tion].” *Id.*

19. Edmund Randolph, *Opinion on the Constitutionality of the National Bank*, in *Bank History*, *supra* n. 2, at 89 (stating that “[t]o be necessary is to be incidental, or, in other words, may be denominated the natural means of executing a power”). Moreover, this role of the Necessary and Proper Clause was assumed in the First Congress during the debate over the proposed Bank of the United States. See *infra* nn. 84–89 and accompanying text.

20. See Natelson, *Necessary and Proper*, *supra* n. 2, at 296–314.

21. *Elliot’s Debates*, *supra* n. 2, at vol. 4, 141. See also *id.* at 468 (reporting James Wilson’s remarks at the Pennsylvania ratifying convention); *id.* at 537 (reporting Thomas M’Kean’s similar remarks at the same convention); *The Federalist*, *supra* n. 2, at No. 33, 158 (Alexander Hamilton); *id.* at No. 44, 234–35 (James Madison). There are other examples.

22. *McCulloch v. Md.*, 17 U.S. 316, 359, 365 (1819).

the federal store.²³ John Marshall—who must himself be accounted a leading Founder, for he had been a principal federalist spokesman at the Virginia ratifying convention—pseudonymously responded with newspaper articles in defense of *McCulloch*. He did not find much to agree with Roane about. But he did concur wholeheartedly with Roane's argument that the Necessary and Proper Clause had no independent legal effect—that it simply memorialized the pre-existing doctrine that incidental powers followed principal ones.²⁴

Thus, the constitutional design pertaining to the Commerce Power was this: Congress would have authority over the law merchant or *lex mercatoria*. Congress also would possess certain incidental powers connected to that authority. But no more.

III. THE FOUNDERS' LAW OF PRINCIPALS AND INCIDENTS

What was the scope of those incidental powers? To answer this, we turn to the common law²⁵ of the time, for as Marshall pointed out, the Necessary and Proper Clause, like the rest of the Constitution, was to be read by the light of the common law.²⁶ We can recover that common law from several kinds of sources. The most important are the reports of cases decided before the Constitution was ratified. These are now available in approximately fifty volumes of *English Reports, Full Reprint*.²⁷ (One must keep

23. Marshall, *Defense*, *supra* n. 2, at 115, 117, 124–25 (stating that the Clause gives Congress no additional power).

24. *Id.* at 97, 176, 186. The editor of this exchange, the late Professor Gerald Gunther of Harvard, was moved to comment, "Clearly these essays give cause to be more guarded in invoking *McCulloch* to support views of congressional power now thought necessary." *Id.* at 20. This understanding of the Necessary and Proper Clause as a pure rule of construction was confirmed by Justice Joseph Story, Marshall's right-hand man on the Court:

The plain import of the clause is, that congress shall have all the incidental and instrumental powers, necessary and proper to carry into execution all the express powers. It neither enlarges any power specifically granted; nor is it a grant of any new power to congress. But it is merely a declaration for the removal of all uncertainty, that the means of carrying into execution those, otherwise granted, are included in the grant.

Joseph Story, *Commentaries on the Constitution of the United States* vol. 3, § 1238 (Hilliard, Gray & Co. 1833) (available at http://www.constitution.org/js/js_000.htm).

25. Here and throughout, I use the term "common law" in a broad sense to refer to English case law, even if decided in the Chancery, Exchequer, or Consistory Courts or in the House of Lords.

26. Marshall, *Defense*, *supra* n. 2, at 167–77 (interpreting the Necessary and Proper Clause according to the common law of principals and incidents).

27. These are *English Reports, Full Reprint*, volumes 1–3, 21–29, 72–100, 123–25, 145, 161, 167, 168, 170, together with a few cases in volume 36. These volumes include a small number of later cases, although this Article cites only three—decided in 1791, 1793, and

in mind, however, that some case reporters²⁸—such as William Salkeld,²⁹ Edward Coke,³⁰ and Edmund Plowden³¹—were more highly regarded than others.³² In addition to the cases, there was a variety of eighteenth-century secondary sources.³³ These included treatises by scholars such as Lord Coke³⁴ and William

1797. See *supra* n. 13 and *infra* n. 48, n. 61. There may be minor spillage of pre-ratification cases into other volumes, but the numbers are not significant.

28. See generally John William Wallace, *The Reporters Arranged and Characterized with Incidental Remarks* (4th ed., Soule & Bugbee 1882) (discussing the biographies, methodology, and relative reputations of the various English case reporters).

29. W.R. Williams, *Salkeld, William (1671–1715)*, *Oxford Dictionary of Natl. Biography*, <http://www.oxfordnb.com/> (2004–2005) (containing a short biography).

30. Allen D. Boyer, *Coke, Sir Edward (1552–1634)*, *Oxford Dictionary of Natl. Biography*, <http://www.oxfordnb.com/> (2004–2005) (containing a short biography).

31. Christopher W. Brooks, *Plowden, Edmund (c. 1518–1585)*, *Oxford Dictionary of Natl. Biography*, <http://www.oxfordnb.com/> (2004–2005) (containing a short biography).

32. In the course of writing from London to his parents, the young John Dickinson, then a law student, offered insight into some of the authors then deemed important. H. Trevor Colbourn & John J. Appel, *A Pennsylvania Farmer at the Court of King George: John Dickinson's London Letters, 1754–1756 Part I*, 86 Pa. Mag. of History & Biography 241, 241 (1962); H. Trevor Colbourn & John J. Appel, *A Pennsylvania Farmer at the Court of King George: John Dickinson's London Letters, 1754–1756 Part II*, 86 Pa. Mag. of History & Biography 417, 417 (1962) (setting forth the content of Dickinson's letters from London to his parents). Dickinson's references are to: Coke, *id.* at 257, 422, 451; Plowden, *id.* at 257, 423, 451; Salkeld, *id.* at 451; and Peyton Ventris, *id.* at 451. He also mentions Littleton, *id.* at 423, probably referring to Coke's commentary on Littleton (i.e., Coke, *supra* n. 2).

33. In my view, modern constitutional commentary tends unjustifiably to overlook much of this material. For example, as of October 7, 2006, there were only fifty articles in the entire Westlaw “journals and law reviews” (JLR) database referencing any works in Giles Jacob's copious bibliography. Only some of these articles were on constitutional law topics. Such citations as were found were exclusively to Jacob's law dictionary, Jacob, *supra* n. 2, rather than to his many other works. At least Jacob fared better than his competitor Thomas Blount, whose dictionary, Blount, *supra* n. 2, garnered only fifteen citations in the same database. The query “Edmund Plowden”—an author the founding generation considered in the same general rank as Coke and Blackstone—produced only thirty-four entries. Even more sparse were citations to Knightly D'Anvers's popular (although incomplete) *Abridgment*, D'Anvers, *supra* n. 2. There were only two—both by me. The most astonishing statistic is that Charles Viner's *Abridgment*, Viner, *supra* n. 2,—the most extensive of his day—was cited in only thirty-eight articles. (I was responsible for two of those.)

On the other hand, scholars often have cited Coke and probably have over-relied on Blackstone. The query “‘Edward Coke’ /s Institutes” produced 514 documents and “‘William Blackstone’ /s commentaries” produced 4,844.

34. Coke, *supra* n. 2.

Blackstone,³⁵ legal dictionaries,³⁶ and legal digests or, as they usually were called, "abridgments."³⁷

These sources show that the doctrine of principals and incidents was a well established, pervasive, and widely employed branch of the law. The doctrine was by no means limited to principal and incidental powers—for example, fealty³⁸ and rent³⁹ were incidents to reversions—but principal and incidental powers did comprise an important, if not the predominant, branch of the overall doctrine. We find that the power of disposal was an incident to a fee simple⁴⁰ and to ownership of personal property.⁴¹ The power to fish with nets was incidental to a grant of the fish.⁴² Ownership of growing trees by one who did not own the ground included as incidents both the power to show the trees to a prospective buyer⁴³ and the power to cut them.⁴⁴ The ownership of a mineral carried an implied power to dig for it.⁴⁵ Authority to manage an estate included power to make short-term leases—but not to convey a

35. Wilfrid Prest, *Blackstone, Sir William (1723–1780)*, *Oxford Dictionary of Natl. Biography*, <http://www.oxfordnb.com/> (2004–2005) (containing a short biography).

36. Blount, *supra* n. 2; Cowell, *supra* n. 2; Cunningham, *supra* n. 2; Jacob, *supra* n. 2; Rastall, *supra* n. 2; *Student's Law-Dictionary*, *supra* n. 2.

37. Matthew Bacon ("A Gentleman of the Middle Temple"), *A New Abridgment of the Law* (Nutt & Gosling 1736); Comyns, *supra* n. 2; D'Anvers, *supra* n. 2; William Nelson, *An Abridgment of the Common Law* (Strahan & Woodfall 1725); Viner, *supra* n. 2.

38. Coke, *supra* n. 2, at vol. 1, 93a.; Blackstone, *supra* n. 2, at vol. 2, *33.

39. Blackstone, *supra* n. 2, at vol. 2, *33. See also *Smith v. Stapleton* (K.B. 1568) 2 Pl. Com. 426, 432–33, 75 Eng. Rep. 642, 650–51 (holding that rent is incident to a reversion); *Casus Incerti Temporis* (K.B. n.d.) Keil. 102, 108–09, 72 Eng. Rep. 266, 274 (holding the same); *Read v. Lawnse* (K.B. 1661) 2 Dy. 212b, 212b, 73 Eng. Rep. 469, 470 (holding that a rent was not extinguished because it was incident to the reversion, which had revived).

40. *Hungerford v. Winton* (Ch. 1735) Amb. 839, 841, 27 Eng. Rep. 525, 526 (stating "a power of disposal is incident to a fee-simple").

41. *Fettiplace v. Gorges* (Ch. 1789) 3 Bro. C.C. 8, 10, 29 Eng. Rep. 374, 375 (holding that the *jus disponendi*—right of disposal—is an incident of personal property).

42. *Randal v. Harvey* (K.B. 1623) Godb. 358, 358, 78 Eng. Rep. 211, 211 (referring to incidental conveyance of right to use nets when conveying all fish in a pond).

43. *Liford's Case* (K.B. 1614) 11 Co. Rep. 46b, 52a, 77 Eng. Rep. 1206, 1217.

44. *Stukeley v. Butler* (K.B. 1615) Hob. 168, 173, 80 Eng. Rep. 316, 320 (holding, "by the grant of the trees by a tenant in fee-simple, they are absolutely passed away from the grantor, and his heirs, and vested in the grantee, and go to the executors or administrators, being in understanding of law, divided as chattels from the free-hold: and the grantee hath power incident and implied to the grant to fell them when he will, without any other special license"); followed in *Ryall v. Rolle* (Ch. 1749) 1 Atk. 165, 176, 26 Eng. Rep. 107, 114. See also Coke, *supra* n. 2, at vol. 1, 55b–56a (citing the rule that the owner of corn has incidental power to cut it when the land is in possession of another).

45. *Case of Mines* (Exch. 1568) 1 Pl. Com. 310, 317, 75 Eng. Rep. 472, 483 (holding that the ore of gold and silver is the King's and that "the power of digging is incident to the thing itself").

fee.⁴⁶ Designation as “trustees, to preserve contingent remainders” encompassed the grant of corresponding powers.⁴⁷ Authority to make war implied the power to make treaties.⁴⁸ Ownership of a manor implied the power to hold court.⁴⁹ A corporation had implied incidental power to make by-laws,⁵⁰ and to remove corporate officers who had failed in their duties.⁵¹

If one had the power to dispose of the principal, one had the power to dispose of the incident.⁵² In a grant of the principal, the incident passed even if the grant contained no express reference to it.⁵³ If the grant did refer to the incident, then, as noted above,⁵⁴ the words of reference did not have independent legal effect: *expressio eorum quæ tacite insunt nihil operatur*.⁵⁵

The legal dictionaries of the time did not define “principal,” but their definitions of “incident” were remarkably uniform. The

46. Viner, *supra* n. 2, at vol. 3, 538–40 (listing powers within and without the implied authority of the bailiff of a manor).

47. *Thong v. Bedford* (Ch. 1783) 1 Bro. C.C. 313, 313–14, 28 Eng. Rep. 1154, 1154. A trustee to preserve contingent remainders was the grantee of a vested remainder for the life of a previous life tenant and preceding a contingent remainder. Thus, in the conveyance “to A for life, then to B for A’s life, then to C and his heirs if C should survive A,” B is the trustee to preserve contingent remainders. The purpose of B’s interest is to prevent C’s interest from being destroyed (pursuant to the doctrine of the destructibility of contingent remainders) if A should forfeit his interest while still alive. If A should forfeit, B’s vested remainder would immediately become a possessory interest for the life of A, thereby preserving C’s remainder even though it was still contingent. A classic case involving this sort of structure was *Perrin v. Blake* (K.B. 1769) 1 Black W. 672, 672–73, 96 Eng. Rep. 392, 392–93, *rev’d*, (Exch. 1772) (unreported op.).

48. *Nabob of Arcot v. E. India Co.* (Ch. 1793) 4 Bro. C.C. 180, 194, 29 Eng. Rep. 841, 847 (holding that the East India Company, which had been granted the power of making peace and war, thereby had power to make “treaties incidental to the peace and war so made”). This case was decided five years after the Constitution was ratified; I cite it only because its principles are confirmatory of earlier law.

49. *Marsh v. Smith* (C.P. 1585) 1 Leo. 26, 27, 74 Eng. Rep. 24, 25 (stating that “in every manor a court is requisite, for a court baron is incident to a manor”); *Rex v. Stafferton* (K.B. 1610) 1 Bulst. 54, 55, 80 Eng. Rep. 756, 757.

50. *Rex v. Major* (K.B. 1720) 1 Str. 385, 386, 93 Eng. Rep. 583, 584 (stating that “[a] power of making by-laws is incident to every corporation”); *Sutton’s Hosp. Case* (K.B. 1613) 10 Co. Rep. 23a, 30b, 77 Eng. Rep. 960, 970 (listing the incidents to corporations).

51. *Lord Bruce’s Case* (K.B. 1728) 2 Str. 819, 819–20, 93 Eng. Rep. 870, 870.

52. *Butler v. Baker* (K.B. 1591) 3 Co. Rep. 25a, 32b, 76 Eng. Rep. 684, 702 (holding, “for inasmuch as the statute enables him by express words to devise the manor, by consequence it enables him to devise the manor, with all incidents and appurtenances to it”).

53. Thus, a royal pardon also restored “all the dependencies, penalties, and disabilities incident unto” the offense. *Cuddington v. Wilkins* (K.B. 1615) Hob. 81, 82, 80 Eng. Rep. 231, 232; *Portington’s Case* (C.P. 1613) 10 Co. Rep. 35b, 39a, 77 Eng. Rep. 976, 982.

54. *Supra* n. 15 and accompanying text.

55. *Supra* n. 15 and accompanying text.

1762 edition of Giles Jacob's popular⁵⁶ law dictionary followed Coke's *Institutes*⁵⁷ by defining an incident as "a Thing necessarily depending upon, appertaining to, or following another that is more worthy or principal."⁵⁸ The definition in the *Student's Law-Dictionary* of 1740 stated that an incident "is any Thing that necessarily depends on, or appertains to another, which is principal or more worthy."⁵⁹ Four other dictionaries contained similar definitions.⁶⁰ The dictionaries all emphasized that an incident was *subordinate to* or dependent on ("depending upon") the principal. Accordingly, incidents could not be more important or more valuable (more "worthy") than their principals.⁶¹ Incidents could not comprise a subject matter independent of the principal.⁶² A person with an incidental power could not use it to change the nature of the thing granted⁶³—a rule buttressed by the requirements

56. On the popularity of various works, including Jacob's law dictionary, see Herbert A. Johnson, *Imported Eighteenth-Century Law Treatises in American Libraries 1700-1799* 59-64 (U. of Tenn. Press 1978).

57. Coke, *supra* n. 2, at vol. 1, 151b.

58. Jacob, *supra* n. 2 (unpaginated). Jacob followed this definition with examples.

59. *Student's Law-Dictionary*, *supra* n. 2 (unpaginated).

60. Blount, *supra* n. 2 (unpaginated) ("a Thing appertaining to, or following another, that is more worthy or principal"); Cowell, *supra* n. 2 (unpaginated) ("a Thing necessarily depending upon another as more principal"); Cunningham, *supra* n. 2 (unpaginated) ("a thing necessarily depending upon another as more principal"); Rastall, *supra* n. 2, at 404 ("a Thing necessarily depending upon another as more principal").

61. *Ex parte Duke of Ancaster* (H.L. 1781) 2 Bro. P.C. 153, 159, 1 Eng. Rep. 855, 859 (distinguishing between cases in which the profit is the principal and a case in which a service is the "greater" and the fee "but concomitant, and an incident"); *Bevil's Case* (K.B. 1583) 4 Co. Rep. 8a, 8b, 76 Eng. Rep. 862, 865 (distinguishing "seisin of superior service" from "seisin of all inferior services which are incident to it"). Thus, the term "merely" was often applied to incidents. *Barnard v. Garnons* (H.L. 1797) 7 Bro. P.C. 105, 115, 3 Eng. Rep. 69, 75. So also was the word "only." *Ibgrave v. Lee* (C.P. 1556) 2 Dy. 116b, 117a, 73 Eng. Rep. 256, 257 ("only accessory [sic] or incident").

62. *Atty. Gen. v. Rigby* (Ch. 1732) 2 Eq. Ca. Abr. 201, 201, 22 Eng. Rep. 172, 172 (holding that a right to nominate beneficiaries of a rent-charge did not pass with the rent-charge since the latter was "a Thing independant [sic] and collateral" to the rent); *Hill v. Grange* (K.B. 1556) 1 Pl. Com. 164, 168, 75 Eng. Rep. 253, 260 (reporting counsel as noting, and the other side as admitting, that land is "another sort of a thing" from a messuage (house and yard) and does not therefore pass as an incident to it; nor does another edifice pass as an incident to conveyance of a house, for the same reason); *Smith v. Stapleton* (K.B. 1573) 2 Pl. Com. 426, 432, 75 Eng. Rep. 642, 650 (holding that if O leases to A for twenty-one years and then immediately leases the reversion to B for twenty-one years, the rent is incident to the reversion and not to the leasehold in possession "which is quite a different thing, and of a different nature").

63. *Lord Darcy v. Askwith* (K.B. 1618) Hob. 234, 234, 80 Eng. Rep. 380, 380. In this case, the question was whether an eighty-year lease that permitted coal mining carried with it the power to use timber for mining purposes. The court held it did not.

For the grounds was agreed . . . that the grant of a thing did carry all things included, without which the thing granted cannot be had. But this case was ad-

that if one acted outside one's authority the action was void, and that authority must be strictly construed.⁶⁴

Immutable rules of law sometimes mandated a relationship of principal and incident.⁶⁵ Most of the common law of principals and incidents, however, consisted of default rules of the hypothetical-bargain variety. In other words, they reflected the courts' inferences as to how, in a given case, these or similarly situated parties would have assigned their respective interests if they had bargained about the matter.⁶⁶

Common law courts established the principal-and-incident hypothetical-bargain default rules, as courts often do, through evi-

judged by the Court *una voce* [unanimously], against the defendant, for that ground is to be understood of things incident and directly necessary. Thus, if I give you the fish in my waters, you may fish with nets, but you may not cut the banks to lay the water dry. If I grant or reserve woods, it implies a liberty to take and carry them away. . . . Now then if mines had not been granted by special name, it had been waste to open a mine of new. For, it is generally true, that the lessee hath no power to change the nature of the thing demised; he cannot turn meadow into arable, nor stub a wood to make it pasture, nor dry up an antient [sic] pool or piscary, nor suffer ground to be surrounded, nor decay the pale of park: for then it ceaseth to be a park . . . but he may better a thing in the same kind, as by digging a meadow, to make a drain or sewer to carry away water.

* * *

Now upon the like reason, though it were no waste to open a mine in this case, as it would have been if the demise had not been of mines by special name; yet it is like a house new built; for maintenance whereof, the lessee can fell no timber, and so much worse, as a new house betters and increaseth the inheritance, whereas the making and digging of mines decays, and perhaps destroys the inheritance of the mine. And therefore it is against reason to make one waste to maintain another.

Id. (citations omitted) (italics added).

64. Comyns, *supra* n. 2, at vol. 1, 458.

65. *Mitchel v. Neale* (Ch. 1755) 2 Ves. Sen. 679, 679, 28 Eng. Rep. 433, 433 (holding that by common law one may do by attorney what one may do oneself, and therefore, one "need not alledge [sic] a custom for it"). Incidents established by positive law were called "inseparable incidents." For example, the right to make a common recovery was inseparably incident to an estate tail, Coke, *supra* n. 2, at vol. 2, 224a, and fealty was inseparable from a reversion, *Magdalen College Case* (K.B. 1615) 11 Co. Rep. 66b, 77a, 77 Eng. Rep. 1235, 1250 ("incident inseparable"). See Farnsworth, *supra* n. 2, at vol. 1, 37, 37 n. 5 (discussing mandatory or immutable rules); see also Blackstone, *supra* n. 2, at vol. 1, **475-76 (listing inseparable incidents of corporations).

66. See generally Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87 (1989) (discussing various kinds of default rules, including those that mimic the bargain parties would have reached); Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 Fordham L. Rev. 1031, 1037-42 (2004) (discussing the use of hypothetical-bargain default rules in contract and inheritance contexts); Robert G. Natelson, *Modern Law of Deeds to Real Property* 562-64 (Little, Brown & Co. 1992) (discussing the nature and occasion of hypothetical bargains); Farnsworth, *supra* n. 2, at vol. 2, 485 (discussing whether the basis for default rules should be the expectations of the parties or similarly situated "reasonable" parties).

dence of custom⁶⁷ and of comparative efficiency.⁶⁸ Custom tends to show how others in the society have resolved similar questions and, in absence of proof to the contrary, suggests how the parties before the court (or those similarly situated) would have resolved the matter had they bargained over it. In many reported cases, the common law referenced custom,⁶⁹ or prescription,⁷⁰ as the basis for a relationship of principal and incident. Blackstone cited the legal status of by-laws and corporate seal as incidents of a corporation sole⁷¹ to illustrate how common usage could create an incident even when necessity was slight.

A court constructing a hypothetical bargain may supplement custom or relieve its absence⁷² by resorting to evidence of comparative efficiency—which I prefer to think of as potential loss or gain under alternative outcomes. Suppose allocation of an entitlement to Xavier would only mildly inconvenience Yvonne, while allocation to Yvonne would result in severe loss to Xavier. That state of affairs is evidence that the parties intended (or would have intended, if they thought about it) that Xavier have the entitlement,

67. See generally David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 Mich. L. Rev. 1815, 1856–59 (1991) (discussing the use of custom in structuring hypothetical bargains); *Restatement (Second) of Contracts* § 219 (1981) (“Usage is habitual or customary practice.”); *id.* at § 221 (“An agreement is supplemented . . . by a reasonable usage . . . if each party knows or has reason to know of the usage and neither party knows or has reason to know that the other party has an intention inconsistent with the usage.”).

68. Cf. Gregory Scott Crespi, *Rethinking Corporate Fiduciary Duties: The Inefficiency of the Shareholder Primacy Norm*, 55 S.M.U. L. Rev. 141, 142 (2002) (assessing alternative fiduciary default rules by the efficiency criterion).

69. *E.g. Neal & Jackson's Case* (C.P. 1595) 4 Co. Rep. 26b, 26b, 76 Eng. Rep. 938, 938 (containing reporter's comment that “[a] steward, as incident to his office, may, by the general custom of all manors, take a surrender out of court,” citing *Dudfeild v. Andrews* (C.P. 1689) 1 Salk. 184, 184, 91 Eng. Rep. 168, 168); *Swayne's Case* (C.P. 1608) 8 Co. Rep. 63a, 64a, 77 Eng. Rep. 568, 570 (discussing incidents by custom in copyhold tenure); *Heddy v. Wheelhouse* (K.B. 1597) Cro. Eliz. 558, 558, 78 Eng. Rep. 803, 803 (discussing customary incidents of fairs); *Howard v. Bartlet* (C.P. 1614) Hob. 181, 181, 80 Eng. Rep. 328, 328 (holding that customary incidents adhere to a life estate). See also *Ekens v. MacKlish* (Ch. 1753) Amb. 184, 185–86, 27 Eng. Rep. 125, 125–26 (holding that a general factor who endorsed and sold a bill of exchange acted within the scope of implied authority because he had complied with the custom of the industry).

70. *E.g. Cowper v. Andrews* (K.B. 1612) Hob. 39, 44, 80 Eng. Rep. 189, 194. See also *Heddy*, Cro. Eliz. at 558, 78 Eng. Rep. at 803 (reporting argument of counsel).

71. Blackstone, *supra* n. 2, at vol. 1, *476 (“[F]or two of them, though they may be practised, yet are very unnecessary to a corporation sole; viz. to have a corporate seal to testify his sole assent, and to make statutes for the regulation of his own conduct.”).

72. See *e.g. Brown v. Nichols* (K.B. n.d.) Moo. K.B. 682, 682, 72 Eng. Rep. 837, 837 (stating, “[u]n conduit pur le porter de ewe al un meason voit passer ove le meason per le parol appartenant, & l'ownor poit vener en aut soile a ceo mender . . . & ceo sans special pscription [sic] ou special grant”) (italics added).

perhaps in exchange for compensation. The English courts characterized a situation in which allocation of an incident to Yvonne would severely injure Xavier by saying the incident was *necessary* to Xavier's enjoyment of the principal.⁷³ The relevant legal maxim, as cited by Lord Coke and others,⁷⁴ was "*quando aliquis aliquid concedit, concedere videtur & id sine quo res ipsa esse non potest*"⁷⁵—"when someone grants something, he is seen to grant also that without which the thing itself cannot be." That sounds as if the incident must be indispensably necessary to the principal, but by the time of the Founding it also could mean that the incident was reasonably necessary to enjoyment of the principal.⁷⁶

An incident was indispensably necessary if the principal was valueless without the incident. A right to dig was incident to ownership of gold and silver ore, because otherwise the ownership of the ore would be useless.⁷⁷ An incident was reasonably necessary if, without the incident, enjoyment of the principal was greatly impaired. Blackstone again: "[D]eer in a real [sic] authorized park, fishes in a pond, doves in a dove-house, etc., though in themselves personal chattels, yet they are so annexed to and so necessary to the well-being of the inheritance, that they shall accompany the land wherever it vests . . ."⁷⁸ The necessity need not be absolute, but as Chief Justice Marshall observed, an indirect connection, without supporting custom, was not sufficient to create a principal-incident relationship.⁷⁹

73. *Colonel Pitt's Case* (K.B. 1734) Ridg. T.H. 91, 106, 27 Eng. Rep. 767, 773 (referring to houses of parliament's power to evict members as an incident, because it was "necessary to preserve" the houses' authority); *Lord Cobham v. Brown* (C.P. 1590) 1 Leo. 216, 218, 74 Eng. Rep. 198, 200 (stating that a steward was incident to a court even without prescription, because a steward was good for the court); *Tyrringham's Case* (K.B. 1584) 4 Co. Rep. 36b, 37a, 76 Eng. Rep. 973, 978 (holding that a right of common was incident "as a thing necessary and incident" to land); *The King v. Richardson* (K.B. 1757) 2 Keny. 85, 119, 96 Eng. Rep. 1115, 1127 (holding that a power to remove corporate officers is incidental to the corporation because it was "as necessary for the well governing a corporation as an incidental power to make by-laws") (Mansfield, C.J.).

74. Viner, *supra* n. 2, at vol. 14, 346 (reporting the maxim under the heading of "incidents"); *Kennycott v. Bogen* (K.B. 1613) 2 Bulst. 250, 252, 80 Eng. Rep. 1098, 1100.

75. *Saunders's Case* (C.P. 1599) 5 Co. Rep. 12a, 12a, 77 Eng. Rep. 66, 67.

76. Natelson, *Necessary and Proper*, *supra* n. 2, at 273–84 (discussing the evolution of the doctrine of incidental powers).

77. *Case of Mines* (Exch. 1568) 1 Pl. Com. 310, 317, 75 Eng. Rep. 472, 483 (holding that the ore of gold and silver is the King's and that "the power of digging is incident to the thing itself").

78. Blackstone, *supra* n. 2, at vol. 2, **427–28.

79. Marshall, *Defense*, *supra* n. 2, at 168 (explaining the use of "convenience" in Coke, *supra* n. 2, at vol. 1, 56a: "neither a feigned convenience nor a strict necessity; but a reasonable convenience and a qualified necessity"); see also *id.* at 186 (stating that the constitu-

Although common law principal-and-incident cases relying on necessity usually did not reference custom, custom was not irrelevant. A finding of necessity took into account prevailing practices when the owner of the principal would have been justified in assuming that the incident came with it. For example, in a society in which the grantee of a term of years generally did not receive the right to cut timber on the land, the fact that a coal mine required timber to operate and the grantee's operation of a coal mine was impeded by the inability to cut timber on the land was not sufficient to pass an incidental right to harvest wood.⁸⁰

In summary, the requirements for the relationship of principal and incident in the Founding-era common law were:

1. Two interests that potentially could be treated together or separately;
2. A perception that one of these—the principal—was the more “worthy,” i.e., more important, or more valuable of the two;
3. A perception that the interests had more in common than not; and
4. Either
 - a. a custom that when the more valuable interest was transferred, the other accompanied it; or
 - b. the absence of a custom of separating the interest *plus* significantly greater loss to one party if the less valuable interest did not accompany the more valuable interest than to the other party if the interests were conjoined *plus* a finding that enjoyment of the more valuable interest would be greatly impaired unless the less valuable interest accompanied it.

IV. EARLY AMERICAN CONSTRUCTION OF THE NECESSARY AND PROPER CLAUSE COMPLIED WITH THE COMMON LAW DOCTRINE OF PRINCIPALS AND INCIDENTS

The First Congress's decision to authorize a Bank of the United States, coupled with subsequent Supreme Court validation

tionality of Congress's choice of the most advantageous means “depends on their being the natural, direct, and appropriate means, or the known and usual [i.e., customary] means, for the execution of the given power”; *id.* at 187 (quoting language from *McCulloch* to the effect that the means must not be a pretext for regulating outside the enumerated powers). Marshall also explained some of the liberal language in *McCulloch* by arguing that the means of executing an enumerated power was part of that power and not an incident, and so was subject to a looser test. *Id.* at 171–73.

80. *Lord Darcy v. Askwith* (C.P. 1618) Hob. 234, 234–35, 80 Eng. Rep. 380, 380–81.

in *McCulloch v. Maryland*,⁸¹ sometimes is cited as one of those momentous events whereby the advocates of a broad and salutary construction of the Necessary and Proper Clause won out over the proponents of cramped and niggardly construction.⁸²

Actually, only minor theoretical differences separated the parties to the bank debate. Most of the dispute in Congress arose from an honest difference of opinion over how to apply the common law incidental powers doctrine to a particularly close case. Bank advocates argued that chartering a national bank was incidental to several of the federal government's express powers, and thereby justified by the Necessary and Proper Clause, because it was *customary* for governments to execute those powers in that manner.⁸³ They also contended that power to incorporate a bank was incidental to the federal government's express powers because it was *necessary* to their exercise.⁸⁴ Bank opponents claimed that chartering a financial institution was not incidental because it was neither customary⁸⁵ nor necessary.⁸⁶ They further

81. *McCulloch v. Md.*, 17 U.S. 316 (1819).

82. E.g. National Park Service, *The U.S. Constitution: First Bank of the United States*, http://www.cr.nps.gov/history/online_books/butowsky2/constitution5.htm (accessed Oct. 25, 2006) (equating constitutional support for the Bank of the United States with "broad construction"); Houghton Mifflin Co., *U.S. Supreme Court: Definition and Much More from Answers.com*, <http://www.answers.com/topic/supreme-court-of-the-united-states> (accessed Oct. 25, 2006) (equating *McCulloch* with broad construction and with *Roe v. Wade*, of all things!); MSN Encarta, *Constitution of the United States*, http://encarta.msn.com/encyclopedia_761569008_3/Constitution_of_the_United_States.html (accessed Oct. 25, 2006) (online encyclopedia, stating that "Marshall used this power [of judicial review] in 1819, in *McCulloch v. Maryland*, to give [sic!] vast authority to Congress and the federal government").

83. 2 Annals of Cong. 1959 (1789) (Rep. Fisher Ames); *id.* at 2007 (reporting Rep. John Vining as stating that the power of incorporation was customary in governments similarly circumstanced); Alexander Hamilton, *Opinion on the Constitutionality of the National Bank*, in *Bank History*, *supra* n. 2, at 111–12; 2 Annals of Cong. at 1961 (Rep. Theodore Sedgwick, stating, "It is universally agreed that wherever a power is delegated for express purposes, all the known and usual means for the attainment of the objects expressed are conceded also"); *id.* at 1962 ("known and usual means"); *id.* at 1974 (Rep. Elias Boudinot, referring to "the common and usual necessary means"). One precedent tending to prove custom was the Bank of England. Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 117–18 (U. Press of Kan. 1985).

84. 2 Annals of Cong. at 1958 (Rep. Fisher Ames, stating that the business of a national bank could be done "badly" without incorporation, but that incorporation was indispensable for doing it "well, safely, and extensively"); *id.* at 1975 (Rep. Elias Boudinot, saying, "He had not heard any argument by which it was proved that [in absence of a bank] either individuals, private banks, or foreigners could with safety and propriety be depended on as the efficient and necessary means for so important a purpose"); *id.* at 1998–2001 (Rep. Elbridge Gerry).

85. *Id.* at 1969 (Rep. James Jackson, distinguishing this proposal from foreign banks); *id.* at 1985 (Rep. Michael Jennifer Stone) (expressing similar sentiments).

argued that the power to incorporate was so significant that it was of equal dignity with (as worthy as⁸⁷), rather than subordinate to, the enumerated powers.⁸⁸

Although Chief Justice Marshall's ensuing opinion in *McCulloch*⁸⁹ sometimes is cited to justify a broad construction of the Necessary and Proper Clause,⁹⁰ the *McCulloch* exposition of that Clause kept it within the outer perimeter of the common law principals and incidents doctrine. During the ratification process, supporters of the Constitution had represented certain areas as within the exclusive jurisdiction of states,⁹¹ and like most other Founders, Marshall opposed treating those fields as mere incidents of federal regulation: "It is not pretended [he wrote] that this right of selection [of means] may be fraudulently used to the destruction of the fair land marks of the constitution."⁹² Marshall believed that "Congress certainly may not, under the pretext of collecting taxes, or of guaranteeing to each state a republican form of government," meddle in such reserved areas as the law of descents.⁹³ For this reason, Marshall added, when exercising its incidental powers, Congress must not adopt remote or indirect means: "Their constitutionality depends on their being the natural, direct, and appropriate means, or the known and usual [i.e.,

86. *Id.* at 2009 (Rep. James Madison). The parties disagreed over the degree of necessity required.

87. *Supra* nn. 57–61 and accompanying text.

88. 2 *Annals of Cong.* at 950 (reporting Rep. James Madison as calling incorporation "a distinct, an independent and substantive prerogative"). The *Annals* reported Rep. William Branch Giles as stating, ironically,

It appears to me, that the incidental authority is paramount to the principal, for the right of creating the ability to lend [i.e., through the proposed bank], is greater than that of borrowing . . . I should, therefore, rather conclude, that the right to borrow, if there be a connexion at all, would be incidental to the right to grant charters of incorporation, than the reverse . . .

Id. at 1991.

89. *McCulloch v. Md.*, 17 U.S. 316 (1819).

90. *E.g. U.S. v. Darby*, 312 U.S. 100, 124 (1941). See also *infra* nn. 147–49 and accompanying text.

91. *Infra* n. 125 and accompanying text.

92. Marshall, *Defense*, *supra* n. 2, at 173. Compare Marshall's view with the Court's current "congruence and proportionality" test used in interpreting the Fourteenth Amendment. *Infra* n. 102 and accompanying text.

93. Marshall, *Defense*, *supra* n. 2, at 173. During the ratification process, federalists frequently cited the law of descents as a reserved state power. *E.g. Elliot's Debates*, *supra* n. 2, at vol. 3, 620 (reporting a speech of James Madison at the Virginia ratifying convention); *id.* at 40 (reporting remarks by Edmund Pendleton at the Virginia ratifying convention); *The Federalist*, *supra* n. 2, at No. 29, 141 (Alexander Hamilton); *id.* at No. 33, 160 (Alexander Hamilton).

customary] means, for the execution of the given power.”⁹⁴ Stated differently, the means Congress selected had to be “plainly adapted”⁹⁵ to some enumerated power. If Congress went further, “it would become the painful duty” of the Court “to say that such an act was not the law of the land.”⁹⁶

V. SIMILARITY OF MODERN LAW—OUTSIDE THE COMMERCE POWER

The Founders’-Era doctrine of principals and incidents would be fairly familiar to any modern lawyer practicing outside of the distorted world of Commerce Power jurisprudence. The latest edition of *Black’s Law Dictionary* defines “incident” in a manner very like that of eighteenth-century dictionaries—as “[a] dependent, subordinate, or consequential part (of something else).”⁹⁷ The modern Supreme Court’s doctrine of principals and incidents is closely akin to its eighteenth-century predecessor—in cases involving *other* parts of the Constitution. For example, the Court has recognized exceptions to the Article III right to trial by jury and the Fifth Amendment right to indictment by grand jury by holding that those rights do not apply to the capture and detention of enemy combatants, because capture and detention of enemy combatants are “incidents” of war arising from well established custom (“by universal agreement and practice”).⁹⁸ Moreover, in upholding executive agreements that do not qualify as treaties, the Court observed that the President’s settlement of international claims can be an incident, by reason of *necessity*, to resolving a foreign policy dispute.⁹⁹ When construing Section 5 of the Fourteenth Amendment¹⁰⁰—whose purpose mirrors that of the Necessary and Proper Clause¹⁰¹—the Court insists that there must be a “proportionality or congruence between the means adopted and the legitimate end to be achieved”¹⁰² so as to avoid

94. Marshall, *Defense*, *supra* n. 2, at 186.

95. *McCulloch v. Md.*, 17 U.S. 316, 421 (1819).

96. *Id.* at 423.

97. *Black’s Law Dictionary* 777 (Bryan A. Garner ed., 8th ed., West 2004).

98. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (quotation marks omitted).

99. *Dames & Moore v. Regan*, 453 U.S. 654, 678, 688 (1981). The court also cited custom. *Id.* at 679–80.

100. U.S. Const. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

101. *City of Boerne v. Flores*, 521 U.S. 507, 525 (1997); *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966).

102. *City of Boerne*, 521 U.S. at 533.

“congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.”¹⁰³ The Court thereby prevents the incidental power of Section 5 from swallowing up other subjects seen as independent or as “worthy.”

In the hypothetical case at the beginning of this essay—involving the ranch owners and their over-ambitious manager, Sam—the latter held a power of attorney that acknowledged a grant of powers incidental to ranch management. By purchasing other businesses, Sam strayed beyond the scope of incidental powers as that concept was recognized in the eighteenth century and (outside commercial Necessary and Proper Clause cases) as incidental powers are recognized today. Neither buying an implements dealership nor acquiring retail stores is absolutely nor reasonably necessary to operate a ranch; nor are they customary.¹⁰⁴ On the contrary, this Montanan might suggest they are a rather odd way to run a ranch. And this is true even though, individually or collectively, these businesses may have a “substantial effect” on the ranch.

Indeed, the dealership and the retail stores certainly would be seen as a different kind of business from a ranch. And unless the ranch is extraordinarily large, the implement dealership and the aggregate retail acquisitions are likely to be at least as “worthy” as the ranch. Their size and value disqualifies them as incidents.

On the other hand, Sam had a good point when he said that a ranch manager should not merely “keep his eyes on the manure and never look outside the ranch.” On occasion, effective management may entail making unusual acquisitions. For example, to protect the integrity of the operation or for other reasons, the manager may have to acquire an adjoining parcel of land.¹⁰⁵ Yet acquisitions of other kinds are relatively unusual, so defending them is correspondingly more difficult.¹⁰⁶

103. *Id.* at 534.

104. Telephone Interview with Wes Gibbs, Extension Agent, Mont. State U., and a former Montana rancher (Mar. 9, 2006).

105. *Id.* Examples include: (a) economic circumstances in the ranching business make acquisition of additional land attractive; or (b) the rancher has been leasing the parcel when suddenly it appears it might be sold for development.

106. The unusual nature of an acquisition would increase the need to show “necessity.” *Supra* nn. 72–80 and accompanying text.

VI. THE MODERN COMMERCE POWER TEST

A. *The Nature of the Test*

We now turn to the modern era in Commerce Power jurisprudence to see what has happened to the Founders' design. The pivotal year is generally thought of as 1937, when the Supreme Court decided *National Labor Relations Board v. Jones & Laughlin Steel Corp.*¹⁰⁷

Commentators sometimes refer to post-1937 jurisprudence as expanding the scope of the Commerce Clause.¹⁰⁸ However, the Supreme Court has never enlarged the core meaning of "commerce" or the express power in the Commerce Clause, because the Court still describes "commerce" as the buying and selling of goods and certain closely related activities.¹⁰⁹ Thus, the legal scope of the *express* commerce power is no more and no less than it was 200 years ago.

The innovation of the modern era has been the change in the *incidental, implied* part of the Commerce Power—the part *implied* by the Commerce Clause, but memorialized textually in the Necessary and Proper Clause. When Congress regulates an interstate railroad, it exercises its express power under the Commerce Clause.¹¹⁰ When it regulates some other activity because of a purported connection to interstate commerce, it relies on the inciden-

107. *Natl. Lab. Rel. Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Justice Kennedy called *Jones & Laughlin*, "[t]he case that seems to mark the Court's definitive commitment to the practical conception of the commerce power." *U.S. v. Lopez*, 514 U.S. 549, 573 (1995) (Kennedy, J., concurring).

108. E.g. John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 187–94 (7th ed., West 2004) (referring to expansive federal jurisdiction under the Commerce Clause without discussing the Necessary and Proper Clause); Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 255 (2d ed., Aspen L. & Bus. 2002).

Taken together, [the later New Deal and post-New Deal cases *Jones & Laughlin*, *U.S. v. Darby*, and *Wickard v. Filburn*] expansively defined the scope of Congress's commerce clause power. . . .

. . . The law of the commerce clause during this era could be simply stated: Congress could regulate any activity if there was a substantial effect on interstate commerce.

Id.

109. E.g. *Wickard v. Filburn*, 317 U.S. 111, 128 (1942) (identifying controlling the prices at which commodities are bought and sold as regulating commerce); *U.S. v. Darby*, 312 U.S. 100, 113 (1941) (stating that "manufacture is not of itself interstate commerce").

110. See *Gonzales v. Raich*, 545 U.S. 1, 34–35, 125 S. Ct. 2195, 2215–16 (2005) (Scalia, J., concurring) (pointing out that channels and instrumentalities of commerce are regulated under the Commerce Clause, while non-commercial activities that substantially affect commerce are regulated under the Necessary and Proper Clause).

tal power doctrine emanating from the Commerce Clause, but made visible in the text by the Necessary and Proper Clause.¹¹¹

Through dicta in *Gibbons v. Odgen*, Chief Justice Marshall suggested—he did not exactly say—that Congress might be able to regulate some intrastate commercial activities that “affected” interstate commerce.¹¹² In other words, under certain fact patterns, regulation of intrastate commerce could become incidental to regulation of interstate commerce. This seems unremarkable, but after 1937, the Supreme Court built upon Marshall’s dicta to hold that congressional regulation of any economic activity that substantially affects interstate commerce is incidental to congressional regulation of interstate commerce.¹¹³ Accordingly, the Court has held that governance of manufacturing,¹¹⁴ labor relations,¹¹⁵ agriculture,¹¹⁶ private land use and mining,¹¹⁷ restau-

111. *Id.* at 5, 125 S. Ct. at 2199 (majority) (holding that “the power vested in Congress by Article I, § 8, of the Constitution ‘[t]o make all Laws which shall be necessary and proper for carrying into Execution’ its authority to ‘regulate Commerce with foreign Nations, and among the several States’ includes the power to prohibit the local cultivation and use of marijuana in compliance with California law”). See also *id.* at 35, 125 S. Ct. at 2216 (Scalia, J., concurring); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423 (1946) (stating that the Commerce Clause is a plenary grant of power and that “[t]he only limitation it places upon Congress’ power is in respect to what constitutes commerce, including whatever rightly may be found to affect it sufficiently to make Congressional regulation necessary or appropriate”); *Darby*, 312 U.S. at 118 (citing *McCulloch v. Md.*, 17 U.S. 316, 421 (1819), the seminal Necessary and Proper Clause case, and specifically the portion on the incidental powers doctrine); *Wickard*, 317 U.S. at 124 (stating that the commerce power is not confined to commerce among the states, but includes other activities that “so affect interstate commerce” as to make regulation appropriate).

112. *Gibbons v. Odgen*, 22 U.S. 1, 194 (1824).

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Id.

113.

The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

Darby, 312 U.S. at 118. See also *Wickard*, 317 U.S. at 125 (holding that Congress may regulate activities that substantially affect interstate commerce); *U.S. v. Lopez*, 514 U.S. 549, 560 (1995) (reaffirming that view, but holding that such activities generally must be economic in nature).

114. *Darby*, 312 U.S. at 113, 123.

115. *Id.* at 115.

116. *Wickard*, 317 U.S. at 128.

117. *Hodel v. Va. Surface Mining & Reclamation Assn.*, 452 U.S. 264, 280–81 (1981).

rants,¹¹⁸ medical marijuana,¹¹⁹ and other activities¹²⁰ are all incidental to governance of interstate commerce because they are economic activities “substantially affecting” interstate commerce, and therefore embraced by the Necessary and Proper Clause.

B. Problems with the “Substantial Effects” Test

1. Infidelity to Original Meaning

Obviously, this broad approach is widely at variance with the common law doctrine of principals and incidents that the Necessary and Proper Clause was supposed to represent.¹²¹ Governing such activities as loan sharking¹²² and strip mining,¹²³ as Congress now does, is hardly a “natural” or “direct” way of regulating interstate commerce. It is, rather, an indication that Congress has seized what is very nearly a general police power. This occurred, in part, because the Supreme Court acquiesced in violations of two central rules of the principals and incidents doctrine: first, that an agent with incidental authority may not employ it to alter the nature of the principal power; and, second, that incidental authority must be strictly construed.¹²⁴

This judicial acquiescence to congressional overreaching is squarely at odds with repeated public representations of constitutional meaning made at the Founding. 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.¹²⁵ Obviously, activities in all these fields “substan-

118. *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964).

119. *Gonzales v. Raich*, 545 U.S. 1, 22, 125 S. Ct. 2195, 2209 (2005).

120. *E.g. Perez v. U.S.*, 402 U.S. 146, 154–55 (1971) (regulating local loan sharking on the theory that crime has wider economic effects that substantially affect interstate commerce).

121. Perhaps in recognition of this, the Court has at times paraphrased the Clause so loosely as to be essentially a re-writing. See *e.g. Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423 (1946) (paraphrasing “necessary and proper” as “necessary or appropriate”).

122. *Perez*, 402 U.S. at 154–55.

123. *Hodel v. Ind.*, 452 U.S. 314, 324 (1981) (sustaining federal surface mining law based on the substantial effects test).

124. *Supra* nn. 63–64 and accompanying text.

125. Robert G. Natelson, *The Enumerated Powers of States*, 3 Nev. L.J. 469, 481–88 (2003).

tially affect” interstate commerce. The Founders themselves thoroughly understood that.¹²⁶ They nevertheless thought of those activities—as probably most people today would think of them—as conceptually independent from, as “worthy” as, commerce.

2. *Other Jurisprudential Shortcomings*

In addition to its lack of fidelity to original meaning, the “substantial effects” standard suffers from a number of other jurisprudential shortcomings. As Justice Thomas pointed out, the substantial effects test is textually discordant, for it yields a commerce power broad enough to turn several other enumerated powers into surplus.¹²⁷ Justice Souter added that the rule requires the Court to engage in the “categorical formalism” of classifying activities according to whether they are “economic.”¹²⁸ The Court also must categorize an activity as commercial or non-commercial and either as substantially affecting or not substantially affecting interstate commerce.

The exact meaning of “substantial” has never been determined, and remains uncertain. And moreover, as Justice Thomas notes, the substantial effects test is anomalous; it is applied to no other congressional power.¹²⁹ It bears an odor of illegitimacy unsuited to such an important part of constitutional law, because it arose not from proper constitutional amendment nor, apparently, from independent judicial reasoning, but out of severe political pressures applied to the Court during the late 1930s and early 1940s.¹³⁰ Arguably, the test is seldom criticized only because of

126. The tight relationship between interstate and foreign commerce (to be regulated by Congress) and most other activities (to be regulated by the states) was not only understood, but trumpeted at the time of ratification. *Id.* at 490–92. See also N.Y. *Indep. J.*, Jul. 9, 1788, in *The Documentary History of the Ratification of the Constitution* vol. 21, 1307–08 (John P. Kaminski et al. eds., Wisc. Hist. Soc. Press 2005) (speaking of the benefits to farmers, manufacturers, merchants, and morals of a wider scope for commerce); N.Y. *Daily Advertiser*, Aug. 2, 1788, in *The Documentary History of the Ratification of the Constitution*, *supra*, at vol. 21, 1635 (reporting hoped-for benefits to bakers of a wider field for commerce).

127. *U.S. v. Lopez*, 514 U.S. 549, 588–89 (1995) (Thomas, J., concurring).

128. *U.S. v. Morrison*, 529 U.S. 598, 644 (2000) (Souter, J., dissenting) (claiming that the Court was engaged in “categorical formalism”).

129. *Lopez*, 514 U.S. at 589 (Thomas, J., concurring).

130. The political pressure arose from the Great Depression, the New Deal, and President Franklin Roosevelt’s Court-packing plan.

the perceived difficulties of getting the congressional horse back into the constitutional barn.¹³¹

3. *Practical Shortcomings*

Many have argued that the substantial effects test at least has the merit of realism—that it represents a sound approach to the needs of the highly interdependent modern economy.¹³² Yet even this defense is questionable, for as applied the test is actually *dysfunctional*.¹³³ I say this for three reasons. First, for constitutional purposes, the substantial effects test disconnects congressional legislation from any real showing of need. Second, by disregarding the “pretext limitation” of *McCulloch*, the test encourages regulation for reasons having nothing to do with interstate commerce. Third, the associated “aggregation principle” contains positive incentives for Congress to over-regulate. I shall consider each of these reasons in turn.

a. *Lack of Any Connection between Legislation and Need*

A standard more faithful to the Constitution would require, when Congress claims that regulating a discrete non-commercial activity is incidental to regulating interstate commerce, that Congress justify its claim. This could be done by showing either Founding-Era custom or modern necessity. In many cases, the government will not be able to show Founding-Era custom because the prevailing practice during the eighteenth century seems to have been to use commercial regulations to affect other activities rather than to regulate other activities to affect commerce.¹³⁴

131. The fact that so many federal programs depend for their “legitimacy” on the substantial effects test has created both great reliance on that test and powerful interest groups in support of it.

132. *Morrison*, 529 U.S. at 644 (Souter, J., dissenting) (“If we now ask why the formalistic economic/non-economic distinction might matter today, after its rejection in *Wickard*, the answer is not that the majority fails to see causal connections in an integrated economic world.”). See also *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring):

That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy . . . Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.

133. *Infra* nn. 134–57 and accompanying text.

134. See e.g. Thomas Whately (“George Grenville”), *The Regulations Lately Made Concerning the Colonies and the Taxes Imposed upon Them, Considered* (J. Wilkie 1765) (a summary of and *apologia* for British commercial policy); Blackstone, *supra* n. 2, at vol. 4, **419–20 (discussing the encouragement of industry through various regulations of commerce); *The Federalist*, *supra* n. 2, at No. 10, 44–45 (James Madison) (referring to measures

Indeed, the drafters and ratifiers of the Constitution consciously adopted an approach that separated power over inter-jurisdictional commerce from power over most other activities.¹³⁵

If the federal government can point to no relevant custom rendering regulation of a non-commercial activity "incident" to its principal (express) commerce power, then according to the constitutional design, the government must demonstrate that its desired plan of regulation is an absolute or reasonable necessity for exercise of the principal power. Thus, if Congress sought to govern labor relations, it would have to show that regulation of interstate commerce would be rendered nugatory or difficult without an accompanying regulation of labor. The Supreme Court made some effort to address the issue of necessity in *Jones & Laughlin*.¹³⁶ The majority opinion contended that federal control of labor relations for a very large business was desirable to prevent serious disruptions of commerce.¹³⁷ After *Jones & Laughlin*, the Court never made the effort again. Instead, it shifted to those who challenge laws the burden of proving the *absence* of any possible incidence,¹³⁸ and transmuted incidence into the "substantial effects" test.¹³⁹ Of course, the most the "substantial effects" test really tells us is that regulation of a non-commercial activity *might be* (not *is*) helpful (not *necessary*) for regulating commerce. It tells us nothing of custom, almost nothing about necessity, and, therefore, almost nothing about incidence.

encouraging local manufactures by restricting commerce with foreign nations); *Elliot's Debates*, *supra* n. 2, at vol. 2, 57-60 (reporting speech by Thomas Dawes at the Massachusetts ratifying convention, discussing how under the Constitution, federal commercial regulations could be employed to promote American agriculture, shipping, manufactures, and production of raw materials). See also Dickinson, *supra* n. 2, at 8-9 n. * (referencing the statutes 15 Car. II, c. 7, a commercial regulation adopted in part to encourage manufactures and the woollen business, and 6 Geo. II, c. 13, a commercial regulation adopted to promote sugar production). Britain did prohibit the manufacture of iron and steel in the colonies, but this appears to have been an isolated instance, and apparently was imposed to protect the British iron and steel industries, not to regulate commerce. *Id.*

135. Natelson, *Commerce*, *supra* n. 2, at 843-44.

136. *Natl. Lab. Rel. Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937).

137. *Id.* (upholding labor legislation, and stating that in view of the size of the company involved "the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic.").

138. See e.g. *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 258 (1964) (holding that a law is constitutional if it "might have" a substantial and harmful effect on interstate commerce and that Congress need only have a "rational basis" for a finding of effect).

139. *E.g. Wickard v. Filburn*, 317 U.S. 111, 125, 128-29 (1942).

It is a historical irony that the Court made this change when it did. The Court abandoned the requirement that the government show necessity, just when necessity should have been easiest to prove—during the period of the Great Depression and the imminence of Global War.

b. Lack of Connection between Means and Purported Purpose

The New Deal Supreme Court did more than abandon the requirement that when Congress legislates under the Necessary and Proper Clause it rely on either custom or necessity. The Court also gutted *McCulloch*'s "pretext" limitation.

McCulloch had laid down, in addition to the objective rule that means be "plainly adapted" to ends,¹⁴⁰ a requirement of subjective congressional good faith. As Chief Justice Marshall stated, Congress was barred from resorting to the Necessary and Proper Clause to regulate activities outside its express enumerated powers unless Congress actually intended to serve an enumerated purpose. In the tradition of Coke,¹⁴¹ Marshall promised that the Court would invalidate any legislation justified merely by a "pretext" of serving enumerated ends, but actually adopted for an unenumerated purpose.¹⁴²

*United States v. Darby*¹⁴³ sustained federal legislation apparently designed, at least in part, to placate the organized labor component of the New Deal coalition. The law had two facets. First, it prohibited interstate trade in goods made by employees

140. *McCulloch v. Md.*, 17 U.S. 316, 412 (1819).

141. In one of Coke's most famous reported cases, the "*Case of Monopolies*" (K.B. 1602) 11 Co. Rep. 84b, 88b, 77 ER 1260, 1266, Coke had noted the elaborate pretext for the monopoly, and added: "*Privilegia quae re vera sunt in praepjudicium reipublicae, magis tamen speciosa habent frontispicia, et boni publici praetextum, quam bonae et legales concessionis, sed praetextu licili non debet admitti illicitum.*"—"Privileges that really are prejudicial to the state frequently have more handsome outside appearances and a pretext as being for the general good than if they were good and legal grants; but an impermissible thing should not be permitted on a permissible pretext." (emphasis added).

142. *McCulloch*, 17 U.S. at 358–59 (stating that Congress may not, under the Necessary and Proper Clause, recite an express power as a mere "pretext" for regulating something else). Marshall's colleague and close collaborator on the Court, Joseph Story, paraphrased this by summarizing the Necessary and Proper Clause as having "a sense at once admonitory, and directory. It requires, that the means should be, *bonâ fide* [in good faith], appropriate to the end." Story, *supra* n. 24, at § 1248.

143. *U.S. v. Darby*, 312 U.S. 100 (1941).

whose working conditions violated the Fair Labor Standards Act of 1938. Second, it prohibited production of such goods.¹⁴⁴

The Court's validation of the interstate trade ban entailed no real Commerce Power difficulties, since Congress's motivation is irrelevant when it is regulating interstate commerce.¹⁴⁵ The evidence from the Founding is that governments commonly did, and the federal government was expected to, use commercial regulations to further non-commercial, including protectionist, ends.¹⁴⁶ This part of *Darby* was well within the American constitutional tradition.

The production ban, though, was not a regulation of commerce per se, and so could be upheld only under the Necessary and Proper Clause.¹⁴⁷ However, the *Darby* Court made no serious argument that production controls were necessary for the commercial ban to work.¹⁴⁸ The Court's justification was that production substantially affected commerce.¹⁴⁹ Moreover, no showing of necessity was possible at the time the law was adopted, since a commercial ban without a production ban had not been attempted. Manufacturers affected by the new law—whose behavior had been entirely legal to date—were denied the courtesy of a trial period.

The fact that Congress could not have known whether the production ban was necessary to support the trade ban feeds the suspicion that Congress's action was motivated by factors other

144. *Id.* at 109–10.

145. *Cf. Champion v. Ames*, 188 U.S. 321, 356 (1903). *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918), standing for the opposite proposition, was overruled by *Darby*.

146. *Supra* n. 134 and accompanying text.

147. The Court does not say so explicitly, but the point was clear.

148. The Court stated,

Congress was not unaware that most manufacturing businesses shipping their product in interstate commerce make it in their shops without reference to its ultimate destination and then after manufacture select some of it for shipment interstate and some intrastate according to the daily demands of their business, and that it would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces of lumber, cloth, furniture or the like which later move in interstate rather than intrastate commerce.

Darby, 312 U.S. at 117–18. Observe that this statement mentions only possible disruption of companies' manufacturing businesses, a disruption companies might have preferred to accept over direct regulation of their manufacturing processes. The Court's statement says nothing about the needs of regulating interstate commerce.

149. *Id.* at 119 ("But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce."). Query whether the double negative was employed with full understanding of its weaseling effect.

than regulation of commerce: that Congress used the Necessary and Proper Clause as a “pretext” for accomplishing goals that really had nothing to do with commerce. The Court’s abandonment of the *McCulloch* good faith standard sent a standing invitation to Congress to pass laws purportedly based on the Commerce Power but that (a) do not regulate commerce and (b) are adopted for non-commercial purposes. Today, of course, statutes in this category are routinely enacted and routinely sustained, so long as either Congress or the courts insert ritualistic references to “commerce.”

By way of illustration, consider *Hodel v. Indiana*.¹⁵⁰ There, the Court sustained against a Commerce Clause challenge a statute that imposed reclamation requirements on surface mines located on “prime farmland.” The principal purpose of the statute apparently was to restore previously productive crop land to agriculture.¹⁵¹ Congress may have had some environmental and health concerns as well,¹⁵² but it was clear the statute was neither a regulation of interstate commerce nor incidental thereto.

The Court saved the statute from invalidation with the following explanation: “Congress adopted the Surface Mining Act in order to ensure that production of coal *for interstate commerce* would not be at the expense of agriculture, the environment, or public health and safety, injury to any of which interests would have deleterious effects *on interstate commerce*.”¹⁵³ In other words, the real targets of the law were agriculture, the environment, and public health and safety, but the Court tagged on references to commerce to serve—in Chief Justice Marshall’s word—congressional “pretexts.”¹⁵⁴ One can see how the statute could have been “validated” by use of other enumerated powers in a similarly imaginative way. For example, the Court might have said, “Congress adopted the Surface Mining Act in order to ensure that production of coal *used in part to heat army installations* would not be at the expense of agriculture, the environment, or public health and safety, injury to any of which interests would have deleterious effects *on military preparedness*.”¹⁵⁵ Alternatively: “Congress

150. *Hodel v. Ind.*, 452 U.S. 314 (1981).

151. *Id.* at 324, 326.

152. *Id.* at 327.

153. *Id.* at 329 (emphasis added).

154. *Supra* n. 140 and accompanying text.

155. *Cf.* U.S. Const. art. I, § 8, cl. 12 (Congress shall have power “[t]o raise and support Armies.”). The Supreme Court rejected an analogous flexing of executive muscle in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (overturning the President’s seizure of steel mills on ground of military necessity during time of war).

adopted the Surface Mining Act in order to ensure that production of coal *used in part to heat scientific buildings* would not be at the expense of agriculture, the environment, or public health and safety, injury to any of which interests would have deleterious effects *on the annual number of patents and copyrights issued*.¹⁵⁶ Any “test” of constitutionality that can be manipulated so cynically is, of course, no test at all; it is, rather, an invitation to Congress to exceed its powers and then lie about it.

c. *The Aggregation Principle*

The year after *Darby*, the Court invented the aggregation principle of *Wickard v. Filburn*.¹⁵⁷ This “principle” (I’m not sure the word is accurate) is that if a statute regulates non-commercial conduct without substantial effect on interstate commerce, the regulation is sustained if *other activities* governed by the statute, when added to the conduct at issue, *collectively* have a substantial effect on interstate commerce. The incentive thus erected is plain. The aggregation principle encourages lawmakers concerned about small problems with insubstantial effects on commerce to legislate on other matters as well so as to reach the constitutional threshold.¹⁵⁸ For example, if public hysteria arises over an obscure and rarely used rule of punitive damages, Congress can constitutionally insulate its ban on the rarely used rule by drafting a statute that needlessly alters many other damage rules. If a would-be assassin shoots a public official with a kind of rifle so rare its production has no substantial effect on interstate commerce, Congress can override state decisions to permit production of that rifle only by extending the prohibition to other firearms that have not been used that way. To continue in the same spirit, the less Con-

156. Cf. U.S. Const. art. I, § 8, cl. 8 (Congress shall have power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

157. *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942) (“That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.”). Query whether “far from trivial” is the same as “substantial.”

158. *Gonzales v. Raich*, 545 U.S. 1, 43, 125 S. Ct. 2195, 2221 (2005) (O’Connor, J., dissenting) (stating that the rule based on the aggregation principle “gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause—nestling questionable assertions of its authority into comprehensive regulatory schemes—rather than with precision”). See also *id.* at 46–47, 125 S. Ct. at 2223 (stating that the Court thereby “invites increased federal regulation of local activity even if, as it suggests, Congress would not enact a *new* interstate scheme exclusively for the sake of reaching intrastate activity”).

gress's real target affects interstate commerce, the stronger the motivation for Congress to spray-shoot every other object in view. *Wickard* encourages Congress to be most aggressive when the problems provoking its response are least consequential.

VII. A RETURN TO BASIC "PRINCIPALS"—AND INCIDENTS

Many have argued, and Justice Thomas has suggested,¹⁵⁹ that a simple return to pre-1937 commerce power jurisprudence is unsatisfactory, because social change may have rendered some of that jurisprudence inappropriate for modern economic—or constitutional—conditions. Hence, Justice Thomas has called for Supreme Court reconsideration of the Commerce Power in an effort to arrive at a formulation more consistent with the structure of the constitutional text and the views of the Founders, but not inconsistent with all of the Court's post-1937 Commerce Power jurisprudence.

My suggestion is that the standard best meeting these criteria is the Founders' own doctrine of principals and incidents.

I say this for several reasons other than mere [sic] fidelity to original meaning. Certainly, the doctrine of principals and incidents may moderate the evils of the "categorical formalism" Justice Souter has decried.¹⁶⁰ Legal categories never can be abandoned consistently with the rule of law, since, after all, law depends for its meaning on categories. However, we can avoid arbitrary categories, and arbitrariness is really what Justice Souter argues against. Categories in the doctrine of principals and incidents generally are not arbitrary because they derive from factual and historical circumstances.

When faced with a claim that a statute is outside the Commerce Power, a court adopting the principals and incidents doctrine initially would inquire whether the activity Congress is attempting to govern is "interstate commerce." If it is, then the law is within the express Commerce Power and that part of the case is at an end. If Congress is regulating some other activity, the Court must determine if the law is authorized in the Necessary and Proper Clause.

159. *U.S. v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring) ("In an appropriate case, I believe that we must further reconsider our 'substantial effects' test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence.").

160. *Supra* n. 128 and accompanying text.

If the government (not the challenger) can demonstrate a historic custom of regulating this sort of activity as a part of controlling inter-jurisdictional commerce, then the requirements of the Necessary and Proper Clause are satisfied. If there is no applicable custom, then the government could still justify the regulation by showing it is absolutely or reasonably necessary (not merely convenient) for the regulation of interstate commerce. This requirement is not unduly burdensome, especially in the context of federal legislation, when the stakes are so high. Among those who believe the federal regulatory state is essential to modern conditions, there must be some who are willing and able to prove it empirically. Given the interests involved, perhaps the level of necessity to be proved should be similar to that applied to actors in the field of private fiduciary relations.¹⁶¹

By way of illustration, suppose Congress has banned interstate traffic in a particular drug. The drug is highly addictive, so there is a strong demand for it, and once manufactured, it is easily concealed and transported. Either a trial period or historical experience with similar items demonstrates that a ban on manufacture or cultivation of the drug would be necessary to render the ban on commerce effective.¹⁶² In that case, the test of necessity would be met, and the production ban valid. Similarly, it may be impractical for Congress to exercise constitutional oversight over interstate commerce over the Internet unless some sites are closed down. A flat ban on such sites would then be incidental to regulation of interstate commerce over the Internet.

Before 1937, the Supreme Court generally barred Congress from regulating any activity the Court classified as "production."¹⁶³ Under the principals and incidents doctrine, however, if changes have created a situation in which governance of interstate commerce would be seriously impaired unless Congress controls some aspect of production, then that fact can be cited to show that regulation of production is incidental to regulation of commerce. Further, by putting the burden of proof on the government, the doctrine of principals and incidents requires Congress

161. See Natelson, *Public Trust*, *supra* n. 2 (describing in detail the Founders' commitment to fiduciary government); Natelson, *Necessary and Proper*, *supra* n. 2, at 284-85 (inferring that "proper" in the Necessary and Proper Clause meant in accordance with fiduciary obligations).

162. *Raich*, 545 U.S. at 35, 125 S. Ct. at 2216 (2005) (Scalia, J., concurring) (pointing out in an illegal drug case that regulation of non-commercial activities is within the Necessary and Proper Clause if "necessary to make a regulation of interstate commerce effective").

163. *E.g. Carter v. Carter Coal Co.*, 298 U.S. 238, 299 (1936).

to have a legitimate basis for regulating an activity. Admittedly, the principals and incidents doctrine may not be symmetrically responsive. This is because if changes have rendered congressional regulation of an activity no longer necessary, then arguably the regulation still is constitutional, because during the period of necessity it has become customary.¹⁶⁴

Although the principals and incidents doctrine may also tilt toward over-regulation, it does so less markedly than the Court's current approach. One result from its adoption (or re-adoption) may be to encourage Congress to proceed more cautiously, and focus more on genuine social problems and less on inconsequential ones. This would be a good thing, in my view, for if we have learned anything about political economy since the New Deal, it is that the increasing complexity of society, rather than justifying centralized administration, often makes centralized administration impractical. In today's world, even the simplest bureaucratic blunder can do immediate and immense damage.

VIII. CONCLUSION

The Constitution grants Congress two sorts of powers pertaining to interstate commerce. The Constitution grants an express power to govern the traditional "law merchant"—the regulation of buying and selling, and certain related fields, such as mercantile finance, commercial paper, currency, transportation, and insurance. It grants an implied, incidental power to regulate other activities. The latter grant is implied from the Commerce Clause, and communicated in words by the Necessary and Proper Clause. However, the Necessary and Proper Clause does not substantively expand the incidental authority given by the Commerce Clause.

The intended scope of Congress's incidental powers can be deduced from the Founders' common law of principals and incidents. An incidental power must be either customary or absolutely or reasonably necessary to the execution of the principal power. One executing the incidental power may not use it to expand one's express authority, nor for any purpose other than execution of express authority. These limitations on incidental powers memori-

164. This, of course, depends on the unanswered question of whether the relevant custom is a contemporary standard or a Founding-Era one. As to the initial test of constitutionality, the standard should be that of the Founding-Era. After a prolonged period of constitutional application, though, one may argue that the interest in legal and social stability is promoted by adopting a contemporary standard.

alized in the Necessary and Proper Clause were honored until about 1937. They assured that federal powers were, as Madison famously wrote, "few and defined."¹⁶⁵

After 1937, the Supreme Court altered the meaning of the Necessary and Proper Clause to allow Congress to regulate any economic activity substantially affecting interstate commerce. Various other limitations associated with the doctrine of principals and incidents were discarded. The result is a Commerce Power jurisprudence that is not only unfaithful to the original meaning and structure of the text, but that suffers from significant practical defects.

I have proposed re-adoption of the doctrine of principals and incidents in interpreting the Necessary and Proper Clause because that doctrine is more faithful to the original understanding and because it is more responsive to social and economic needs. It would preserve that portion of post-1937 Commerce Power jurisprudence justified by social and economic change, while moderating Congress's current incentives for disingenuous behavior and over-regulation.

165. *The Federalist*, *supra* n. 2, at No. 45, 241 (James Madison).