

## ORIGINALISM AND THE COMMERCE CLAUSE: A MIGRATORY FLIGHT

Scott Moriarity<sup>†</sup>

I.	INTRODUCTION .....	1575
II.	ORIGINALISM AND THE DETERMINATION OF AN INTERPRETIVE PRINCIPLE .....	1579
	A. <i>Finding the Framers' Approach to Constitutional Interpretation</i> .....	1579
	B. <i>The Integrity of the Historical Record</i> .....	1585
	C. <i>Deriving a Consistent Standard for Constitutional Adjudication</i> .....	1587
III.	THE EVOLUTION OF THE COMMERCE CLAUSE.....	1591
	A. <i>The Framers' Concept of Commerce</i> .....	1591
	B. <i>Development in the Supreme Court</i> .....	1596
IV.	CONCLUSION.....	1605

### I. INTRODUCTION

Great portions of the working Constitution, while not described or prescribed by the Document, are urged to be merely its “applications”—or merely the “application” of its words “as interpreted.” . . . It becomes inconvenient, first, in lumping disparate things together: white-slaving, railroad consolidation, Federal Trade Commission, prize-fight films, radio control, drug traffic, conceivably migratory birds, certainly [the National Recovery Administration], (and so child labor, *and barbers*)—all in one basket marked “regulate commerce among the several States.”<sup>1</sup>

[W]e find (once again) that the destruction of migratory bird habitat and the attendant decrease in the population

---

<sup>†</sup> Editor, William Mitchell Law Review; third-year law student, William Mitchell College of Law (J.D. expected 2002).

1. K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 15 (1934).

of birds “substantially affects” interstate commerce. The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires.<sup>2</sup>

In the 1930s, prior to the “switch in time that saved nine,”<sup>3</sup> Llewellyn observed the broad powers Congress might take according to a liberal interpretation of the Commerce Clause. His prediction proved correct, and today the Commerce Clause is used to justify congressional action in areas such as pollution,<sup>4</sup> natural resources,<sup>5</sup> and civil rights.<sup>6</sup> Yet many complain that Congress’ power has far exceeded that permitted by the Commerce Clause.<sup>7</sup> They point to recent efforts to extend the Commerce Clause to domestic abuse or to gun control, issues that appear far removed from commercial activity.<sup>8</sup> In effect, these authorities suggest, the Commerce Clause has been parlayed into an unlimited grant of power.

The most vocal proponents of this view are typically originalists—those who claim that the Constitution should be interpreted according to the intent of the Framers.<sup>9</sup> Originalists

---

2. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs.*, 191 F.3d 845, 850 (7th Cir. 1999), *rev’d*, 531 U.S. 159 (2001).

3. *See generally* WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 214-20 (1995). Prior to 1936, the Supreme Court rejected many of the New Deal programs proposed by the Roosevelt Administration. The Court was led by the conservative “Four Horsemen,” Justices Willis Van Devanter, James McReynolds, George Sutherland, and Pierce Butler. Their basic legal rationale was that Congress’ actions exceeded its enumerated powers under Art. I, § 8 of the Constitution. *Id.* at 214.

4. *E.g.*, *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 280-81 (1981).

5. *E.g.*, *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 281-82 (1977).

6. *E.g.*, *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964).

7. *See, e.g.*, Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 189-91 (1996) [hereinafter Epstein, *Constitutional Faith*] (suggesting that Commerce Clause jurisprudence retreat to a pre-New Deal standard); Russell F. Pannier, *Lopez and Federalism*, 22 WM. MITCHELL L. REV. 71, 78-82 (1996) (describing Congress’ encroachment upon “general welfare” powers).

8. *See* *United States v. Morrison*, 529 U.S. 598, 613 (Rehnquist, C.J.) (domestic violence); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (Rhenquist, C.J.) (possession of a gun in a school zone).

9. *See, e.g.*, Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 695-96 (1996); Epstein, *Constitutional Faith*, *supra* note 7, at 182, 188-89; *see also* Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 826 (1986). For a general introduction to the originalist

claim that the Framers' concept of commerce was greatly limited. Even if the Framers contemplated more than the movement of goods between states, they could not have intended commerce to include matters of public health and safety that were deferred to the states. Put another way, Congress' power should be limited to a specific, 18th- and 19th-century concept of commerce, the interstate economy as the Framers imagined it.<sup>10</sup> Thus, Congress' power cannot extend to all of the institutions, and all of the complications, presented by the modern industrial or post-industrial economy.<sup>11</sup>

To reach the originalists' argument, the threshold issue is whether the Framers did, in fact, expect the Constitution to be interpreted according to their intent.<sup>12</sup> If so, the next issue is how the Framers intended the Constitution to function. Did they intend the Constitution to provide a set of static, certain set of principles?<sup>13</sup> Or did they intend a more flexible document that would be able to respond to the contingencies the nation would face?<sup>14</sup>

The answers to these questions are, at best, equivocal. The historical record does not contain any certain answers,<sup>15</sup> and that record is constantly recast to serve ideological or political goals.<sup>16</sup> These difficulties also reflect a more philosophical issue: whether it

---

school of constitutional interpretation, see generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

10. See *Lopez*, 514 U.S. at 585-87 (Thomas, J. concurring).

11. See Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 485 (1981). Dworkin calls this proposition the "negation argument." *Id.*

12. See generally H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

13. See, e.g., Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 6-7 (1998) [hereinafter Meese, *Original Intent*].

14. See, e.g., Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 799-800 (1983).

15. See LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 1-3 (1988); Stephen A. Conrad, *Some Problems with "Origins"*, 16 SO. ILL. U. L.J. 233, 234-37 (1992); James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 38 (1986); Tushnet, *supra* note 14, at 794-95.

16. Compare Hans W. Baade, "Original Intent" in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1005-08 (1991), with Raoul Berger, *Original Intent: The Rage of Hans Baade*, 71 N.C. L. REV. 1151, 1156-65 (1993). Perhaps ironically, Baade relied upon 18th-century English common law for the proposition that legislative intent was not probative to statutory interpretation. As a result, he interpolated that the founders did not want their intentions to guide constitutional interpretation. Berger's pointed rebuttal excavated the opinions of learned English jurists from the 15th to 17th centuries.

is even possible for modern legal scholars to put themselves in the place of the Framers and supply their motives.<sup>17</sup> When the Commerce Clause is applied to modern social and economic institutions, the tension between the modern mindset and the Framers is particularly severe.<sup>18</sup>

The purpose of this paper is to examine the tension between originalism and the modern application of the Commerce Clause. Part II begins with the doctrine of originalism and its relevance as a form of constitutional interpretation.<sup>19</sup> In Part III, originalism is revisited in the context of Commerce Clause jurisprudence. After considering early scholarship,<sup>20</sup> it will examine how the Commerce Clause has evolved in Supreme Court case law, while comparing that evolutionary process against originalist principles.<sup>21</sup> In particular, three factors are considered. First, what factors drove the development of the Commerce Clause? Second, are these factors indicative of the Commerce Clause's underlying purpose? Third, how does this purpose compare with the intentions of the Framers?

This paper does not purport to offer an authoritative finding of the Framers' intent. A partial examination of their intent is instructive, but it will not be determinative. Instead, original intent is the starting point for a broader understanding of the Commerce Clause. The goal is an interpretive approach that respects the clause's purpose while accommodating the complexity of modern society. In the words of Professor Tribe,

To the extent that information about the assumptions, hopes or fears of those who wrote or ratified a given provision might shed light on the provision's original meaning. . . [it seems] worth consulting. But the ultimate question in every case must be what the provision in

---

17. *E.g.*, William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 435 (1986); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 221-22 (1980) [hereinafter Brest, *The Misconceived Quest*]; *see also* FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 121-22 (1889).

18. *See* LEO MARX, THE MACHINE IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA 148-49 (describing how the Framers did not anticipate industrialization or the emergence of technology); Dworkin, *supra* note 11, at 486 (noting that modern institutions cannot be interpolated into the imagination of the Framers).

19. *See infra* Part II.

20. *See infra* Part III.A.

21. *See infra* Part III.B.

question means, not what those who favored or opposed it thought.<sup>22</sup>

## II. ORIGINALISM AND THE DETERMINATION OF AN INTERPRETIVE PRINCIPLE

According to originalism, constitutional interpretation should follow the intent of the Framers. But for this approach to be consistent, it must also be shown that the Framers intended originalism.<sup>23</sup> If such intention was present, then the issue becomes how originalism can be practiced.<sup>24</sup> At minimum, originalism requires that the Framers' intent be inferable from the historical record.<sup>25</sup> For originalism to function as a legal theory, it should provide consistent standards for determining factual cases.<sup>26</sup>

### A. *Finding the Framers' Approach to Constitutional Interpretation*

*The Framers.* The historical record indicates that the Framers considered, at least in retrospect, how the Constitution would be interpreted. James Madison wrote that if "the sense in which the Constitution was accepted and ratified by the Nation. . . be not the guide in expounding it, there can be no security for a consistent

---

22. Lawrence W. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1242 n. 66 (1995).

23. See Dworkin, *supra* note 11, at 497 ("Suppose we had made an initial decision to look to the intention of the Framers, but found, when we investigated their own theories of constitutional intention, that they did not think their own intentions should matter at all, under any conception.")

24. See generally Brest, *The Misconceived Quest*, *supra* note 17, at 213-16. Brest chose to frame this inquiry somewhat differently, noting some of the practical difficulties in determining original intent. The first difficulty was the identification of the Framers, whether representatives at the Convention or the members of the state ratifying conventions. *Id.* at 214. Other difficulties were what such a varied group might have intended, and the specificity with which they sought their intent to be applied. *Id.* at 215-16.

25. See *id.* at 213-14.

26. See Tushnet, *supra* note 14, at 784 (noting that constitutional theory developed in part as a means to constrain judges to standards); see also Brennan, *supra* note 17, at 435 ("It is arrogant to pretend from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions."); *infra* Part II.C. "Consistency" is not offered as an inherent requirement of the law, nor is it meant to suggest that law should be applied in an exact, scientific manner. Rather, this concept is meant in its pragmatic sense—that the application of law should be reasonably predictable.

and stable, more than for a faithful exercise of its powers.”<sup>27</sup> But Madison’s writings also point to the contrary. “[I]t must be allowed by all that the best key for the text of the Constitution, as of a law, is to be found in the contemporary state of things and the maladies and defects which were to be provided for.”<sup>28</sup>

Madison’s words are further complicated by his refusal to publish his notes of the Constitutional Convention.<sup>29</sup> His rationale was that the debates of the Convention lacked any “authoritative character.”<sup>30</sup> As a result, the most complete record of the Convention was not published until after his death, in 1840.<sup>31</sup> In the meantime, the only records of the Convention were those of Luther Martin and Robert Yates; both provided accounts that were highly abridged and highly subjective.<sup>32</sup>

---

27. Letter from James Madison to Henry Lee (June 25, 1824), in 9 JAMES MADISON, WRITINGS at 191 (Gaillard Hunt ed.) (1910) [hereinafter MADISON, WRITINGS].

28. Letter from James Madison to William Cabell Rives (Dec. 20, 1828), in 3 JAMES MADISON, LETTERS AND OTHER WRITINGS 663-64 (1865). Perhaps with the “contemporary state” in mind, Madison suggested that when the constitutionality of government actions was at issue, both the judiciary and the popular will of the electorate would constrain the government. See Donald O. Dewey, *James Madison Helps Clio Interpret the Constitution*, 15 AM. J. LEGAL HIST. 38, 48-49 (citing Letter from James Madison to M.L. Hurlbert (May 1830), in 9 MADISON, WRITINGS, *supra* note 27, at 370-75). But cf. Paul D. Carrington, *Meaning and Professionalism in American Law*, 10 CONST. COMMENT. 297, 298-99 (1993). Carrington finds that Madison intended “mere[ ] acceptance of the words embodied in the charter itself. . . to be understood by those who ratified it.” *Id.* (quoting 3 JAMES MADISON, LETTERS AND OTHER WRITINGS, *supra*, at 228).

29. Dewey, *supra* note 28, at 45-46.

30. Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), in 9 MADISON, WRITINGS, *supra* note 27, at 71-72. Dewey also notes, “[Madison’s] view of the relative unimportance of the Federal Convention of 1787 is surprising. He consistently described the proceedings of this Convention as less significant than those of the ratifying conventions for anyone seeking the meaning of the Constitution.” Dewey, *supra* note 28, at 42.

31. Dewey, *supra* note 28, at 45-46. Baade’s analysis, first mentioned *supra* note 16, suggests that originalism dates from this publication. He partly relies upon the analysis of Lysander Spooner; in 1848, he was one of the first legal scholars to examine Madison’s records. Spooner concluded that the record was fragmentary and unreliable. Baade, *supra* note 16, at 1046-48.

32. Dewey, *supra* note 28, at 45-46. Dewey suggests that Madison delayed publication just so he could have the last word against Martin and Yates. *Id.* On a related point, a comparative analysis of all three accounts led one modern commentator to believe that none were reliable. See generally Hutson, *supra* note 15, at 38 (including excerpts directly photographed and reproduced from the original documents). Another commentator has noted, “If it were true that the ratifiers wanted their intent to control . . . they can be justly accused of gross negligence for failing to take even rudimentary steps to preserve their precious

Even if Madison espoused some form of originalism, little evidence appears to corroborate his point of view. Alexander Hamilton rejected any notion that extrinsic evidence might be used to construe the Constitution. Instead, he suggested that language be applied in its obvious and popular sense.<sup>33</sup> Thomas Jefferson had a similar philosophy.

Some men look at constitutions with sanctimonious reverence, and deem them too sacred to be touched. They ascribe to the men of the preceding age a wisdom more human . . . . Let us not weakly believe that our generation is not as capable as another of taking care of itself . . . .<sup>34</sup>

To summarize, given a terse review of the Founding Fathers, none express any clear principle for constitutional interpretation.<sup>35</sup>

*Other historical sources: an introduction.* Another approach is to examine early constitutional interpretation. The Framers' contemporaries were the first to be confronted by interpretive issues. Their direct relationship with the Framers suggests that they would have been best informed of, or closest to, the Framers' interpretive approach. However, this inquiry must appreciate the risk of projecting modern doctrine onto their efforts, which may or may not have consciously embraced an ideology of constitutional law.

*Other historical sources: The First Congress.* One early source offers some indication of originalism. In what may have been the first issue of constitutional impression, the First Congress debated the meaning of the Treaty Clause.<sup>36</sup> Their deliberations reveal a desire to discover the intent of the Framers.<sup>37</sup> However, when the Framers in that Congress were asked what was intended, the

---

thoughts." Boris I. Bittker, *Interpreting the Constitution: Is the Intent of the Framers Controlling? If Not, What Is?* 19 HARV. J.L. & PUB. POL'Y 9, 33 (1995).

33. Powell, *supra* note 12, at 915 (citing Alexander Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank*, in 8 PAPERS, at 111 (Harold C. Syrett ed. 1965)).

34. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in THE PORTABLE THOMAS JEFFERSON 558-59 (1975).

35. Lest the reader be misled, Jefferson was not a signatory to the Constitution. However, his participation in the development of constitutional law is probative. For example, many of the structures in the U.S. Constitution can be drawn from Jefferson's influence on the Virginia Constitution. See WILLARD STERNE RANDALL, THOMAS JEFFERSON: A LIFE 353-55 (1993).

36. 5 ANNALS OF CONGRESS 775 (1796); see generally Baade, *supra* note 16, at 1014-21.

37. 5 ANNALS OF CONGRESS 775 (1796).

Framers balked.<sup>38</sup> The record noted,

But after all, whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions.<sup>39</sup>

*Other historical sources: Early Supreme Court decisions.* The early decisions of the Supreme Court offer another source for early constitutional interpretation. For example, in *Hylton v. United States*,<sup>40</sup> the Court considered whether a tax on carriages violated the proscription against “direct” taxes in Article I, section 9.<sup>41</sup> In the lead opinion, Justice Chase acknowledged the intent of the Framers.<sup>42</sup> However, his analysis began with a straightforward textual analysis, deriving Congress’ power of indirect taxation by comparing sections 8 and 9 of Article I.<sup>43</sup> He bolstered this argument with a pragmatic example, noting the fundamental difference between taxing per person instead of per commodity.<sup>44</sup> The supporting opinions take a similar, practical approach that consider the purpose and effect of the law.<sup>45</sup>

---

38. *Id.* (“He should have remarked, that neither himself nor the other members who had belonged to the Federal Convention, could be under any particular obligation to rise in answer to a few gentlemen, with information, not merely of their own ideas at that period, but of the intention of the whole body . . . .”)

39. *Id.* at 776. This text also supports the proposition, advanced by some, that the “original intent” was originally understood to refer to the intent of the state ratifying conventions. See Bittker, *supra* note 32, at 31. It is also instructive to reevaluate some of Madison’s statements according to this theory. See Dewey, *supra* note 28, at 40; see also *supra* notes 27-28, 30 and accompanying text.

40. 3 U.S. (3 Dall.) 171 (1796).

41. *Id.* at 172-73. “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.” U.S. CONST. art. I § 9 cl. 4.

42. *Hylton*, 3 U.S. (3 Dall.) at 173 (“If the framers of the Constitution did not contemplate other taxes than direct taxes, and duties, imposts, and excises, there is great inaccuracy in their language.”).

43. *Id.* at 174.

44. *Id.* In his example, Justice Chase posits an example where a per-commodity tax is apportioned to all the citizens of a state. In states of equal population, a state with more carriages has a higher per capita tax burden than a state with fewer carriages. Justice Chase dryly observes the “very great inequality and injustice” of such a scheme. *Id.*

45. Justice Paterson reaches the same textual implications as Justice Chase.

These interpretive principles are further demonstrated by Chief Justice Marshall's decision in *McCulloch v. Maryland*.<sup>46</sup> Briefly put, the issues were whether the Congress had power to incorporate a bank, and if so, whether Maryland had power to tax it.<sup>47</sup> Again, the Court relied upon textual analysis. To define what is "necessary," it compared that term's use in the Necessary and Proper Clause with its use in Article I, section 10.<sup>48</sup> But the Court's textual analysis broadened to include an architectural point, noting that the Necessary and Proper Clause is included among Congress' section 8 powers rather than its section 9 proscriptions.<sup>49</sup> The Court even draws from extrinsic sources. Where limiting language was omitted from the Constitution, and that language appeared in the Articles of Confederation, the Court noted that Article I powers may be implied.<sup>50</sup>

*McCulloch* also resorts to the pragmatic reasoning previously observed in *Hylton*.<sup>51</sup> Just as Justice Chase noted the impracticality of apportioning commodity taxes to nonowners of the commodity, Chief Justice Marshall noted the impracticality of apportioning

---

*Id.* at 176. But he then moves to more practical considerations, including the need to distinguish land from goods, and the need for the federal government to collect revenue. Put another way, Paterson appears to consider the purposes and needs that the tax power was designed to serve. *See id.* at 178-80. He even relies upon an extrinsic, nonlegal source to support his argument. *Id.* at 180-81 (quoting 3 ADAM SMITH, WEALTH OF NATIONS 331, 341 (1775) (\*383, \*386 (3d ed. 1784))). (The starred page numbers are employed for the third edition of Wealth of Nations; for further discussion of Smith's work, *see supra* notes 109-15 and accompanying text.) Justice Iredell's arguments are a similar blend of textual interpretation and practical reasoning. *Id.* at 181-83.

46. 17 U.S. (4 Wheat.) 316 (1819). The reader will be pleased to learn that, despite the use of this chestnut, there will be no exclamation as to what document, if any, is being "expounded."

47. *Id.* at 401, 425.

48. *Id.* at 413. "[The Congress shall have Power] To 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. . . ." U.S. CONST. art. I § 8 cl. 18. "No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . ." U.S. CONST. art. I § 10 cl. 2.

49. *McCulloch*, 17 U.S. (4 Wheat.) at 419.

50. *Id.* at 406 (noting that the Tenth Amendment refers to powers "not delegated," whereas the Articles referred to powers "not expressly delegated").

51. *See generally* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 752-754 (1999) (offering an in-depth analysis of the interpretive techniques employed in *McCulloch*, and particularly noting Justice Marshall's pragmatism).

state taxes to nonresidents of the state.<sup>52</sup> And the Court's reasoning takes an even broader step, making several inferences about the powers of Congress from the purpose and structure of the Constitution. For example, after looking at the Supremacy Clause<sup>53</sup> and the states' ratification processes,<sup>54</sup> Marshall infers that the federal government acquired some sovereign power over the states.<sup>55</sup> He notes that many of the enumerated powers, including collection of taxes, borrowing of money, and support of the military, are facilitated by a national bank.<sup>56</sup> But the broadest inference is that Congress' powers must be construed in a manner that is adapted to "the *crises* of human affairs," even where such powers are not explicitly supplied by the Constitution.<sup>57</sup>

This brief analysis of *McCulloch* is not offered to prove the correctness of the Chief Justice's views. Rather, it shows the broad sweep of interpretive techniques used by a contemporary of the Framers.<sup>58</sup> And more tellingly, neither *Hylton* nor *McCulloch*

---

52. Compare *Hylton*, 3 U.S. at 174, with *McCulloch*, 17 U.S. (4 Wheat.) at 428.

53. U.S. CONST. art. VI cl. 3.

54. Compare prior discussion of the ratifiers' intent, *supra* notes 27-28, 30, 39.

55. *McCulloch*, 17 U.S. at 404-06.

56. *Id.* at 407.

57. *Id.* at 415. To quote the passage at length,

The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. This could not be done, by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.

*Id.* Like Justice Chase, there is a rhetorical nod to the "intention of those who gave these powers." *Id.* It is interesting to note how modern commentators have molded this passage to support various schools of constitutional thought. Compare Edwin Meese III, *Construing the Constitution*, 19 U. C. DAVIS L. REV. 22, 25 (1985) (finding that Chief Justice Marshall was "keeping faith" with originalist principles, and was referring to the adaptability of the enumerated powers), with Amar, *supra* note 51, at 752-53 (finding that Justice Marshall sought liberal, nontextual reading of Congress' powers in order to facilitate the pragmatic purposes of the federal government).

58. Although he was not a signatory, Chief Justice Marshall appeared in arguments before the Convention. WILLIAM F. SWINDLER, *THE CONSTITUTION AND*

directly pose the originalist question. That is, did the Framers intend an indirect commodity tax? Or did the Framers intend a federal bank,<sup>59</sup> one that would be exempt from taxation? Instead, the opinions are a balance of historical, textual, and pragmatic concerns. In *McCulloch*, Justice Marshall even appears to reject reliance upon the Framers.

In the course of the argument [before the Court], the Federalist has been quoted; and the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained; and to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed.<sup>60</sup>

*Summation.* This brief review of the historical record cannot conclusively show that the Framers did not intend originalism. However, there is significant evidence that the Framers did not have a unified approach to constitutional interpretation. Nor were the Supreme Court's early decisions made according to any recognizable originalist principles.<sup>61</sup> If the Framers intended originalism, it is puzzling that their intention was not commonly recognized or carried out by their contemporaries.

### B. *The Integrity of the Historical Record*

Originalism relies upon history. The Framers' intentions, though primarily derived from the Constitution itself, are also determined from the records, writings, and debates of the

---

CHIEF JUSTICE MARSHALL 3-4 (1978).

59. From the time a federal bank was first proposed, its constitutionality was a point of major contention, suggesting that the Framers' intent was far from unitary on the issue. See JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT* 109-12 (1999).

60. *McCulloch*, 17 U.S. (4 Wheat.) at 433.

61. See also Jacobus TenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 CAL. L. REV. 437, 445 (1938). In a broad survey, TenBroek examined whether the Court's decisions were concerned with the Framers' intent. He noted several cases where historical sources were used to support the Court's position, but he concluded that such usage was not pervasive enough to be deemed a fundamental interpretive principle. *Id.* at 445-49.

Framers.<sup>62</sup> Absent a sufficient historical basis, constitutional interpreters can only speculate as to what the Framers intended.<sup>63</sup>

The primary historical records are those of the Convention of 1789. As previously noted, only three records were made of the proceedings, by Luther Martin, Robert Yates, and James Madison.<sup>64</sup> Of those three, Madison's is the most complete, and it is generally the favored record of constitutional scholars.<sup>65</sup> However, there are several reservations as to the reliability of any of the records of the convention; they are far from complete and reflect the implicit or explicit biases of the authors.<sup>66</sup>

If intent is to be derived from sources beyond those of the Convention itself, further difficulties arise. Some look to the ratifying State Conventions. There is significant evidence that the intent of the "Ratifiers," not the Framers, was meant to inform constitutional interpretation.<sup>67</sup> Yet the records of the State Conventions are far from complete. Elliot's Debates, the sole record of the Conventions,<sup>68</sup> only offers deliberations from nine of the states.<sup>69</sup> In addition, because of fragmentary accounts from three of the smaller states,<sup>70</sup> the Ratifiers' record is confined to the interests of the larger states. Given the lack of uniformity in the record, it is difficult, if not dangerous, to extrapolate the intent of the Ratifiers.

---

62. See, e.g., RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 368 (1977); BORK, *supra* note 9, at 165.

63. See LEVY, *supra* note 15, at 285; Brest, *The Misconceived Quest*, *supra* note 17, at 213; Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 523, 553 (1995); Powell, *supra* note 12, at 919-20; TenBroek, *supra* note 61, at 437 n. 3.

64. Dewey, *supra* note 28, at 45; see also *supra* notes 30-32 and accompanying text.

65. See Bittker, *supra* note 32, at 32; Hutson, *supra* note 15, at 24-25.

66. Dewey, *supra* note 28, at 45-46; Hutson, *supra* note 15, at 24-33. See also 2 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1009, 1012 (1953) (suggesting that Madison may have misrepresented parts of the proceedings to suit his own political views); Letter from James Madison to N.P. Trist (Dec. 1831), in 9 MADISON, WRITINGS, *supra* note 27, at 473 ("Of the Debates [of the Convention], it is certain that they abound in errors, some of them very material in relation to myself. Of the passages quoted, it may be remarked that they do not warrant the inference drawn from them.").

67. See, e.g., Powell, *supra* note 12, at 931; see also *supra* note 40.

68. Hutson, *supra* note 15, at 13.

69. See 2 JONATHAN ELLIOT, DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION v-xi (2d ed. 1836) (Massachusetts, Connecticut, New Hampshire, New York, Pennsylvania, Maryland); 3 *id.* at v (Virginia); 4 *id.* at iv-ix (North Carolina, South Carolina).

70. 2 *id.* at 185, 205, 547.

Other extrinsic sources offer similar pitfalls. Early records of Congress have been questioned on the basis of their accuracy.<sup>71</sup> Significant value has been attached to the Federalist Papers, but the Papers were partisan documents developed in the context of New York's highly charged ratification proceedings.<sup>72</sup> More remote historical sources are subject to criticism as well: some criticize the lack of development in historical record,<sup>73</sup> whereas others point to the lack of hierarchy by which the relevance of sources can be evaluated.<sup>74</sup>

*C. Deriving a Consistent Standard for Constitutional Adjudication*

The difficulties posed by the historical record lead to a third issue. Part of the appeal of originalism is that it provides an abstract, neutral basis from which to determine the law.<sup>75</sup> Instead of permitting judges to manipulate interpretive principles to arrive at a subjectively desirable result, originalism constrains judges to a fixed standard.<sup>76</sup> Therefore, the doctrine ensures a consistent

---

71. See NATIONAL HISTORICAL PUBLICATIONS COMMISSION, A NATIONAL PROGRAM FOR THE PUBLICATION OF HISTORICAL DOCUMENTS 93-94 (1954) (noting that many of the early records were derived from contemporary newspapers); Hutson, *supra* note 15, at 36-37. In particular, Hutson finds that the reporter, Thomas Lloyd, was known for excessive drinking. Lloyd's shorthand was cluttered and surrounded by doodling. His transcriptions not only failed to match his shorthand but also were attacked for misrepresenting the substance of proceedings. Hutson, *supra* note 15, at 36-38.

72. Bittker, *supra* note 32, at 33; Flaherty, *supra* note 63, at 553 & n. 137 (noting a "fetish" of reliance upon one or two historical sources, especially the Federalist Papers).

73. See, e.g., Stephen A. Conrad, *Some Problems with "Origins,"* 16 SO. ILL. U. L.J. 233, 234-37 (1992) (noting the lack of historical antecedents for colonial law).

74. See David M. Beatty, *The Forms and Limits of Constitutional Interpretation*, 49 AM. J. COMP. L. 79, 99 (2001); Powell, *supra* note 12, at 43. See also Robert Post, *Theories of Constitutional Interpretation*, in LAW AND THE ORDER OF CULTURE 13, 22-23 (1991). Post identifies some of the modern presumptions underlying originalist analysis. In particular, he notes how historical analysis can be undermined by the persuasive process.

The Federalist Papers are by common convention presumed to constitute authoritative (and convenient) evidence of the intent of the Framers, although any historian could easily demonstrate the empirical inadequacy of the presumption . . . . [H]istorical interpretation need not focus on the intentions of the Framers or Ratifiers at all, but may attempt instead to ascertain consent through inquiries aimed at altogether different kinds of evidence.

75. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 94 (1980); Dworkin, *supra* note 11, at 469-70; Tushnet, *supra* note 27, at 784.

76. Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L.

result. To put this point more broadly, if all people enjoy the consistent, predictable application of the law, then the basic aspirations of the law—fairness and equality—are served.<sup>77</sup> The issue here is whether originalism indeed offers a neutral basis for the fair application of the law.

In the context of the prior discussion of history and originalism, the basic inquiry was whether historical concepts can be interpreted neutrally.<sup>78</sup> The interpreter must first decide which facts best illuminate a historical concept.<sup>79</sup> This decision already poses a value judgment, as different levels of significance are accorded to different facts.<sup>80</sup> Some observers feel that this decision is inherently political.<sup>81</sup> In the highly charged, value-sensitive field of constitutional adjudication, it is practical to observe that any doctrine, no matter how dispassionately executed, is subject to the pressures of *realpolitick*.<sup>82</sup>

---

& PUB. POL'Y 283, 284 (1996) (describing originalism as “axiomatic”); Meese, *Original Intent*, *supra* note 13, at 11 (finding that originalism is “an enduring standard”; decrying the “extra-constitutional tradition in which doctrine and meaning have no fixed source and hence can easily be changed over time by judicial fiat”); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 360 (1953) (“All of these [nonoriginalist doctrines] view the constitution as positively forbidding ‘wrongs’— distribution of burdens and benefits by the political process that offend some *current* conception of political morality.”) *But see* Tribe, *supra* note 22, at 1224-25 (“[O]nly on rare occasions do I find . . . that the law of the Constitution is, in the end, merely a language for pressing one’s preferences.”)

77. Bork’s approach explores the philosophical basis of this proposition. He frames the problem as the “Madisonian dilemma”: If the majority determines the principles by which the minority is governed, then the majority is free to impose its tyranny. Because “dominant” doctrines of constitutional interpretation do not place sufficient limits on judicial power, the rights of the minority are jeopardized. *See* BORK, *supra* note 9, at 140-41.

78. *See supra* note 74.

79. *See* Flaherty, *supra* note 63, at 553; Post, *supra* note 74, at 22-23. *But cf.* Monaghan, *supra* note 76, at 374-77 (finding that, because some extrinsic sources of the Framers’ intent are available, the Framers’ intent is sufficiently determinable).

80. *See supra* notes 71-74 and accompanying text.

81. *See* Paul Brest, *The Fundamental Rights Controversy: The Essential Contradiction of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1090-92; Flaherty, *supra* note 63, at 553; *see also* Tushnet, *supra* note 14, at 795-96 (“And to the extent that the supplementary [rules of constitutional interpretation] are based on policy grounds, the liberal project itself is defeated. . . confront[ing] liberalism with the anomaly of relying on a particular political or social vision to support interpretivism.”).

82. *See* ELY, *supra* note 75, at 55 (observing that “[n]eutral principles have often served as a code term for judicial conservatism”); Flaherty, *supra* note 63, at 551-52 (noting that originalism should be viewed as a rhetorical construct, whose

In addition, historical interpretation has its limits. In the case of originalism, the historical inquiry determines not only the intent of those long past, but also prospectively applies that intent to modern issues. Even proponents of originalism recognize that certain modern concepts cannot be reconciled with the intent of the Framers.<sup>83</sup> At this point, at this threshold of modernity, the interpretive principles of originalism are in crisis. The principled interpreter must abandon a particularized, neutral standard and decide whether and how to apply the intentions of the past.<sup>84</sup>

One way of resolving the issue is to exclude modern concepts from the Constitution. Put another way, if the Framers did not consider an idea, then they could not have intended the Constitution to incorporate that idea.<sup>85</sup> Another possible solution is to extrapolate how the Framers would address a modern concept.<sup>86</sup> This approach requires that the interpreter either

---

use is determined by its persuasive effect in litigation); Jonathan R. Macey, *Originalism as an "Ism,"* 19 HARV. J.L. & PUB. POL'Y 301, 305 (1996) ("[O]nce judicial review becomes a feature of a legal system. . . there is a danger that the constitutional text will be transformed to coincide with the political interests of whoever is interpreting the document."); see also Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrines*, 11 HARV. J.L. & PUB. POL'Y 67, 72 (1988) (finding that the advocacy of interpretive doctrines is a participatory process that democratically expresses the ideas of the community).

83. E.g., Bork, *supra* note 9, at 826. He says,

[Originalism] is not the notion that judges may apply a constitutional provision only to circumstances specifically contemplated by the Framers. In such a narrow form the philosophy is useless. Because we cannot know how the Framers would vote on specific cases today, in a very different world from the one they knew, no intentionalist of any sophistication employs the narrow version just described.

*Id.*

84. The subsequent discussion offers three possible interpretive approaches. See *supra* notes 85-91 and accompanying text. This conclusion has some similarities to the thesis in Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. & PUB. POL'Y 457, 457 (1996). To paraphrase McConnell's argument, the originalists had to either (1) find that desegregation was not intended by the Framers of the Fourteenth Amendment, (2) concede that the Framers wanted a result that had become morally unacceptable by modern standards, or (3) derive some argument by which desegregation would accord with the intent of the Framers. *Id.*

85. See, e.g., Norman Dorsen, *How American Judges Interpret the Bill of Rights*, 11 CONST. COMMENT.' 379, 385 (1994); Dworkin, *supra* note 11, at 485; Tribe, *supra* note 22, at 1241.

86. See, e.g., Richard A. Epstein, *Some Thoughts on Constitutional Indeterminacy*, 19 HARV. J.L. & PUB. POL'Y 363, 368 (finding that the Commerce Clause had been interpreted to "create a federal power that, if candidly acknowledged at the Framing, would have scuttled the new constitution of 1787 even before the ratification debates began").

import the concept into the Framers' world, or find an appropriate analogy, and then decide what the Framers would have thought.<sup>87</sup> But this sort of thought exercise invites the sort of speculation that originalism was meant to avoid.<sup>88</sup>

To avoid the negation required from the first approach and the speculation offered by the second approach, a middle way has emerged. Here, when the threshold of modernity is reached, the inquiry moves from the intent to the purpose of the Framers.<sup>89</sup> Unlike the speculative approach, this inquiry is confined to a rigorous, historical determination of the Framers' purpose.<sup>90</sup> Thereafter, if decisions are made beyond the threshold of modernity, the decision must respect the underlying purposes of the Framers.

But a determination of purpose runs contrary to fundamental precepts of originalism. Purpose suggests more than simple an expression of simple intent. It is an appeal to the extrinsic motivations of the Framers, with a look to the ends the Framers desired to achieve, rather than the means the Framers intended to provide.<sup>91</sup> Thus, the middle way begins to resemble other interpretive doctrines: it limits the value of the constitutional text, and it is less likely to provide a fixed, abstract basis for adjudication.

Thus, at least in theory, originalism has several limitations. But to explore the practical scope of these limitations, it is necessary to observe the historical passage through the threshold of modernity. Perhaps the most compelling illustration of this passage is the transformation of the Framers' nation from an agrarian society to a post-industrial information economy. In turn, the primary

---

87. See Randy E. Barnett, *The Relevance of the Framers' Intent*, 19 HARV. J.L. & PUB. POL'Y 403, 405 (1996); Bittker, *supra* note 32, at 35; Dworkin, *supra* note 11, at 486.

88. Brest suggests that this approach invites solipsism into the interpretive process. See Brest, *The Misconceived Quest*, *supra* note 17, at 221-22; see also *supra* notes 75-77 and accompanying text.

89. See Bork, *supra* note 9, at 826 (saying that where intent does not readily supply a result, the interpreter must seek a "major premise" that states a "core value that the Framers intended to protect").

90. Bork also suggests that where a constitutional issue has controverted moral dimensions, the issue falls beyond the scope of constitutional jurisprudence. Thus, Bork presents a de facto rejection of any substantive constitutional rights that have "moral" implications. See BORK, *supra* note 9, at 255-56; see also Bittker, *supra* note 32, at 35 (rejecting Bork); Monaghan, *supra* note 76, at 363, 390-91 (offering a similar philosophy to Bork's).

91. But see Dworkin, *supra* note 11, at 472-73 (finding that originalism overlooks the purpose and architecture of the Constitution).

constitutional provision implicated by this transformation is the Commerce Clause. In sum, moving from interpretive theory to actual practice, the evolution of the Commerce Clause offers the opportunity to evaluate the principles and limits of originalism.<sup>92</sup>

### III. THE EVOLUTION OF THE COMMERCE CLAUSE

#### A. *The Framers' Concept of Commerce*

In his concurrence in *United States v. Lopez*, Justice Thomas considered the definition of commerce under the Commerce Clause.<sup>93</sup> One of his considerations was intratextual, comparing the power to regulate commerce to the other enumerated powers.<sup>94</sup> He noted that many of the other enumerated powers—enactment of bankruptcy laws, issuance of currency, and establishment of weights and measures—substantially affect commerce.<sup>95</sup> If commerce included matters that substantially affected it, he reasoned, then many of the enumerated powers would be rendered superfluous.<sup>96</sup>

Justice Thomas also considered the Framers' understanding of the plain meaning of commerce.<sup>97</sup> Relying upon several contemporary dictionaries, he found that commerce consisted of "selling, buying, and bartering, as well as transporting for those purposes."<sup>98</sup> From the term's usage in the Federalist Papers, Elliot's Debates, and contemporary newspapers, he further concluded that commerce was a concept separate from agriculture or manufacturing.<sup>99</sup>

Justice Thomas' definition of commerce provides a useful

---

92. See FELIX FRANKFURTER, *THE COMMERCE CLAUSE* 63 (1937).

The history of American constitutional law in no small measure is the history of the impact of the modern corporation upon the American scene. We are still sadly wanting a comprehensive account of the pervasive influence of corporate enterprise upon our national life, and its judicial aspect is only very partially written in the opinions dealing with constitutional limitations claimed for incorporated business.

*Id.*

93. *United States v. Lopez*, 514 U.S. 549, 585-93 (1995).

94. *Id.* at 588.

95. *Id.* at 588-89.

96. *Id.* at 589.

97. *Id.* at 585-93.

98. *Id.* at 585-86 (citing three eighteenth-century dictionaries).

99. *Id.* at 590-92.

starting point for an investigation into the Framers' understanding of commerce. As this investigation proceeds, it will be instructive to compare his definition against other elements of the historical record. The purpose of this investigation is not to push the Framers' concept beyond its boundaries, but to observe the semantic limitations upon commerce's meaning.

Historically, the primary purpose of the Commerce Clause was to facilitate trade, between the states and abroad.<sup>100</sup> Toward that end, Tench Coxe, a Philadelphia merchant, appeared before the Convention in May of 1787.<sup>101</sup> Coxe argued for a "stronger, more centralized government."<sup>102</sup> In particular, he focused on his manufacturing concerns, complaining of "the high rate of labour. . . the want of a sufficient number of hands . . . the scarcity and dearness of raw materials—want of skill in the business itself and its unfavorable effects on the health of the people."<sup>103</sup> These issues—the distribution of resources and the availability of labor—implicated more than the ordinary movement and sale of commodities. Rather, Coxe had identified some of the primary difficulties confronting industrialization.<sup>104</sup>

It is unlikely that the Framers recognized the significance of Coxe's complaints.<sup>105</sup> The Framers did not understand the importance of industrialization, nor did they realize how factory-based manufacturing would alter the economy.<sup>106</sup> At that time, the concept of manufacturing itself focused upon the skilled crafting of a product, not unskilled mass production.<sup>107</sup> Long-standing concepts, such as "engine," "machine," and "industry," were being

---

100. See CLINTON ROSSITER, 1787: THE GRAND CONVENTION 42-44 (1966). Cf. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 172-73 (2d ed. 1935).

101. MARX, *supra* note 18, at 150-52.

102. *Id.* at 152-53.

103. *Id.* at 153.

104. See generally WALTER LIGHT, INDUSTRIALIZING AMERICA 41-43 (1995); Winifred Barr Rothenberg, *The Invention of American Capitalism: The Economy of New England in the Federal Period*, in ENGINES OF ENTERPRISE 93-103 (Peter Temin ed., 2000).

105. MARX, *supra* note 18, at 148.

106. See *id.* at 146, 148 (noting how "[i]t did not occur to Jefferson that the factory system was a necessary feature of technological process," and that most American statesmen did not anticipate industrialization).

107. *Id.* at 166-68; see generally MANSSEL G. BLACKFORD & K. AUSTIN KERR, BUSINESS ENTERPRISE IN AMERICAN HISTORY 98-102 (1986) (discussing the origins of industrial production in America; America's first textile mill was built in 1791 and did not achieve success until 1801).

reappropriated for the vocabulary of industrialization.<sup>108</sup> Technology had yet to be recognized as a concept.<sup>109</sup>

Perhaps the best contemporary exposition of the concept of commerce is provided by Adam Smith's *Wealth of Nations*.<sup>110</sup> In the chapter "Of Treaties of Commerce," Smith uses the term in a limited sense, describing commerce as the movement of commodities between states.<sup>111</sup> He confirms this description by relating commerce to infrastructure: roads, bridges, canals, and harbors.<sup>112</sup>

But in a section discussing "the Public Works and Institutions which are necessary for facilitating particular Branches of Commerce," Smith employs the concept of commerce more broadly.<sup>113</sup> The "Institutions" that Smith discussed were chartered trading companies, the predecessors of the modern corporation.<sup>114</sup> Although the primary purpose of the trading companies was to import and export goods, they were also broadly vested elsewhere. The companies' concerns included whaling, insurance, banking, water supply, glass grinding, mining, and textiles.<sup>115</sup> The substance of Smith's critique is that the charter companies—the "Institutions . . . necessary for facilitating particular Branches of Commerce"—were better at handling manufacturing, or securities, than foreign trade.<sup>116</sup> Thus, Smith appears to have a concept of commerce that

---

108. MARX, *supra* note 18, at 166 n.

109. *Id.* at 149.

110. See 1 WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 99 (1953).

111. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* \*233 (3d ed. 1784) (University of Chicago Great Books edition) [hereinafter SMITH, *WEALTH OF NATIONS*] ("When a nation binds itself by treaty either to permit the entry of certain goods from one foreign country. . . or to exempt the goods of one country from duties. . . or at least the merchants and manufacturers of the country, whose commerce is so favored, must necessarily derive great advantage . . .").

112. *Id.* at \*315-16.

113. *Id.* at \*319. In support of this proposition, Crosskey also turns to the original index of Smith's work, where Smith cross-references commerce with "Agriculture, Banks, Capital, Manufactures, Merchant, Money, Stock, Trade, etc." 1 CROSSKEY, *supra* note 110, at 100 (quoting SMITH, *WEALTH OF NATIONS*, *supra* note 111, at \*434).

114. See SMITH, *WEALTH OF NATIONS*, *supra* note 111 at \*320, \*323, \*330; see also BLACKFORD & KERR, *supra* note 107, at 30.

115. SMITH, *WEALTH OF NATIONS*, *supra* note 111 at \*330-31.

116. See *id.* at \*331. Much of Smith's critique is an indictment of the corruption and inefficiency of the charter companies. They often were bailed out by Parliament; the only way the companies operated profitably was under auspices of an official monopoly. See generally *id.* at \*326-30.

expands beyond the movement of goods.

Other leaders among the Framers appear to adopt a similar concept. For example, when Hamilton advocated for a national bank in 1780, he described “several public manufactories” as “a species of commerce,” as well as speaking of a bank as engaged “in commerce.”<sup>117</sup> Prior to the Framing, John Dickinson used his Farmer’s Letters to advocate plenary “commercial power” for Parliament and to seek common regulation of trade.<sup>118</sup> In response, Jefferson soundly criticized Dickinson’s view, saying,

Mr. Dickinson . . . not daring to question the authority to regulate commerce so best to answer [British] purposes, to which we had so long submitted, admitted that authority in its utmost extent. He acknowledged in his Farmer’s Letters that they could put down our looms, slitting mills, and other instruments of manufacture . . . . He therefore admitted they they might control our commerce . . . .<sup>119</sup>

Regardless of Dickinson’s own point of view, the power at stake was “authority to regulate commerce.” Although Jefferson did not agree with Dickinson’s view, he found Dickinson’s interpretation of that power credible enough to merit a response.<sup>120</sup>

---

117. See 1 CROSSKEY, *supra* note 110, at 93 (citing Letter from Alexander Hamilton to Robert Morris (1780), in 3 ALEXANDER HAMILTON, WORKS, at 322, 334, 339, 340 (fed. ed.) (1904)). *But cf.* United States v. Lopez, 514 U.S. 549, 590 (1995) (Thomas, J. concurring) (quoting THE FEDERALIST NO. 23 (Hamilton) (finding that Hamilton viewed commerce as an independent concept from agriculture and manufacturing)).

118. See 1 CROSSKEY, *supra* note 110 at 132 (citing 1 JOHN DICKINSON, POLITICAL WRITINGS 138-42 (1801)).

119. See 1 *id.* at 133 (quoting Letter from Thomas Jefferson to Francois Soules (Sept. 13, 1786) (Library of Congress), at <http://memory.loc.gov> [select Series 1; select letters dated from July 23, 1786; select images 317 and 318]).

120. A comparison of other contemporary sources shows considerable variation in the use and definition of the concept of commerce. For example, Crosskey’s authorities include a Boston newspaper where commerce “is not intended merely [to include] the exports and imports of the country”; a 1719 pamphlet on trade where commerce includes “all manner of Exchange in dealing” including “Exchange. . . [of] Labour either for Labour or Wages”; and a Virginia newspaper article soliciting support for a textile factory, “not doubting but by proper caution and a regularity of commerce, they will be able, after a short time, to manufacture as low as imported.” In addition to the Federalist Papers, Justice Thomas relies in part upon some contemporary newspapers, which note that agriculture is a “source of commerce,” and that manufacturing is a beneficiary of commerce; and upon Elliot’s Debates, where a delegate to the North Carolina convention described commerce as the “nurse” of agriculture and manufacturing. Compare 1 CROSSKEY, *supra* note 110, at 91-93, with *Lopez*, 514 U.S. at 590.

At this point, it is interesting to return to Tench Coxe, who joined the Washington Administration as an Assistant Secretary of the Treasury.<sup>121</sup> In his *Sketch of the General Trade of the United States*, Coxe purported to take a “survey of the American commerce.”<sup>122</sup> In particular, Coxe discussed shipbuilding, fishing, and agriculture; he also observed the difficulties American farmers were having in obtaining credit for their goods abroad.<sup>123</sup> Coxe’s statements do not unequivocally define commerce, but they show how broad economic analysis had acquired and was changing the concept of commerce.

In any case, the historical record is far from disclosing any certain definition for commerce. Instead, it appears that even at the time of the Framers, there was significant disparity in both the understanding and application of the concept.<sup>124</sup> Because of this indeterminacy, scholars struggled to provide a clear indication of constitutional power.<sup>125</sup> Two noted scholars opted for a liberal reading of commerce. For example, John Taylor said,

The whole property and wealth of the country are more nearly connected with commerce, than roads are with war; and the mode of reasoning in that case will embrace agriculture, and invest Congress with a power of regulating that also, as is attempted by making it tributary to manufactures.<sup>126</sup>

Justice Story’s seminal treatise, *Commentaries on the Constitution of the United States*, further expands Taylor’s theme.<sup>127</sup> After noting the nation’s economic difficulties under the Articles, Justice Story found that under the Constitution the concept of commerce must be understood liberally, in its “general

---

121. See 1 CROSSKEY, *supra* note 110, at 87 (citing Tench Coxe, *A Sketch of the General Trade of the United States*, in *A VIEW OF THE UNITED STATES OF AMERICA* 337-44 (1794)).

122. *Id.*

123. *Id.*; see also Tench Coxe, *A Sketch of the General Trade of the United States*, in *A VIEW OF THE UNITED STATES OF AMERICA* 340-41 (1794).

124. See *supra* note 120 and accompanying text.

125. See JOHN TAYLOR, *CONSTRUCTION CONSTRUED AND CONSTITUTIONS VINDICATED* 22 (1820) (raising the concern that “chains of inferences” would be used to overextend federal power).

126. *Id.* at 221. It is interesting to compare this statement with Taylor’s sentiments regarding federal power. See *supra* note 125.

127. For further information on Justice Story’s influence on early constitutional jurisprudence, see R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY* (1985).

sense.”<sup>128</sup> He then addresses the controversy surrounding the scope of the concept, which eerily mirrors the modern debate: some favor a narrow interpretation, limiting Congress to its enumerated powers and avoiding federal interference in state affairs; others favor a broad interpretation, allowing Congress to facilitate domestic industry and prevent the interference of foreign powers.<sup>129</sup> Justice Story concludes,

[I]f congress does not possess the power to encourage domestic manufactures by regulations of commerce, the power is annihilated for the entire nation. . . . No man can doubt, that domestic agriculture and manufactures may be most essentially promoted and protected by regulations of commerce. No man can doubt, that it is the most usual, and generally the most efficient means of producing those results.<sup>130</sup>

At the time of the Framing, both the nation’s economy and the concept of commerce were in transition. The Framers may have been aware of the changes industrialization were bringing, but they could not anticipate its revolutionary dimensions. Yet both the Framers themselves, and other contemporaries, were struggling to create a vocabulary to describe the change. This struggle is shown by the controversy that surrounded the definition of commerce. Its usage and meaning was far from consistent. But even at that time, some advocated a liberal construction of commerce, a construction that would include manufacturing and agriculture. By doing so, they worked toward a concept that would keep apace with emerging economic changes.

#### *B. Development in the Supreme Court*

The historical record has disclosed, at minimum, the ambiguities that surround the concept of commerce. By examining the Supreme Court’s jurisprudence, this amorphous concept is tailored by a more concrete inquiry. By necessity, the Court is constrained to develop an adjudicative standard, one that must necessarily place limits on how commerce is understood to apply to real-world facts. However, this standard is not an absolute. First, the Court does not necessarily provide a particularized

---

128. See 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1054, 1057 (1833).

129. See 2 *id.* §§ 1075, 1076.

130. See 2 *id.* § 1080.

definition. Second, the Court's determinations are limited by the facts before it. And third, just as the facts before the Court increase in complexity over time, so must its holdings account for that complexity.<sup>131</sup>

Therefore, the purpose of this survey of the Court's case law is not intended to provide any particularized standard. Instead, the purpose of this survey is to examine some of the boundaries placed on the concept of commerce, and to track the evolution of those boundaries over time. In the final analysis, the question is whether some underlying principle can account for the changes that have taken place.

The natural starting point for this analysis is the Court's first major Commerce Clause case, *Gibbons v. Ogden*.<sup>132</sup> In that case, the plaintiffs challenged a New York law that gave the defendants an exclusive franchise over all navigable waters in the state.<sup>133</sup> Before reaching the substantive issues, Chief Justice Marshall first considered what principles should guide the interpretation of the Constitution.<sup>134</sup> After noting that there was no textual principle that required strict construction,<sup>135</sup> he rejected the principle, saying,

If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and would render it unequal to the object for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded.<sup>136</sup>

---

131. See generally Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN. L. REV. 155, 226-27 (1997).

132. 22 U.S. (9 Wheat.) 1 (1824); see FRANKFURTER, *supra* note 92, at 13-15.

133. *Gibbons*, 22 U.S. at 1-2.

134. See *id.* at 187-88.

135. *Id.* ("It has been said, that [the enumerated powers] ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule?").

136. *Id.* at 188. Cf. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202-03 (1819) (finding that departure from the "plain meaning" of the Constitution was

Chief Justice Marshall went on to define the scope of Commerce Clause power. He rejected limiting it to “traffic, buying and selling, or the interchange of commodities.”<sup>137</sup> Then, after noting the importance of navigation to trade, he found that it was an essential element of Congress’ Commerce Clause powers.<sup>138</sup> But Chief Justice Marshall goes even further, unambiguously seeking to extend the breadth of the Commerce Clause. Rather than restricting it to simple passage between states, he finds, “Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.”<sup>139</sup>

Only after laying this broad foundation does Chief Justice Marshall move to the most ambitious part of the decision, the recognition of the “dormant” Commerce Clause.<sup>140</sup> In a structural argument, he finds that where state power is inconsistent with the federal power, the federal power controls.<sup>141</sup> Interestingly, the Chief Justice did not attempt to demonstrate where the precise conflict of powers had occurred, or how the exercise of power by one negated the power of the other. Instead, without further analysis, he relied upon his prior, broad assessment of commerce to both prove the conflict and permit implementation of the doctrine.<sup>142</sup>

By contrast, the limits of the Commerce Clause were more clearly drawn in *Cooley v. Board of Wardens*.<sup>143</sup> Here, Pennsylvania passed a law requiring that vessels on the Delaware River obtain a local river pilot.<sup>144</sup> In his opinion, Justice Curtis conceded

---

warranted only where “the absurdity and injustice” of such interpretation was clearly obvious).

137. *Gibbons*, 22 U.S. at 189-90. In one of Chief Justice Marshall’s more oracular statements, he describes commerce as “intercourse,” without necessarily distinguishing the term from ordinary traffic or trade. *See id.*

138. *Id.* at 193-94. The Chief Justice also supports his argument intratextually, relying upon Art. I § 9 cl. 1. The clause barred Congress, prior to 1808, from prohibiting the “migration or importation” of slaves. Noting that the clause “has always been considered as an exception from the power to regulate commerce,” he found that commerce must otherwise include migration and importation. He also drew what, from the modern perspective, is a fairly disturbing analogy between the voluntary and involuntary transportation of persons. *See id.* at 206-07, 216-17.

139. *Id.* at 194.

140. *See generally* 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.4 (3d ed. 1999).

141. *Gibbons*, 22 U.S. at 205-06.

142. *See id.*

143. 53 U.S. (12 How.) 299 (1851).

144. *Id.* at 311-12.

Congress' power to regulate navigation.<sup>145</sup> But he held that river pilots did not fall within this category.<sup>146</sup> To place this limit on the Commerce Clause, he discussed the purposes for which the Commerce Clause was intended.

Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their natures; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity,<sup>147</sup> which alone can meet the local necessities of navigation.

Put another way, Justice Curtis considered whether federal regulation was necessary, or whether local regulation best suited the issue. Instead of applying a traditional police power analysis—asking whether the issue was a matter of public health and safety—he examined the practical effects of the regulation.<sup>148</sup> After noting that local pilots are far better suited to the task than could possibly be dictated by the federal government, Justice Curtis held that the power to regulate local pilots was outside the Commerce Clause.<sup>149</sup>

At this point, the boundaries of the Commerce Clause are responding to two competing ideas. Chief Justice Marshall set out a broad, amorphous concept, providing that the Commerce Clause power can act both between the states and within the states. While he acknowledges that the states must retain some powers,<sup>150</sup> he also takes care to avoid a determinate separation of powers between the federal government and the states, implicitly leaving the door open for greater exercise of federal power. By contrast, while adverting to matters that “imperatively demand” federal control, Justice Curtis articulates a limiting principle. Part of his argument is an abstract calculation of power: he notes how unchecked federal power, in and of itself, both disempowers the states and deconstructs the federal system.<sup>151</sup> But he also offers a pragmatic analysis: if a matter only has local effects, or can best be served by

---

145. *Id.* at 315.

146. *Id.* at 320.

147. *Id.* at 319.

148. *Id.* at 320.

149. *Id.*

150. *Gibbons*, 22 U.S. at 203-04.

151. *Cooley*, 53 U.S. at 318-19.

local expertise, he finds that the state should control.<sup>152</sup>

When modern technology is introduced, it becomes more difficult to determine whether state or federal regulation can be effective. For example, in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, the Court had to decide between state and federal control of communications technology.<sup>153</sup> Congress had passed a law that gave all telegraph companies the right to build lines upon all federal waters and lands, including railroad rights-of-way.<sup>154</sup> Florida granted Pensacola Telegraph the exclusive right to build telegraph lines in two Florida counties, and Western Union challenged the grant, relying upon the federal law.<sup>155</sup>

In an opinion by Chief Justice Waite, the Court ruled in favor of the federal law, finding Congress had power under the Commerce Clause.<sup>156</sup> Discussing the new technology, the Chief Justice did not attempt to redefine commerce, but instead examined the evolution of the commerce power itself.

The powers thus granted are not confined to the instrumentalities of commerce. . . but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse and its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth.<sup>157</sup>

What makes Chief Justice Waite's argument interesting is what it lacks. For instance, he fails to note that the telegraph, unlike the other "instrumentalities," does not involve the transportation of others. The line at issue was fully within the state of Florida, and he does not distinguish between interstate and intrastate communications, nor does he attempt to explain why a local service requires federal control.<sup>158</sup> Instead, the Chief Justice looks at the relationship between interstate commerce and the information

---

152. *Id.* at 319.

153. *See Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. (6 Otto) 1, 3-4 (1877).

154. *Id.*

155. *Id.* at 5.

156. *Id.* at 10.

157. *Id.* at 9.

158. *See id.* at 9-10.

conveyed by telegraph. He finds that the telegraph is both “instrumental” to interstate transactions and necessary for the acquisition of information.<sup>159</sup> Thus, the underlying basis for the decision was an examination of the telegraph’s effect on interstate commerce.

However, the Court’s reaction to new developments in technology was far from uniform. *United States v. E.C. Knight Co.*<sup>160</sup> was one of the first major antitrust cases to be considered by the Court.<sup>161</sup> Here, the technological development was more abstract but nonetheless novel, involving the centralization of production and the implementation of an interlocking directorate.<sup>162</sup> In the case, American Sugar Refining Company swapped stock with its four main competitors, thus obtaining control over ninety-eight percent of refined sugar production.<sup>163</sup>

Unlike *Pensacola Telegraph*, the Court, led by Chief Justice Fuller, begins by articulating some discrete limits upon the Commerce Clause. First, he finds that intrastate restraints upon trade are properly regulated per the states’ police power.<sup>164</sup> Then, in a separate argument, he relies upon a narrow definition of commerce, which includes purchase, sale or transport but which excludes manufacture.<sup>165</sup> Chief Justice Fuller’s principal concern is the danger of unlimited federal power, and he is more concerned with the effect upon federal power than the effect of the monopoly itself.<sup>166</sup>

Part of the Court’s resistance to federal power may be ascribed to its discomfort with the institutions involved. To sidestep a determination of the sugar trust’s effect upon the national economy, Chief Justice Fuller observes, “It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected.”<sup>167</sup> Thus, when Chief Justice Fuller makes his final

---

159. *Id.* at 10.

160. 156 U.S. 1 (1894).

161. MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM 1890-1916* 124-27 (1988).

162. *Id.* at 98, 124.

163. *United States v. E.C. Knight Co.*, 156 U.S. 1, 3, 6 (1894).

164. *Id.* at 11.

165. *Id.* at 14 (quoting *Kidd v. Pearson*, 128 U.S. 1, 20-21 (1888)).

166. *Id.* at 13-14.

167. *Id.* at 13.

analysis, he ignores the broader effect of the trust, noting that the stock transactions and the manufacturing at issue was solely intrastate.<sup>168</sup>

In dissent, Justice Harlan revisits many of the previously identified themes. Like in *Cooley*, Justice Harlan examines whether state power is sufficient to handle the issue.<sup>169</sup> He observes that states have power to regulate intrastate monopolies, but that the sugar trust's control has national scope.<sup>170</sup> Like in *Pensacola Telegraph*, Justice Harlan examines the effects of the new technology—here, the monopolizing trust. Rather than confining his inquiry to the site of the manufacturing, or to the site of the stock transactions, he looks to the effect of the trust as a whole, connecting the powers of the directorate to the means of production.<sup>171</sup>

*E.C. Knight* is indicative of the boundaries that had evolved in Commerce Clause doctrine. Chief Justice Fuller represents the static, but orthodox,<sup>172</sup> view that required a clear separation between federal Commerce Clause powers and state police powers. To maintain this static distinction, the consideration of technology's effect upon commerce had to be limited. Justice Harlan provided a more evolutive approach. He challenged the status quo, reevaluating the commerce power in light of societal change. But he also incorporated some of the core principles from early Commerce Clause jurisprudence: Chief Justice Marshall's concept of a power, not limited to trade in commodities, that could reach within the states; and Justice Curtis' comparison of federal and state governments' competence to regulate their affairs.

Notwithstanding the distance between Chief Justice Fuller and Justice Harlan, both static and evolutive principles continued to operate upon Commerce Clause jurisprudence. In the *Shreveport Rate Cases*, the Supreme Court considered the Interstate Commerce Commission's (ICC) power to control intrastate rail rates.<sup>173</sup> The plaintiffs were two Texas-based railroad companies that charged

---

168. *Id.* at 17.

169. *Id.* at 42-43; *see supra* notes 147-51 and accompanying text.

170. *Id.* at 37-38, 42-43.

171. *Id.* at 34-35.

172. *See* 2 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 1240-41, 1274, 1277 (8th ed. 1927); *see also* 1 ROTUNDA, *supra* note 140, § 4.6.

173. *See* *Houston, E. & W. Tex. Ry. Co. v. United States (Shreveport Rate Cases)*, 234 U.S. 342, 345 (1914).

higher rates of service to Shreveport than for comparable service to Texas cities.<sup>174</sup> The difference in rates was “substantial” enough to place Shreveport at a competitive disadvantage to Texas ports.<sup>175</sup> As a result, the ICC ordered that the Texas carriers’ rates to Shreveport be lowered to match rates in Texas.<sup>176</sup>

The Supreme Court, in an opinion by Justice Hughes, held that the Commerce Clause offered a sufficient basis for congressional action.<sup>177</sup> He found that the Commerce Clause embraced

all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such a manner as to cripple, retard or destroy it.<sup>178</sup>

In light of the purposes Justice Hughes attributes to the Commerce Clause, it is interesting to compare the *Shreveport Rate Cases* with *E.C. Knight*. Both cases involved monopolies; the only difference was that the *Rate Cases* was strictly a geographic monopoly. Perhaps the only material difference between the two cases was that the *Rate Cases* involved railroads, a long-recognized instrumentality of commerce,<sup>179</sup> whereas *E.C. Knight* involved a corporate abstraction, the monopoly trust.<sup>180</sup> In addition, the *Rate Cases* addressed a local phenomenon, what Justice Hughes called the “rivalries of local governments.”<sup>181</sup> Thus, although the issue and effect at stake were far less significant than that in *E.C. Knight*, Justice Hughes employed sweeping language to describe Congress’ powers under the Commerce Clause. Indeed, a determination of the effects upon interstate commerce—in Justice Hughes’ own words, to

---

174. *See id.* at 345-46.

175. *Id.* at 346.

176. *Id.* at 345.

177. *Id.* at 359.

178. *Id.* at 351.

179. *E.g.*, *Illinois Cent. R.R. Co. v. Illinois*, 163 U.S. 142, 153 (1895); *see also* 1 ROTUNDA, *supra* note 140, § 4.5.

180. *E.C. Knight Co.*, 156 U.S. at 1.

181. *Shreveport Rate Cases*, 234 U.S. at 350.

“cripple, retard or destroy”<sup>182</sup>—indicates movement back toward the evolutive considerations Justice Harlan suggested in his prior dissent.<sup>183</sup>

Over twenty years later, Justice Hughes revisited those considerations in *NLRB v. Jones & Laughlin Steel Corp.*<sup>184</sup> The case challenged Congress’ power to impose sanctions against employers for discriminatory anti-union practices.<sup>185</sup> Justice Hughes begins his analysis with an examination of the steel industry, noting its scope and effect within the national economy.<sup>186</sup> Then, he states the doctrinal theme.

The congressional authority to protect interstate commerce from burdens and obstructions which can be deemed to be an essential part of the “flow” of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact ‘all appropriate legislation’ for its ‘protection or advancement’ . . . . Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.<sup>187</sup>

Although Justice Hughes’ formulation was a revolutionary turn in Commerce Clause jurisprudence,<sup>188</sup> it was not a unilateral departure from established doctrine. Instead, it was a juncture between two competing interpretive schemes, both of which had existed from the inception of the Commerce Clause. Because the evolutive principle helped define the boundaries of the Commerce Clause, it was a meaningful—and available—analytical tool. It was

---

182. *Id.* at 351.

183. *See supra* notes 169-73 and accompanying text. It must be reiterated that Justice Hughes’ statement only referred to the “agencies” of commerce. “Agencies” clearly included transportation, such as railroads, but the term would not necessarily have embraced manufacturing or production. *Cf.* *Furst v. Brewster*, 282 U.S. 493, 497-98 (1931) (examining the application of the Commerce Clause to interstate shipping).

184. 301 U.S. 1 (1937) (5-4 decision).

185. *Id.* at 22.

186. *Id.* at 27.

187. *Id.* at 36-37 (citations omitted).

188. *See generally* ROTUNDA, *supra* note 140, §§ 4.7, 4.9.

not always at the center of jurisprudence doctrinally.<sup>189</sup> Nevertheless, it was better suited to address the economic and technological issues before the Court, and thus found open expression in *Jones & Laughlin*.

#### IV. CONCLUSION

By necessity, the development of the Commerce Clause was driven by economic change. Even at the time of the Framing, the concept of commerce was in flux. No discrete limitations were placed upon the concept.

When those limitations developed, two principles emerged. Chief Justice Marshall espoused a flexible, federal power; Justice Curtis sought to preserve the states' powers. The scope of state power was not only defined in terms of police power, but also in terms of federal and state competence to regulate economic issues. Modern economic institutions tested these limits by exerting influence that exceeded state control. To respond to these changes, practical, evolutive principles were incorporated into Commerce Clause doctrine.

These principles contrast with originalism. By setting a historical foundation for constitutional interpretation, it aspires for a fair and consistent adjudicative standard—a standard that does not evolve over time, but instead anchors itself to an age of

---

189. Without further elucidation, this proposition risks a glib dismissal of much of pre-New Deal Commerce Clause jurisprudence. There are two deeper philosophical issues at play here, and both of them fall beyond the scope of this paper.

First, and most significantly, is the problem of how precedent controls constitutional law. Here, the question is what principles will allow the reevaluation or reversal of constitutional doctrine. See generally Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994).

A related, but separate, problem is the difficulty of deriving a broad principle from a limited survey of caselaw. To borrow an analogy from science, the analysis relies upon a limited number of experimental results—here, the selected cases—to describe a governing principle. A more intensive survey of cases, or more “experimental results,” would help flesh out the principle. On the other hand, microscopic examination can obscure important, larger principles. Although this paper attempts to strike a balance between the two extremes, further consideration of caselaw is an appropriate test of the thesis. Certainly, some cases interrupt the trends that this paper identifies. See, e.g., *South Carolina v. United States*, 199 U.S. 437, 463 (1905) (Brewer, J.) (holding that federal taxation of state-operated liquor sales was permissible under the Commerce Clause).

certainties. But as demonstrated by the sweep of case law from *Gibbons* to *Jones & Laughlin*, every time a doctrine confronts a new idea—regardless of whether that doctrine is static or evolutive—it is reformed. In the course of the survey, it is particularly interesting to note how rarely the intent of the Framers is relied upon, much less adverted to.

Nevertheless, the step away from certainty, from an absolute principle, is precipitous. Certainly, some commentators correctly point out that complete reliance upon a dynamic approach, without some underlying, controlling principle, is dangerous.<sup>190</sup> But law is not produced in an academic vacuum. For law to be legitimate, it requires the legal community to accept its principles, even though it may be far from agreement on its application.<sup>191</sup> Thus, precedent, reasoning, tradition, and consistency still maintain valued and necessary roles in the development of law.<sup>192</sup>

Returning to the beginning of the paper, Llewellyn noted the “inconvenience” of power that cannot be strictly constrained.<sup>193</sup> However, he goes on to say, “Yet the greater inconvenience lies in obfuscation of those vibrant tails which have become the things that count in life.”<sup>194</sup> It is the “vibrant tail,” the modern experience, that requires constitutional law to continue responding to, and serving, a changing society.

---

190. See Tribe, *supra* note 22, at 1298 n. 247 (finding that a dynamic evaluation of constitutional norms “seems more than a bit schizophrenic”).

191. See Donald H.J. Hermann, *Legal Reasoning as Argumentation*, 12 N. KY. L. REV. 467, 469 (1985) (“[L]egal reasoning . . . is dependent upon the legal conclusion and the reasons given in support of it being accepted by the audience or constituency to which such argumentation is directed.”).

192. See Stanley Mosk, *The Common Law and the Judicial Decision-Making Process*, 11 HARV. J.L. & PUB. POL’Y 35, 40-41 (1988).

193. See *supra* text accompanying note 1.

194. Llewellyn, *supra* note 1, at 15-16. For more information about Karl Llewellyn’s impact on the law, see N.E.H. Hull, *The Romantic Realist: Art, Literature, and the Enduring Legacy of Karl Llewellyn’s “Jurisprudence,”* 40 AM. J. LEGAL HIST. 115 (1996).