No. 03-1454

In The
Supreme Court of the United States

JOHN D. ASHCROFT,
Attorney General, et al.,

Petitioners,

v.

ANGEL McCLARY RAICH, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE INSTITUTE FOR JUSTICE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS*

The Institute for Justice is a nonprofit, public interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. Central to the mission of the Institute is guaranteeing that Congress be limited to its enumerated powers under Article I, Section Eight of the U.S. Constitution. The Institute is filing this brief in support of the Respondents. The parties in the case have consented to the filing of this *amicus* brief.[1]

SUMMARY OF ARGUMENT

The decision of the Ninth Circuit should be affirmed on both narrow and broad grounds. The narrow ground is that the government's assertion of federal power is inconsistent with the limitations on the Commerce Clause that *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000) place on this Court's earlier decision in *Wickard v. Filburn,* 317 U.S. 111 (1942). The broad ground is that *Wickard v. Filburn*, on which the government relies, was wrongly decided and should be forthrightly overruled on the ground that it is wholly inconsistent with the original design of the federal system. *Wickard* read the commerce power to reach all economic and commercial transactions that had a substantial effect on interstate commerce. In so doing, it repudiated this Court's seminal decision in *Gibbons v. Ogden,* 22 U.S. 1 (1824), which held that the clause, broadly read, extended to all cross-border transactions, which included both the shipment of goods and services across state lines

[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

and the use of the various instrumentalities of interstate commerce to achieve that end.

Starting with the narrow ground, *Lopez* announced a return to first principles. 514 U.S. at 553. It therefore began with the incontrovertible proposition that the Constitution delegates to the Congress only enumerated powers. From that premise, this Court concluded that a simple Congressional say-so does not establish federal power. Rather, the subject matter of the legislation must fall within one of the enumerated powers. To show that particular legislation falls under the commerce power, therefore, Congress must offer some reasoned demonstration of a substantial effect on interstate commerce. As articulated in *Lopez* and *Morrison*, this Court now requires, at a minimum, some commercial or economic transaction to sustain federal power. Such a substantial effect has not been established in this case.

In addition, this case is wholly unlike *Wickard* in several key respects. In *Wickard* the defendant sought to act free from all restraints under either federal or state law. In this case, California's system of regulation limits access to marijuana and proscribes its diversion into the market for illicit drugs. But, in contrast to *Wickard,* California introduces a valid state police power interest by advancing the health and comfort of its citizens. In addition, in *Wickard*, a very large share of the overall grain market – perhaps as much as 20 percent – was used in home consumption. The key question of fact here, to which the government has devoted no attention, is the extent of leakage from the marijuana supplied under this program into commercial circulation. The proper approach would be to examine California's program as it is in fact administered. If California administers its program in ways that have a substantial effect on interstate commerce, the state should be able to reform its program to ensure that marijuana supplied under the program will go overwhelmingly to medically needy individuals within the state.

In contrast to the narrow approach, the outright rejection of *Wickard* would eliminate the difficult line-drawing determinations that *Lopez* and *Morrison* require. To be sure, *Lopez* confounded the common belief that after *Wickard* the principle of enumerated powers was a dead letter because every activity under the sun had some indirect effect on interstate commerce. But *Wickard* itself was not faithful to the original understanding of the Commerce Clause, or to the seminal case of *Gibbons v. Ogden,* 22 U.S. 1 (1824) (cited in *Lopez,* 514 U.S. at 553), which only stands for the proposition that navigation across state lines is covered by the interstate commerce power. *Id*. at 203. Nothing in the original Constitution indicates that local manufacture, mining, or agriculture falls within the scope of the power.

The ordinary doctrine of changed conditions, whereby traditional doctrine is adapted to new and unforeseen circumstances, makes it imperative that the commerce power apply to interstate transport and communication by rail, plane, or wire. That principle does not require that the domain of local commerce be shrunk to nonexistence. The Commerce Clause gave the federal government *no* power over purely *intra*state transactions, and no account of national economic interdependence required that the Court bestow that power on Congress in 1942 or preserve it today. Overruling *Wickard* will do nothing to stop the federal government from attacking the interstate trafficking in drugs. The states can take over where the federal government leaves off on matters of purely local distribution and use, adopting those policies that they think appropriate to deal with the problem, including compassionate use provisions.

The return of the commerce power to its original contours will *improve* the economic welfare of the United States by allowing for state competition in the regulation of economic affairs and state experimentation in dealing with difficult issues of drug use. Congress retains all power to prevent state bottlenecks and blockades of

economic activity. The return to the original meaning of the Constitution is as imperative today as it ever was. *Lopez* undercut the intellectual foundations of *Wickard*. This Court should now finish the job by overruling *Wickard*.

ARGUMENT

I. The Medical Use of Marijuana under the California Compassionate Use Act Bears No Substantial Relation to Interstate Commerce.

A. This Court's Decision in *United States v. Lopez* Reaffirms the Doctrine of Enumerated Powers.

In *Lopez,* this Court announced a tripartite test to determine the scope of Congress' power to regulate under the Commerce Clause.

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.

Lopez, 514 U.S. at 558-59 (citations and internal quotations omitted).

The first two heads of Congressional power, which have engendered little or no controversy, are manifestly insufficient to sustain the use of federal power to prevent the local consumption of marijuana for any purpose. As this Court has noted, all the pressure is on the third category that *Wickard* creates – that of substantial effect on interstate commerce. The challenge that the government

faces in this case is to read that category broadly enough to cover California's medical marijuana program without obliterating the doctrine of enumerated powers that *Lopez* reaffirms.

In the years between *Wickard* and *Lopez,* it was commonly assumed that Congress could bring any and all regulation into that third category. But in *Lopez,* this Court confounded that view by limiting the *Wickard* substantial effects test. The Court did so by analogizing it to the *Shreveport Rate Cases,* 234 U.S. 342 (1914), which upheld the power of the Interstate Commerce Commission to regulate the rates of a purely intrastate railroad that was in direct competition with an interstate railroad. The *Shreveport* court upheld the regulation because if Congress could not regulate the rates of the intrastate railroad, it would undermine the federal regulation of interstate railroads. 234 U.S. at 350-51. Yet it is critical to understand the limitations of that decision. The *Shreveport Rate Cases* applied *only* to instrumentalities of interstate commerce, that is, to those involving transportation and communication. 234 U.S. at 352. Employing the exact same analysis, the *Lopez* court explained that the creation of a gun-free school district was not a situation "in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez,* 514 U.S. at 561. After *Lopez, Wickard* is best understood as an extension of the *Shreveport* rule on competitive interdependence between local and national markets to manufacturing, agriculture, mining, and other local productive activities. Hence, to the extent that local production competes with products that move in interstate commerce and thereby has a substantial effect on the price and quantity of goods shipped in interstate commerce, *Wickard* subjects them to Congressional legislation.

Wickard itself explained that the local consumption of home-grown wheat substantially affected interstate commerce because it constituted at least 20% of the

national grain market. Exempting that wheat from federal price and production controls would, like the intrastate railroad in *Shreveport*, significantly undermine Congressional attempts to regulate the price of interstate wheat. *United States v. Wrightwood Dairy Co*., 315 U.S. 110 (1942), decided only a few months prior to *Wickard*, held that the Commerce Clause allowed the regulation of milk sales that directly competed with and substantially affected interstate milk sales. *See id.* at 117-18 (intrastate milk constituted 60% of Illinois market). *Wickard* went one step further, applying the *Shreveport* principle to internal consumption as well as sales, but it still required direct competition and a substantial effect on interstate commerce.

B. The Congressional Findings in Support of the Controlled Substances Act Do Not Justify the Application of the Act to the Conduct in This Case.

Now that *Lopez* has affirmed the requirement of an actual substantial effect on interstate commerce, the question then arises whether Congress has established that nexus between California's compassionate use program and interstate commerce. In principle that turns, after *Wickard*, on the degree of separation and connection between drug trafficking and medical use of marijuana. Here, as an empirical matter, much depends on the operation of California's program. If that program effectively allowed all individuals to obtain marijuana for recreational use, this case would be more difficult to distinguish under *Wickard*. The lax administration of the program could support a credible claim that the California statute legalized all marijuana use, effectively ending any separation between the medical and recreational markets.

The brief submitted by a group of Congressional Representatives, citing to reports in the media, purports to

show that just this mixing of markets has happened with the administration of the program in Oakland, California, and perhaps other areas. U.S. Rep. Brief at 18-23. There are two problems with the Representatives' claims. First, none of the information they cite is part of the record in this case. Any consideration of those factual assertions would have to occur on remand, where such evidence could be tested. Second, and most critically, the government has chosen not to engage in any such close empirical investigation of the operation of the California program. It disavows any need for an actual, factual connection between the medical marijuana program and interstate commerce, and, instead, mounts a *facial* attack on any and all state programs that allow for the medical use of marijuana, regardless of how they are administered. The Petitioners consciously exclude any possibility that such a program could be put into place by any state without the blessing of the United States government. In so doing, they rely on a set of 1970 findings that cover two points: first that all use of marijuana is necessarily harmful, and second that it is impossible to keep the medical market separate from the recreational market. Some comments on both points seem appropriate.

First, medical use: The government points to the findings of the CSA that state there is no medical use for marijuana in order to establish a federal interest sufficient to bolster its claim under the commerce clause. The brief submitted by interested members of the House of Representatives relies on various sources to defend the related claim that "botanical marijuana" has never been able to pass the "strict scientific standards" for drug approval because "marijuana is fundamentally bad for human health" insofar as it is responsible for a list of harmful human effects including "brain damage, lung damage, and heart disease." *See* U.S. Rep. Brief at 13-14, citing sources. For the purposes of this argument, we assume that these

claims about the harmful effects of marijuana are true for the general population.

However, these general findings, if relevant to the Commerce Clause issue at all, hardly support a *universal* ban that would make it unnecessary to investigate the operation of the California program. Respondents Raich and Monson are not part of the general population blessed with good health. They are at present in constant pain and face diminished life prospects no matter what they do. Accordingly, it is quite rational for them to take marijuana, despite its adverse side effects, just as they would take approved forms of other medicines or treatments known to have potent adverse side effects. The key question in all cases is whether the substance used has more beneficial effects than harmful effects, which, contrary to the unsupported findings in the CSA, can only be decided on an individual basis for people who suffer from various maladies. No healthy person would undergo surgery or chemotherapy, which are well known to cause all sorts of heinous tissue damage. But for a person with cancer, either or both these courses of action make perfect sense. The entire system of medical treatment in the United States rests on the principle of individual self-determination. *See Schloendorff v. Society of the New York Hospital*, 211 N.Y. 125, 129-30 (1914). The truly frightening import of the government's position on drugs lies in its determination to prohibit recreational use by sacrificing traditional respect for individual autonomy.

Petitioners and their *amici* rely on selective citations to support their claims about the dangers of medical uses of marijuana. For example, these briefs nowhere cite or discuss the Institute of Medicine study, *Marijuana and Medicine* (Joy, Watson and Benson 1999), which recommends the development of drug delivery systems for "cannabinoid drugs" and explicitly recognizes that patients should be allowed to smoke marijuana if they are unable to obtain relief from approved drugs. *See also*, Richard E.

Musty & Rita Rossi, *Effects of Smoked Cannabis and Oral Δ^9-Tetrahydrocannabinol on Nausea and Emesis After Cancer Chemotherapy: A Review of State Clinical Trials*, 1 J. Cannabis Therapeutics 29 (2001), which concluded that "it appears that smoked marijuana can be a very successful treatment for nausea and vomiting following cancer chemotherapy." In light of this evidence, unquestioning deference to the findings of the CSA as to the lack of medical value of marijuana is wholly unwarranted.

Second, market interdependence: The separation between legal and illegal uses should be treated as a matter of fact, not as a universal truth. If that separation is largely maintained in practice, then it is possible to accommodate both the federal policy against recreational drug use and the exception to federal power for the medical use of medical marijuana when affirmatively adopted under state law. The key point is that neither the CSA in 1970, nor the sparse record before this Court today, provide any evidence about either the universal dangers of marijuana or the necessary interdependence between a specialized local market and the general trafficking of marijuana. *See* 21 U.S.C. §§ 801 (2)-(6) (providing only general findings). The government's effort to show that the CSA necessarily and in all cases falls within the scope of the commerce clause represents a leap of faith that this Court should not accept. As the Ninth Circuit correctly noted below, that determination in the abstract is not decisive in the context of this litigation, for even though the CSA has been upheld under *Lopez* as applied to the general distribution of drugs, the particular context matters. *See*, *e.g., United States v. Visman,* 919 F.2d 1390, 1393 (9th Cir. 1990); *Proyect v. United States*, 101 F.3d 11, 13 (2d Cir. 1996). That result follows directly from the treatment of Congressional findings outlined in *Lopez*. Although there is some dispute as to exactly how much weight should be attached to these findings, *Lopez* makes

clear that they should in no circumstances be regarded as conclusive:

> Although as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce, the Government concedes that "neither the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone."

Lopez, 514 U.S. at 562 (citations omitted).

That observation is especially pertinent here because the general findings about the dangers of marijuana to "the health and general welfare of the American people" make no specific findings about the effect of marijuana on seriously ill patients. Likewise, the general findings on the contributions that local distribution and possession make to the overall markets are made without any reference to the statutory controls put in place by California's compassionate use statute or any similar program. These omissions are not trivial in light of *Lopez*, which struck down the Gun-Free School Zones Act in part because the legislation "contains no jurisdictional element which would ensure, *through case-by-case inquiry,* that the firearm possession in question affects interstate commerce." *Lopez,* 514 U.S. at 561 (emphasis added).

C. The Findings Below Do Not Meet the Reinvigorated Rational Basis Test Applied in *Lopez*.

In order to hide from these serious deficiencies in the record, the Petitioners and their *amici* stress that *Lopez* did not change the lay of the constitutional landscape because it continued to adhere to the rational basis test used in earlier cases, which supposedly obviates the need

for any such demonstration. (*See, e.g.,* Petitioners' Brief at 16-17.) But once again, this isolated reference to the rational basis test misses the sea change that *Lopez* brought about. Before *Lopez*, the phrase "rational basis" could have been read as tantamount to the necessary inference that the Commerce Clause reached any challenged legislation; after all, no statute was struck down on Commerce Clause grounds between *Wickard* and *Lopez*. But *Lopez did* invalidate a statute on Commerce Clause grounds, and in doing so, it confirmed that "rational basis" does not mean the blind, unquestioning deference advocated by Petitioners. Thus, Chief Justice Rehnquist wrote: "Since that time [of *Wickard*], the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Lopez*, 514 U.S. at 557. Lest anyone mistake the clear implication that the revived rational basis test has some teeth, Justice Rehnquist added a footnote citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc*., 452 U.S. 264 (1981), for the proposition that "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id*. at 311 (Rehnquist, J., concurring). In this new rational basis regime, congressional findings need not carry the day simply because they ape the language of *Wickard,* especially when drafted without reference to the particular context in which the application of the statute is challenged.

D. The "Necessary and Proper" Clause Does Not Extend the Scope of the Commerce Power.

Petitioner cannot suppress the revival of Commerce Clause jurisprudence by unexplained reference to the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, which states that Congress shall have the 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, or in any Department or Officer thereof." *Id*. To be sure, this clause received a broad construction in *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819), where Chief Justice Marshall collapsed the two distinct terms "necessary" and "proper" into the single weaker word, "appropriate," a construction that this Court recently applied in connection with the Spending Power in *Sabri v. United States*, 124 S. Ct. 1941, 1949-50 (2004), as a means to preserve and protect the vast sums of federal money that are distributed daily through the nation's banking system. But even this broad interpretation does not support the Petitioner's implicit assertion that this clause extends the ultimate reach of the Commerce Clause. As Madison explained, the entire purpose of the Necessary and Proper Clause was to give Congress the *means* to achieve its stated and enumerated ends. There is "[n]o axiom in law, or in reason, that whenever the end is required, the means are authorized." *The Federalist* No. 44, at 285 (James Madison) (Clinton Rossiter ed., 1961). The Necessary and Proper Clause therefore does *nothing* to expand the scope of the Commerce Clause or to compromise the principle of enumerated powers.

Just that conclusion was reached by Chief Justice Marshall in *Gibbons v. Ogden*, 22 U.S. 1 (1824), some five years after his opinion in *McCulloch*, where in offering his account of the commerce power as covering navigation and other cross-border transactions, he disdained any reliance on the Necessary and Proper Clause. In approaching this question, Marshall first rejected the claim that this Court should adopt a "strict construction" of the commerce clause when that view would render the Constitution ineffectual for achieving its great purpose of forging a nation out of a collection of states. Then in speaking of the Necessary and Proper Clause, Marshall wrote:

> In the last of the enumerated powers, that which grants, expressly, the means for carrying all others

> into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule.

22 U.S. at 187-88. *Gibbons* contains no citation to *McCulloch* because Chief Justice Marshall thought that the Necessary and Proper Clause only places a limitation on the means to achieve an enumerated power, but does not limit the power in question. By the same token, his refusal to rely on the Necessary and Proper Clause shows he thought that it also does nothing to *expand* any enumerated power. It is just inapplicable to the choice of ends. Thus, the clause would allow Congress to avail itself of whatever appropriate tools it needed to stop activities that fall within interstate commerce. But if "the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law," *Raich v. Ashcroft,* 352 F.3d 1222, 1228 (9th Cir. 2003) is an activity that falls outside the scope of the Commerce Clause, the Necessary and Proper Clause does not bring it back in.

E. Enforcing the Limited Scope of the Commerce Clause Will Advance the Functional Objective of Making the States Laboratories for Experimentation on Social Matters.

Finally, the arguments here are not solely textual in nature, but are also structural and functional: the Ninth Circuit's interpretation of *Lopez* is consistent with the broader principles of dual sovereignty so critical to the success of our basic federalist constitutional scheme. One fundamental virtue of federalism is that it allows for experimentation at the state level in the solution of difficult issues that divide a nation. That proposition was

made famous in Justice Brandeis's dissent in *New State Ice Co. v. Liebman*, 285 U.S. 262 (1932), where he wrote: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

This case deals with questions that every government must face in the regulation of the conduct of its citizens, specifically in this instance a state regime that allows for personal choice on matters of life and death. In this context, the local interest in experimentation is strong enough to prevent one monolith from imposing a uniform nationwide policy that precludes across the nation all compassionate use of marijuana for medical purposes. As of this writing, Arizona, Alaska, Colorado, Maine, Maryland, Oregon, Vermont, and the District of Columbia have adopted programs similar to California's. Other states have adopted alternative policies for dealing with medical marijuana, including decreasing the fines for medical use or making medical necessity a legitimate defense to prosecution. *See* Respondents' Brief at 2. In trying several different approaches, these states are exemplifying the role of states as laboratories where varying strategies may be tried and evaluated. Nothing in the Commerce Clause gives the United States the power to veto those experiments.

II. This Court Should Overrule *Wickard v. Filburn* and Return the Commerce Clause to the Proper Construction It Received in *Gibbons v. Ogden* and *United States v. E.C. Knight*.

A. The Local Manufacture and Local Consumption of Any Product, Including Marijuana, Are Matters Outside the Proper Scope of the Commerce Power.

The problems inherent in modern Commerce Clause jurisprudence go deeper than the line-drawing problems inherent in Wickard. The scope of federal power can be

rationalized only by taking the simple but critical step of returning Commerce Clause jurisprudence to its settled limits prior to the New Deal developments that culminated in the *Wickard* decision. *See Lopez*, 514 U.S. at 584-602 (Thomas, J., concurring) (describing doctrinal drift in Commerce Clause jurisprudence and suggesting reconsideration of substantial effects test).

Although it is not necessary for the resolution in this case, *amici* respectfully urge that *Wickard* be forthrightly overruled. The case is flatly inconsistent with every major approach to constitutional interpretation, whether it stresses the text of the Commerce Clause, the basic constitutional structure, the pre-1937 precedents on the matter, or the functional justifications for the rule. *Wickard* was adopted in an era when conventional wisdom held that major problems of social dislocation required federal solutions regardless of constitutional constraints. In its brief, the government delicately states that *Wickard* allows the government, to regulate "the supply, demand, and prices in the interstate wheat market." *See* Petitioner's Brief at 15. In plain English, it wanted to expand the scope of the commerce power to rig prices as part of a comprehensive federally-sponsored agricultural cartel in an otherwise competitive market. For the following reasons, that should never have been allowed to happen.

B. The Substantial Effects Test Does Not Allow Congress to Regulate Agriculture and Manufacturing under the Commerce Clause.

1. The Text of the Commerce Clause Does Not Support the Broad Reading of the Substantial Effects Test Found in *Wickard*.

To start with the textual issue, it is useful to restate the Commerce Clause in full: "Congress shall have the

power . . . To Regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3. Looking at it first in isolation from the rest of the Constitution, the term "commerce" has to have a meaning that is consistent across all three heads of the clause. This canon of construction was explicitly adopted by Chief Justice Marshall in explaining why the power of Congress to regulate commerce among the several states included the power to regulate navigation. He first explained that foreign commerce included the power to regulate navigation. *Gibbons,* 22 U.S. at 189-94. He then continued: "If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it." *Id.* at 194.

The same principle that explains why interstate commerce must comprehend navigation among states explains why it cannot be read to embrace ordinary local activities of farming and manufacture. As a matter of textual construction, it will not do to have one definition of "commerce" for foreign commerce, another for commerce among the states, and perhaps a third for commerce with the Indian tribes. As a textual matter, it is impossible to claim that, under the foreign commerce clause, Congress has the power "to regulate agriculture and manufacturing *within* foreign nations," even if those activities have a substantial effect on overall world prices. "With" and "within" have contradictory, not complementary meanings. The point here is *not* that the substantial effects test has no place in interpreting the commerce clause. Rather, it is that the same restricted meaning of the substantial effects test used in foreign commerce has to apply to federal efforts to regulate activities that are wholly internal within the states, even if their price effects are felt on interstate commerce. Commerce among the several states

does not mean agriculture and manufacturing within each state.

The sensible, narrower interpretation of the Clause (which is by no means narrow) necessarily includes, of course, all forms of cross-border transactions. It allows Congress to regulate all forms of transportation and communication that operate across state lines, as well as transactions for the provision of goods and services that take place in more states than one. *See, e.g., The Pipeline Cases*, 234 U.S. 548 (1914). More specifically, the natural reading of the Clause in no way compromises the ability of Congress to interdict cross-border transactions in the drug trade from outside the United States or among the several states. Yet, if under *Wickard*, "commerce" includes local production and consumption, then Congress has that power over foreign as well as interstate commerce. Logically, it follows that Congress should, under the Foreign Commerce Clause, have the power to regulate the production and consumption of grain anywhere in the world on the ground that these too influence the price and quantity of grain that can be exported from the United States. But, no one reads the Constitution as a charter for world domination.

The challenge, therefore, is to find a way to read the substantial effects test in ways that do not wholly obliterate the doctrine of enumerated powers. Once again the foreign commerce cases provide the key clue for, in this context, the test has been confined to the enforcement of antitrust laws for sales by foreign firms in transactions intended for the American market. Thus, in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), this Court was faced with an antitrust case that challenged certain contract provisions that insurers in the London market wanted to insert in its reinsurance policies sold in the United States. This Court wrote that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some

substantial effect in the United States." *Id*. at 796. The words "substantial effect" in this sentence do *not* bear the same meaning that they have in *Wickard*, for it would be bizarre to claim that the substantial effects test that this Court adopted in *Hartford Fire* would allow Congress to regulate the home consumption of wheat in the English market because of its influence on world prices.

The key to understanding *Hartford Fire* lies in recognizing that this Court only adopted the same *restricted* meaning of the "substantial effects" test that informed the pre-1937 decisions that applied the antitrust laws to domestic business activities. Thus *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 238-40 (1899) upheld the application of the Sherman Act to the formation of a price-fixing cartel among iron pipe manufacturers. It requires no stretch of judicial imagination to assume that a cartel whose sole function is to rig the prices that sellers located in different states charge for their wares throughout the United States counts as part of "commerce among the several states." The same is true of *Swift & Co. v. United States,* 196 U.S. 375 (1905), which used the antitrust laws to attack a cartel among meat dealers that fixed the price for meat sold at the stockyards while the cattle in question were still moving within the stream of interstate commerce. Neither of these cases questioned the distinction between manufacture that is internal to the state and commerce among the several states that was announced, but misapplied, in *United States v. E.C. Knight Co.*, 156 U.S. 1, 14-15 (1895). *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387 (1987).

These decisions are consistent with the judgment in *Hartford Fire* that allows the foreign commerce clause to reach transactions done with a view to committing antitrust violations in the American market, but not to routine business transactions between English insurers and their English clients. *Addyston Pipe* and *Swift* did not commit this Court to *Wickard* before 1937, just as *Hartford Fire*

does commit this Court to *Wickard* today. For the same limiting construction, see also The Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (2004), as construed in *F. Hoffman-LaRoche Ltd. v. Empagran S.A.,* 124 S. Ct. 2359, 2363 (2004). This reading of the commerce clause to the antitrust laws, either domestic or foreign, was not addressed by Chief Justice Marshall in *Gibbons*. But, this extension of the clause to antitrust actions, designed to preserve a competitive national market, was well established before *Wickard* and can be completely accepted without rejecting *Knight's* basic distinction between agriculture and commerce. After all, *Wickard* involved no contract or combination among local farmers.

2. The Pre-*Wickard* Construction of the Commerce Clause is Consistent with the Structure of the Constitution as a Whole.

The grammatical structure of the Commerce Clause is wholly consistent with the original recipe for the formation of our national union. Indeed, the recognition that differences in local policy, most critically on questions of slavery, was one major driver behind the doctrine of enumerated powers. Before the Civil War, everyone, North and South, understood that the Commerce Clause did not allow the abolition of slavery within the states by federal legislation. It is inconceivable that we suffered through a bloody Civil War if Congress could have, by simple legislation, abolished slavery in the United States because the practice, taken as a whole, has a profound influence on the quantity and price of goods that traveled across state lines. Instead, a wholly different reading of the issue is evident in Article I, Section 9, Clause 1: "The Migration and Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year [1808]," U.S. Const. art. I, § 9, cl. 1. This oblique reference to the slave trade disabled Congress only from dealing with cross-national transactions. The only

reason why the abolition of the practice of slavery within any state was not likewise curtailed was that everyone on all sides knew that Congress had no power to regulate local agriculture or manufacture in the first place. The Commerce Clause did not allow Congress to abolish slavery within the states, which is why the Thirteenth and Fourteenth Amendments were necessary. The abolition of slavery had many fortunate consequences, but one of these was not an implicit expansion of the scope of the commerce power.

Similarly, the Eighteenth Amendment was passed as a constitutional amendment, not a federal statute. Prior case law made it clear that the states had the exclusive power to regulate the production and consumption of alcohol within their borders, while the federal government had the power to regulate the movement of alcohol between the states. *See, e.g., Kidd v. Pearson*, 128 U.S. 1, 20 (1888) ("No distinction is more popular to the common mind, or more clearly expressed in the economic and political literature, than that between manufacture and commerce"); *compare with Leisy v. Hardin*, 135 U.S. 100 (1890) (invalidating an Iowa statute that forbade the importation of intoxicating beverages into the state). Had Congressional power extended to local manufacture and consumption of alcohol, which undoubtedly had a substantial effect on the interstate market for alcohol, prohibition could have been brought about by simple Congressional legislation.

The basic conclusion that the Commerce Clause did not include local agriculture and manufacturing is reinforced by setting the Commerce Clause in its larger textual context. Article I, Section 8 contains an enumeration of specific powers granted to Congress. Each provision of our Constitution is presumed to have independent meaning. Yet *Wickard's* reading of the Commerce Clause is so broad that it makes redundant the grants of power found elsewhere within the same section. Surely the

taxation of all activities has some influence on interstate commerce, so that the power to tax granted under Article I, Section 8, Clause 1, would be redundant. Worse still, any limitations on the power to tax contained in that clause – the specific purposes for which taxes could be levied, and the uniformity requirement for "all Duties, Imposts, and Excises" – could be easily circumvented by running legislation through the Commerce Clause. Likewise, there would be no need for separate authorization of the power to pass uniform laws of bankruptcy under Article I, Section 8, Clause 4; nor any reason to respect the requirement that such rules be "uniform" across the United States. Finally, the creation of all forms of intellectual property clearly affects interstate commerce. Thus, the clause governing patents and copyrights in Article I, Section 8, Clause 8, turns out to be wholly anomalous if *Wickard* offers an accurate reading of the Commerce Clause. There is no reason why copyrights and patents need be issued only for limited terms, and confined only to writings and inventions. For discussion of just this possibility, see Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 Colum. L. Rev. 272 (2004). None of these anomalies so much as arise if the substantial effects test is read in the narrow fashion of *Addyston, Swift, Hartford Fire.*

The *Wickard* view of the Clause also gives "commerce" a reading that is inconsistent with the use of that same term elsewhere in the Constitution. Thus Article IV, Section 9, Clause 6 provides that "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." The point of this clause is to prevent each state from favoring its own traders on matters pertaining to either taxation or regulation. Here the phrase "regulation of commerce" is used in opposition to the regulation of revenue, and confined as such to navigation and trade. Substitute the phrase

"manufacture or agriculture" for "commerce" (as *Wickard* does) and the clause is devoid of all sense.

C. *Gibbons v. Ogden* Is Flatly Inconsistent with the Subsequent Extension of the Commerce Clause in *Wickard v. Filburn*.

Virtually all of these arguments from textual structure can be found in various portions of Chief Justice Marshall's opinion in *Gibbons v. Ogden, supra*, as well as Justice Thomas's concurrence in *Lopez*. For an accurate and careful dissection of the *Gibbons* decision, see David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789-1888* 168-176 (1985). Currie observes: "It bears emphasizing that in *Gibbons,* as in *McCulloch v. Maryland,* the great exponent of national power expressly acknowledges significant limitations on the reach of federal legislation; it was Marshall's successors who were to expand the commerce power to cover virtually everything." *Id*. at 170 (footnotes omitted). Chief Justice Marshall wrote with great eloquence about the need to avoid the canon of strict construction if its application would paralyze the operation of a great nation. His broad construction played a vital role in the preservation of Union and was resisted at the time by many who argued for a continuation of slavery under the banner of states' rights. But Marshall's meaning must be understood in light of the particulars of the controversy before him, which was whether New York could bar a ferry that wanted to cross into its waters from Elizabethtown, New Jersey by conferring an exclusive license of steamboats in New York waters on one person, Robert Livingston, of whom Ogden was an assignee.

In arguing that the Commerce Clause should receive a broader interpretation, Marshall's target was the cramped reading of the clause in *Livingston v. Van Ingen*, 9 Johns. 507 (N.Y. 1812), which limited the commerce power to

regulating transactions literally at the border between two states, and little more. Marshall also rejected Ogden's argument that the clause covered only buying and selling, but excluded the regulation of navigation. *Gibbons,* 22 U.S. at 189. Marshall's broader definition of commerce as "commercial intercourse" in dealing with foreign nations thus has to have the same meaning in connection with commerce among the states, in the absence of any marker to indicate that some different meaning was intended. *Gibbons*, 22 U.S. at 193-94. Marshall's entire discussion of the regulation of navigation and embargos made clear that the Union could be preserved only if Congress could regulate the navigation for the entire length of an interstate journey, from the depths of one state into the heart of another.

The modern efforts to justify *Wickard* have disregarded all these important qualifications. Thus Professor Tribe writes of the decision that while

> [t]he actual *holding* of *Gibbons* was a narrow one . . . Marshall indicated that, in his view, congressional power to regulate "commercial intercourse" extended to all commercial activity having any interstate component or impact – however indirect. Acting under the Commerce Clause, Congress could legislate with respect to all "commerce which concerns more states than one."

Lawrence Tribe, *American Constitutional Law* 808 (3rd ed. 2000). This short summary is packed with major errors.

First, Marshall is at great pains to make clear (as Tribe nowhere mentions) that inspection and quarantine and health laws are not part of interstate commerce, even though they "may have a remote and considerable influence on commerce," *Gibbons,* 22 U.S. at 203. Marshall's conception and examples are consistent with the view that interstate commerce covers the interstate journey and not what precedes or follows it, which is the exact opposite of what Tribe reports. Indeed it took an explicit decision of

this Court to hold that intrastate legs of an interstate journey are subject to federal regulation. *See The Daniel Ball*, 77 U.S. 557 (1871). Similarly, Marshall did not write that Congress "could legislate *with respect to all* 'commerce that concerns more states than one.'" Rather, his full sentence says precisely the opposite: "Comprehensive as the word 'among' is, it may very properly be *restricted* to *that* commerce which concerns more States than one," which for Marshall excluded "the completely interior traffic of a State." *Gibbons*, 22 U.S. at 194 (emphasis added). Additionally, Marshall said: "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.*

Marshall's full sentences convey the meaning that some commerce (i.e., trade and intercourse) is outside the scope of the federal power because it is internal to the state. Marshall does not use the term, "commerce," as a synonym for all productive activity: there is no hint in *Gibbons* that any manufacture or agriculture fell within its scope. Indeed the word "agriculture" appears nowhere in Marshall's opinion, and the word "manufactures" appears but once, in a sentence that refers to "vessels carrying manufactures," which only reinforces the link between commerce and navigation. *Gibbons,* 22 U.S. at 216.

Nor is the *Wickard* interpretation advanced by noting that Marshall spoke of the "plenary" nature of the Commerce Power. His full proposition reads: "the sovereignty of Congress, *though limited to specified objects*, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of

the United States." *Gibbons*, 22 U.S. at 197 (emphasis added). The italicized phrase respects the doctrine of enumerated powers.

D. The Interpretation of the Commerce Clause in *Gibbons* Offers a Far More Accurate Reflection of the Economic Realities of a Complex National Economy Than Does the Mistaken Reading in *Wickard*.

The reading that Marshall gave the Commerce Clause was suitable for the economy in the nineteenth century and is equally suitable for today. Whether the inquiry focuses on 1787 or 2004, the essential task of constitutional interpretation was to fashion a workable account of the commerce clause that preserves, over time, the same distribution of federal and state power. If the activities of the nation are more integrated today than in 1787, then there will be more transportation and communication across state lines, so that the federal government will exert control over a larger fraction of the economy today than it did 225 years ago *even when the definition of commerce among the several states is left unchanged.* The defenders of the well-nigh infinite reach of the commerce power have not carried their burden of explaining which changed social and economic circumstances compel any judicial acceptance of the *Wickard* version of the substantial effects test.

The strength of this position is made clear by a consideration of the various attacks that have been leveled on the pre-*Wickard* synthesis of the Commerce Clause. Thus, many defenders of *Wickard* claim that decisions like *E.C. Knight* retreated from *Gibbons* by resorting to a "formal" test in lieu of the "empirical" test ostensibly suggested in *Gibbons.* Tribe, at 811-12. *See also* Geoffrey R. Stone, Louis Seidman, Cass Sunstein & Mark Tushnet, *Constitutional Law* 181-82 (4th ed. 2001) (contrasting "formalism"

and "realism"). But those words are devoid of content. Marshall's concern was to delineate the respective spheres of control for different layers of government within a federal system. He knew that this distinctive structure could not find any area for state autonomy if all "remote" factors that had a "considerable" impact on commerce were subject to federal regulation. *Gibbons*, 22 U.S. at 193 (noting that inspection laws precede or follow commerce and thus are a state function). The subsequent cases that followed his injunction were similarly aware of the same structural limitations, to which they rightly responded, for example, by seeking out ways to define the appropriate limits of an interstate journey. *See, e.g., The Daniel Ball*, 77 U.S. 557 (1871), (allowing for federal licensing of intrastate ships whose goods flowed in interstate commerce). Before 1937, the major erosion of the Marshallian model arose with respect to communication and transportation that took place within a single state. Over time these entire networks were brought within federal power. *See, e.g., Second Employers' Liab. Cases,* 222 U.S. 20 (1911) (upholding a revised version of the Federal Employer Liability Act that treated intrastate commerce integrated with interstate commerce as subject to coverage under the Act); *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy,* 257 U.S. 563 (1923) (upholding the Transportation Act of 1920, 41 Stat. 456). Yet insofar as these cases only applied to transportation and communication, they were and remain clearly distinguishable from the vast expansion of federal power wrought by *Wickard* and could still survive even if *Wickard* is overruled.

Nor can this traditional reading of the commerce power be read to stifle the ability of the United States to respond to new shifts in technology. As early as 1875, the Court did not hesitate unanimously to hold that the power

of Congress to regulate extended to the telephone and the railroad as it had extended to the stagecoach nearly a century earlier. *Pensacola Tel. Co. v. Western Union Tel. Co.,* 96 U.S. 1, 9 (1876). There is nothing in the clause that by language or structure limits Congressional power to the modalities of interstate commerce known in 1787. But, by the same token, the rush of new technology does not require any extravagant translation of the Constitution to cover "the full range of economic (and hence social) life in America." Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 Sup. Ct. Rev. 125, 130 (1996). There is perfect fidelity to the Constitution without this dubious mistranslation. The important point here is to note that both local and national commerce receive the advantages of new technology, so that the accurate "translation" is that which preserves their relative balance in 1787 and for Chief Justice Marshall. The local sale of computers raises the same issue as the local sale of buggy whips. Recall that the scope of the power, as defined by Marshall, was enormous in 1824 when questions of the tariff and immigration were high on the American agenda. It is just wrong to claim that a new level of "interconnectedness" between intrastate and interstate activities, Tribe, at 811, requires a rethinking of the older doctrine. No new technological or demographic element was needed to catapult these elements to the fore after 1937. All that is needed is an application of the old rules to the new setting.

Thus, it is demonstrably false that the pre-1937 Court showed a "characteristic blindness" to the complexity of "economic reality." Tribe, at 811. Quite the opposite is true. The original Marshallian conception of the Commerce Clause does a far better job of balancing the competing interests within the contemporary federal system and national economy than does *Wickard.* The key function of government is to allow for the maintenance of a system of

ordered liberty, under which national markets can flourish over an economic and social infrastructure that is supplied by the states. That theme was well understood by Justice Jackson when he invoked the *dormant* Commerce Clause to strike down state regulations that interfered with the operation of a national competitive market in agricultural produce. *See, e.g., H.P. Hood v. DuMond*, 336 U.S. 525 (1949). *See also Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951).

In evaluating *Wickard* against this backdrop, its perverse anticompetitive and social consequences cannot be overlooked. The dispute that spurred *Wickard* was nothing more than a referendum vote by farmers on whether to accept wheat quotas proclaimed by the Secretary of Agriculture under the Agricultural Adjustment Act of 1938. The *Wickard* reading of the Commerce Clause allowed for the creation of nationwide cartels through which each increment in price reduced the nutritional content available to consumers, rich and poor, at a time when malnutrition was a far greater scourge than obesity. *See* Dale Heien & Cathy Roheim Wessells, *The Nutritional Impact of the Dairy Price Support Program,* J. Consumer Affairs 22 (Winter 1988): 201 (noting that the greatest impact of price supports was on welfare families whose consumption of calcium under regulation fell below recommended daily amounts, but which rose above those levels with deregulation). *See also* Kuo S. Huang, *Effects of food prices and consumer income on nutrient availability*, 31 Applied Economics, 367, 372 (1999) (noting impact of small income changes on nutrition); John Adrian & Raymond Daniel, *Impact of Socioeconomic Factors on Consumption of Selected Food Nutrients in the United States*, 59 (no. 1) Am. J. of Agricultural Economics 31 (1976).

The traditional reading of the Commerce Clause is sound because it stops such national abuses in their tracks. At the same time, it gives Congress the power to

prevent individual states from engaging in restrictive practices that block interstate commerce and upset the operation of competitive markets. Just that threat was posed by the New York legislation that was overridden in *Gibbons*. The claim that *Gibbons* is outdated and cannot apply to our current society is simply wrong. Indeed, *Gibbons'* rendering of the commerce power uncannily parallels contemporary economic theory. We live in a world with elaborate, nationwide transportation and communications networks for which it is proper for federal regulation to take priority over state regulation when necessary to keep national networks open from end to end.

Economic theory reflects this same understanding. The entire modern field of network economics deals with situations in which cooperation and coordination are needed among multiple actors, and it was created on the theory that "*these [network] markets cannot function as competitive markets*." Oz Shy, *The Economics of Network Industries* 6 (2001) (emphasis in original). And what are these network industries? They include, for starters, the telephone, email, Internet, airlines, and railroads. And, as Shy writes, we can "distinguish them from the market for *grain*, dairy products, apples and treasury bonds," *id*. at 1 (emphasis added), in which competitive solutions can be reached by the uncoordinated activities of separate firms.

It is no accident that the Agricultural Adjustment Act, discussed in *Wickard,* put in place a nationwide cartel that could *not* have been organized if the Commerce Clause had the reading it had received in *Gibbons*. In sum, the doctrine of translation in recognition of changed conditions applies to the Commerce Clause, if at all, only in reverse. Today, the United States is blessed with an unrivalled network of transportation and communication so that suppliers for all parts of the nation and the world can sell their goods in any and all markets. So long, therefore, as

the commerce power allows the Congress to keep the arteries of commerce clear from state encrustation, it is actually easier to have competitive product and service markets throughout the United States than it was in 1797 – but only if *Gibbons* remains the law.

The choice is clear. Uphold *Wickard* and reap nationwide cartels and authoritarian politics. Overrule *Wickard* and usher in competition and diversity. The Framers of the Constitution made this choice for us when they created a federal government of enumerated powers. We should stick to it today.

CONCLUSION

This Court should affirm the decision below.

Respectfully submitted,

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