

COMMERCE

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This Article applies the method of text and principle to an important problem in constitutional interpretation: the constitutional legitimacy of the modern regulatory state and its expansive definition of federal commerce power. Some originalists argue that the modern state cannot be justified, while others accept existing precedents as a “pragmatic exception” to originalism. Nonoriginalists, in turn, point to these difficulties as a refutation of originalist premises.

Contemporary originalist readings have tended to view the commerce power through modern eyes. Originalists defending narrow readings of federal power have identified “commerce” with the trade of commodities; originalists defending broad readings of federal power have identified “commerce” with all gainful economic activity. In the eighteenth century, however, “commerce” did not have such narrowly economic connotations. Instead, “commerce” meant “intercourse” and it had a strongly social connotation. “Commerce” was interaction and exchange between persons or peoples. To have commerce with someone meant to converse with them, meet with them, or interact with them. Thus, commerce naturally included all trade and economic activity because economic activity was social activity. But the idea of commerce-as-intercourse was broader than economics narrowly conceived—it also included networks of transportation and communication through which people traveled, interacted, and corresponded with each other.

Understanding “commerce” in its original sense of “intercourse” is consistent with all of the evidence offered by rival theories of commerce as trade or economic activity; but it better explains the source of Congress’s powers over immigration and foreign affairs. It also better explains Congress’s broad powers over transportation and communications networks, whether or not these networks are used for purposes of business or trade.

Congress’s power to regulate commerce “among the several states” is closely linked to the general structural purpose behind Congress’s enumerated powers as articulated by the Framers—to give

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Congress power to legislate in all cases where states are separately incompetent or where the interests of the nation might be undermined by unilateral or conflicting state action. Properly understood, the commerce power authorizes Congress to regulate problems or activities that produce spillover effects between states or generate collective action problems that concern more than one state.

This basic structural principle explains why Congress's commerce power inevitably expanded with the rise of a modern integrated economy and society, and it explains and justifies most if not all of modern doctrine. This approach justifies the constitutionality of federal regulation of labor law, consumer protection law, environmental law, and antidiscrimination law; it even shows why a federal mandate for individuals to purchase health insurance is constitutional. Finally, this approach shows why there are still areas where federal commerce power does not extend—these are areas where Congress cannot reasonably claim that an activity produces interstate spillovers or collective action problems, and does not involve networks of transportation and communication.

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INTRODUCTION:

ORIGINAL MEANING AND THE MODERN STATE

A good test for the plausibility of any theory of constitutional interpretation is how well it handles the doctrinal transformations of the New Deal period. Roughly between 1937 and 1942, the Supreme Court significantly altered the law of federal-state relations, including the federal power to regulate commerce and to tax and spend for the general welfare.

The doctrinal structure that emerged by the mid-1940s was drastically different from the expectations of the founding generation. Even the most stridently nationalist members of that generation would not have expected a federal government as powerful as the one that developed in the middle of the twentieth century. It now had a robust regulatory and welfare state with jurisdiction over federal health and safety laws, laws protecting the environment, laws securing the rights of workers, and a panoply of federal civil rights guarantees. Without the New Deal transformation in constitutional understandings about national power, we could not have a federal government that provides all of the social services and statutory rights guarantees that Americans have come to expect. The government could neither act to protect the environment nor rescue the national economy in times of crisis.

The rise of the modern state poses a problem for originalist theories of constitutional interpretation. Some originalists, like Justice Antonin Scalia (or Judge Robert Bork) have simply accepted the New Deal as settled even though they believe it is inconsistent with original meaning.¹ Justice Scalia has called his acceptance of nonoriginalist precedents a “pragmatic” exception to originalism.² Other originalists, like Justice Clarence Thomas,³ Randy Barnett,⁴ and Richard Epstein,⁵ refuse to make the same concessions to current political realities; they regard significant parts of the New Deal and the legislation that followed it as unconstitutional. For them, the question is how best to transition to a federal government that stays within its proper constitutional limits.

By contrast, Bruce Ackerman, a vigorous defender of the New Deal, agrees that it is inconsistent with the Founders’ Constitution.⁶ He explains the legitimacy of the New Deal by arguing that starting in 1936, the American people had a quasi-revolutionary “constitutional moment,” which actually amended the Constitution outside of the Article V amendment process.

1. See *Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring in judgment); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 158-59 (1990); *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. pt. 1, 112-13, 264-65, 292-93, 465 (1987), reprinted in 14 *THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916-1987*, at 292-93, 444-45, 472-73, 645 (Roy M. Mersky & J. Myron Jacobstein eds., 1990) (testimony of Robert H. Bork, Sept. 15, 1987-Sept. 19, 1987); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861-64 (1989); Philip Lacovara, *A Talk with Judge Robert H. Bork*, *DISTRICT LAW.*, May/June 1985, at 29, 32.

2. Antonin Scalia, *Response*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 129, 140 (Amy Gutmann ed., 1997); *id.* at 139 (“The whole function of the doctrine [of stare decisis] is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability.”).

3. *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

4. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 317-18, 348-53 (2004).

5. Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

6. BRUCE ACKERMAN, *1 WE THE PEOPLE: FOUNDATIONS* (1998).

I reject each of these approaches. In a series of articles, I have argued that the opposition between originalism and living constitutionalism is a false dichotomy.⁷ Constitutional interpretation requires fidelity to the original meaning of the text and to the principles stated by the text or that underlie the text. But fidelity to original meaning does not require fidelity to the original expected applications of text and principle. This approach, which I call the method of text and principle, is faithful to the original meaning of the constitutional text and to its underlying purposes. It is also consistent with a basic law whose reach and application evolve over time, a basic law that delegates to each generation the task of implementing the Constitution's words and principles. In each generation the American people are charged with implementing text and principle in their own time, through building political institutions, passing legislation, and creating precedents, both judicial and nonjudicial. These constitutional constructions, in turn, shape how succeeding generations will understand and apply the Constitution in their time. That is the best way to understand the interpretive practices of our constitutional tradition and the work of the many political and social movements that have transformed our understandings of the Constitution's guarantees. The present Article applies this approach to the question of federal power in the modern administrative and regulatory state; it shows how to use the traditional modalities of legal argument to articulate and flesh out the constitutional text and its underlying principles.

I disagree both with originalists and with their critics because I do not believe that the New Deal is inconsistent with the Constitution's original meaning, its text, or its underlying principles. Therefore there is no need to make an exception for it, "pragmatic" or otherwise. Nor did the transition to the modern state require an Article V amendment; and therefore it also did not require an amendment outside of Article V. Rather, the New Deal, while preserving the Constitution's original meaning, featured a series of new constitutional *constructions* by the political branches that were eventually ratified by the federal judiciary.⁸ Although the scope of the change was lar-

7. See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 Nw. U. L. REV. 549, 549–60 (2009) (arguing that fidelity to original meaning requires fidelity to Framers' choice of rules, standards, and principles to organize politics, but not to how they would have applied abstract principles or vague language in concrete circumstances); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 432–36 (2007) (advocating a method of "text and principle" that distinguishes between original meaning and original expected applications); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292–307 (2007) (same). These articles develop the basic theory of constitutional interpretation applied in this Article.

8. Balkin, *Framework Originalism and the Living Constitution*, *supra* note 7, at 560–63. On the idea of constitutional construction, see KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 5 (1999); see also KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999). Whittington defines constitutional interpretation as the "process of discovering the meaning of the constitutional text," while constitutional construction is "essentially creative, though the foundations for the ultimate structure are taken as given. The text is not discarded but brought into being." *Id.* at 5. Although Whittington's original theory of construction assumed that only the political branches engaged in construction, Randy Barnett has pointed out that

ger than in most doctrinal transformations, the New Deal is actually a fairly standard example of how new constitutional constructions displace older ones.

The impetus for changed understandings came not from the courts but from the political branches, who led and responded to political mobilizations for change. The federal courts, attuned to an older way of thinking, and seeking to preserve older constructions, resisted at first. However, the public strongly supported the president and Congress, who continued to press for a different understanding of the Constitution. The courts, increasingly stocked with allies of the president, eventually followed popular opinion, legitimating the new constitutional constructions in a series of landmark decisions.⁹

But this simply raises the question: How *is* the modern regulatory and administrative state consistent with the original meaning of the constitutional text? In this Article, I focus on the most important source of authority for the modern state: the Commerce Clause of Article I, Section 8, which provides that “[t]he Congress shall have the power. . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹⁰ I will not be able to discuss all of the issues raised by the Commerce Clause in this Article; instead I will touch only on basic features that are central to the legitimacy of the regulatory state.

Whether they defend a broad or narrow conception of federal authority, contemporary originalist readings have tended to view the commerce power through modern eyes. Originalists defending narrow readings of federal power have identified “commerce” with the trade of commodities;¹¹ originalists defending broad readings of federal power have identified “commerce” with all gainful economic activity.¹² In the eighteenth century, however, “commerce” did not have such narrowly economic connotations. Instead, “commerce” meant “intercourse” and it had a strongly social connotations. “Commerce” was interaction and exchange between persons or peoples. To have commerce with someone meant to converse with them, meet with them, or interact with them. Thus, commerce naturally included all trade and economic activity because economic activity was social activity. Defenders of commercial activity in the eighteenth century emphasized its sociality: they argued that commercial intercourse generated peace, fostered social cooperation, and ultimately forged bonds of connection. But the idea of commerce-as-intercourse was broader than economics narrowly conceived—it also included networks of transportation and communication

judges also engage in constitutional construction through the development of constitutional doctrines that implement and give legal effect to the text. BARNETT, *supra* note 4, at 118–30.

9. Balkin, *Framework Originalism and the Living Constitution*, *supra* note 7, at 575–85; Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *FORDHAM L. REV.* 489, 490–92 (2006).

10. U.S. CONST. art. I, § 8, cl. 3.

11. *See infra* text accompanying notes 44, 52–53.

12. *See infra* text accompanying notes 56–63.

through which people traveled, interacted, and corresponded with each other.¹³

Defining commerce in its original sense of “intercourse” is consistent with all of the evidence offered by rival theories of commerce as trade or economic activity, but it better explains the source of Congress’s powers over immigration and foreign affairs. It also better explains Congress’s broad powers over transportation and communications networks, whether or not these networks are used for purposes of business or trade.¹⁴

Congress’s power to regulate commerce “among the several states” is closely linked to the general structural purpose of Congress’s enumerated powers as articulated by the Framers: to give Congress power to legislate in all cases where states are separately incompetent or where the interests of the nation might be undermined by unilateral or conflicting state action. This structural principle underlies all of Congress’s enumerated powers, and we should interpret the commerce power accordingly. Properly understood, the commerce power authorizes Congress to regulate problems or activities that produce spillover effects between states or generate collective action problems that concern more than one state.¹⁵

This basic structural principle explains why Congress’s commerce power inevitably expanded with the rise of a modern integrated economy and society, and it explains and justifies most if not all of modern doctrine. In particular, this approach justifies the constitutionality of federal regulation of labor law, consumer protection law, environmental law, and anti-discrimination law; it even shows why a federal mandate for individuals to purchase health insurance is constitutional. Finally, this approach shows why there are still areas where federal commerce power does not extend—these are areas where Congress cannot reasonably claim that an activity produces interstate spillovers or collective action problems, and does not involve networks of transportation and communication.¹⁶

I. A GOVERNMENT OF FEDERAL AND ENUMERATED POWERS

The text of the Commerce Clause has two noteworthy features. First, the Commerce Clause is a *clause*—it forms one part of a very long extended sentence, which lists (most of) the enumerated powers of Congress. Second, the Commerce Clause uses the words “regulate” and “commerce” only once; it then applies them to three different situations: with foreign nations, with the Indian tribes, and among the several states. The same words—“regulate commerce”—apply to each situation. So, if there is a difference in Congress’s constitutional powers with respect to foreign, Indian, and domestic commerce, it does not stem from the original meaning of the words “regulate” or “commerce.” Rather, any differences in congressional power

13. See *infra* text accompanying notes 40–52.

14. See *infra* text accompanying notes 78–97, 106–109.

15. See *infra* text accompanying notes 36–37, 114.

16. See *infra* text accompanying notes 135–147.

come from the difference between the words “with” and “among.” For this reason, Akhil Amar has remarked that we should really call the Commerce Clause the “with-and-among clause.”¹⁷

Why does the text read this way? Why does it yoke foreign, Indian, and interstate commerce together in a single clause, and why does it embed that clause in a very long list of enumerated powers?

The text looks the way it does because a basic structural principle underlies the text, and in fact, the text was written precisely to articulate that general principle. The Tenth Amendment, added in 1791, emphasizes that the powers delegated by the people are less than a complete grant to the national government. It states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹⁸ Chief Justice Stone once described the Amendment as “but a truism that all is retained which has not been surrendered.”¹⁹ But the Tenth Amendment is not a mere truism if it reflects a deeper structural principle underlying the text and its choice of enumerated powers.

A note about structural arguments: When we interpret the Constitution, we constantly make reference to structural principles, such as the separation of powers, or the principle of checks and balances, or democratic self government, or the rule of law. These structural principles are special types of constructions. They do not simply implement abstract principles already announced in the text; rather, they explain how the Constitution works in practice and how it should work.

Many of these structural principles were intended by people who drafted the Constitution and they explained their ideas in debates about the Constitution. We can use evidence of their reasoning to show that a structural principle exists and that it should guide our interpretation of the Constitution. But we should not confuse structural principles with original intentions. Structural principles do not have to have been intended by anyone in particular; indeed, they may only become apparent over time as we watch how the various elements of the constitutional system interact with each other. Like Minerva’s owl, people may recognize structural principles in the Constitution only after the mechanisms have been working for some time, or when they threaten to stop working properly and must be repaired or redeemed.

Later constitutional amendments, subsequent constructions, and changes in circumstances might make some of the Framers’ assumptions about how the Constitution would work obsolete. For example, the Framers did not imagine a system of political parties, or a dominant presidency, much less expect that the United States would someday be a world power with standing armies located around the globe. Americans had to figure out the

17. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 108 (2005).

18. U.S. CONST. amend. X.

19. *United States v. Darby*, 312 U.S. 100, 124 (1941).

structural principles that should apply (and how they should apply) given those changed circumstances. The Seventeenth Amendment sought to give the people greater control over the Senate. But it had structural consequences that were not fully understood for many years. In fact, we might say that structural arguments often arise when people disagree about whether the constitutional machine is out of joint and they have to articulate how it should work properly. If we try to ground structural principles solely in the intentions of the Framers, we will miss many structural features of our Constitution as it actually works in practice.

Many people who defend the modern administrative and regulatory state following the New Deal probably think that the Framers' structural assumptions about limited and enumerated powers fall into the category of ancient structural principles that have been thoroughly undermined. Perhaps they suspect this because the people who want to shrink or overthrow the modern state are always doing so in the name of the Framers. The latter tell us that if we were faithful to the structural principles, we couldn't have anything like the modern state.

But both sides are wrong. The defenders of the modern activist state have given up too quickly on the text of the Constitution and its underlying principles, while their opponents have confused ancient and outmoded constructions for the actual requirements of the constitutional framework. The key structural principles underlying the list of enumerated powers in Article I, Section 8 are still quite relevant today. Not only are they consistent with the rise of the modern administrative and regulatory state, they also explain and justify why that state came into being.

The basic principles underlying the list of enumerated powers were well stated by one of the key Founders, James Wilson, in the Pennsylvania ratifying convention in November of 1787:

Whatever object of government is confined, in its operation and effects, within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States.²⁰

In saying this, Wilson was doing no more than summarizing the structural assumptions of the drafters in Philadelphia. The origins of Congress's powers go back to the sixth of the resolutions prepared by the Virginia delegation, led by James Madison and Edmund Randolph, and introduced at the constitutional convention on May 29, 1787. These resolutions were collectively called the Virginia plan. Resolution VI, introduced by Randolph, stated that the new "National Legislature" would be empowered "to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise

20. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA 424 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT].

of individual Legislation.²¹ The convention initially approved this language on May 31st by a vote of nine in favor, none against, and one delegation divided.²²

Representing the interests of smaller states, William Paterson offered his New Jersey plan on June 15, 1787, with a far weaker national government and a smaller list of enumerated powers, including the power to “pass Acts for the regulation of trade & commerce as well with foreign nations as with each other.”²³ Comparing the two plans, Wilson explained that while under the Virginia plan “the Natl. Legislature is to make laws in all cases at which the separate States are incompetent,” the New Jersey plan offered Congress only a minor increase of the powers it enjoyed under the existing confederation.²⁴ The convention reapproved the Virginia plan and rejected the New Jersey plan on June 19th, by a vote of seven states to three, with one delegation divided.²⁵

On July 16th, after the so-called “Great Compromise” that gave the small states equal representation in the Senate, the convention took up Resolution VI once again. On the 17th, Roger Sherman of Connecticut, who had been the only delegate to oppose Resolution VI in the original vote, moved to amend it to ensure that the federal government would not interfere with state governments:

To make laws binding on the People of the United States in all cases which may concern the common interests of the Union: but not to interfere with the government of the individual States in any matters of internal police which respect the government of such States only, and wherein the general welfare of the United States is not concerned.²⁶

The convention defeated this proposal by a vote of eight to two.²⁷

Gunning Bedford of Delaware then moved to further clarify the principles of Resolution VI: “That the national Legislature ought to possess the legislative rights vested in Congress by the confederation;”²⁸ “and moreover to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual

21. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 21 (Max Farrand ed., rev. ed. 1966).

22. *Id.* at 47; *see id.* at 53-54.

23. *Id.* at 243.

24. *Id.* at 252, 277.

25. *Id.* at 322.

26. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 21, at 21 (internal quotation marks omitted); *see id.* at 25. James Wilson seconded the motion, understanding it as a friendly amendment, but Gouverneur Morris objected, arguing that “[t]he internal police, as it would be called & understood by the States ought to be infringed in many cases, as in the case of paper money & other tricks by which Citizens of other States may be affected.” *Id.* at 26.

27. *Id.* at 26.

28. *Id.* at 14; *see id.* at 16-17.

legislation.”²⁹ The Bedford amendment passed six to four, and the amended Resolution VI was adopted by a vote of eight to two.³⁰

The amended version of Resolution VI, along with the other resolutions, was then handed to the Committee of Detail, which, on August 6, 1787, produced the basic list of enumerated powers that now appears in Article I, Section 8. It is worth noting that nobody at the Philadelphia Convention seems to have objected to the transformation from general principle to enumerated list. As Jack Rakove explains, “[T]he fact that it went unchallenged suggests that the committee was only complying with the expectations of the convention.”³¹ It was “an effort to identify particular areas of governance where there were ‘general Interests of the Union,’ where the states were ‘separately incompetent,’ or where state legislation could disrupt the national ‘Harmony.’”³² Indeed, when Pierce Butler of South Carolina complained that the test of state “incompetence” was far too general, Nathaniel Gorham of Massachusetts responded that “[t]he vagueness of the terms constitutes the propriety of them. We are now establishing general principles, to be extended hereafter into details which will be precise & explicit.”³³

The structural principle of Resolution VI—with its focus on state competencies and the general interests of the Union—was designed to be adaptable to changing circumstances. Putting to one side the concrete expectations of the Framers, the principle seems to suggest that the federal government might grow very large and very powerful if social, economic, and technological changes meant that more and more problems required federal solutions. Indeed, if spillover effects multiplied and the United States developed a fully integrated national society and economy, something like the modern regulatory state might be entirely appropriate.

For this reason, Resolution VI has always made the proponents of a weak federal government a bit nervous. Thus, in his libertarian reinterpretation of the Constitution, Randy Barnett argues that the convention actually *rejected* Bedford’s language.³⁴ Barnett provides no evidence for this extraor-

29. *Id.* at 21; *see id.* at 26, 131-32.

30. *Id.* at 21, 27.

31. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 178 (1996).

32. *Id.*; accord Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1340 (1934).

33. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 21, at 17 (Madison spells Gorham’s name “Ghorum”). John Rutledge of South Carolina then moved “that the clause should be committed to the end that a specification of the powers comprised in the general terms, might be reported.” *Id.* The motion failed by an equally divided vote of the state delegations. But as it turned out, this was only a temporary delay, for by the middle of August the Committee of Detail, on which Rutledge served, had done precisely what he had asked for in July. Also see the May 31st discussion of the delegates, in which they argued for framing general principles that would later be articulated or enumerated in precise terms. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 21, at 53–54, 59–60.

34. BARNETT, *supra* note 4, at 155 (arguing that the Committee of Detail rejected the language); *id.* at 167 (arguing that “the Convention” rejected the language).

dinary assertion, and I have been unable to find any. The records indicate that the convention specifically *adopted* Bedford's language. The Committee of Detail was not charged with the authority to reject resolutions voted on by the convention; rather its purpose was to articulate the general principles stated by the convention in concrete language and specific provisions.

Perhaps what Barnett really means is that the actual language of Resolution VI does not appear in the final Constitution. That is certainly true. But there is no evidence that the convention rejected the structural principle stated in Resolution VI at any point during its proceedings. Indeed, this principle was the *animating purpose* of the list of enumerated powers that appeared in the final draft, and it was the key explanation that Framers James Wilson offered to the public when he defended the proposed Constitution at the Pennsylvania Ratifying Convention. Wilson was a member of the Committee of Detail and he would certainly have known if the Committee had abandoned the principle of Resolution VI. As Wilson explained, however, the purpose of enumeration was not to *displace* the principle but to *enact* it:

[T]hough this principle be sound and satisfactory, its application to particular cases would be accompanied with much difficulty, because, in its application, room must be allowed for great discretionary latitude of construction of the principle. In order to lessen or remove the difficulty arising from discretionary construction on this subject, an enumeration of particular instances, in which the application of the principle ought to take place, has been attempted with much industry and care.³⁵

Advocates of a weak federal government might point to the Tenth Amendment as having rejected Bedford's (and Wilson's) principle. That is hardly the case. The Tenth Amendment is simply the mirror image of Resolution VI. It tells us that what was not delegated to the federal government was reserved to the states and to the people. And what principle explains what *was* delegated? Those situations in which "the States are separately incompetent; or in which the harmony of the United States may be interrupted by the exercise of individual legislation."³⁶

In sum, the creation of a list of enumerated powers was not simply an attempt to limit the new federal government for its own sake. It was designed to realize a basic structural idea, and as we look through the list of enumerated powers, we see how each of them furthered the principle announced in Resolution VI. They allowed the new federal government to engage in a single foreign policy, a single trade policy, and a single military and defensive strategy. All this was crucial to the infant nation's survival in a dangerous geopolitical situation where it would have been easy for a foreign power to divide and conquer the states, where individual states might frequently have acted competitively or at cross-purposes, and where the actions of individual states might drag the entire Union into a conflict with foreign

35. 2 ELLIOT, *supra* note 20, at 424–25.

36. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 21, at 21; *see id.* at 131–32.

powers. The government also had the power to raise taxes, collect duties, and spend for the general welfare, to control a single currency, to regulate naturalization and bankruptcy by uniform laws, and last but not least, to regulate commerce with the Indian tribes, with foreign powers, and among the several states.

One might argue that we should read each of the enumerated powers strictly and narrowly so that they do not overlap; otherwise, the enumeration of each would be superfluous. But this misunderstands the purpose of enumeration. Because all of Congress's powers were designed to realize the structural principle of Resolution VI, they inevitably must overlap to ensure that the new government would have the power to legislate in all areas where the states were severally incompetent. As circumstances changed, the various enumerated powers might intersect in new ways. It should hardly be surprising, for example, that the powers to raise and support armies, make war, make rules for the government and regulation of the land and naval forces, and define and punish offenses against the law of nations inevitably would overlap in practice, both among themselves and with the power to regulate foreign and Indian commerce. Likewise, there should be no difficulty if the power to regulate commerce comprehends many of the same subjects as the power to tax and spend for the general welfare, to establish post roads, to coin money, or to promote the progress of the sciences and the useful arts. What limits these powers is not that they are hermetically sealed from each other, but that they extend only to subjects of individual state incompetence.

The list of enumerated powers was designed so that the new federal government would have power to pass laws on subjects and concerning problems that are *federal* by nature; that is, problems that require a federal solution, as opposed to *national* problems that occur in many places, but that do not require coordinated action and a single approach. This is the key insight of Resolution VI, and it is still true to this day.³⁷

Examples of federal problems include questions of foreign and military policy where the nation needs to speak with a single voice, to marshal resources for the common defense, and to prevent foreign powers from

37. Robert Cooter and Neil Siegel reach a similar conclusion using economic analysis. Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. (forthcoming 2011). Cooter and Siegel explain that public goods benefiting the entire nation are best produced nationally, and that many activities originating within states produce positive and negative interstate externalities. Costs and benefits that spill over state lines create incentives for states to free ride on the efforts of other states. This leads to less than optimal investments in interstate or national public goods and more negative interstate externalities. In theory, states could band together to achieve interstate benefits and avoid interstate harms, but the more states that are affected, the higher the transaction costs and the greater the possibility of hold-outs. As a federation of states grows in size, the transaction costs quickly become prohibitive. A federal government allows states to solve these problems by majority rule in a national legislature rather than by requiring unanimous consent through an interstate compact. Plenary federal power over all subjects, however, allows a majority of states to exploit a minority in cases where there is no genuine interstate good or collective action problem. Therefore, Cooter and Siegel argue, national powers should extend only to (1) problems where the federal government is likely to be best at internalizing interstate externalities and (2) situations involving the provision of national or interstate public goods. *Id.*

pushing the states around or engaging in divide-and-conquer strategies, whether relating to trade, immigration military threats, or diplomatic alliances. Domestically, federal problems are those that single states cannot unilaterally solve by themselves, because activity in one state has spillover effects in other states, or because a problem that affects multiple states creates collective action problems, so that some states may be unable or unwilling to act effectively in ways that promote the general welfare unless other states do so as well. Finally, federal problems may arise when states are likely to produce conflicting regulations over a set of activities, engage in parochial legislation favoring their own interests at the expense of the general welfare, or engage in escalating forms of provocation or retaliation against each other. Each of these might hamper economic union in the short run and threaten political and social union in the long run.³⁸

It is a commonplace to say that the national government is a government of limited and enumerated powers. But it would be more correct to say that it is a government of *federal* and enumerated powers, for the purpose of enumeration is not merely to limit the scope of the powers, but to ensure that they serve a federal purpose. When we implement congressional powers through constructions, we must always keep this general principle in mind.

The text of the Commerce Clause reflects this basic structural principle. Article I, Section 8, Clause 3 gives Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”³⁹ It focuses on relationships between the United States and foreign powers and Indian tribes, which involve foreign policy concerns, and activities among the various states, which raise problems of spillover effects and collective action. Both of these sets of concerns might require the United States to speak with a single voice, and that is why they are properly part of the list of enumerated powers.

Earlier I noted that the same words, “regulate commerce,” apply to foreign commerce, Indian commerce, and interstate commerce. Whatever “regulate” and “commerce” refer to, there is a strong argument that they have the same semantic meaning with the respect to all three examples.⁴⁰ Chief Justice John Marshall made precisely this point in *Gibbons v. Ogden*, when he noted that the word “commerce” “must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain

38. See also *id.* (offering a list of appropriate federal concerns including securing national defense, facilitating and protecting national markets, building and maintaining infrastructures that create beneficial network effects, providing media of economic exchange, setting standards, developing nationally enforceable intellectual property rights, preventing regulatory races to the bottom, and protecting natural resources of benefit to the nation).

39. U.S. CONST. art I, § 8, cl. 3.

40. Saikrishna Prakash calls this “the presumption of intrasentence uniformity.” Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149 (2003). For a response, see Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 ARK. L. REV. 1175 (2003). Vermeule’s arguments, however, go primarily to how best to construct the Constitution through doctrine, and not to original meaning.

intelligible cause which alters it.”⁴¹ Marshall argued that “commerce” must include navigation, because it would make no sense to think that Congress could not regulate navigation to and from foreign nations.⁴²

There are three important qualifications to this argument. First, the same set of words might have different effects in combination with different words in the same sentence, so that to “regulate commerce *with*” might not mean the same thing as to “regulate commerce *among*.” The difference between Congress’s powers over foreign and domestic commerce reflects this difference in language.

Second, we might have good reasons to choose different *constructions* to implement congressional power to regulate foreign commerce, Indian commerce, and interstate commerce. In fact, that is exactly what happened in American history. These reasons connect to the different structural purposes for regulating foreign, Indian, and domestic commerce, as well as the linguistic differences between “with” and “among.”⁴³ My point here, however, is about original semantic meaning—the irreducible requirement of the basic framework across different generations—and not about the constructions we choose to implement original meaning. The distinction is important because we could pick different constructions to implement the constitutional text later on as times and conditions change, and this, too, is what has happened throughout American history.

Third, the Constitution may contain additional textual restrictions on Congress’s powers that may apply differently to these different types of commerce. Article I, Section 8, Clause 1 requires that “all duties, imposts and excises shall be uniform throughout the United States.” Article I, Section 9, Clause 5 states that “[n]o tax or duty shall be laid on articles exported from any state,” and Clause 6 states that “[n]o preference shall be given by any regulation of commerce or revenue to the ports of one state over those

41. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824).

42. *Id.* at 197.

43. In an 1829 letter to Joseph Carrington Cabell, James Madison explained that although the literal meaning of “commerce” is the same for foreign and interstate commerce, the scope of the two powers should be construed differently because they serve different structural purposes:

I always foresaw that difficulties might be started in relation to that power which could not be fully explained without recurring to views of it, which, however just, might give birth to specious though unsound objections. Being in the same terms with the power over foreign commerce, the same extent, if taken literally, would belong to it. Yet it is very certain that it grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged. And it will be safer to leave the power with this key to it, than to extend to it all the qualities and incidental means belonging to the power over foreign commerce, as is unavoidable

Letter from James Madison to Joseph C. Cabell (Feb. 13, 1829), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 14–15 (1865) (citation omitted). Madison’s basic assumption—that the powers over foreign and domestic commerce are different—is sound even today, although one might dispute his views about the best contemporary construction of Congress’s powers over domestic commerce.

of another: nor shall vessels bound to, or from one state, be obliged to enter, clear, or pay duties in another.”

These additional texts affect Congress’s powers over domestic, Indian, and foreign commerce in different ways. For example, although Congress may treat trade from different foreign countries differently, it may not discriminate between ports in different states of the Union or have different duties, imposts, or excises for different parts of the country. These provisions limit the powers that Congress might otherwise have had under the Commerce Clause. They also shape the most reasonable constitutional constructions for the Clause. But they do not demonstrate that the words “regulate” and “commerce” have different semantic meanings when applied to terms within the same sentence.

II. THE ORIGINAL MEANING OF “COMMERCE”

What is the original meaning of “commerce”? Samuel Johnson’s dictionary, roughly contemporaneous with the Founding, defines “commerce” as “Intercourse; exchange of one thing for another, interchange of anything; trade; traffick.”⁴⁴ Johnson’s secondary definition of commerce is “common or familiar intercourse.”⁴⁵ Today we associate commerce with economics, trade, and business, but at the time of the founding, “commerce” included far more than purely commercial activity. It meant “intercourse”—that is, interactions, exchanges, interrelated activities, and movements back and

44. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (9th ed. 1790) (unpaginated) (defining commerce as a noun); *id.* (4th ed. 1773) (unpaginated) (same); *id.* (1st ed. 1755) (unpaginated) (same). Johnson’s first edition offered the following examples of proper usage:

Places of publick resort being thus provided, our repair thither is especially for mutual conference, and, as it were, *commerce* to be had between God and us. *Hooker*, [*Ecclesiastical Polity*,] b[ook].v.s.,[Chapter] 17 [18].

How could communities,
Degrees in schools, and brotherhoods in cities,
Peaceful *commerce* from dividable shores,
But by degree stand in authentick place? *Sh[akespeare]*, *Troil[lius]*. and *Cress[ida]*.

Instructed ships shall sail to quick *commerce*,
By which remotest regions are ally’d;
Which makes one city of the universe,
Where some may gain, and all may be supply’d. *Dryden*.

These people had not any *commerce* with the other known parts of the world. *Tillotson*

In any country, that hath *commerce* with the rest of the world, it is almost impossible now to be without the use of silver coin. *Locke*.

All of these are examples of exchange, some social, some economic. The primary example is not economic: Hooker’s “places of publick resort” are not inns but churches for public preaching, and presumably our commerce with God is communication and prayer, not the trade of commodities. In the fourth edition of 1775, Johnson’s example of the second definition of “commerce,” “common or familiar intercourse,” also concerns social interactions: “Good-nature, which consists of overlooking of faults is to be exercised only in doing ourselves justice in the ordinary *commerce* and occurrences of life. *Addison*.” *Id.* (4th ed. 1775).

45. *Id.*

forth, including, for example, travel, social connection, or conversation.⁴⁶ Economic transactions were only a special case of social intercourse. To have commerce with someone meant to converse with them, mingle with them, associate with them, or trade with them.⁴⁷ “Traffick” was a coarser word for “trade” (e.g., to traffic in drugs);⁴⁸ later it came to mean travel, whether or not for purposes of trade, and still later, impediments to travel (i.e., traffic jams).

The contemporary meanings of “intercourse” and “commerce” are far narrower than their eighteenth-century meanings. We no longer think of conversation and sociality when we think of intercourse—we think only of sexual intercourse, which is not the concept referred to by the Commerce Clause. And when we think of commerce, we no longer think of social interaction, only business and the exchange of commodities. But it is the broader, eighteenth century meaning and not the narrower, contemporary meaning that should determine Congress’s powers today.

Some contemporary originalists like Justice Clarence Thomas have argued that the original meaning of “commerce” is very narrow, essentially limited to the trade or exchange of goods and commodities.⁴⁹ Thus, it would not include manufacturing, mining, or agriculture, much less any non-economic activities. This reading is anachronistic: by focusing on the disposition of commodities it reflects a *modern* conception of commerce viewed as a subset of economic activity; it completely misses the eighteenth-century dimensions of commerce as a form of social intercourse.

The concept of “commerce” in the eighteenth century had strong social connotations which are almost the opposite of our modern focus on commodities. It was the *exchange* of commodities *by people* that made business activity “commerce,” not the commodities themselves. Commercial relations were “commerce” because they were *relations*.⁵⁰ Commerce brought

46. *Gibbons*, 22 U.S. (9 Wheat.) at 189–90; see AMAR, *supra* note 17, at 107–08 (the Commerce Clause gives Congress powers to regulate “all forms of intercourse in the affairs of life, whether or not narrowly economic . . . if a given problem genuinely spilled across state or national lines”).

47. See JOHNSON, *supra* note 44, (9th ed. 1790) (definition of “commerce” as verb).

48. See *id.* (defining “traffick”).

49. *United States v. Lopez*, 514 U.S. 549, 585–86 (Thomas, J., concurring); see BARNETT, *supra* note 4, at 280–88; Epstein, *supra* note 5.

50. The Latin cognate from which “commerce” is derived, *commercium*, meant not simply the exchange of goods but a variety of forms of social exchange, interaction, and participation. In Roman law, the rights of *commercium* included the basic civil rights of citizens to make transactions, inherit and convey property, and have access to courts to defend their rights. In his *Critique of Pure Reason*, Immanuel Kant equates *commercium* with the German word *Gemeinschaft* (community) and explains that it refers to a “dynamical community.” IMMANUEL KANT, *CRITIQUE OF PURE REASON* A213/B260–A214/B261, at 235–36 (Norman Kemp Smith trans., 1929) (1784); see also HOWARD CAYGILL, *A KANT DICTIONARY* 117 (1995) (explaining that when Kant uses *commercium* he means “free exchange and respect between individuals rather than in terms of shared characteristics or space”). *Commercium* came to refer to traditional academic feasts, where *commercium* songs were sung around the table. Finally, *commercium* meant correspondence; thus the Royal Society’s famous account of the dispute about the invention of calculus between Sir Issac Newton and Leibniz is called the *Commercium Epistolicum*; i.e., a correspondence of letters. JASON SOCRATES BARDI,

people together, and caused people of different experiences and nationalities to mingle (think of port cities as an example); therefore many eighteenth-century thinkers believed that commercial relations fostered tolerance and understanding, smoothed over social, religious, and cultural differences, brought refinement of manners, and, in the long run, political and social peace. A century earlier Montesquieu had coined the term *doux commerce*, meaning “sweet commerce” or “gentle commerce,” to describe this phenomenon.⁵¹

The Framers of the 1787 Constitution, influenced by these ideas, believed that commercial relations between different parts of the country would foster national connection and social cohesion, and that commercial relations with other nations would keep America peaceful and safe while avoiding dangerous political and military alliances.⁵² We see these ideas in the 1776 Model Treaty and the nation’s subsequent Treaties of Amity and Commerce with Prussia and France.⁵³

A striking example of the idea of commerce as intercourse that produces social cohesion appears in George Washington’s Farewell Address. Although the Address is best known for its warning against entangling alliances with foreign powers, it also offers a vision of commercial intercourse and networks of transportation and communication as social cement. Washington argued that the North and South, in an “unrestrained intercourse” benefiting manufacturing and agriculture, will grow closer together.⁵⁴ “The East, in a like intercourse with the West” will benefit from “progressive improvement of interior communications by land and water”

THE CALCULUS WARS: NEWTON, LEIBNIZ, AND THE GREATEST MATHEMATICAL CLASH OF ALL TIME 198–99 (2006).

51. See ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* 60–63 (1977).

52. FELIX GILBERT, *TO THE FAREWELL ADDRESS: IDEAS OF EARLY AMERICAN FOREIGN POLICY* 62–72 (1961).

53. *Id.* at 48–62. Treaty of Amity and Commerce Between the United States of America and His Most Christian Majesty, U.S.–Fr., Feb. 6, 1788, 8 Stat. 12 (annulled July 7, 1798) (treaty with France); Treaty of Amity and Commerce Between his Majesty the King of Prussia and the United States of America, U.S.–Prussia, July 9–Sept. 10, 1785, 8 Stat. 84; see also Treaty of Peace and Friendship Between the United States of America, and His Imperial Majesty the Emperor of Morocco, U.S.–Morocco, July 15, 1786–Jan. 25, 1787, 8 Stat. 100; Treaty of Amity and Commerce, Concluded between his Majesty the King of Sweden and the United States of North America, U.S.–Swed., Apr. 3, 1783, 8 Stat. 60; Treaty of Amity and Commerce between their High Mightiness the States General of the United Netherlands, and the United States of America, to wit: New Hampshire, Massachusetts, Rhode–Island and Providence Plantations, Connecticut, New–York, New–Jersey, Pennsylvania, Delaware, Maryland, Virginia, North–Carolina, South–Carolina, and Georgia, U.S.–Neth., Oct. 8, 1782, 8 Stat. 32. The famous Jay Treaty of 1794 was styled a “Treaty of Amity, Commerce and Navigation.” Treaty of Amity, Commerce and Navigation Between His Britannic Majesty and the United States of America, by their President, with the Advice and Consent of their Senate, U.S.–U.K., Nov. 19, 1794, 8 Stat. 116. The Jay Treaty became controversial in part because of concerns that it would tilt the United States politically toward Britain.

54. George Washington, Farewell Address (Sept. 19, 1796), available at http://avalon.law.yale.edu/18th_century/washing.asp.

which will produce not only both exchanges of goods and materials but “an indissoluble community of interest as one nation.”⁵⁵

If we want to capture the original meaning of “commerce,” we must stop thinking primarily in terms of commodities. We must focus on the ideas of interaction, association, sociability, and the movement of persons that business (in its older sense of being busy or engaged in affairs) exemplifies.

I will call the contrasting view held by Justice Thomas and others—that the original meaning of “commerce” is the trade or exchange of commodities—the “trade theory.” The trade theory immediately runs into difficulties, because “trade” or “exchange of goods” does not literally include methods of transportation, like navigation. However, the Framers clearly sought to give the new government powers over navigation and often used the terms “commerce” and “navigation” interchangeably.⁵⁶ So in order to ensure that Congress can regulate navigation the trade theory must treat “commerce” non-literally as a metonym (a word that denotes one thing but also refers to a related thing).⁵⁷ Alternatively, we might argue that the Necessary and Proper Clause gives Congress power over transportation (although the question would remain whether Congress could reach transportation that is not used for purposes of trade).⁵⁸

Now if the word “commerce” was used non-literally in the Constitution’s text, or if the Necessary and Proper Clause was required to give Congress the power to regulate navigation, one would think that opponents of the Constitution (or the Framers at the Philadelphia convention itself) would have pointed this out. This didn’t happen; as noted above, people routinely spoke of navigation as falling within commerce. This in itself should suggest that there is something wrong with the trade theory. We do not have to read the word non-literally (or bring in the Necessary and Proper Clause) if we adopt the actual eighteenth-century definition of commerce as “intercourse,” which necessarily includes movements back and forth and therefore easily comprehends navigation and, indeed, every form of transportation and communication.

55. *Id.*

56. For a the discussion of navigation acts in the Philadelphia Convention on August 29, 1787, see 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 21, at 449–53; *id.* at 631 (remarks of George Mason).

57. Justice Thomas does not appear to recognize that under the eighteenth-century dictionary definitions he offers to prove his case, including navigation would be a non-literal usage. Instead, he simply adds “as well as transporting for these purposes” to his own definition of commerce. See *United States v. Lopez*, 514 U.S. 549, 585–86 (1995) (Thomas, J., concurring). Perhaps he assumes that “traffick” includes travel, as it does today, although in the eighteenth century it was a synonym for trade. Randy Barnett, to his credit, immediately sees the difficulty. BARNETT, *supra* note 4, at 291–93. He notes that the Framers might have used words “which did not accurately express their intentions.” *Id.* at 292. He proposes that navigation might be included in commerce “because of its intimate connection to the activity of trading,” *id.*, and because the Framers seem to have spoken of navigation and commerce together frequently, *id.* at 292–93. That is, he proposes a metonymic extension of the word.

58. BARNETT, *supra* note 4, at 293.

By 1824, in *Gibbons v. Ogden*, counsel for Ogden tried to argue that “commerce” meant only trade or exchange. Chief Justice Marshall bluntly rejected the argument:

This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic [i.e., trade], but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.⁵⁹

Marshall clearly did not suggest that treating navigation as commerce was a non-literal usage or that the Necessary and Proper Clause was required: “All America understands, and has uniformly understood, the word ‘commerce,’ to comprehend navigation [T]he attempt to restrict it comes too late.”⁶⁰

Another group of modern scholars, including Douglass Adair, Walton Hamilton, and William Crosskey, and more recently Grant Nelson and Robert Pushaw, have also noted that the trade theory is artificially narrow, and have offered an economic theory of commerce.⁶¹ The economic theory accepts that the core meaning of “commerce” is trade, but expands it non-literally in two different ways. First, it treats “commerce” as a synecdoche—a figure of speech in which a part stands for a larger whole. The economic theory argues that “commerce” stands for “economic behavior,” or “the economy.” Thus, Congress’s power to regulate “commerce” extends to all forms of business and economic activity, including manufacturing, agriculture, all gainful employment, and all business contracts, including employment contracts.⁶² Second, like the trade theory, the economic theory treats “commerce” as a metonym because it argues that commerce includes associated transportation networks used for engaging in trade and economic activity.⁶³

59. 22 U.S. (9 Wheat.) 1, 189–90 (1824).

60. *Id.* at 190; see also 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1057–62 (5th ed. 1994) (expanding on Marshall’s arguments and maintaining that commerce “comprehend[s] navigation and intercourse”).

61. See 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953); WALTER H. HAMILTON & DOUGLASS ADAIR, THE POWER TO GOVERN (1937); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1 (1999).

62. See CROSSKEY, *supra* note 61, at 288–92; Nelson & Pushaw, *supra* note 61, 9–10, 14–21, 35–42; Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 NW. U. L. REV. 695, 700 (2002).

63. See Nelson & Pushaw, *supra* note 61, at 37. Robert Natelson takes a position between the trade theory and the economic theory, arguing that “commerce” is a legal term of art that refers to “the sort of [economic] activities engaged in by merchants” but does not include all gainful economic activity. Robert G. Natelson, *The Legal Meaning Of “Commerce” in the Commerce Clause*, 80 ST. JOHN’S L. REV. 789, 845 (2006). Natelson argues that in legal documents “commerce” referred to “buying and selling products made by others (and sometimes land), associated finance and financial instruments, navigation and other carriage, and intercourse across jurisdictional lines.” *Id.* The evidence Natelson provides is actually consistent with Marshall’s theory of commerce as “commercial intercourse,” but he does not recognize that all of his examples are united by the general concept of “intercourse.”

In 2005 in *Gonzales v. Raich*⁶⁴ the Supreme Court came very close to adopting the economic theory. Without explicitly defining “commerce,” the *Raich* Court argued that Congress had the power to regulate both interstate and intrastate economic activities that affected interstate commerce, and then defined “economics” as “the production, distribution, and consumption of commodities.”⁶⁵ If we combine the economic theory with the idea that Congress can regulate interstate transportation networks (including intrastate networks that connect to those networks) and anything that moves (or has moved) in these networks, the federal government enjoys very wide powers.⁶⁶

The economic theory is a definite improvement on the trade theory because it can account for a greater share of the data. There is plenty of evidence that at the time of the Founding people used the word “commerce” to include a wide range of economic activities, sometimes called the “branches of commerce.”⁶⁷ In fact, once we read these various sources, the trade theory seems far less plausible. But in another sense the economic theory is also ahistorical. Viewing history through modern eyes, it focuses solely on economics rather than on the social relations and social interaction through which the economy operates. It also maintains that the Constitution uses “commerce” non-literally in not one, but two different ways, and, once again, nobody in 1787 seems to have noticed this fact or remarked on it. To be sure, the Constitution has plenty of non-literal language. The word “speech” in the First Amendment is a non-literal usage; so too are the words “writings” and “discoveries” in the Progress Clause.⁶⁸ But if we start with

64. 545 U.S. 1 (2005).

65. *Id.* at 25–26 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

66. Not all advocates of the economic theory, however, would accept these extensions. *See* Pushaw & Nelson, *supra* note 62, at 698, 698–99 & nn.28–29 (arguing for purely economic meaning); *cf.* Natelson, *supra* note 63, at 845 (same).

67. *See, e.g.,* CROSSKEY, *supra* note 61, at 84–89, 96–113; HAMILTON & ADAIR, *supra* note 61, at 52–63, 79–81, 89–100; Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court’s Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213, 2229–30 (1996) (quoting ADAM SMITH, *THE WEALTH OF NATIONS* 690–716 (3d ed. 1784)); Nelson & Pushaw, *supra* note 61, at 16–21.

68. The word “speech” in the First Amendment is both a synecdoche—where a part stands for a larger whole—and a metonym—where a word stands for something related to it. Thus, “speech” refers to a larger category of communication including writing, singing, painting, drama, moviemaking, and broadcasting. It also protects media of communication and various activities associated with communication. Similarly, “writings,” for purposes of the Progress Clause, are not limited to written marks on paper, but include many other forms of fixed communication, like maps, drawings, sculptures, even software programs. And “discoveries” in the same clause refers to new inventions and new technology, not to scientific discoveries about the laws of nature, which are not patentable.

As one might expect, non-literal usage presents many problems for constitutional interpretation. First, we must have evidence that a non-literal usage was understood by the general public. For example, although in theory, “thirty five,” the minimum age for Presidents, could be a non-literal usage, the historical context does not support this. Second, assuming the usage is non-literal, we must figure out what set of concepts the text refers to. This makes the question of original meaning very difficult to disentangle from original expected application; nevertheless our goal is not to recover original expected application, but to figure out the animating principles or policies that naturally led people to use words non-literally. Third, some non-literal usages at the time of enact-

the primary eighteenth-century definition of “commerce” as “intercourse,” we do not need to treat the word as a metonym or synecdoche. We can account for all of the evidence of linguistic usage offered by proponents of the trade and economic theories, and, as we shall see shortly, we can account for examples that the other theories cannot. When people like George Washington, John Marshall, and Joseph Story use the words “commerce” and “intercourse” interchangeably, perhaps we should listen to them.

Advocates of the “trade” theory argue that in the Philadelphia convention and the ratification debates delegates spoke only about questions of trade and potential barriers to trade.⁶⁹ But constitutional debates tend to focus on the key concerns that divide people at the time and not on the many possible applications of constitutional language. Even if the Framers used the term in its narrowest possible sense (which they did not), the public meaning of the words to a general audience was much wider, and surely it is the general publicly understood meaning of the words used that should count.⁷⁰

Modern defenders of the trade theory, like Justice Thomas, are quite critical of much of contemporary Commerce Clause doctrine. Yet, ironically, contemporary Commerce Clause doctrine is actually based on the trade theory. The Supreme Court adopted the distinctions between commerce, agriculture, and manufacturing in the early nineteenth century, in part to maintain distinctions between local and national power.⁷¹ The trade theory is actually a *constitutional construction* adopted in a particular historical context that limited the scope of “commerce” in order to maintain an underlying structural principle.

Although the economic and social conditions that gave rise to this construction have vanished, the Court has never officially abandoned this nineteenth-century construction. Instead, the Court simply worked around it, adding a wide variety of doctrines that now give the federal government the power to do most of the things it wants to do. For example, without deciding that commerce includes agriculture or manufacturing, the Court held in 1941 in *United States v. Darby* that Congress can regulate intrastate activity that cumulatively and substantially affects interstate commerce.⁷² The Court also repeatedly leveraged the view that Congress can regulate navigation. In the early nineteenth century people disagreed about whether commerce

ment eventually become generally accepted meanings of a word, which makes it difficult to know what the original meaning was.

69. See e.g., BARNETT, *supra* note 4, at 282–89. But see Nelson & Pushaw, *supra* note 61, at 13–42; Pushaw & Nelson, *supra* note 62, at 709–11 (providing counterexamples in the debates).

70. Pushaw & Nelson, *supra* note 62, at 700.

71. Howard Gillman, *More on the Origins of the Fuller Court's Jurisprudence: Reexamining the Scope of Federal Power Over Commerce and Manufacturing in Nineteenth-Century Constitutional Law*, 49 POL. RES. Q. 415, 421–23 (1996).

72. See 312 U.S. 100, 113 (“While manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce . . .”).

included any other forms of transportation.⁷³ However, the Court gradually extended Congress's powers to include telegraphs, railroads, and new forms of transportation; roads, bridges, and tunnels; and instrumentalities of transportation like cars and buses.⁷⁴ The Court also eventually gave Congress the power to regulate other instrumentalities of trade like telegraph, telephone, and communication networks.⁷⁵ Finally, the Court has held that all instrumentalities of transportation and all items that move or ever have moved in interstate transportation networks, or have crossed state lines, are within Congress's commerce power, whether or not they have anything to do with trade or exchange.⁷⁶ The Court has done all this without ever officially abandoning the distinction between commerce, manufacturing, and agriculture.

Contemporary Commerce Clause doctrine since the New Deal has often been defended as pragmatic and realistic because it recognizes that we live in a fully integrated national economy. But in another sense the doctrine is quite formalistic and even a little bizarre.⁷⁷ The courts gave the federal government its current powers by stretching older constructions and multiplying legal fictions. The doctrine looks the way it does because courts began with a very narrow construction of "commerce" as trade plus navigation and gradually built an elaborate superstructure on top of it, expanding it beyond all recognition. It is like a vast mansion that was built with no particular rational plan around a modest bungalow. This happened in part because the Supreme Court often does not like to overrule older cases explicitly, but instead works around them,⁷⁸ and in part due to the federal courts' characteristically evolutionary and ad hoc forms of common law decision making.

Contemporary critics of Commerce Clause doctrine—especially economic libertarians—would like to return to a narrow version of the trade theory without these many workarounds. But the trade theory remains ad hoc and formalistic even if we remove all of the later additions. That is because in today's world it is not a theory that is well designed to serve the Constitution's key structural principle: empowering the federal government to legislate in areas in which the states are severally incompetent. Rather,

73. See, e.g., *Veazie v. Moor*, 55 U.S. (14 How.) 568, 573–74 (1852) (explaining that Congress's powers under the Commerce Clause do not include "control over turnpikes, canals, or railroads").

74. BORIS I. BITTKER WITH BRANDON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE 3-8 to -16, 3-20 to -24 (1999) (tracing the evolution of the Court's doctrines).

75. *Id.* at 3-30 to -39.

76. See, e.g., *Scarborough v. United States*, 431 U.S. 563 (1977); *United States v. Bass*, 404 U.S. 336 (1971).

77. Donald H. Regan, *How To Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 562 (1995) (labeling current doctrine "a new formalism" which is 'pragmatic' only in the sense that it can always serve the goal of justifying federal power").

78. Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document And The Doctrine*, 114 HARV. L. REV. 26, 40–41 & n.44 (2000).

the trade theory is designed to limit the federal government *per se*, and it cripples the federal power to protect civil rights, employee rights, public health, public safety, and the environment in ways that the American public would find totally unacceptable. It is a construction that lacks democratic legitimacy and thus fails as “our law.”

By contrast, if we returned to the original meaning of “commerce” as intercourse, the Commerce Clause would be perfectly adaptable to modern conditions. Call this approach the “interaction theory” of commerce. It has been offered in different forms by John Marshall, Joseph Story, Justice Hugo Black, and Akhil Amar.⁷⁹ Donald Regan and Steven Calabresi have advanced similar ideas without specifically connecting their arguments to the original meaning of the text.⁸⁰

The interaction theory defines “commerce” according to its broadest eighteenth-century meaning as “intercourse.” The primary focus of the Clause is “commercial intercourse between nations, and parts of nations, in all its branches.”⁸¹ Nevertheless Congress can also regulate other forms of interaction, like communications and transportation networks, whether they are used for commercial or noncommercial purposes.

Under the interaction theory, Congress has the power to regulate all interactions or affairs with foreign governments and with the Indian tribes.⁸² Congress also has the power to regulate interactions or affairs among the several states. This would include activities that are mingled among the states or affect more than one state, because they cross state borders, because they produce collective action problems among the states, or because they involve activity in one state that has spillover effects in other states. Thus, the interaction theory closely connects the language of the Commerce Clause to the structural principle of Resolution VI that underlies the enumeration of federal powers.⁸³

79. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824) (opinion of Marshall, C.J.); STORY, *supra* note 60, at §§ 1057–62; *United States v. Se. Underwriters Ass’n*, 322 U.S. 533, 549–53 (1944) (opinion of Black, J.); AMAR, *supra* note 17, at 107–08.

80. See Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 781–84, 805–07, 814–30 (1995) (arguing that externalities produced by state policies justify the scope of federal power); Regan, *supra* note 77, at 555–59 (arguing that federal power is justified in order to solve problems that states cannot solve individually).

81. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) at 189–90 (opinion of Marshall, C.J.).

82. At Philadelphia, the convention originally voted to give Congress the power to regulate “affairs” with the Indian tribes. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 21, at 321. When it prepared the list of enumerated powers, the Committee of Detail attached this power to the end of the Commerce Clause. *Id.* at 367; see also *id.* at 569 (Report of the Committee of Style). There is no evidence, however, that the shift from “affairs” to “commerce” was thought to change the meaning or the scope of the powers granted. AMAR, *supra* note 17, at 107 & n.17.

Under the Articles of Confederation, Congress had the power of “regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated.” ARTICLES OF CONFEDERATION, art. IX, ¶ 4. Since under Resolution VI Congress was to have at least the powers of the old confederation, we may assume that “commerce” included both “trade” and “affairs.”

83. As Justice Black explained:

As noted previously, the interaction theory accounts for all of the historical evidence offered by defenders of the trade and economic theories without having to resort to non-literal usages. As I shall now show, it is also consistent with other evidence of linguistic usage that the two other theories have difficulty explaining.

If we view the Commerce Clause through the lens of the central reasons for forming the Constitution and the central questions that faced the new nation—foreign affairs and dealings with Indian tribes—reading “commerce” to mean “intercourse” or “interactions” makes the most sense. The Clause enabled “Congress to regulate *all* interactions (and altercations) with foreign nations and Indian tribes,” which “if improperly handled by a single state acting on its own, might lead to needless wars or compromise the interests of sister states.”⁸⁴

One of the first things the new government did, for example, was to regulate its interactions with the Indian tribes, through a series of Trade and Intercourse Acts beginning in 1790. The title of these acts was apt: they not only required licenses for trade with Indians, but also punished “any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians.”⁸⁵ These crimes did not necessarily involve trade

The power confided to Congress by the Commerce Clause is declared in *The Federalist* to be for the purpose of securing the “maintenance of harmony and proper intercourse among the States” . . . It is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one;—to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing.

Se. Underwriters Ass'n, 322 U.S. at 551-52 (quoting *THE FEDERALIST* No. 41 (James Madison)).

84. AMAR, *supra* note 17, at 107.

85. An Act to Regulate Trade and Intercourse with the Indian Tribes, Act of July 22, 1790, ch. 33, 1 Stat. 137 (1790) (expired 1793). Congress passed new versions repeatedly during the antebellum era, with changing provisions. Act of Mar. 1, 1793, ch. 19, 1 Stat. 329 (repealed 1796); Act of May 19, 1796, ch. 30, 1 Stat. 469 (expired 1799); Act of Mar. 3, 1799, ch. 46, 1 Stat. 743 (expired 1802); Act of Mar. 30, 1802, ch. 13, 2 Stat. 139 (repealed 1834); Act of June 30, 1834, ch. 161, 4 Stat. 729. The current version of the Trade and Intercourse Acts is 25 U.S.C. § 177 (2006), which now covers only purchases and grants of land from Indian tribes.

The first such statute, the 1790 Act, does regulate economic transactions with Indians and the Indian tribes. For example, it requires a license to do business with Indian tribes and it holds that sales of lands by Indians are not valid unless “made and duly executed at some public treaty, held under the authority of the United States.” 1 Stat. 137 § 3. But section 5 of the Act also regulates ordinary crimes committed against members of the Indian tribes:

SEC. 5: *And be it further enacted*, That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such state or district, such offender or offenders shall be subject to the same punishment, and shall be proceeded against in the same manner as if the offence had been committed within the jurisdiction of the state or district to which he or they may belong, against a citizen or white inhabitant thereof.

Id. at § 5.

The reason for section 5 of the 1790 Act is fairly clear: Congress wanted to keep the peace with nonbelligerent Indian tribes; if Americans attacked Indians or trespassed on their property, this might damage foreign relations. In fact, the 1796 Act is specifically entitled “An Act to regulate

or even economic activity; they could involve assault, murder, or rape. Note as well that even if the point of regulating these crimes was because of their likely effects on trade with the Indian tribes, the activities regulated were themselves not economic. And note finally that the 1790 and 1793 Trade and Intercourse Acts could not be justified as legislation designed to enforce treaties; they applied to crimes against Indians whether or not they had signed treaties with the United States.⁸⁶ Congress clearly believed that it could reach both economic and noneconomic activity under the Indian Commerce Clause;⁸⁷ at the very least it believed that it could regulate noneconomic activity in order to protect trade and diplomatic relations that would further trade.⁸⁸ This is hardly surprising. It was assumed in international law at the time of the founding that international intercourse included both commercial and noncommercial aspects that were inevitably intertwined.⁸⁹

Neither the trade theory nor the economic theory can explain why the early Trade and Intercourse Acts would be constitutional unless we assume that Congress has the auxiliary power to regulate noneconomic (or nontrade)

Trade and Intercourse with the Indian Tribes, and to preserve Peace on the Frontiers.” Congress’s power to regulate “commerce” (*i.e.*, intercourse or interactions) with the Indian tribes is the natural source of the prohibitions in the 1790 Act.

The Trade and Intercourse Act of 1793, which succeeded the 1790 Act, made even clearer that noneconomic transactions were covered: it prohibited “murder, robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians.” 1 Stat. 329 § 4.

86. Beginning in 1796, the Trade and Intercourse Acts do enforce treaty obligations—for example, they limit hunting and cattle drives on Indian lands—although they continue to prohibit ordinary crimes against Indians whether or not there is a treaty. 1 Stat. 469 § 2. (The ban on crimes against the person of Indians was not removed until the 1834 version.)

87. Another example is Congress’s attempt to protect Indians from the influence of alcohol. Congress made it a crime not only to sell alcohol, but to give it away, or even to bring it into Indian Country. Section 20 of the Trade and Intercourse Act of June 30, 1834, made it a crime to “sell, exchange, give, barter, or dispose of any spiritous liquor or wine to an Indian (in the Indian Country)” or “to introduce, or attempt to introduce, any spiritous liquor or wine into the Indian Country” except as required by the War Department. Indian Intercourse Act, 4 Stat. 729 (1834). The Act was amended in 1862 to protect Indians who were not in Indian Country as long as they were “under the charge of any Indian superintendent or Indian agent appointed by the United States.” Act of February 13, 1862, 12 Stat. 339 (1862).

The Court upheld the 1862 act in *United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1865) and *United States v. Forty-Three Gallons Of Whiskey*, 93 U.S. 188 (1876). *Holliday* involved a sale to an Indian, while *Forty-Three Gallons* involved transportation “with intent to sell, dispose of, and distribute.” 93 U.S. at 189. In *Holliday* Justice Miller held that the law properly regulated not only “buying and selling and exchanging commodities, which is the essence of all commerce,” but also “the intercourse between the citizens of the United States and those tribes, which is another branch of commerce, and a very important one.” 70 U.S. (3 Wall.) at 417.

88. In *United States v. Kagama*, 118 U.S. 375, 378 (1886), Justice Miller argued that criminal laws that regulated Indians living on reservations might not fall within the Indian Commerce Clause, if they were not part of a larger set of “trade and intercourse laws.” This is consistent with the notion that Congress’s power is regulating commerce *with* the Indian tribes, rather than simply regulating the Indian tribes *per se*.

89. See, *e.g.*, ADAM M. McKEOWN, *MELANCHOLY ORDER: ASIAN MIGRATION AND THE GLOBALIZATION OF BORDERS* 91 (2008) (“At the turn of the nineteenth century, intercourse was generally conceived as the entwined relationships of trade and diplomacy between nations.”); see also GILBERT, *supra* note 52, at 92 (arguing that in eighteenth century conceptions of power politics, diplomacy, trade, and military strategy were inseparable).

activity that affects foreign or Indian commerce. That is, we must assume that Congress can reach activities that do not involve trade or are not economic in order to protect its powers to regulate trade or other economic activity, perhaps under the Necessary and Proper Clause. If so, then the two theories essentially merge into the interaction theory. Note, however, that the Clause says that Congress can regulate “commerce” with foreign nations and with the Indian tribes, not “activity that affects commerce” with foreign nations and with the Indian tribes. The interaction theory is therefore more consistent with the text.

Immigration offers a second example of the limitations of the trade and economic theories. Although the 1787 Constitution bestows a power “[t]o establish an uniform Rule of Naturalization,”⁹⁰ it does not specifically mention the power to control immigration. We could infer the power from the naturalization power or from Congress’s power to declare war or its powers “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”⁹¹ But there is a far more obvious source of the power to regulate the flow of populations across the nation’s borders. It is the commerce power, which appears in the clause immediately before the naturalization power.⁹² The eighteenth-century definition of commerce as “intercourse” or “exchange” among different peoples easily encompasses immigration and emigration of populations for any purpose, whether economic or noneconomic.

Article I, Section 9, Clause 1 limits Congress’s power to prohibit “the Migration or Importation of such Persons as any of the States now existing shall think proper to admit” before 1808.⁹³ Where does that power to prohibit come from? The obvious source, once again, is Congress’s power to regulate commerce with foreign nations and the Indian tribes. Indeed, this was assumed both in the debates in Philadelphia and at the time of the Founding.⁹⁴ Note that even if the “importation” of slaves into the United States was trade narrowly defined, the “migration” of other persons—which might include free white immigrants—was not, although it still fell under the commerce power. In the period before the Civil War the use of the commerce power to regulate immigration became increasingly bound up with disputes over Congress’s powers to regulate slavery, and many different theories emerged.⁹⁵ Following the abolition of slavery, the Supreme Court

90. U.S. CONST. art. I, § 8, cl. 4.

91. *Id.* at cl. 15.

92. *Id.* at cl. 3.

93. *Id.* at § 9, cl. 1.

94. In the Virginia Ratifying Debates, Edmund Randolph noted, “To what power in the general government is the exception made respecting the importation of negroes? Not from a general power, but from a particular power expressly enumerated. This is an exception from the power given them of regulating commerce.” 3 ELLIOT, *supra* note 20, at 464.

95. See DAVID L. LIGHTNER, *SLAVERY AND THE COMMERCE POWER* (2006). The South was firmly opposed to any suggestion that Congress might regulate the interstate slave trade under the Commerce Clause, even though, if slavery were not involved, the question would be fairly easy. (Moreover, no one doubted Congress’s ability to regulate or even ban the foreign slave trade after

returned to the original assumption that Congress had the power to regulate immigration under the Commerce Clause.⁹⁶ Thus, in *Chy Lung v. Freeman*, the Court argued, consistent with the structural principle in Resolution VI, that:

[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress [under its] . . . power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.⁹⁷

The interaction theory best explains and justifies Congress's powers over immigration. Congress could regulate immigration under the trade theory to the extent that it can regulate methods of transportation used for trade. Congress could regulate immigration under the economic theory to the extent that people pay for their travel and transportation companies engage in economic activity. But neither theory would reach a person entering the country on foot from Mexico or Canada, even if the purpose was to make a living in the United States. If these theories cannot explain why Congress has the power to control the flow of people walking into the country, they are not very plausible accounts of the power to control the country's borders. To be sure, migration of populations affects the price of goods and labor. Therefore, once again, if we postulate that Congress has the power to regulate nontrade or noneconomic activity that affects commerce (defined either as trade or economic activity), then the trade and economic theories merge into the interaction theory. In that case, the interaction theory is superior because it is simpler and it better corresponds to the actual words of the Constitution.

Today, courts would probably say that Congress's power to regulate immigration (and indeed conduct foreign affairs generally) comes from the plenary power doctrine, which was introduced in the *Chinese Exclusion Case*⁹⁸ and was stated most forcefully in *United States v. Curtiss-Wright Export Corporation*.⁹⁹ The plenary power doctrine, however, has no basis in the text. It was created in the late nineteenth century in order to give Congress a free hand in regulating foreign affairs at a time when courts held that the scope of Congress's domestic powers were very limited.¹⁰⁰

1808.) The Supreme Court debated the questions in a trio of cases: *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849); *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841), and *New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837).

96. See, e.g., *The Head Money Cases*, 112 U.S. 580, 591 (1884); *New York v. Compagnie Generale Transatlantique*, 107 U.S. 59, 60 (1883); *Henderson v. Mayor of New York*, 92 U.S. 259, 270 (1875).

97. 92 U.S. 275, 280 (1875).

98. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889).

99. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315–18 (1936).

100. Justice Sutherland's argument rested on the fiction that the states were never really sovereign in foreign affairs and therefore "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution." *Id.* at 318. This

If one had to defend an unenumerated plenary power to conduct foreign affairs, the best justification would be something like the structural principle stated in Resolution VI: Congress must have the power to regulate in the interests of the nation as a whole, in all areas where the states are severally incompetent or where individual actions by states might disturb the harmony of the Union. The argument for such an unenumerated power seems entirely sensible, but it also flies in the face of the claim that the federal government is a government of limited and enumerated powers and that the Framers exercised considerable care in their choice of which powers to give the new federal government. Because foreign affairs were so crucial to the Framers' reasons for forming a new Constitution, it seems very strange that they would have forgotten to give the federal government this power.

But they didn't forget. One doesn't need to postulate a general unenumerated power to conduct foreign affairs if one reads the Commerce Clause according to its original meaning of "intercourse." The Commerce Clause, like the powers to conduct war, make treaties, and define and punish violations of international law, is already in the text of the Constitution, and together with these other powers it gives the federal government the ability to regulate all kinds of affairs and interactions with the outside world.

Focusing on Congress's powers to regulate foreign commerce also helps settle whether the word "regulate"—i.e., prescribe rules for commerce—includes the power to prohibit.¹⁰¹ Surely if Congress has the power to keep both goods and people out of the country under the Foreign Commerce Clause, "regulation" must include prohibition. Even under the trade theory, the power to regulate must include the power to prohibit. The point of the new federal government was to promote American trade with foreign nations. It could not do this unless it could credibly threaten to block or

would no doubt have come as a surprise to the Framers, especially in those jurisdictions that debated whether to join the new Constitution.

101. Samuel Johnson's definition of "regulate" is to make regular or to adjust by a rule or a method. JOHNSON, *supra* note 44 (9th ed. 1805) (unpaginated); *id.* (1st ed. 1755) (unpaginated) (same). *Champion v. Ames (The Lottery Case)*, 188 U.S. 321 (1903), considered whether Congress could prohibit the shipment of lottery tickets between states as a regulation of interstate commerce.

The four dissenting judges argued that the power to regulate commerce gave Congress only the power to "free[] such commerce from state discrimination, and not to transfer the power of restriction." *Id.* at 372 (Fuller, C.J., dissenting). They conceded that their theory "does not challenge the legislative power of a sovereign nation to exclude foreign persons or commodities, or place an embargo, perhaps not permanent, upon foreign ships or manufactures." *Id.* at 374. Thus, they were forced to maintain that the word "regulate" had two different meanings for foreign and domestic commerce, when the more sensible reading would be to distinguish "commerce with" from "commerce among."

The majority held that Congress had the power to prohibit undesirable or wrongful commerce from moving across state borders. Because states might not be able to ban such commerce—this might be forbidden discrimination against out-of-state business—the federal government was "the only power competent to that end." *Id.* at 358. Note especially the Court's use of the word "competent," echoing Resolution VI's basic structural principle that the federal government has the power to act where states are severally incompetent. The *Champion* Court correctly understood that the power to "regulate"—that is, to prescribe a rule for commerce—includes the power to determine what commerce is wrongful or undesirable and therefore may be restricted or excluded. Congress may do more than protect commerce among the states. It may use its powers to promote particular social or economic policies by regulating commerce that produces spillover effects or creates collective action problems.

embargo goods coming from foreign countries in order to force them to open up their borders to American goods.

I have argued that the interaction theory makes the most sense of the meaning of “commerce” because it makes the most sense of Congress’s powers to regulate foreign and Indian commerce. It is true that Congress’s powers to regulate domestic commerce are more constrained. My point, however, is that people who want to demonstrate that difference by limiting the meaning of the word “commerce” are looking in the wrong place. As a result, they have to come up with rather implausible theories for why the same word in the same sentence points to three different concepts.¹⁰²

These linguistic somersaults are unnecessary if one reads just a little further in the text. The powers of foreign and Indian commerce are different from powers over interstate commerce because they serve different structural purposes that are reflected in the text. Congress can regulate commerce *with* foreign nations and the Indian tribes, but it can only regulate commerce *among* the several states.

III. “AMONG THE SEVERAL STATES”

A. *Operations and Effects*

What does “among the several states” mean? Samuel Johnson’s dictionary defines “among” as “in the middle of.”¹⁰³ Randy Barnett argues that “among” means only commerce “between States” or “between people of different states,” and does not reach commerce that occurs between persons in the same state.¹⁰⁴ Even if this activity affected other states or the nation as a whole, Congress could not reach it.¹⁰⁵ In *Gibbons v. Ogden*, Chief Justice Marshall properly rejected this view. He argued that “among” means “intermingled with” and that “commerce among the several states” means “commerce which concerns more States than one.”¹⁰⁶ Thus, even commerce

102. Randy Barnett, for example, notes that ascribing three meanings to the same word raises potential difficulties with his theory of objective meaning, because that theory focuses on what an ordinary speaker of the language would understand a word to mean. See BARNETT, *supra* note 4, at 92–93, 97, 103. However, he argues that “when a group of people agrees to use one word to connote, depending on the circumstances, two different meanings, they have objectively manifested their intentions, albeit in an awkward manner that makes the objective meaning of their words sometimes difficult to discern.” *Id.* at 310. What Barnett has not demonstrated is that there was an agreement by the ratifiers to assign three different meanings to the same word in the same sentence. Such an agreement among such a widely dispersed population would have been very difficult to negotiate and form. Perhaps more importantly for his theory of objective original public meaning, he has not shown that members of the general public who were not involved in the debates would have understood that there was an agreement to use one word in three different ways. Instead of attributing an “awkward manner” to the constitutional text, we might simply look for other ways in the text to distinguish foreign, Indian, and domestic commerce.

103. JOHNSON, *supra* note 44 (9th ed. 1805) (unpaginated); *id.* (1st ed. 1755) (unpaginated) (same).

104. BARNETT, *supra* note 4, at 297.

105. *Id.* at 300.

106. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194–95 (1824).

that occurs within a single state might be within Congress's regulatory power if it has external effects on other states or on the nation as a whole. As Marshall puts it, echoing Resolution VI:

The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.¹⁰⁷

Marshall warned in *Gibbons* that Congress's power would not apply to "[t]he completely internal commerce of a State."¹⁰⁸ But the question at issue is what commerce is "completely internal." Marshall and other nineteenth-century jurists adopted a series of constructions of "commerce among the several states" designed to limit the reach of the commerce power and preserve distinctions between local and national subjects of regulation.¹⁰⁹ Many of these distinctions, like the distinction between commerce and production or between direct and indirect effects on commerce, make little sense today, but they are not part of the original meaning of the text and we do not have to accept them.

Instead, we should read the phrase "among the several states" in a way that is most consistent with the structural principle behind the enumeration of powers. To use James Wilson's words, Congress can regulate interactions that extend in their *operation* beyond the bounds of a particular state, and interactions that extend in their *effects* beyond the bounds of a particular state.¹¹⁰

What kinds of *operations* extend beyond a state's boundaries? Transportation and communication are the two most obvious examples. Thus, Congress can regulate whatever crosses state lines. Equally important, it can regulate interstate networks of communication and transportation, subject always, of course, to individual rights protections like the First Amendment.¹¹¹

Transportation and communication are not only activities; they occur as part of *networks*, which include technologies, institutions, facilities, and standards that are linked together in a system. Thus, a transportation or communications network includes not only the actual movement of people, goods, or electrons, but also an architecture of channels, nodes, and links, and the technologies, institutions, facilities, and standards that make movement possible.

Transportation and communications networks are crucial to the "commerce" of the nation, particularly when we understand "commerce" in the

107. *Id.* at 195.

108. *Id.*

109. *See infra* Part V.

110. 2 ELLIOT, *supra* note 20, at 424.

111. *See* Regan, *supra* note 77, at 571–75.

eighteenth-century sense of “intercourse.” These networks create important externalities whose value transcends any particular state and can become more valuable as more people use them; indeed, economists give these externalities a special name—they are called network effects. Leaving regulation of these networks solely to state control might produce conflicting regulations that undermined their efficiency and interoperability and disturbed the “harmony of the Union.” (Imagine, for example, that the state of Arkansas required all internet traffic to use a special protocol that no one else used.) This would reduce the value of these networks both within and without a state and impose costs on persons in other states.

The generation of 1787 did not use the term “network effects,” a product of twentieth century economic theory. But they well understood that the ability to move and communicate throughout the country was essential both to political union and to a vibrant commercial republic.¹¹² It follows that Congress also has the power to regulate intrastate transportation and communication networks, because they are part of larger national networks. Every element of interstate transportation and communications networks, Donald Regan has pointed out, operates within the boundaries of some state (think of telephone poles and railroad tracks), and “[t]he power to regulate some particular element” of the network “should not depend on whether that element itself ever moves across state lines or not.”¹¹³ The fact that a cellular antenna or a piece of fiber optic cable remains fixed in the ground in one state does not mean that Congress cannot regulate it.

What kinds of interactions have *effects* beyond a single state? These are interactions that create spillover effects or collective action problems. In the words of Resolution VI, commerce is “among the several states” when the states are “separately incompetent” to deal with a particular issue, “or [when] the Harmony of the United States may be interrupted by the Exercise of individual Legislation.”¹¹⁴ Note that the structural principle announced in Resolution VI is somewhat more restrictive than Wilson’s formulation in the Pennsylvania ratifying convention.¹¹⁵ It is not enough that the activity in question has effects beyond a particular state’s borders; what matters is that these effects generate the sort of problem that makes a federal solution appropriate. We have already seen that transportation and communications networks can produce significant spillover effects. But many other kinds of activities can produce them as well, including environmental pollution, agriculture, manufacturing, banking, and employment relations.

112. That is one reason why Congress was given the power in Article I, Section 8, Clause 7 “[t]o establish Post Offices and post Roads.” U.S. CONST. art. I, § 8, cl. 7.

113. Regan, *supra* note 77, at 574; *see also* Houston, E. & W. Tex. Ry. v. United States (*The Shreveport Rate Case*), 234 U.S. 342 (1914) (upholding federal rate regulation of intrastate railroad transportation which affects interstate commerce); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870) (upholding federal safety regulation to steamship moving entirely within a single state).

114. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 21, at 21, 26, 131–32.

115. ELLIOT, *supra* note 20, at 424.

B. *Darby and Labor Regulation*

Begin with federal minimum wage and maximum hour laws, upheld in the landmark case of *United States v. Darby*.¹¹⁶ The Fair Labor Standards Act prohibited shipping goods made with substandard labor conditions across state lines. It also prohibited substandard labor conditions whether or not the goods crossed state lines.

Congress can ban the interstate shipment of goods made with substandard labor conditions if it believes that these goods unfairly compete with goods from states that do not have substandard labor conditions. Because Congress has the right to control interstate transportation and communications networks, it may control what goods and persons cross state lines, subject to the Constitution's individual rights guarantees. In this case, the goods are presumably not defective or dangerous in and of themselves; rather Congress wants to control their flow across state lines because of the spillover effects that they produce.¹¹⁷

In *Darby* Justice Stone also argued that Congress had the power to ban substandard labor conditions in production in order to enforce the ban on interstate transportation.¹¹⁸ This style of argument is a relic of the trade theory: Congress can control production because production affects trade. If we start with the interaction theory (or the economic theory, suitably understood), we need not entertain the legal fiction that Congress is regulating local labor conditions because it helps police the flow of goods across state lines. Rather, we can move directly to the real issue. Congress may regulate production because substandard labor conditions in some states create spillover effects in other states and raise a potential collective action problem that only Congress can solve.

Suppose some states prohibit substandard conditions, while others do not. In the short run at least, firms in unregulated states will probably face lower production costs, and they can sell their goods more cheaply than firms in regulated states. In a national market, they will underprice goods from regulated firms; in particular they will be cheaper in the regulated states themselves. States that require better working conditions probably cannot constitutionally block goods from states with substandard labor conditions, because courts would view this as a forbidden discrimination against out-of-state businesses. Worse still, in the long run firms in regulated states may threaten to relocate to unregulated states to take advantage of lower costs and a friendlier business environment. All of this will put economic and political pressure on regulated states to allow substandard labor conditions.

Thus, in a national market, substandard labor conditions are not purely local matters; they have spillover effects on other states, and individual

116. 312 U.S. 100 (1941).

117. See *id.* at 113–17 for Justice Stone's version of this argument.

118. *Id.* at 117–21.

states are separately incompetent to deal with the problem.¹¹⁹ (There is also a potential collective action problem if many states would like to improve working conditions but will not do so unless all the other states do so as well.) Congress may therefore regulate wages and working conditions because states face a federal problem that requires a federal solution.¹²⁰

Note that this argument presumes that what I am calling “substandard” working conditions really are below an acceptable level—whether for moral, political, or economic reasons—and that additional regulation would be better, not worse. Often this will be a controversial claim. What some states regard as unjust violations of human dignity others will think perfectly acceptable and a protection of liberty of contract for employers and employees alike. What some states see as unfair competition that pressures them to participate in a race to the bottom others will view as a race to the top: good old fashioned competition that promotes greater liberty, local autonomy, and productivity. What some states see as a federal problem demanding a federal solution others will see as not presenting a problem at all other than the dangers of needless federal interference with individual states’ regulatory choices and their distinctive modes of life.

If the claimed spillover effects are nonexistent or insignificant or if they are outweighed by the values of liberty and local self-determination, there is no federal problem that requires a federal solution. If the states disagree among themselves about these issues, who decides the question? The answer is that Congress decides. The point of having a federal government, after all, is to resolve conflicts among the different interests in different states. All states are represented in Congress and they can struggle among themselves about whether there really is a federal problem and, if so, negotiate the appropriate solution. The Commerce Clause does not require any particular answer to this question; it simply gives Congress the ability to solve problems that it reasonably believes to exist.¹²¹

119. See *id.* at 122 (arguing that legislation is necessary to prevent unfair competition from firms implementing substandard labor conditions that harms businesses implementing acceptable labor conditions).

120. One might object that some businesses, like laundries and restaurants, do not sell goods that regularly cross state lines. Regan, *supra* note 77, at 588–89 (arguing that federal government should not be able to regulate businesses that produce goods primarily for local consumption). However, these businesses compete for labor with businesses that do interstate business. Moreover, labor, like capital, is mobile and may leave for states with better working conditions, thus putting downward pressure on wages and working conditions in those states. Congress may therefore include both businesses that ship interstate and those that do not in a comprehensive federal solution.

121. Note that a reasonableness test applies to two different questions: The first is whether there is a sufficient spillover effect, collective action problem, or other effect on interstate commerce to justify regulation. The second is whether Congress’s choice of regulation is sufficiently adapted to achieving its purposes in regulating.

The test of reasonableness is not required by the original meaning of the constitutional text. It is a construction that originates in one of the earliest judicial constructions of Congress’s enumerated powers. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). In *McCulloch*, Chief Justice Marshall argued that “the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution.” *Id.* at 421. Such discretion requires that courts defer to Congress’s judgment where reasonable minds may differ. Hence, Marshall concluded that all means that are appropriate and

The advantage of this construction of “commerce” and “among the several states” is that it makes the constitutional question very similar to the policy question that Congress must debate—whether there are significant spillover effects or collective action problems and whether these present a genuine problem that is best solved by a federal solution. By resolving the policy debate, Congress also resolves the constitutional question, unless its conclusion is completely unreasonable.

C. *Wickard and the Culmination of Individual Effects*

Next consider *Wickard v. Filburn*,¹²² which many people have assumed tests the limits of Congress’s powers. In fact, *Wickard* is a fairly easy case, a standard example of a problem requiring a federal solution. The issue in *Wickard* is volatility in agricultural production and prices. Congress believed that farmers would go through cycles of overproduction leading to low prices, which led to farm bankruptcies, and eventually to new agricultural shortages. Individual states could not solve this problem by limiting what their farmers could grow, because farmers in other states might overproduce—indeed, they might have incentives to do so—and this would drive down prices for all. Thus state agricultural policies have spillover effects on other states and even if all states wanted to limit production, they cannot do so unless all the other states who produce the same crops agree. Producing states might make an informal agreement to do so, but this might violate the prohibition on interstate compacts in Article I, Section 10, Clause 3.¹²³ After all, states that consumed, but did not grow, the crop in question might resent the cartel because it raised costs for their citizens, and they might try to find ways to retaliate. In any case such an agreement (like all other cartels) might

adapted to legitimate constitutional ends are constitutional exercises of Congress’s enumerated powers. *Id.*; see also *id.* at 413–14 (explaining that “necessary” means convenient or useful to achieving an end); *id.* at 415–16 (“[Congress must not be] deprive[d] . . . of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.”); *id.* at 419 (explaining that even without the Necessary and Proper Clause, Congress may employ means “which, in its judgment, would most advantageously effect the object to be accomplished”); *id.* at 420 (“[The Necessary and Proper Clause] cannot be construed . . . to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government.”).

In *United States v. Darby*, the Supreme Court followed *McCulloch* by requiring a reasonable relationship between Congress’s choice of means for regulating commerce and its legitimate ends:

Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government.

Darby, 312 U.S. at 121 (citing *McCulloch* and later cases).

122. 317 U.S. 111 (1942).

123. The Compact Clause states that “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State.” U.S. CONST. art. I, § 10, cl. 3.

be difficult to enforce, and it probably could not be enforced by blocking agricultural goods coming from defecting states.¹²⁴ (By contrast, the federal government has the power to block agricultural exports from foreign nations.) In short, states are severally incompetent to limit agricultural production. The problem, to the extent one exists, is a federal one, and Congress has the power to decide the nature of the problem and devise an appropriate solution.

Wickard is famous for the proposition that if the sum of certain activities is within Congress's powers to regulate—because, for example, it has a sufficiently substantial effect on commerce—Congress can regulate each individual instance.¹²⁵ In *Wickard*, the activity in question was wheat grown on a family farm for private consumption, which might substitute for purchased wheat or, if prices rose, might be drawn into the national market.¹²⁶ Under the interaction theory (or the economic theory) this proposition not only makes considerable sense, it is almost inevitable.¹²⁷ Spillover effects and collective action problems are produced by the sum of many different individual activities; therefore we must look to the aggregate to decide whether the problem is both federal and substantial. And if it is, Congress should be able to reach all the individual instances in a general scheme of regulation to get at the problem.¹²⁸

D. Spillovers and Environmental Regulation

Next, consider environmental regulations. Air and water pollution cross state lines. States may have sufficient incentives to prevent pollution that falls wholly within their own jurisdictions, but they may have neither sufficient incentive nor sufficient ability to prevent pollution beyond their borders.

The interaction theory is superior to the economic theory in this case because not all pollution or environmental damage is caused by economic activity, even if it has economic effects. Once again, however, if we adopt the construction that Congress may regulate noneconomic activities that cumulatively affect interstate economic activity, there is little practical difference between the two theories.

124. See Regan, *supra* note 77, at 583–85.

125. 317 U.S. at 127–29.

126. *Id.* at 127–28.

127. See Regan, *supra* note 77, at 583–84.

128. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 17–22 (2005) (upholding federal regulation of intrastate manufacture and possession of marijuana); *Perez v. United States*, 402 U.S. 146, 154 (1971) (“Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power ‘to excise, as trivial, individual instances’ of the class.” (emphasis omitted)); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118–19 (1942) (“Congress . . . possesses every power needed to make [its] regulation [of interstate commerce] effective. . . . [Its power] extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.”); *cf.* *United States v. Lopez*, 514 U.S. 549, 561 (1995) (invalidating a statutory section that was “not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated”).

What about the protection of endangered species? Many species migrate between states, so securing their survival presents a federal problem. What about species that stay in one state? Congress can protect them if pollution or threats to their survival (e.g., hunters or predators) come from out of state. It can also protect them if they are threatened by business activities that have spillover effects in other states.

The value of environmental protection, however, is not completely captured by considerations of economic cost; it also concerns how Americans view their relationship to nature and the resources that nature provides us.¹²⁹ The nation's natural resources properly belong to the nation as a whole, and not to any single state. If interactions among the several states threaten those resources, the nation as a whole should have the right to protect them.

E. Antidiscrimination Law and the Right to Commerce

Now consider the constitutionality of antidiscrimination laws. Since the civil rights revolution of the 1960s Congress has passed most of these laws using its commerce power. Discrimination does not present a federal problem because, as the Supreme Court once suggested, food served in discriminating restaurants has traveled from out of state.¹³⁰ Rather discrimination—even in housing and local restaurants—has spillover effects on states that prohibit discrimination, which these states cannot effectively counteract on their own. In addition, discrimination affects the ability of Americans to participate fairly and fully in interstate networks of transportation and communication.

Like other labor laws, antidiscrimination laws create collective action problems that may discourage states from prohibiting discriminatory practices unless other states do so as well. Some antidiscrimination laws may increase costs for businesses, especially in the short run. Examples include laws that require accommodation of disabled employees or customers, laws that require employers to pay women and minorities as much as white men, laws that prohibit firing or demoting people for discriminatory reasons (creating problems of proof), and laws that require significant monitoring, record keeping and compliance costs. As in the previous discussion of *United States v. Darby*, firms located in states that permit discrimination may have a competitive advantage over firms in states that prohibit discrimination. Similarly, states may shy away from passing stronger antidiscrimination laws out of fear that businesses will migrate to states with weaker laws.

Discrimination within a state may produce spillover effects on other states in a number of different ways. First, discrimination imposes costs on employers in interstate enterprises who may not be able to make the most efficient allocation of resources in their personnel decisions. For example, businesses may be less likely to assign blacks or gays to jobs that require

129. See Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 YALE L.J. 1122 (2010).

130. *Katzenbach v. McClung*, 379 U.S. 294, 298–300 (1964).

them to move or travel to jurisdictions where housing or public accommodations discrimination will increase their costs of living or make them less productive. Some businesses may not move to discriminating jurisdictions for fear of losing valuable employees or gaining a reputation as discriminatory or hostile to minorities.

Second, discrimination within a state or a region of the country (like the Jim Crow South) can have spillover effects in other jurisdictions if markets for goods and services are interconnected. Businesses in states that do not permit discrimination may alter their employment and production policies in order to cater to consumers and clients in jurisdictions that permit (or even expect) discrimination.

Third, if markets are interconnected, credit, employment, risk, and pricing decisions by businesses in jurisdictions that permit (or expect) discrimination may affect business judgments by firms in other states. Interstate effects on business judgments can occur in many different ways. Regional or local discrimination may lower the average wealth and educational attainment (and hence expected creditworthiness) of minorities in the nation as a whole, skewing decisions in nondiscriminating jurisdictions. If regional patterns of discrimination lead to high rates of poverty and incarceration for racial minorities, this affects nationwide assessments of criminality, creditworthiness, healthiness, expense, and other risks. Sex discrimination that limits women's job history affects their ability to compete when they travel to nondiscriminating jurisdictions. In this way, patterns of subordination in one area of the country lead to informational heuristics and biases that may limit housing, employment, and other opportunities for women and minorities in other parts of the country. In sum, if people economize on information when they make decisions and make decisions based on risk pools, the effects of discrimination against women and minorities can move with them across state lines.

Fourth, minorities, unhappy with poor treatment and limited opportunities, may leave states that allow discrimination for states that prohibit discrimination (or have greater protections against discrimination). Gays may leave socially conservative rural areas to enjoy freer lives in large urban centers. Jim Crow policies in the South led to the Great Migration of blacks to cities in the North. Immigration from discriminating states will put pressure on housing, wages, and working conditions in more egalitarian states, especially if the new immigrants are used to working at lower wages and under inferior working conditions. Accordingly, the flow of cheap labor into the state and the influx of minority groups into neighborhoods and schools may exacerbate discrimination against minorities by majority groups, undermining the state's nondiscrimination policies and increasing costs for public and private sectors alike.

Many people—including members of Congress during the debates over the 1964 Civil Rights Act—have pointed out that Congress's powers to enforce the Reconstruction Amendments are a better vehicle for combating discrimination than the commerce power, because the former powers directly concern equality and the latter power, in their view, concerns only

issues of business and trade.¹³¹ In one sense, this is correct: the Reconstruction Amendments are and should be an important source of congressional power to regulate private discrimination.¹³² In another sense, however, this criticism misses the deeper purpose of the power to regulate interactions among the states in a federal system. This may be in part because people still view the commerce power through the lens of the nineteenth century trade theory, which defines “commerce” as solely about the exchange (and transportation) of goods and not in its broader sense of “intercourse,” which includes ideas of sociality, intermixture, and, to use more modern language, integration.

The Commerce Clause empowers Congress to prevent states from exporting elsewhere the problems they create through unwise and unjust social policies. To do this, Congress inevitably must make judgments of morality and policy. That is because one state’s externality is another state’s liberty. Activities in different states often affect other states, but not all of them justify a federal solution as a matter of sound policy. Congress therefore must decide whether state policies impose real and undesirable effects on other parts of the Union or whether these policies actually preserve local autonomy, economic liberty, and individual choice. One cannot do this unless one makes judgments of what effects are good or bad and what liberties are worth preserving.

Antidiscrimination laws involve Congress’s judgment that private discrimination is not a liberty worth protecting, and that the practice of discrimination is a poison that affects and undermines other parts of the Union. Jim Crow may have impoverished the South by denying many of its citizens the chance to become healthy, happy, and productive, but in an integrated economy, it impoverished the North as well. Congress was entitled to

131. See, e.g., *A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce: Hearing on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 190-93 (1963) (statement of Sen. John Cooper). At the same hearing, Senator John Pastore stated:

I believe in this bill, because I believe in the dignity of man, not because it impedes our commerce. . . . I like to feel that what we are talking about is a moral issue. . . . And that morality, it seems to me, comes under the 14th amendment . . . about equal protection of the law.

Id. at 252; see also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 291 (1964) (Goldberg, J., concurring) (“The primary purpose of the Civil Rights Act of 1964 . . . as the Court recognizes . . . is the vindication of human dignity and not mere economics.”); *id.* at 292 (“Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color.”) (quoting S. REP. NO. 872, at 16 (1964)); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 504–05 (2000) (“No one at the time had the slightest doubt but that the antidiscrimination statutes enacted by Congress during the 1960s were implementing the equality norms of Section 1 of the Fourteenth Amendment.”); cf. Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 IND. L.J. 1297, 1312–13 (2000) (noting that choice to use the commerce power to defend the 1964 Civil Rights Act was based on litigation strategy, not the purpose of the Act).

132. See Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. (forthcoming 2010) (arguing that Congress has ample authority to pass modern civil rights laws—including those affecting private parties—under its powers to enforce the Reconstruction Amendments).

decide that in undermining human dignity, the South was dragging other states down with it.¹³³

Moreover, the Commerce Clause gives Congress the power to give Americans access to networks of transportation and communication, and to allow them to enjoy the benefits of commerce (i.e., commercial and non-commercial intercourse) among the several states. Discrimination discourages minorities from using these networks fully and fairly. Racial discrimination discouraged blacks from traveling in the South, and it denied them economic opportunities nationwide. Because discrimination has multiple ripple effects in an integrated economy, it hinders the ability of minorities to compete fully and fairly in public life and discourages their use of the instrumentalities and networks of interstate commerce. Antidiscrimination laws, in short, protect both freedom of commerce (in its eighteenth-century sense) and equality in commerce.

These are not simply questions about gross national product. They are questions of personal liberty—including economic liberty to be sure—but also of the rights to travel, meet, interact, and live with others throughout the country. These issues concern the rights to participate in the social and economic intercourse of the nation. Congress has to decide what are fair terms of access and fair opportunities of enjoyment with respect to the networks, channels, and instrumentalities of interstate commerce. These judgments of fairness are inevitably political and moral; they are inevitably judgments of what both liberty and equality require.

F. *Federalism and Experimentation*

A familiar defense of federalism is that it preserves traditional mores and local ways of life against national homogenization. This argument has a checkered pedigree: not only valuable traditions, but also discrimination against blacks, women, and homosexuals have been defended on these terms. When states differ about these matters, the argument goes, the harmony of the Union and individual freedom are best served by letting each state decide these questions without federal interference. That may be so where tradition imposes costs only within a single state. But where discrimination imposes costs on other states, the harmony of the Union is already disturbed, and Congress may step in. When subordination of social groups in the name of tradition has spillover effects elsewhere, tradition may be too costly for the federal government to ignore.

133. Racial discrimination also made our relations with foreign powers more difficult during the Cold War, which was one motivation for *Brown v. Board of Education*, 347 U.S. 483 (1954) and the passage of national civil rights laws. MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 79-114 (2000). Here, however, I focus only on domestic effects. I do not reach the interesting question of whether Congress may, under its powers to regulate foreign commerce, reach intrastate activity that would embarrass the nation diplomatically. At least where no treaty obligations are involved, there might be good reasons to adopt a limiting construction of Congress's ability to regulate intrastate activities to further the regulation of foreign commerce or to define and punish offenses against the law of nations.

A second and more important defense of federalism is that it promotes innovation and experimentation in different localities. Almost every important antidiscrimination principle began with states and local governments. Indeed, this justification for federalism is in some tension with a defense based on tradition: experiments mean rejecting customary ways of doing business. It is hard to see Jim Crow as an experiment. If so, it was an experiment that failed.

We should take the language of experimentation seriously rather than as a rhetorical excuse for nonregulation, or as a way to resist the application of federal constitutional rights. Experiments should be encouraged if they work to the benefit of the entire nation. But if these are genuine experiments, experiments generally end at some point and the results are tabulated; somebody has to decide whether the experiment is a success or a failure, and, if a success, adopt best practices nationwide.

Second, some experiments can blow up in your face, and, more importantly, in your neighbor's. You don't let your neighbor experiment with nuclear fission next door, because his actions might harm you and others. Where state experiments throw off harms to other states, Congress may regulate them.

Finally, some types of innovation are best achieved when the federal government ensures a basic platform of uniform standards on which both states and private parties can innovate. *Gibbons v. Ogden* is a good example.¹³⁴ New York sought to promote and reward technological innovation by awarding a monopoly to a new technology, steamship transportation. The problem was that the monopoly interfered with the transportation network along the east coast of the United States. By establishing a single national coastal licensing scheme, the federal government allowed many different parties to innovate and compete with each other. This promoted technological development in the long run.

Telecommunications regulation is another example. States might allow (or require) broadband companies to block or filter internet traffic. This may assist broadband companies' own attempts at innovation, but it can squelch innovation by third parties. A federal requirement of either network nondiscrimination or open access to telecommunications facilities decentralizes innovation so that many different people can create new technologies and applications that can be layered on top of national telecommunications networks. Federal regulation that creates a platform for innovation may benefit many different states, businesses, and individuals.

Antidiscrimination law also provides a platform for innovation, although we do not often think of it this way. Jim Crow kept the South backward and undermined its economic development. It is no accident that port cities and centers of commerce and immigration also tend to be most tolerant of differences. In recent years, cities that have welcomed homosexuals have benefited from cultural and economic innovation. In these situations a na-

134. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

tional “platform” of tolerance and antidiscrimination can benefit creativity and innovation as well as civil rights.

These claims are surely controversial. I can think of fairly obvious counterexamples. But the point is that if there is controversy about whether regulation stifles or promotes innovation, someone has to decide. Congress is best suited to decide these questions.

G. *Lopez* and Limits

Is anything beyond Congress’s commerce powers? Yes, if Congress cannot reasonably conclude that an activity presents a federal problem. Note, however, that Congress may still be able to reach the activity through its other powers to tax and spend for the general welfare or its powers to enforce the Reconstruction Amendments.

In *United States v. Lopez*, the Supreme Court struck down the Gun-Free School Zones Act of 1990, which made it a federal crime to possess a firearm within 1,000 feet of a school.¹³⁵ Putting aside the Court’s reasoning in *Lopez*, the result makes some sense. The possession of guns near schools does not look like a federal problem that produces significant spillover effects in other states, and Congress, at least at the time it passed the bill, did not provide any evidence that this activity created a federal problem.¹³⁶ Gun possession in or near schools might be a serious problem around the nation, but one whose dangers individual states would be motivated to address. That is, it might be a *national* problem—one that occurs in many states—but not a *federal* problem that states are incompetent to address individually.¹³⁷

The Gun-Free School Zones Act appeared to be legislative grandstanding, a freestanding prohibition unconnected to a larger federal scheme of regulation of education on the one hand, or gun trafficking on the other. Thus, Chief Justice Rehnquist noted that “[s]ection 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”¹³⁸ More correctly put, it was not part of a larger scheme of regulation of *interstate* activity that would be undercut unless intrastate activity were included.¹³⁹ It follows that Congress may be on surer constitutional footing if it displaces more state law than if it displaces less. But the apparent paradox is illusory: the issue is not the amount of federal regulation but rather whether it is reasonably directed at a federal problem. *Lopez* therefore

135. 514 U.S. 549 (1995).

136. Indeed “[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.” *Id.* at 562 (quoting Brief for United States at 5-6). Congress later provided legislative findings about effects on interstate and foreign commerce in Section 320904 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796 (1994). See *Lopez*, 514 U.S. at 563 n.4.

137. See the discussion in PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISION-MAKING 621–23 (5th ed. 2006).

138. *Lopez*, 514 U.S. at 561.

139. See BREST ET AL., *supra* note 137, at 626.

makes the most sense if we understand it as announcing an “antigrandstanding” principle. This principle requires that in close cases Congress must demonstrate a genuine federal problem by detailed findings or else Congress must make its desired regulation an integral part of a more comprehensive scheme that does address a genuine federal problem.

The Justices in the *Lopez* majority, however, did not stop here. Instead, they offered two new constructions to explain why the Gun-Free School Zones Act was beyond federal power. Neither is well connected to the structural purposes of the Commerce Clause.

First, the Court suggested that the federal government could not reach so-called “traditional” areas of state regulation, including education, crime, and family law.¹⁴⁰ The argument is based on a false premise: the federal government has regulated family law since at least Reconstruction, and it has regulated education heavily in the last fifty years.¹⁴¹ And of course, the federal government has attacked crime since the beginning of the Republic and with increasing frequency in the twentieth century. Perhaps more important, the argument from tradition is the same argument that was rejected during the New Deal: The *Lochner*-era Court viewed manufacturing and labor relations as traditional areas of state regulation; the Justices eventually realized that this made little sense in an integrated economy. If an area of concern has significant spillover effects on other states, or begins to do so, it shouldn’t matter that it was the traditional concern of state regulation.

Education is a good example. The federal government became increasingly interested in educational policy after World War II because conditions changed; both economic productivity and democracy required a well-educated workforce. The evolution of an information economy in the late twentieth century made these requirements all the more important. As transportation networks have improved, so has mobility, and given easy mobility, some states may increasingly underinvest in education. Poorer and rural states may not be able to recoup the long-term benefits of a good educational system because educated persons will leave for large urban areas. Conversely, people may flock to states with better educational systems, putting strains on their resources and preventing them from delivering quality services. Because poorly educated people are less able to be productive in an information economy and participate in an information rich public

140. *Lopez*, 514 U.S. at 564–65; see also *United States v. Morrison*, 529 U.S. 598, 615–16 (2000).

141. Kristin A. Collins, *Federalism’s Fallacy: The Early Tradition of Federal Family Law and the Invention of States’ Rights*, 26 *CARDOZO L. REV.* 1761, 1767 (2005) (arguing that prior to the Civil War, the federal government was actively engaged in creating law concerning family relations); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 *UCLA L. REV.* 1297 (1998) (arguing that the federal government has been heavily involved in regulating domestic relations since Reconstruction). Federal regulations of health, safety, and welfare that seek to promote “family values” are only the most obvious examples. It is true that the federal government has primarily used the taxing and spending powers to regulate education and family life. But the question is not which federal power is being used; it is whether the states have traditionally had more or less exclusive control in the area with no significant history of federal intervention.

sphere, states with poor educational systems may impoverish not only themselves but other states as well.

Crime offers a second example. Much crime presents a national problem but not necessarily a federal problem. But two varieties are federal concerns. The first type are crimes that make use of interstate transportation and communication networks or that cross state lines for their preparation and execution. An example is the federal power to regulate wire fraud. The second type are crimes in which the enterprise is organized in more than one state; states may be less effective in investigating and prosecuting out-of-state participants and may need federal assistance. Hence the federal government may reach different varieties of organized and white collar crime.¹⁴² On the other hand, the constitutionality of the Violence Against Women Act, struck down in *United States v. Morrison*,¹⁴³ is better defended not in terms of crime that has spillover effects but as Congress's attempt to guarantee women's equal treatment in the justice system. Despite the Court's remarkably cavalier treatment of the issue, the Violence Against Women Act is a straightforward application of Congress's powers under Section 5 of the Fourteenth Amendment to guarantee the equal protection of the laws.¹⁴⁴

The *Lopez* Court offered a second construction to justify its decision: it argued that Congress should not be able to regulate noneconomic activity even if it cumulatively affected interstate commerce.¹⁴⁵ But it should not matter that air pollution comes from a backyard incinerator or a factory, or that a migratory bird is shot by a lone hunter or a corporate operative.¹⁴⁶ If noneconomic activity creates a federal problem that states cannot individually handle, it should fall within the commerce power.¹⁴⁷

142. See, e.g., *Perez v. United States*, 402 U.S. 146 (1971) (upholding federal loan-sharking statute). The federal government may also have special regulatory competence where weapons or other dangerous items that are portable, easily concealed, and often used in crime regularly cross state lines in ways that are hard for individual states to police. Regan, *supra* note 77, at 569–70.

143. 529 U.S. 598 (2000).

144. See Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. (forthcoming 2010). The basic idea is that if state and local law enforcements do not take violence against women seriously, they are, quite literally, denying women “the equal protection of the laws.” Therefore, Congress may pass both corrective and prophylactic legislation that directly prohibits gender-motivated violence by private actors, just as Congress is empowered to protect blacks from racially motivated violence when local law enforcement looks the other way. See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888* 397 (1985) (“A strong argument can be made, on the basis of the origins of the equal protection clause, that private lynching was among the evils that Congress was meant to have power to forbid.”); Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1357, 1377–78 (1964) (explaining that Congress assumed the Fourteenth Amendment gave it authority to protect blacks from private violence).

145. *Lopez*, 514 U.S. at 561; accord *Morrison*, 529 U.S. at 613.

146. See Regan, *supra* note 77, at 564.

147. In particular, the notion that ordinary household activity that contributes to pollution or to other social problems is not economic is particularly ironic. The word “economic” comes from the word *oikos*, meaning “household” and *nomos*, meaning “rules” or “ordering;” (or in this case, “management” or “control”); one of its earliest meanings was household management. See OXFORD ENGLISH DICTIONARY (2d ed. 1989). The first economic treatise, Xenophon's *Oeconomicus*, is a

There is a far more sensible limiting construction. Instead of asking whether the activity that produces the spillover effects is “economic,” we should focus instead on whether the spillover has economic effects. Air or water pollution may not come from a factory or economic enterprise, but the effects may still cost money to the invaded state. We might sensibly require that Congress measure the spillover effects in economic terms and not simply in terms of the degree of moral or ethical disapprobation by individuals in other states. Moral or ethical objections to how a state handles its resources or governs its populations would not count as a spillover effect; but economic consequences for other states would. Of course, one can always cash out moral objections by asking hypothetically how much people in other states would be willing to pay to persons in the state to stop these activities or to adopt different ones, but under the construction suggested here the possibility of a hypothetical transfer payment does not make the spillover effects economic.

The *Lopez* majority recognized and accepted that in a modern, integrated economy, there will be very few things that the federal government cannot regulate, especially if it does so through general comprehensive programs. It also recognized that the federal government can often reach these subjects through its other powers, like the power to tax and spend for the general welfare. Thus, despite all the controversy that accompanied the decision, the practical effect of *Lopez* was very modest: only a very small class of possible statutes would be beyond Congress’s power to enact. For this reason the doctrinal distinctions that *Lopez* created did not really further any of the traditional goals of federalism, whether they be individual liberty, respect for traditional subjects of state regulation, or local experimentation, precisely because Congress could regulate the same activities in other ways.

Nevertheless, like other Supreme Courts before it, the *Lopez* Court sought a limiting principle to federal commerce power so that it could claim that the Commerce Clause did not bestow a general federal police power to regulate on all subjects in any part of the Union. The irony of the decision is that there *is* such a structural limiting principle in the text, backed by impeccable historical sources. The commerce power does not extend to situations where Congress cannot reasonably claim to be solving a federal problem.

H. *The Individual Mandate for Health Insurance: Lopez or Wickard?*

The recent debate over health care reform has revived the debate over limits on the commerce power. The Patient Protection and Affordable Care Act features an “individual mandate” that is designed to coax uninsured persons into purchasing health insurance.¹⁴⁸

Socratic dialogue about how to manage an estate. The household was the source of production throughout most of human history and still is the source of the vast majority of budgetary decisions.

148. Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act, Pub. L. No. 111–152, 124 Stat. 1029 (2010). The individual mandate is § 1501(b) (*to be codified at* 26 U.S.C § 5000A).

The term “individual mandate” is misleading for two reasons. First, the law does not actually require all individuals to purchase insurance. The mandate does not apply to persons receiving Medicare or Medicaid, military families, persons living overseas, persons with religious objections, or persons who already get health insurance from their employers under a qualified plan.¹⁴⁹ Second, it is not actually a mandate. It is a tax, which people do not have to pay if they have purchased health insurance. As amended, the Patient Protection and Affordable Care Act imposes a penalty tax for each month that an individual fails to pay premiums into a qualified health plan.¹⁵⁰

The tax is part of a comprehensive reform of health insurance that insures more people and prevents them from being denied insurance coverage because of pre-existing conditions. Successful reform requires that uninsured persons—most of whom are younger and healthier than average—join the national risk pool; this helps lower the costs of health insurance premiums nationally.

The tax gives uninsured people a choice. If they stay out of the risk pool, they effectively raise other people’s insurance costs, and Congress taxes them to recoup some of the costs. If they join the risk pool, they save the system money and so they do not have to pay the tax. A good analogy would be a tax on polluters who fail to install pollution-control equipment: they can pay the tax or install the equipment.

It is likely that the individual mandate is fully constitutional under Congress’s powers under the General Welfare Clause “[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”¹⁵¹ The tax clearly promotes the general welfare under existing precedents.¹⁵² Moreover, the tax is not a direct tax that must be apportioned by state population.¹⁵³

Nevertheless, the tax is also constitutional as an exercise of Congress’s commerce power. Congress has two goals in reforming health care: The first goal is universal coverage—to make health insurance as widely available as possible. The second goal is “guaranteed issue,” which is essentially a requirement of nondiscrimination. Such a rule makes insurance coverage

149. See *id.* § 1501(b) (to be codified at 26 U.S.C. § 5000A(d), (e)). Persons listed as dependents on another’s tax return are not directly liable for the penalty; however, the taxpayer listing them as a dependent is responsible for their health care coverage. See 26 U.S.C. § 5000A(b)(3)(A).

150. The amount of the penalty is the greater of a flat dollar amount (which is calculated according to a complicated formula) and a percentage of adjusted gross income which rises to 2.5 percent for taxable years beginning after 2015; this figure, in turn, is capped at the average national premium. See *id.* (to be codified at 26 U.S.C. § 5000A(c)(3)).

151. U.S. CONST. art. I, § 8, cl. 1.

152. See Jack M. Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, 362 NEW ENG. J. MED. 482 (2010); Jack Balkin, *The Constitutionality of An Individual Mandate for Health Insurance, Parts I and II*, in David B. Rivkin, Jr., Lee A. Casey, and Jack M. Balkin, *Debate, A Healthy Debate: The Constitutionality of an Individual Mandate*, 158 U. PA. L. REV. PENNUMBRA 93, 102–05, 114–16 (2009), <http://www.pennumbra.com/debates/pdfs/HealthyDebate.pdf> [hereinafter, Balkin, *A Healthy Debate*].

153. See Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, *supra* note 152, at 2; Balkin, *A Healthy Debate*, *supra* note 152, at 114–16.

portable when people change jobs, prevents insurance companies from denying coverage because of pre-existing conditions, and prohibits insurance companies from imposing lifetime caps on insurance or imposing other arbitrary limitations on health care coverage.

The goals of universal coverage and guaranteed issue are connected because markets for health insurance face a problem of adverse selection. Younger and healthier people have incentives to stay out of health insurance markets, while the elderly and people with greater health care needs have incentives to stay in. Because the latter are more expensive to insure, adverse selection increases the total cost of insurance for everyone in the pool. Guaranteed issue requirements exacerbate the difficulty; many people will wait until they become ill to purchase health insurance, knowing that they cannot be turned down.

To solve the adverse selection effects and lower insurance costs, health reform must bring younger and healthier persons into the risk pool. Hence policymakers must combine nondiscrimination reforms with an individual mandate.

Does health insurance reform present a regulatory problem where states are individually incompetent and a national solution is required? Only one state so far (Massachusetts) has attempted an individual mandate. It is not difficult to see why. States that unilaterally impose strict guaranteed issue requirements face obvious collective action problems. People with health problems will have incentives to move to a state where they cannot be turned down, raising health care costs for everyone, while insurers will prefer to do business in states where they can avoid more expensive patients with pre-existing conditions, and younger and healthier people may leave for jurisdictions where they can avoid paying for health insurance.

If all states imposed an individual mandate, there would be no incentive for businesses or younger and healthier people to exit and the costs of guaranteed issue reforms would be subsidized by a broader risk pool in each state. But without a guarantee that all states will adopt similar reforms, individual states may not want to reform their insurance practices if it means significantly higher health insurance premiums for their citizens.

For this reason, Congress might reasonably conclude that few states will be able to adopt guaranteed issue/individual mandate reforms on their own. Only a national solution can solve the collective action problems that states face while simultaneously creating a broader risk pool than any individual state could manage. Thus, the regulatory question is quite similar to those in *Darby* and *Wickard*.

But is the individual mandate a regulation of “commerce”? One objection to the individual mandate is that it regulates people who don’t buy insurance. They cannot be engaged in commerce if they are literally doing nothing.¹⁵⁴ In fact, this is not accurate. People who do not buy health insur-

154. Balkin, *A Healthy Debate*, *supra* note 152, at 99; Memorandum from Randy Barnett et al., The Heritage Foundation, Why the Personal Mandate to Buy Health Insurance Is Unprecedented

ance are actually self-insuring. When they get sick, they rely on their families for financial support and they purchase over-the-counter health care remedies. They also go to emergency rooms where they cannot be turned away, increasing costs for everyone in their community. Indeed, emergency room care may be far more expensive than preventative care or care by a regular physician. These practices involve borrowing, purchasing, and consuming goods and services; their cumulative economic effect is substantial, and they impose significant economic costs on the rest of the country. Because uninsured persons contribute to a national problem, Congress may regulate them as part of a national solution.¹⁵⁵

IV. AN ASIDE ON “NECESSARY AND PROPER”

I have said relatively little about the Necessary and Proper Clause so far because most contemporary understandings of federal regulatory power can be justified without it. The interaction theory derives Congress’s foreign and domestic powers directly from the original meaning of the Clause coupled with basic structural principles. Under the trade or economic theories, however, one might need the Necessary and Proper Clause to explain why Congress can reach nontrade or noneconomic activity that affects trade or economic activity, respectively. Because Congress has the power to make its

and Unconstitutional (Dec. 9, 2009), available at <http://www.heritage.org/research/legalissues/lm0049.cfm>.

155. Under current doctrine, Congress may regulate economic activity that has a cumulative and substantial effect on interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 117 (1942); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 121–22 (1942); *United States v. Darby*, 312 U.S. 100, 118–24 (1941). Congress may also regulate local behavior when doing so is “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” *Gonzales v. Raich*, 545 U.S. 1, 24 (2005) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)). Indeed, as Justice Scalia has explained, under the Necessary and Proper Clause “Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.” *Id.* at 37 (Scalia, J., concurring in the judgment).

The constitutionality of the individual mandate is a straightforward application of *Wickard* and *Raich*. In *Wickard*, the Supreme Court held that Congress could regulate wheat grown for home consumption as part of a more general regulation of farm production. People who grew wheat at home substituted it for wheat products they would otherwise purchase in the market; cumulatively, this practice had a substantial effect on interstate farm prices and undermined Congress’s regulation of farm production. In *Gonzales v. Raich*, the Court held that Congress could regulate marijuana grown for home consumption as part of a general ban on controlled substances, because Congress reasonably concluded that people would substitute homegrown marijuana for other marijuana purchased in black markets, and this would undermine Congress’s more general regulation of controlled substances.

As noted in the text, uninsured persons actually self-insure; they rely on their families for financial support, go to emergency rooms (often passing costs on to others), or purchase over-the-counter remedies. They substitute these activities for paying premiums to health insurance companies. All these activities are economic, and they have a cumulative effect on interstate commerce. Moreover, like people who substitute homegrown marijuana or wheat for purchased crops, the cumulative effect of uninsured people’s behavior undermines Congress’s regulation—in this case, its regulation of health insurance markets. Because Congress believes that national health care reform will not succeed unless these people are brought into national risk pools, it can regulate their activities in order to make its general regulation of health insurance effective.

regulations of commerce effective, the argument goes, it may reach at least some activity that is neither trade nor economic activity.

Much ink has been spilled on the meaning of “necessary” and to what extent it limits federal regulatory power. Does “necessary” mean “absolutely required” or “indispensable,” or does it mean “convenient” or “designed to achieve a particular end,” as Alexander Hamilton and Chief Justice John Marshall maintained? The answer becomes clear when we look at the text of the entire Clause: “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 or in any Department or Officer thereof.”¹⁵⁶

Most writers have focused on what we might call the “vertical” aspect of the Clause: laws that affect the interests of states. But an equally important function of the clause is its “horizontal” aspect. It empowers Congress to organize the executive and judicial branches to carry out federal governmental functions.¹⁵⁷

The power to create new cabinet departments and organize or reorganize existing ones, for example, comes from Congress’s powers “[t]o make all Laws . . . for carrying into Execution” the “Powers vested . . . in the Government of the United States, or in any Department or Officer thereof.”¹⁵⁸ This horizontal aspect of the Necessary and Proper Clause gives Congress the power to shape the structure and organization of coordinate branches of the federal government.¹⁵⁹

Congress has used its horizontal powers under the Necessary and Proper Clause throughout the nation’s history. For example, Congress created the Department of Justice in 1870 to administer and prosecute federal laws following the Civil War. Following World War II, it merged the Departments of the Army and Navy into the Department of Defense and created the Central Intelligence Agency and the National Security Council in the National Secu-

156. U.S. CONST. art. I, § 8, cl. 18.

157. See AMAR, *supra* note 17, at 110–11. The idea of the clause’s “horizontal” effect comes from William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS. 102 (1976).

158. U.S. CONST. art. I, § 8, cl. 18.

159. In *United States v. Comstock*, the Supreme Court held that Congress had the power to create a civil commitment procedure for mentally ill sexually dangerous federal prisoners beyond the date they would otherwise be released. *United States v. Comstock*, 560 U.S. ___ (2010). Justice Breyer’s majority opinion held that the test is “whether a statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.” *Id.* at 6. *Comstock* is a good example of the basic principle behind Congress’s Article I, Section 8 powers. *Comstock* presents a classic collective action issue, a NIMBY (not in my back yard) problem. As Justice Alito puts it, “The statute recognizes that, in many cases, no State will assume the heavy financial burden of civilly committing a dangerous federal prisoner who, as a result of lengthy federal incarceration, no longer has any substantial ties to any State.” *Id.* at 1 (Alito, J., concurring in the judgment). Without a federal solution, states will attempt to deny responsibility for dangerous mentally ill sex offenders, hoping that some other state will assume the costs. Hence a federal solution becomes appropriate. See Jack M. Balkin, *Comstock, Health Care Reform, and Federalism*, BALKINIZATION, May 17, 2010, <http://balkin.blogspot.com/2010/05/comstock-health-care-reform-and.html>.

rity Act of 1947. It combined various federal programs and agencies into a Department of Health Education and Welfare in 1953 and later split it into a Department of Education (created in 1979) and a Department of Health and Human Services (officially renamed in 1980). It created a Department of Homeland Security in 2002 following the September 11, 2001, terrorist attacks. And of course, within each department Congress has created and modified various offices and agencies, and assigned to each its respective duties, jurisdictions, and obligations.

According to the text of the Constitution each creation or reorganization of these federal departments had to be “necessary and proper” for carrying out powers granted to the federal government. But was each of them *indispensable* to “carry[] into execution” the Constitution’s enumerated powers? Obviously not. Nor could we always say that these laws were always the most efficient, most straightforward, or most direct means of exercising federal powers. Rather, in each case Congress simply judged the legislation a convenient or appropriate way of organizing the executive branch. That is all that the word “necessary” requires.

If “necessary” only means “convenient” or “designed to achieve a particular end” when Congress regulates horizontally, i.e., when it creates laws that affect the other branches, it means the same thing when it regulates vertically, i.e., when it creates laws that affect the interests of the states. There is, after all, only one Necessary and Proper Clause. In fact, the bill creating the Second Bank of the United States upheld in *McCulloch v. Maryland*¹⁶⁰ had both horizontal and vertical aspects. It created a new federal agency (with a mixture of public and private ownership and control) and the agency affected state banks and state economic activities.

The word “proper” is equally important to understanding the scope of the Necessary and Proper Clause. A regulation is “proper” if it is consistent with the Constitution, including its underlying structural principles. An otherwise convenient law might not be proper, for example, because it violates individual rights protected by the Constitution. An otherwise convenient law might not be proper because it violates the Tenth Amendment, which, as we have seen, is just the flip side of the structural principle in Resolution VI. (For example, the law might not seek to solve a genuine federal problem but merely be an exercise in congressional grandstanding.) Finally, a law might not be proper because it violates the separation of powers or undermines important checks and balances between the different branches.

V. CONSTRUCTION AND CHANGE

The original meaning of the Commerce Clause is consistent with the modern activist state and gives the federal government wide latitude to pass civil rights, employment, consumer protection, health, and environmental laws. Courts, however, have read it far more narrowly for much of the nation’s history. Original meaning did not compel them to do so. Judicial doctrines

160. 17 U.S. (4 Wheat.) 316 (1819).

were constructions designed to implement the constitutional text and underlying structural principles. These doctrines were premised on assumptions about economic and social life in the early nineteenth century that were not sustainable as national markets developed and transportation and communications networks expanded. There is nothing surprising about this: constitutional constructions are always attempts at implementation—often imperfect and provisional—premiered on background assumptions about social and political life. When those assumptions prove outmoded or unreasonable, fidelity to text and principle not only allows but requires that we abandon older constructions and replace them with new ones.

Nineteenth century courts sought to preserve a distinction between national and local power by making distinctions between national and local subjects of regulation, and they created a series of doctrinal structures to accomplish this goal. These included distinctions between commerce and agriculture or manufacturing and between direct and indirect effects on commerce. Thus, as noted earlier, the trade theory is less an adequate account of original meaning than a *construction* designed to demarcate separate spheres of federal and state power. Ironically, it achieves this goal by defining “commerce” narrowly—with predictable problems for Congress’s powers to regulate foreign and Indian affairs—when the real point of these distinctions was to narrowly define what commerce was “among the several states” and therefore subject to federal regulation.

Lawyers often associate these distinctions with the *Lochner*-era Court that sat between 1897 and 1937, but they actually date from a bit earlier in the nineteenth century. They grow out of John Marshall’s dicta about state inspection laws in *Gibbons v. Ogden*, and they were developed in a series of cases that gave the states freer rein to regulate in areas that the federal government was unlikely to enter.¹⁶¹ Courts continued to employ these constructions in an era increasingly ill-suited for them, sometimes adding various workarounds—for example, to permit federal regulation of new transportation technologies like trains.

In the late eighteenth and early nineteenth centuries, people well understood that many activities, including noneconomic activities, could affect more than one state, particularly if they used interstate networks of transportation and communication. But the lack of a truly integrated national society and economy meant that these spillover effects were likely not to be significant in most cases. Travel between different parts of the Union was often difficult and sometimes even dangerous. In a nonintegrated society and economy, spillover effects between states might often be attenuated. More-

161. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824) (inspection laws “act upon the subject before it becomes an article of . . . commerce . . . and prepare it for that purpose. . . . No direct general power over these objects is granted to Congress”); *Veazie v. Young*, 55 U.S. 568, 573–74 (1852) (holding that regulation of commerce does not include regulation of manufactures and agriculture); *McCready v. Virginia*, 94 U.S. 391, 396–97 (1877) (“Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade.”); JAMES KENT, COMMENTARIES ON AMERICAN LAW 436 (John M. Gould ed., 14th ed. 1896) (noting that commerce does not include preparation of articles for export); Gillman, *supra* note 71, at 421–22.

over, the structural principle behind enumerated powers was double sided; it assumed that states would have regulatory authority in cases where federal solutions were not needed. Hence it made sense for politicians and judges to argue for constructions that would act as rules of thumb to divide up the realm of state and federal regulatory power.

Although many of the nineteenth century constructions purported to define “commerce,” they were really ways of articulating and implementing what commerce was “among the several states;” that is, situations that presented a federal problem that required a federal solution. Where foreign nations and the Indian tribes were concerned, the problem was presumptively federal, and so courts usually gave Congress fairly wide latitude. But where domestic legislation was concerned, the distinction between direct and indirect effects, or between commerce, manufacturing, and agriculture, arguably had a heuristic or functional justification. They helped maintain a rough albeit imperfect division between activities that might have significant spillover effects or create significant collective action problems and activities that did not.

Nevertheless, these nineteenth-century constructions became increasingly unrealistic as the twentieth century proceeded. The problems began years earlier when telegraphs and railroads began to connect previously isolated parts of the country, later abetted by automobiles, trucks, and airplanes. As the industrial revolution took off and telecommunications and transportation networks grew, spillover effects multiplied. Courts responded by creating an elaborate series of cross cutting doctrines, distinctions, and subdistinctions to get around the straitjacket imposed by these early nineteenth-century constructions.

By the early twentieth century, this doctrinal structure had lost most of its usefulness. Distinctions between manufacturing, agriculture, and commerce, or between direct and indirect effects, no longer served the function of implementing the structural principle of Resolution VI and demarcating areas where intrastate activities had few spillover effects. Instead, in a changed world, these older constructions frustrated the Constitution’s purposes by limiting federal power in arbitrary ways. In this context, the structural principle behind the doctrine of enumerated powers justified replacing older constructions with newer ones. These changes inevitably meant a much greater potential federal power to regulate private intrastate activity. But that is the consequence of applying an abstract text and an abstract principle to profoundly changed circumstances. The generation of 1787 would never have dreamed of a federal government as powerful as the one we have today. But they lived in a different world. Although we must remain faithful to the original meaning of the constitutional text, we are not bound by the Framers’ expected applications of text and principle.

