LOCATING THE BOUNDARIES: THE SCOPE OF CONGRESS'S POWER TO REGULATE COMMERCE

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The Congress shall have Power . . . To regulate Commerce . . . among the several States.

—U.S. Constitution, Art. I, § 8, cl. 3

I. INTRODUCTION

In the wake of the American Revolution, neither the Continental Congress nor the States acting on their own could respond effectively to the external and internal trade disputes that threatened the new country's prosperity and peace. "It may be doubted," wrote Chief Justice John Marshall, "whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great [constitutional] revolution which introduced the [modern constitutional] system, than the deep and general conviction, that commerce ought to be regulated by Congress."[1] Accordingly, although the federal government was to be limited to exercising only enumerated powers, those powers included the power to regulate commerce, thus remedying this deficiency in the Articles of Confederation.

Regrettably, but perhaps inevitably, "[t]he ink was not yet dry on the Constitution when its revision began."[2] Almost immediately, Congress began pressing beyond specifically enumerated powers granted it in Article I. As a result, today, Americans encounter a national government far more expansive than the Framers and men of their generation could ever have imagined.

Despite this expansion of federal power, however, certain actions and policies of the several States increasingly threaten the free flow of goods and services in interstate commerce; we still face the problem that led to the creation of the federal Constitution. Unsure about the scope of the federal commerce

1. Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 446 (1827).
2. EDWARD C. BANFIELD, HERE THE PEOPLE RULE 35 (1991).

power and, accordingly, the appropriate limits on state interference with interstate commerce, the courts, executives, and legislatures, at the federal and state level alike, are often at a loss about how to approach the problem.

Uncertainty stems, in part, from the recognition that the scope of the commerce power has expanded so far beyond the original understanding of that power's boundaries that any attempt to adhere strictly to its original meaning today would likely be futile and inappropriate. This Article attempts to provide direction to those who, although fully aware of these significant and enduring changes, seek nonetheless to assess the propriety of federal and state legislation with an eye toward respecting the original purpose of the enumeration of congressional power and, therefore, to effect a proper balance between the national and state government.

There is no possibility, today, of adhering completely to the original constitutional design. Such a daring plan would require overturning the New Deal, the Great Society, and almost all of the vast network of federal legislation and regulation put in place in the last two-thirds of the twentieth century. It appears that the American people would be overwhelmingly against such a change and no court would attempt to force it upon them.

Moreover, as Edward Banfield has argued, the attempt to define the outer limits of national power, as Article I, Section 8 of the Constitution does, was likely a flawed enterprise, doomed to failure from the very beginning:

> Nothing of importance can be done to stop the spread of federal power, let alone to restore something like the division of powers agreed upon by the framers of the Constitution. The reason lies in human nature: men cannot be relied upon voluntarily to abide by their agreements, including those upon which their political order depends. There is an antagonism, amounting to an incompatibility, between popular government—meaning government in accordance with the will of the people—and the maintenance of limits on the sphere of government.[3]

Orginalists thus face a particularly difficult task in trying to find a way to give current effect to the original philosophy that

3. *Id.* at 24.

animated the adoption of the Commerce Clause and other limited federal powers. That philosophy is federalism, which remains a constitutional value. It must be remembered that federalism not only limits the federal government but also gives it very powerful means to carry out the tasks assigned it. Accordingly, Congress should carefully examine every piece of proposed legislation to determine whether the state or federal government should address the particular problem.

This Article examines the original purpose of the Commerce Clause, assesses the evidence and scholarship concerning its original meaning, and applies that understanding to several examples of modern legislative import. This analysis shows that the Clause was crafted, among other reasons, to vest the federal government with the ability to protect commerce between the States from the discriminatory interference of self-interested States. As the Supreme Court said in 1888, "the object of vesting in Congress the power to regulate commerce with foreign nations and among the several States was to insure uniformity of regulation against conflicting and discriminating state legislation."[4]

The evidence further suggests that the text of the Commerce Clause was designed to empower Congress to regulate trade between and among the States—that is, the buying and selling of goods and services in interstate commerce. The Commerce Clause does not seem to have granted Congress the power directly to regulate manufacturing, labor, agriculture, or industry, although the Court long ago expanded the Clause to cover such subjects. Congress likely has the power to prohibit certain practices in interstate commerce, and some measure of its power to regulate commerce is probably shared concurrently with the States. Given the text of and purpose behind the Clause, Congress certainly has the power, at a minimum, to displace state laws that discriminate against interstate commerce, either explicitly or implicitly.

Harder questions arise when Congress uses its legitimate power over commerce to impose conditions on the entry of a product into the stream of commerce that may have the effect of regulating manufacture, labor, or agriculture. It may be that Congress lacks the power *ab initio* to impose such a regulation

4. Kidd v. Pearson, 128 U.S. 1, 21 (1888).

in the absence of any threat to interstate commerce, but that enough inconsistent regulations by enough States can pose such a threat and thus make the exercise of congressional power legitimate. Our regime gives rise to difficult questions and is susceptible to Congressional abuse, but the occasional difficulty in drawing lines does not mean that the enterprise should be abandoned.

This Article also surveys Supreme Court case law from the earliest interpretation of the commerce power to the evolution of the modern formulation during the New Deal, as well as the Court's recent attempt to reestablish the principle that there are some limits to Congress's power under the Commerce Clause. Unfortunately, because the Court did not have many opportunities to examine the Clause until after the founding era, this survey contributes only a little to the understanding of the original purpose and role of the Commerce Clause. Even so, this history tracks the evolution of the Clause into its modern form, examining how that form can perhaps be reconciled both with the original purpose of the Clause and also applied to current federalism questions.

Finally, the Article addresses four specific topic areas: tort reform, environmental law, criminal law, and transportation regulation. This analysis suggests that, in the absence of the guiding principle provided by the original purpose of the Commerce Clause, Congress may be both too bold and too timid in exercising the commerce power. Congress is often too bold in routinely invoking the Commerce Clause to regulate manufacturing and industry in the absence of a threat to interstate commerce. Yet Congress has also been too timid, in that it has allowed certain impediments to interstate commerce to persist.

In the area of national tort reform, for example, Congress may unnecessarily fear acting even though a legitimate exercise of the Commerce Clause provides the necessary power—viz., where numerous and conflicting state laws impair the free flow of commerce. Environmental law, on the other hand, may seem a tempting arena for federal legislation because the problem itself is at times interstate. Environmental issues that are national but not commercial do not seem, as an original matter, appropriate for national resolution under the commerce power. This does not mean that courts or legislators should treat

existing federal environmental legislation as unconstitutional. Rather, existing statutes should be interpreted against a background that respects federalism concerns to the extent possible.

With respect to criminal law, although modern Commerce Clause jurisprudence often requires applying old standards to new situations, some situations will never suitably fit a particular standard. Most crime was and is local or non-commercial or both, and therefore Congress's ability to regulate crime under the commerce power should be rather limited.

Finally, we consider the application of the commerce power to transportation regulation, an area that is often both commercial and interstate. We conclude that although the Commerce Clause may grant the federal government broad power to regulate transportation, even that power is limited. Federal regulation of transportation must still be tied to commercial and interstate concerns. Moreover, when appropriating funds, federal mandates must be directly linked to the purpose of that grant.

Although this Article is meant to address the scope of Congress's power under the Commerce Clause and not preemption law, we note that having a sense of where federal powers cease and exclusive state power starts has important implications for preemption analysis as well. Knowing Congress's limits not only constrains Congress's ability to invade the States' prerogatives, but is also helpful in ensuring that Congress is accorded the full scope of its legitimate power.

Too often, when the question of federal preemption of State law arises, those lacking any conception of limited federal power manifest an untamed fear of federal overreaching. Without a principled method of limiting federal action, they instead put a thumb on the scale against preemption.[5] Such an approach may cloud the key question in any preemption case—i.e., whether Congress has clearly exercised its legitimate powers.

Those who have a clear conception that federal power has some limits are often better able to interpret congressional acts

5. *See, e.g.*, Cipollone v. Liggett Group Inc., 505 U.S. 504 (1992) (Stevens, J., plurality opinion).

without the same bias.[6] The security that comes with the knowledge that there are discernible limits to the federal government allows for a more honest analysis, one which permits Congress to exercise those powers it legitimately holds to their full and proper extent.

II. THE PROBLEM FACING THE CONTINENTAL CONGRESS UNDER THE ARTICLES OF CONFEDERATION

The American Revolution dramatically altered the regulation of the internal and external commerce of the colonies. Before the Declaration of Independence, Britain regulated and monitored trade among the colonies. When this regulation was eliminated, and no real power took its place under the Articles, uncertainty and retaliatory trade barriers begin to spread among the States. Many States passed laws interfering directly with commerce, including port fees, taxes, and exclusionary trade laws.[7]

The Revolution also harmed the entire economy. "Most obviously, the break from England ruptured America's umbilical commercial connection to the mother country, with special harm flowing from the loss of colonial subsidies and preferences."[8] Britain closed numerous ports to American exports by force and by refusing to make treaties and, at the same time, flooded the good-deprived States with British imports.[9] The Northern States lost their primary trading partner in London, and the entire West Indies market was cut off from further exports.[10]

The political effect of the increasing tension between various States led some to fear that unregulated commercial warfare would turn to interstate war. "[B]order quarrels" had already erupted, and more could be expected.[11] "It is not at all

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6. *Compare* Egelhoff v. Egelhoff, 531 U.S. 141 (2001) (finding federal law preemption of state inheritance law statute) *with id.*153-61 (Breyer, J., dissenting).

7. *See* THE FEDERALIST NO. 7 at 31 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

8. 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, 22 (1999).

9. *See id.* at 22 n.84.

10. *See* WALTER HAMILTON & DOUGLASS ADAIR, THE POWER TO GOVERN 27 (1937).

11. Nelson & Pushaw, *supra* note 8, at 23; *see also* HAMILTON & ADAIR, *supra*

probable," Hamilton argued, that:

> [the] unbridled spirit [of enterprise] would pay much respect to those regulations of trade by which particular States might endeavor to secure exclusive benefits to their own citizens. The infractions of these regulations, on one side, the efforts to prevent and repel them, on the other, would naturally lead to outrages, and these to reprisals and wars.[12]

As the economy failed, States attempted to protect themselves. Some state legislatures passed laws providing "debtor relief," a euphemism for allowing in-state debtors to cancel their debts to out-of-state creditors. At the same time, certain States began issuing unsupported paper money with which debtors could "pay" their debts.[13] The States began dividing into debtor States and creditor States. The pro-debtor laws—passed by States with more debtors—led to retaliation by States that had a large number of creditors.[14]

Some political commentators argued that when the economy recovered, trade and peace among the States would be restored. Hamilton disagreed. To those who claimed "that whether the States are united or disunited, there would still be an intimate intercourse between them," Hamilton answered that "this intercourse would be fettered, interrupted, and narrowed by a multiplicity of causes."[15] "A unity of commercial" interests, Hamilton concluded, "can only result from a unity of government."[16] Otherwise, Hamilton believed, the "competitions of commerce" would always be a "fruitful source of contention."[17] He stated:

> The States less favorably circumstanced would be desirous of escaping from the disadvantages of local situation, and of sharing in the advantages of their more fortunate neighbors. Each State, or separate confederacy, would pursue a system of commercial policy peculiar to itself. This would occasion

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note 10, at 31-32.

12. THE FEDERALIST NO. 7, at 31 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

13. *See* THE FEDERALIST NO. 10, at 52 (James Madison) (Clinton Rossiter ed., 1999) (condemning the "rage for paper money, [and] for an abolition of debt").

14. *See* THE FEDERALIST NO. 10, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

15. THE FEDERALIST NO. 11, at 58 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

16. *Id.*

17. THE FEDERALIST NO. 7, at 30-31 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

> distinctions, preferences, and exclusions, which would beget discontent. The habits of intercourse, on the basis of equal privileges, to which we have been accustomed since the earliest settlement of the country, would give a keener edge to those causes of discontent than they would naturally have independent of this circumstance.[18]

Congress under the Articles of Confederation was powerless to address the problems of excessive importation, interstate squabbling, and piecemeal foreign policy. "Devoid of power," the Continental Congress "could neither prevent the excessive importations . . . nor even raise from that excess a contribution to the public revenue."[19] The Congress therefore lacked the power to prepare a coherent response to interstate squabbles. According to Jack Rakove, "the most serious doubts about the adequacy of the Articles of Confederation arose over the inability of Congress to frame and implement satisfactory foreign policies."[20] During the Ratification debates, Charles Pinckney noted that:

> Frequent and unsuccessful attempts were made by Congress to obtain the necessary powers. The States, too, individually attempted, by navigation acts and other commercial provisions, to remedy the evil [of foreign trade sanctions]. These, instead of correcting, served but to increased it; their regulations interfered not only with each other, but, in almost every instance, with treaties existing under the authority of the union.[21]

Indeed, the problem was so grave that some have even taken the view that the purpose of the Constitution was to vest complete authority in Congress over commerce. Professor William Crosskey, for example, offered a novel and expansive view of the purpose behind the Commerce Clause.[22] To Crosskey, the period preceding the Constitutional Convention was marked by widespread support for a generally

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18. *Id.*

19. James Wilson, in the Pennsylvania Convention, (Nov. 24, 1787) *in* THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 141 (Max Farrand ed., 1911) [hereinafter RECORDS OF THE FEDERAL CONVENTION].

20. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 26 (1996).

21. Charles Pinkney, Argument, *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, at 253-54 (Jonathan Elliot ed., 1901) [hereinafter DEBATES].

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

empowered national government, a government whose powers would greatly exceed the limited powers extolled in *The Federalist*.[23]

In fact, the deep post-Revolution depression did seem to lead some in the New England States to desire complete federal regulation of commerce and slavery. The southern States were wary of any national commercial regulation, but wanted to expand their territory and were dependent on the northern States's military power to do so. Crosskey argued that to get expansive federal commercial power the North allowed the southern States increased representation in the Congress. The South also was guaranteed that the slave trade would not be altered by the national government, at least until a defined date.[24]

One thing is certain: the Founders turned to a federal commerce power to carve stability out of this commercial anarchy. Of the four "grand committees" created at the Federal Convention of 1787, two dealt with commerce.[25] These committees drafted a clause which grants Congress power to regulate three separate spheres of commerce—foreign, domestic, and Indian. Of course, the foreign section of the clause had a different impetus than the domestic section. Related historical events, however, precipitated combining the foreign and domestic sections of the Commerce Clause.

In sum, the Clause was drafted to grant Congress the power to craft a coherent national trade policy, to restore and maintain viable trade among the States, and to prevent interstate war. For example, Madison gauged that:

> [n]o one who recollects . . . the period when the power over Commerce was in the individual States, & separate attempts were made to . . . regulate it, needs be told that the attempts were not only abortive, but by demonstrating the necessity

23. Crosskey's methodology was as iconoclastic as were his conclusions, although his research into the original meaning of words is remarkable: Crosskey thought that all statements made in connection with the drafting or ratifying of the Constitution were open to suspicion of political spin-doctoring, and so should be disregarded. "The samples of word-usage and juristic and political discussion" informing his analysis were all "drawn . . . from sources not connected with the Constitution." *Id.* at 5.

24. The "Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year 1808." U.S. CONST. art. I, §. 9, cl. 1.

25. *See* RAKOVE, *supra* note 20, at 84 n.75.

> of general & uniform regulations gave the original impulse to the Constitutional reform which provided for such regulations.[26]

III. THE LANGUAGE OF THE COMMERCE CLAUSE

What power does the Constitution grant to Congress with the Clause, "The Congress shall have Power . . . To regulate Commerce . . . among the several States?"[27] The language of the Clause offers insight into the limits of that power.

Constitutional language, by necessity and design, varies in levels of abstraction or generality. In the clause "No Person shall be a Representative who shall not have attained to the age of twenty five Years," the age requirement is concrete, and the meaning of "Representative" is not open to serious question.[28] Unfortunately, the key words in the Commerce Clause—"regulate," and "commerce," "among the several States"—are not similarly as concrete or self-explanatory.

This does not mean, of course, that these key words lack definition. The meaning of more general concepts is often far more important than the meaning of more concrete words. It is easier to define "chair" than it is to define "justice," but a "chair" is not more important, nor does "justice" have so loose a meaning as to have none at all.[29]

In addition to its generality, the history of the Commerce Clause throws another curve into the search for meaning: for a long time after the founding, Congress exercised the commerce power so infrequently that its eventual exercise may be less indicative of the founding conception of the Clause. Ordinarily, the First Congress sheds light on the meaning of the Constitution because the same men were involved in the Constitutional debates and the Convention, and their intellectual and social contemporaries filled the ranks of the Congress and the Supreme Court after ratification. What the

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26. Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), *in* 2 THE FOUNDERS' CONSTITUTION 520 (Philip B. Kurland & Ralph Lerner eds., 2000) [hereinafter FOUNDERS' CONSTITUTION].

27. U.S. CONST. art. I, § 8, cl. 3.

28. U.S. CONST. art. I, § 2.

29. "The role of a judge . . . is to find the meaning of a text—a process which includes finding its degree of generality, which is part of its meaning." ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 149 (1990).

men of the First Congress took the Constitution to mean is illuminating not because we are swayed by each man's individual understanding, but "because what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean."[30] Accordingly, "[b]y the time the First Congress adjourned in 1791 the country had a much clearer idea of what the Constitution meant than when that body had first met in 1789."[31]

Except, it turns out, with respect to the Commerce Clause, which early Congresses invoked sparingly, if at all. Naturally, this meant few opportunities for judicial pronouncements on the subject. "Not until 1824 by the decision of the Supreme Court in *Gibbons v. Ogden* was a clear indication given of the extent of the power granted, and not until the Constitution was nearly a hundred years old did Congress begin the exercise of the authority granted it to regulate, affirmatively, commerce between the States."[32] Rather, "[b]efore [1887] the commercial power granted to the federal government had been employed only by way of preventing an interference with interstate and foreign commerce by the States."[33] Thus, Supreme Court jurisprudence on the Commerce Clause is both late in time after the founding and relatively indeterminate.

Despite this history, coming to an original understanding of the Commerce Clause is possible and, even more, necessary.

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30. *Id.* at 32.

31. David Currie, *The Constitution in Congress: Substantive Issues in the First Congress*, 61 U. CHI. L. REV. 775, 778 (1994). Banfield does point out that the First Congress, even without invoking the Commerce Clause, immediately took actions which may have been inconsistent with the Constitution's text. According to Banfield:

> [I]n his first message to Congress, President Washington proposed giving assistance to agriculture, commerce, and manufacturing. The First Congress, sixteen of whose thirty-nine members had been delegates to the convention, made tariff legislation its first order of business. The declared purpose of the Tariff Act was certainly constitutional—Congress had power to lay duties and collect revenues—but this purpose concealed another, the subsidization of particular occupations and interests, which the Constitution did not authorize.

BANFIELD, *supra* note 2, at 31.

32. 2 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 721 (2d ed. 1929).

33. *Id.* at 778. The 1887 Interstate Commerce Act created the Interstate Commerce Commission. 24 Stat. 399. Congress enacted the Sherman Antitrust Act three years later. 26 Stat. 209.

Difficult as it may be to give a succinct definition of the commerce power, it is often quite easy to identify territory clearly falling outside the power. It is also quite possible to identify many areas falling within. In particular, documents from the founding era, most notably *The Federalist* and records of the ratification conventions, provide insight into the definition and use of the words "commerce," "among the several States," and "to regulate."

A. "Commerce"

1. What "Commerce" Is

"Commerce" was defined in the early years of the Union as trade, intercourse, navigation, traffic, and transportation for profit. "Navigation," for example, although perhaps more immediately grasped by the modern mind than what is meant by "traffic," is less straightforward than might be imagined.[34] Still, when "commerce" is repeatedly described in similar terms by those discussing the national regulation of commerce, a clearer view of the word's scope takes shape. In short, "commerce" means the activities of buying and selling that come after production and before the goods come to rest.

Professor Crosskey—whose analysis excludes the great number of ratification documents that identify "commerce" with trade—interpreted "commerce" far more broadly to mean "all gainful activity."[35] Crosskey acknowledged that "[i]n most senses in which 'commerce' was used in the eighteenth century, the word 'trade' was also used."[36] "The exception," according to Crosskey, "was the broadest of the then current uses . . . in which the word covered any or all of the manifold activities that men carry on together," and "almost always meant 'all kinds of business,' or the gainful activity of the nation."[37]

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34. *See, e.g.*, St. Clair County v. Interstate Sand & Car Transfer Co., 192 U.S. 454 (1904) (involving state regulation of ferries between States).

35. CROSSKEY, *supra* note 22, at 89.

36. *Id.* at 84.

37. *Id.* at 84, 89. Crosskey's evidence for a broader reading of "commerce" came from numerous, mostly pre-revolutionary sources. His quotations are too extensive to categorize to any use here, but they fail to prove his ultimate point; there may have been a broader definition of "commerce," but Crosskey did not overcome the relevant ratification evidence suggesting that the Commerce Clause

The language of the day supports the narrower interpretation, however. In 1773, Samuel Johnson's Dictionary of the English Language defined "commerce" as "Intercour[s]e; exchange of one thing for another; interchange of any thing; trade; traffick."[38] Other contemporaneous dictionaries described commerce similarly, as "[e]xchange of one thing for another."[39]

"Trade" seems to be the most common substitute. Professor Randy Barnett has tallied each appearance of "commerce" both in Madison's notes on the Constitution Convention and in *The Federalist*.[40] Barnett concludes that "[i]n none of the sixty-three appearances of the term 'commerce' in The *Federalist Papers* is it ever used to refer unambiguously to any activity beyond trade or exchange."[41] He similarly concludes that in Madison's notes every non-foreign reference to "commerce" could be substituted with either "trade" or "exchange" "with the apparent meaning of the statement preserved."[42]

Indeed, in 1828, Madison wrote a letter in which he stated that "[t]he Constitution vests in Congress expressly . . . 'the power to regulate trade.'"[43] Throughout the letter, Madison continues to replace "commerce" with "trade:" "a power to regulate trade;" "the power to regulate trade with foreign nations;" "[t]he meaning of the Phrase 'to regulate trade;'" and "regulations of trade," are but a few examples.[44]

The state ratifying conventions also include numerous instances of "commerce" being used such that "trade" could

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did not employ this less common use. *See id.* at 84-136.

38. 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773).

39. THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796); NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (26th ed. 1789).

40. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 114-16 (2001). Madison's notes mentioned "commerce" thirty-four times plus sixteen times in quotations, and commerce appeared sixty-three times in The *Federalist Papers*. *See id.*

41. *Id.* at 116.

42. *Id.* at 114.

43. Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), *in* 2 FOUNDERS' CONSTITUTION, *supra* note 26, at 517.

44. *Id.* at 114-15. Madison may have used this locution because of confusion about the several plans submitted to the Constitutional Convention that employed "trade" instead of "commerce." Both the Pinckney and the Paterson Plan proposed to grant Congress "the exclusive power of regulating the Trade of the Several states as well with Foreign Nations . . . ." 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 19, at 607, 612.

easily be substituted.[45] To pick one of many examples, a participant in the North Carolina convention referred to "commerce" as "the nurse of both" agriculture and manufacturing, because "[t]he merchant furnishes the planter with such articles as he cannot manufacture himself, and finds him a market for his produce."[46]

2. *What "Commerce" Is Not*

History provides us with more material on the subject of what "commerce" is *not* than on what "commerce" *is*. This is unsurprising; the Commerce Clause was not drafted to cause confusion. Its drafters employed plain language that could reasonably be expected to be understood at the time. It is therefore natural that most of the discussion should take place at the margins—identifying those areas that could be "commerce" but are not—and that very little of the discussion centers on a basic definition of a word already understood.

Early American writings distinguish "commerce" from the class of subjects to which it is separate but connected in two ways: either by a direct discussion of what is excluded from commerce, or by implication. Alexander Hamilton's writings in The *Federalist Papers* provide many of these definitions by implication. Hamilton often included "commerce" in a list of concepts which are similar in one way (activities critical to the success of the nation, for instance), but distinct enough to call for separate identification, as in "the state of commerce, of arts, of industry."[47]

These early discussions of the nature of the Union suggest that "commerce" does not include manufacturing, agriculture, labor, or industry. In short, "commerce" does not seem to have been used during the founding era to refer to those acts that *precede* the act of trade. Interstate commerce seems to refer to

45. *See* Barnett, *supra* note 40, at 116-25 (noting that "the term [commerce] was uniformly used to refer to trade or exchange, rather than all gainful activity," in the state ratification conventions).

46. 4 DEBATES, *supra* note 21, at 20.

47. THE FEDERALIST NO. 21, at 109 (Alexander Hamilton) (Clinton Rossiter ed., 1999). Unlike direct discussions on the meaning of "commerce," of course, we must be careful to take these potential insights into the common understanding of commerce for what they are and no more. Hamilton's separate treatment of commerce and industry, or commerce and agriculture, is additional, but not dispositive, evidence of the general distinction between the two.

interstate trade—that is, commerce is "intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the . . . citizens of different States."[48]

a. Manufacturing, Industry, and Labor

Trade among the States and with foreign countries was vigorous even in the earliest years of the nation. The creation of goods to be transported in interstate commerce was a prominent concern of early American industry and agriculture: commerce, said Alexander Hamilton, is "the faithful handmaid of labor and industry."[49]

Writing almost a century later, expounding on the difference between commerce and industry, Justice Joseph Lamar, for the Supreme Court, said:

> No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The *buying and selling and the transportation incidental thereto* constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. . . . If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it

48. Welton v. Missouri, 91 U.S. 275, 280 (1876) (holding that a state act requiring payment of a license fee only for vendors selling out-of-state merchandise imposed an unconstitutional burden on interstate commerce).

49. THE FEDERALIST NO. 12, at 60 (Alexander Hamilton) (Clinton Rossiter ed., 1999). Hamilton felt that the interests of labor and industry were distinct, but that the two groups could see their way to common ground at times and thus create a unified political front. He stated:

> Mechanics and manufacturers will always be inclined, with few exceptions, to give their votes to merchants, in preference to persons of their own professions or trades. Those discerning citizens are well aware that the mechanic and manufacturing arts furnish the materials of mercantile enterprise and industry. Many of them, indeed, are immediately connected with the operations of commerce. They know that the merchant is their natural patron and friend; and they are aware, that however great the confidence they may justly feel in their own good sense, their interests can be more effectually promoted by the merchant than by themselves. . . . We must therefore consider merchants as the natural representatives of all these classes of the community.

THE FEDERALIST NO. 35, at 182-83 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

> would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. [50]

That the Commerce Clause most likely gave Congress the power to regulate "buying and selling" of goods in interstate commerce but not production is supported by other contemporary definitions of "commerce" as well as the purpose behind the Clause.

The distinction between commerce and the production of goods (either through industry or agriculture) that preceded commerce was periodically and consistently remarked upon by the Supreme Court. "[W]henever a commodity has begun to move as an article of trade from one State to another," then, the Court held, "commerce in that commodity between the States has commenced."[51] The famous formulation of this idea is Justice Fuller's: "Commerce succeeds to manufacture, and is not a part of it."[52]

That the drafters chose "commerce" in lieu of a more sweeping term reflects the Framers' vision of the Commerce Clause; it was to keep the States from treating one another as hostile foreign powers. Such a limited function would not have been furthered by giving Congress power to regulate the pre-trade production of goods. Alexander Hamilton contended that "[t]he importance of the Union, in a commercial light, is one of those points about which there is least room to entertain a difference of opinion, and which has, in fact, commanded the most general assent of men who have any acquaintance with the subject."[53] Without unified national intervention, Hamilton

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50. Kidd v. Pearson, 128 U.S. 1, 20-21 (1888) (emphasis added). Samuel Johnson's Dictionary, 1785 edition, defines "manufacture" as "[t]he practice of making any piece of workmanship" or "[a]ny thing made by art." SAMUEL JOHNSON, 1 A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785).

51. The Daniel Ball, 77 U.S. (10 Wall.) 557, 565 (1870) (upholding a federal law regulating a ship traveling only intrastate on navigable waters, with goods in the stream of interstate commerce).

52. United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) (refusing to apply the Sherman Antitrust Act to sugar production because such production is local and under the exclusive control of the States).

53. THE FEDERALIST NO. 11, at 52 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

concluded in a different *Federalist* paper, States would ignore one another's trade regulations in the "endeavor to secure exclusive benefits to their own citizens."[54] As noted earlier, Hamilton warned that the result of these infractions would be "on one side, the efforts to prevent and repel them, on the other, would naturally lead to outrages, and these to reprisals and wars." [55] It was much less likely that the manufacturing or agricultural decisions of a State would cause such strife.[56] Thus, understanding "commerce" to include trade but not manufacture or agriculture is consistent with what is known about the purpose of the Commerce Clause.

Several scholars have suggested that the generation of the Framers would have assumed and accepted that the power to regulate commerce included the power to do so for the purpose of encouraging manufacturing.[57] At least Madison would have concurred: "The power" to regulate commerce, he wrote "embrac[es] the object of encouraging manufactures," and this "use of the power by Cong[ress] accords with the intention and expectation of the States in transferring the power over trade from themselves to" the federal government.[58] This seems

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54. THE FEDERALIST NO. 7, at 31 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

55. *Id.*

56. Certainly, the discussions in The *Federalist Papers* do not reveal any such fear. Some commentators have argued that intrastate commerce was meant to be included in the Commerce Clause because the phrase "among the several States" referred to all such activity engaged in by the people of the States, whether intrastate or interstate. *See* CROSSKEY, *supra* note 22, at 50-55. However, "among" was often used as "between" during the founding era. Hamilton used the construction "between the States" in *The Federalist* when referring to the commerce power. Of "[t]he principal purposes to be answered by the union," for example, Hamilton lists "the regulation of commerce with other nations and between the States." THE FEDERALIST NO. 23, at 121 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

Moreover, even those scholars who accept Crosskey's expansive definition of "commerce" tend to reject his reading of "among." Nelson and Pushaw, the modern champions of Crosskey's view of "commerce," accept the established reading of the phrase without hesitation:

> Linguistically, the primary definition of "among," both in 1787 and today, is "the mingling of" or "associated with"; hence, the word signifies the reciprocal relation of one thing in a group to the other members of that group. Read most naturally, then, "among the several States" applies to commercial activity that links one State to another.

Nelson & Pushaw, *supra* note 8, at 43.

57. *See* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1077-84, 1089 (Melville M. Bigelow, ed., 1994) (1833); Daniel Farber, *The Constitution's Forgotten Cover Letter*, 94 MICH. L. REV. 615, 641 (1995).

58. Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), *in* 2

reasonable enough as far as it goes. The Framers no doubt hoped that Congress's regulation of interstate commerce would improve the entire economy as well as the political relations between the States. This does not necessarily mean, however, that the definition of "commerce" would have allowed direct regulation of manufacture or agriculture preceding commerce.

Richard Epstein has argued that "commerce" must mean "trade" to the exclusion of "manufactures." Otherwise, he argues, it would have been unnecessarily duplicative to have specified the regulation of commerce with foreign nations, among the States, and with the Indian tribes.[59] "What possible sense does it make as a matter of ordinary English to say that Congress can regulate 'manufacturing with foreign nations, or with Indian tribes,' or for that matter 'manufacturing among the several States,' when the particular fabrication or production takes place in one state, even with goods purchased from another?"[60] None, if "commerce" meant "manufactures." But even those who take an expansive view of "commerce" agree that it must include trade.

Professor Epstein's argument highlights that the acts of trade and manufacturing are fundamentally different; different enough, perhaps, that one should be skeptical in the absence of strong evidence to the contrary that a clause including both would bear any resemblance to the Commerce Clause. More persuasively, if the members of the Constitutional Convention had wished to invest the national government with broad powers to regulate all forms of economic activity, they probably would not have used a word that often referred to trade.

b. Agriculture

Similarly, Hamilton referred in *The Federalist* to agriculture and commerce as related but separate pursuits:

> The several States are in various degrees addicted to agriculture *and* commerce. In most, if not all of them, agriculture is predominant. In a few of them, however, commerce nearly divides its empire, and in most of them has

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FOUNDERS' CONSTITUTION, *supra* note 26, at 517.

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

60. *Id.* at 1394.

a considerable share of influence.[61]

Hamilton further argued that, to hold "knowledge of local circumstances," a person had to have knowledge of the various pursuits of a state, "of its agriculture, commerce, manufactures, with the nature of its products and consumptions, [and] with the different degrees and kinds of its wealth, property, and industry."[62]

Because "agriculture" was defined at the time as "[t]he art of cultivating the ground; tillage; husbandry, as distinct from pasturage," it would not have been considered a form of commerce, trade, sale, or intercourse.[63] Indeed, said Hamilton, "between agriculture and commerce," there existed a "rivalship."[64] Hamilton conceived of the power to regulate commerce as "national," whereas "the supervision of agriculture and of other concerns of a similar nature . . . are proper to be provided for by local legislation."[65]

Still, Hamilton identified the "three great [presumably distinct] objects of government" as "agriculture, commerce and revenue."[66] In his notes on the Constitutional Convention, Madison revealed a similar view in an ultimately unsuccessfully proposal to grant the new Congress the power "[t]o establish public institutions, rewards, and immunities for the promotion of agriculture, commerce, trades and manufactures."[67]

B. "To regulate"

Two issues about the meaning of "to regulate" arose: (1) Was the power exclusive of state exercise of similar power, and (2)

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61. THE FEDERALIST NO. 60, at 337 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (emphasis added); *see also* THE FEDERALIST NO. 8, at 37 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (discussing both "the improvements of agriculture and commerce").

62. THE FEDERALIST NO. 36, at 186 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

63. 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785).

64. THE FEDERALIST NO. 12, at 59 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

65. THE FEDERALIST NO. 17, at 86 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

66. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 19, at 329.

67. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 478 (1996).

Did the power include the power to prohibit or destroy? The evidence suggests that there was probably general agreement that Congress's power to regulate interstate commerce included the power to prohibit. It remained unsettled whether Congress's power to regulate commerce was an exclusive national power and, if so, as to what areas of commerce it was exclusive.

Samuel Johnson's dictionary defined "to regulate" as "1. To adjust by rule or method . . . 2. To direct."[68] This definition is supported by Chief Justice Marshall's noted description of the power to regulate as the power "to prescribe the rule by which commerce is to be governed."[69] Chief Justice Melville Fuller later reiterated a similar formulation: "The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed."[70] This formulation suggests that the aim of "regulation" must be limited to the governance of commerce, although Supreme Court jurisprudence is not uniform on this topic.[71]

1. The Power to Prohibit

The power to regulate could include the power to prohibit, but the meaningful question may be the power to prohibit *what*. Professor Randy Barnett argues that because the definitions of "regulate" and "prohibit" "sharply differ," and because "to regulate" appears in various forms seven additional times in the Constitution, regulation probably does not include prohibition.[72] In support of this argument, he cites Samuel Johnson's dictionary, which defines "to prohibit" as "1. To

68. 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785). Regulation may also have ordinarily included taxation. Madison evinces a strong belief that the constitutional "power to lay & collect taxes[,] duties[,] imposts[,] & excises" would have been assumed to be a part of "the power to regulate trade," and remained a part of that power, despite being "particularly expressed" in a separate phrase. Letter from James Madison to Joseph C. Cabell, *in* 2 FOUNDERS' CONSTITUTION, *supra* note 26, at 517.

69. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824).

70. United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895).

71. *Compare* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 319-20 (1851) (allowing a law regulating the piloting of ships in a Pennsylvanian harbor even though it affected interstate commerce because this level of commerce was inherently "local" and not "national") *with* Champion v. Ames, 188 U.S. 321, 353-54 (1903) (upholding a federal prohibition on the shipment of lottery tickets across state lines as objects of interstate commerce).

72. Barnett, *supra* note 40, at 139-40.

forbid; to interdict by authority . . . 2. To debar; to hinder."[73]

But Johnson's definition of regulate does not necessarily exclude prohibition. If, for example, the government were to regulate the flow of mail from one State to another, that regulation might include a prohibition on one State holding the mail for excessive fees. Regulation of a larger activity, in other words, may logically include the prohibition of lesser included activities.

It does not, therefore, seem *logically* necessary, given Johnson's definitions of "to regulate" and "to prohibit," that the power to regulate interstate commerce could not also include the power to prohibit certain manners, modes, or impediments to commerce. Moreover, it was understood that future Congresses might have an interest in limiting or prohibiting foreign commerce in order to advance foreign policy or budding American industry. The power granted to Congress to regulate foreign commerce thus unquestionably included the power to prohibit some commerce through the imposition of tariffs or preferential trade policies.

Because the purposes behind the foreign and interstate segments of the Clause were so different, some have argued that the word "regulate" entailed a subtly different meaning with respect to each sphere.[74] That may be, but it is unlikely that the same word—"to regulate"—includes the power to prohibit when modifying "foreign commerce" but not when modifying "commerce among the several States." That said, Congress's power to prohibit commerce among the States may be limited by the purpose of the Clause—so that Congress is limited to eliminating modes of trade that impede interstate commerce.

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73. *Id. at* 139 (citing 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785)).

74. Madison, for one, seems to have thought so. As Barnett reports:

> Madison contended that the "meaning of the power to regulate commerce is to be sought in the general use of the phrase; in other words, in the objects generally understood to be embraced by the power when it was inserted in the Constitution." And, as is well known, the purposes of granting Congress the power to regulate trade "with foreign nations" differed markedly from the purpose for regulating trade "among the several States." Given the need for a broader power over the former, Madison said he "always foresaw" difficulty properly interpreting the latter.

Barnett, *supra* note 40, at 145 (internal quotations omitted).

2. *An Exclusive Power to Regulate?*

A second key "regulation" question is whether the Framers intended the federal power to regulate commerce to be exclusive of state power to do so. Some, such as Professor Laurence Tribe, have been quick to take *Gibbons v. Ogden*[75] for that proposition.[76] In *Gibbons*, the Court was faced with a dispute between two steamship owners, both of whom wanted to travel between New York and New Jersey. New York law granted an exclusive right to the travelway to one person; all others could make the journey only with his permission. New Jersey returned the favor by passing a law that would allow New Jersey citizens to sue in a New York court under the New York law but to have treble damages enforced by a New Jersey court. The Court held that a federal statute licensing ships was a legitimate exercise of the commerce power that preempted the conflicting state laws.

Close examination of the case reveals that Tribe's reading is too broad. At most, as one early commentator claimed, the "precise point actually decided in *Gibbons v. Ogden* was that the Federal authority over foreign and interstate commerce is exclusive in so far as that commerce *is carried on by water*."[77] "That the Federal power was exclusive seems . . . to have had little relation to monopolies of transportation, and no relation whatever to land transportation and ferriage."[78] Moreover, because the New York statute struck down in *Gibbons* conflicted with a federal statute, the Court did not have to decide if the power to regulate commerce was exclusive in the face of inaction by the federal government.[79]

The Supreme Court's other rulings on whether the power is exclusive or concurrent do not resolve the issue; indeed, they are inconsistent. The Court in *Brown v. Maryland*,[80] held the

75. 22 U.S. (9 Wheat.) 1 (1824).

76. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978) § 5-4, at 232 (footnotes omitted).

77. 2 WILLOUGHBY, *supra* note 32, at 763 (emphasis added).

78. E. PARMALEE PRENTICE & JOHN G. EGAN, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION 68 (1898).

79. Professor Brad Clark makes the interesting observation that the commerce power can only be exclusive if it is construed narrowly; otherwise, it would trench too much on state authority. *See* Bradford R. Clark, *Translating Federalism: A Structural Approach*, 66 GEO. L. REV. 1161 (1998).

80. 25 U.S. (12 Wheat.) 419 (1827).

Clause to grant exclusive federal authority. Two years later, in *Willson v. Black Bird Creek Marsh Co.*,[81] Chief Justice Marshall, confusing those who had read *Gibbons* to declare an exclusive power, determined that the States had concurrent power to regulate commerce.[82]

Eight years later, in *New York v. Miln*,[83] the Court interpreted a law requiring ships entering New York to provide passenger lists and bonds for immigrants to be an exercise of the police power to protect the health and wealth of New York's citizens. The Court stated:

> We shall not enter into any examination of the question whether the power to regulate commerce be or be not exclusive of the states, because the opinion which we have formed renders it unnecessary: in other words, we are of opinion that the act is not a regulation of commerce, but of police; and that being thus considered, it was passed in the exercise of a power which rightfully belonged to the states.[84]

Miln thus seems to answer the question of exclusivity to some extent. In *Miln*, the Court was willing to permit a State to regulate interstate commerce in the absence of congressional exercise of the commerce power because the state regulation rested on other (police power) grounds. The best conclusion to be drawn from this and the other cases, however, is that the question of the exclusivity of the Federal commerce power had not been definitively answered. Today, the question of concurrency has been resolved; some of Congress's power may be exclusive, but much of it is not.[85]

In sum, the text of the Commerce Clause seems to have given

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81. 27 U.S. (2 Pet.) 245 (1829).

82. *See id.* at 252 ("If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, . . . we should not feel much difficulty in saying that a State law coming in conflict with such act would be void. But Congress has passed no such act.").

83. 36 U.S. (11 Pet.) 102 (1837).

84. *Id.* at 132.

85. *See* Parker v. Brown, 317 U.S. 341, 360 (1943) ("This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the States the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken."); Gwin, White & Prince Inc. v. Henneford, 305 U.S. 434, 441 (1939) (holding local tax on fruits in interstate commerce unconstitutional because tax discriminated on activities outside the state: "There has been left to the states wide scope for taxation of those engaged in interstate commerce, extending to the instruments of that commerce, to net income derived from it, and to other forms of net income not destructive of it.").

Congress the power to regulate, and, if necessary, prohibit, state laws that impinged on the buying and selling of goods in commerce. Congress lacked the authority, however, to use this power over interstate commerce to regulate manufacture, labor, agriculture, or industry. As demonstrated below, the Supreme Court essentially took this view for more than the first hundred years of the Republic.

IV. THE SUPREME COURT'S INDETERMINATE JURISPRUDENCE

As noted, the early Congresses relied upon the Clause sparingly. Because Congress so rarely invoked the Commerce power, the Supreme Court had scant opportunity to evaluate the scope and meaning of the Clause in the first hundred years of the Union, other than in the few cases discussed above. In fact, the trusted Prentice and Egan treatise on the Commerce Clause declares that "such a history as this can, it is believed, find its parallel in no other branch of constitutional law."[86]

A brief history of the evolution of the commerce power under Supreme Court jurisprudence helps identify how the original understanding has been warped and was eventually abandoned.

A. The Marshall Court Speaks

As the history of the Commerce Clause in the early years of the Union would suggest, the Marshall Court did not address the Clause very often. In fact, only one Commerce Clause case and one case concerning the Necessary and Proper Clause bear discussion. Both reveal a limited conception of Congress's powers, in keeping with the original understanding.

As discussed above, in *Gibbons v. Ogden*, Chief Justice Marshall delivered an influential "first" ruling and rumination—a good bit of it dictum—on the Commerce Clause.[87] The question before the Court was whether

86. PRENTICE & EGAN, *supra* note 78, at 14.

> [B]efore the year 1840 the construction of [the Commerce C]lause had been involved in but five cases submitted to the Supreme Court of the United States. In 1860 the number of cases in that court involving its construction had increased to twenty; in 1870 the number was thirty; by 1880 the number had increased to seventy-seven; in 1890 it was one hundred and fifty eight.

Id.

87. 22 U.S. (9 Wheat.) 1 (1824). The Supreme Court later ruled factually contrary

"commerce" included navigation. The Court concluded it did. In so doing, Justice Marshall revealed that he did not view the *Gibbons* dispute as a close case. "The word [commerce]," he declared, "comprehends, and has always been understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word 'commerce.'"[88]

For a variety of reasons, including the length of time between ratification and the decision as well as Marshall's biases, this long and often unnecessary foray into the scope of the Commerce Clause seems problematic as a reliable guide to the original understanding of the scope of the commerce power.[89] There is a particular danger in focusing on Marshall's dicta without keeping particular turns of phrase in context.[90] Specifically, Marshall's statement that "[the commerce] power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution," seems to muddle the issue.[91] The sentence does not attempt to describe the *content* of the commerce power—intrastate, interstate, direct, or indirect. Rather, it simply suggests that the power, whatever it entails, is complete.

By examining piecemeal certain phrases in *Gibbons*, some law professors, such as Laurence Tribe, have concluded that "Marshall indicated that . . . congressional power to regulate 'commercial intercourse' extended to all commercial activity having any interstate impact—however, indirect."[92] Upon careful reading, the "elaborate preliminary discussion," upon which Professor Tribe rests this conclusion, does not address the scope of the power over "indirect" commercial activity at

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to *Gibbons* in other cases, without a clarifying or distinguishing explanation. *See* Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829) (upholding state law authorizing a dam which interfered with interstate navigation).

88. *Gibbons*, 22 U.S. at 193.

89. *Id.* at 200. Justice Marshall admits at various points that he addresses questions, at length, the answers to which do not control the case at hand. The Court later observed that Marshall took "care to observe that the question [of federal exclusivity] was not involved in the decision required by that case." Mobile v. Kimball, 102 U.S. 691, 700 (1880).

90. His less controversial and more appropriate discussion of the original understanding of "commerce" should not be overlooked, however. *See Gibbons*, 22 U.S. at 25.

91. *Id.* at 196.

92. TRIBE, *supra* note 76, at 808.

all.[93] Instead, Chief Justice Marshall is addressing whether the Commerce Clause should be read nonsensically so as to apply only to "the narrow boundary between the two states."[94]

In fact, Marshall's own discussion suggests that Tribe's reading is incorrect and that Marshall did not intend the Clause to reach activity with an indirect effect on interstate commerce:

> It is not intended to say that [the discussion thus far] comprehend[s such] commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. . . .
>
> Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description.[95]

Accordingly, *Gibbons* suggests that, although Congress can regulate navigation between States, purely intrastate commerce is considered beyond its reach.

The other relevant case decided during Marshall's tenure was *McCulloch v. Maryland*,[96] in which the Court considered whether the establishment of a national bank was "necessary" to fulfill Congress's powers to coin and regulate the value of money.[97] *McCulloch* did not address the Commerce Clause, but did interpret the meaning and scope of the Necessary and Proper Clause, which the Court would later use to expand the reach of the commerce power.[98]

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93. *Id.*

94. *See* Epstein, *supra* note 59, at 1403.

95. *Gibbons*, 22 U.S. at 194-95.

96. 17 U.S. (4 Wheat.) 316 (1819).

97. The Court did not consider in *McCulloch* whether the bank was a "proper" extension of Congress's enumerated powers because neither side raised the issue.

98. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act's prohibition on the interstate shipment of products manufactured by employers who did not comply with the Act's wage and hours requirements); Wickard v. Filburn, 317 U.S. 111 (1942) (reading the commerce power to reach noncommercial activities like the growing of wheat for personal consumption so long as these activities "substantially affect" interstate commerce).

The Necessary and Proper Clause should not substantially alter the analysis of the scope of the commerce power.[99] The Clause provides Congress with the power "[t]o make all Laws which shall be necessary and proper for the 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."[100] The debate about whether the Clause provides a power of execution—that "Congress shall not fail because it lacks the means of implementation"—or a substantive increase in congressional powers need not, and cannot, be fully engaged here.[101] Nonetheless, those who argue for the latter must answer why the Founders would have gone to the trouble of enumerating and excluding powers, only to undo their handiwork in one clause.

In *McCulloch*, Chief Justice Marshall warned that statutes passed as necessary and proper to the execution of a granted power must still "consist with the letter and spirit of the constitution."[102] This requirement includes respect for the Constitution's enumerated powers.[103] "Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution . . . [or] pass laws for the accomplishment of objects not entrusted to the government," the Court further warned, such laws would be struck down.[104]

Given this understanding, the Necessary and Proper Clause cannot be used to expand the definitions of "commerce" or "regulate." The Clause provides for the "Execution of the foregoing Powers," including the power to regulate commerce.[105] Chief Justice Marshall rightly read the "necessary and proper" language as a "limitation on the *means* which may be used" to execute the enumerated powers, which does not alter or extend "the powers which are conferred."[106]

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99. *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of the Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

100. U.S. CONST. art. I, § 8.

101. *See* Epstein, *supra* note 59, at 1398.

102. 17 U.S. at 421.

103. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, 164 (1985).

104. *McCulloch*, 17 U.S. at 423.

105. U.S. CONST. art. I, § 8.

106. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 187-88 (1824) (emphasis added). As

B. Relative Quiet: 1836-1888

Six decades passed after *Gibbons*, with few cases addressing the congressional exercise of the commerce power. The Court had more occasions during this period to consider the so-called dormant commerce clause. The question facing the Court in these cases was whether a State could legislate in an area where the federal government could legislate under the commerce power but had not done so.[107]

One of the most important dormant commerce clause cases was the aforementioned *Kidd v. Pearson*.[108] *Kidd* is important because, although the Court upheld Iowa's ban on the manufacture of alcohol within the State against a dormant commerce clause challenge, it recognized Congress's broad powers under the Commerce Clause over the sale of goods in interstate commerce. This articulation, during an era when the Court still tried to adhere to the Constitution's original understanding, highlights that States have considerable power reserved to them, but that the Commerce Clause gives Congress considerable authority over goods once they have entered the stream of interstate commerce.

The Court had earlier condoned state legislation pursuant to the States' police power or to "local" power over intrastate commerce.[109] As discussed above, in *Kidd*, the Court acknowledged the principle of cases like *Miln* and *Cooley*, but identified a broad role for the federal government as well, saying that: "The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation

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Professor Clark puts it, because of the Constitution's structure, "[t]o the extent that changed circumstances have led us to expand our understanding of what constitutes 'commerce among the several states,' changed circumstances may lead us to narrow our conception of what means are 'necessary and proper' to regulate such commerce." Clark, *supra* note 79, at 1175.

107. *See* Brannon P. Denning, *The Dormant Commerce Clause Doctrine and Constitutional Structure*, *at* http://papers.ssrn.com/paper.taf?abstract_id=260830 (Feb. 19, 2001).

108. 128 U.S. 1 (1888).

109. *See* New York v. Miln, 36 U.S. (11 Pet.) 102 (1837) (interpreting a law requiring ships entering the State to provide passenger lists and bonds for immigrants as an exercise of the police power to protect the health and wealth of state's citizens); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851) (allowing a law regulating the piloting of ships in a Pennsylvanian harbor even though it affected interstate commerce because this level of commerce was inherently "local" and not "national").

at least of such transportation."[110]

By using this definition, the Court was also able to align the local/national distinction it had laid out in *Cooley* with the interstate nature of most commerce, as well as the intrastate nature of pre-trade commercial activity. In *Cooley*, the Court had upheld a law that affected interstate commerce by regulating the piloting of ships in a state harbor. The Court reasoned that the state police power extended to all pre-trade production to the exclusion of the federal commerce power because such activities were "local" "in their nature."[111] A "local" activity, it said, becomes "national" "whenever a commodity has begun to move as an article of trade from one State to another."[112]

In addition to these dormant commerce clause cases, in 1870, the Court struck down a federal law criminalizing the sale of certain dangerous oils as an exercise of the police power reserved to the States' internal affairs.[113] During this period the Court also held that the Commerce Clause granted Congress the power to regulate "all that portion of commerce. . . between the States which consists in the transportation, purchase, sale, and exchange of commodities."[114]

In short, by the end of the nineteenth century, the Court had clarified three key aspects of the commerce power. First, although the line between state and federal commerce powers remained (and still remains) fuzzy, the Court had recognized—implicitly, if not explicitly—that at least some of the power was concurrent. Second, as evidenced by *Kidd* and *Miln*, the state regulatory power over intrastate commerce, even with incidental effects on interstate commerce, was broad. Nonetheless, States would not be permitted to invade the federal power. Finally, the term "commerce" was understood to assign to Congress power over the "buying and selling" of

110. *Kidd*, 128 U.S. at 20.

111. *Id.* at 21.

112. The Daniel Ball, 77 U.S. (10 Wall.) 557, 565 (1870) (upholding a federal regulation that encompassed a ship traveling only intrastate on navigable waters, with goods in the stream of interstate commerce). At that point, "commerce in that commodity between the States has commenced." *Id.*

113. United States v. Dewitt, 76 U.S. (9 Wall.) 41 (1870).

114. Mobile v. Kimball, 102 U.S. 691, 697 (1880) (rejecting assertion that the federal commerce power precluded the State from raising funds to improve a harbor).

goods in interstate commerce while restricting the regulation of pre-commerce production to the local control of the States.

C. The Turning Point: The Pre-New Deal

During the progressive era, Congress began to regulate in novel areas for novel reasons. Some cases from this period, the last in 1936, are relatively straightforward decisions in which the Court maintained the distinction between commerce and manufacturing or production. The famous formulation of this distinction is Justice Fuller's: "Commerce succeeds to manufacture, and is not a part of it."[115] But these decisions, as well as a second, more complex line of cases raised "questions [that] remain[] intractable because both the motive and the effect of congressional regulation concerned matters that were themselves not within the 'stream of commerce,' at least not as the phrase was understood before 1937."[116] The seminal instance of this second line of cases is *Champion v. Ames*,[117] which is discussed below.

The first group of cases describes "commerce" in keeping with the original understanding. As late as 1936, in *Carter v. Carter Coal Co.*,[118] the Supreme Court described "commerce" as "the equivalent of the phrase 'intercourse *for the purposes of trade*.'"[119] Relying upon this definition, the Court concluded that the Commerce Clause did not convey the power to regulate the production of coal before the coal has entered into commerce. According to the Court, "[m]ining brings [coal,] the subject matter of commerce[,] into existence . . . . Commerce disposes of it."[120]

The second line of cases is represented by *Champion*, in which the Court upheld a federal prohibition on the shipment of lottery tickets across state lines.[121] The Court confined its

115. United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) (refusing to apply the Sherman Act because the production of sugar is local and is under exclusive state control).

116. Epstein, *supra* note 59, at 1421.

117. 188 U.S. 321 (1903).

118. 298 U.S. 238 (1936).

119. *Id.* at 298 (emphasis added).

120. *Id.* at 304; *see also* Hammer v. Dagenhart, 247 U.S. 251 (1918) (invalidating the Child Labor Act as a regulation on production through the prohibition of goods made by children in interstate commerce).

121. *Champion*, 188 U.S. at 353-64.

analysis to whether the lottery tickets were objects of interstate commerce, and logically concluded that they were. What the Court avoided was that the lottery tickets were not being regulated *in their capacity* as objects of interstate commerce, but as objects encouraging immorality—which they could do just as easily intrastate as interstate. "In one sense, the Congress stayed within the commerce clause because Chief Justice Marshall told us that the commerce power is 'plenary' over everything that comes within its specified limits."[122] However, this permissive attitude toward using an enumerated power to infringe on the police power, an area reserved to the States, seems inconsistent with the Constitution's structure.[123] Later cases expanded on this loose measure of *Champion*:

> The principle established . . . is the simple one . . . that Congress has the power over transportation "among the several States"; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only the means necessary but convenient to its exercise, and the means may have the quality of police regulations.[124]

Where *Champion* and its progeny may have gone wrong was not by allowing Congress to regulate articles in interstate commerce, which the Constitution's text seems to allow. Rather, the Court blessed congressional regulation of interstate commerce for reasons that have nothing to do with preserving the free flow of goods and services across state lines. Put another way, Congress seems to have been leveraging its legitimate power to regulate to an area beyond the scope of its delegated power. Distinguishing those circumstances from the legitimate exercise of power may be difficult, but there is an obligation to try.

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122. Epstein, *supra* note 59, at 1423.

123. Today, the law at issue in *Champion* might be defended on the grounds that gambling on lottery tickets is a general drag on the nation's economy, and thus on "commerce." The difficulty with this argument is that it has no principled stopping point, and it invites Congress to regulate any activity which, in the aggregate, diminishes the nation's economy. *See* United States v. Lopez, 514 U.S. 549, 615 (Breyer, J., dissenting).

124. Hoke v. United States, 227 U.S. 308, 323 (1913) (upholding the Mann Act, making it a federal crime to transport a woman across States lines for the purpose of prostitution).

D. The New Deal And Beyond

Three New Deal cases expanded the purpose for which the commerce power could be exercised and altered the previous "requirement" that the object regulated be an object of interstate commerce. Beginning in 1937, the Court allowed Congress to regulate acts that have a "substantial effect" on interstate commerce. In *NLRB v. Jones & Laughlin Steel Corp.*,[125] the Court considered the constitutionality of the Wagner Act. It decided that "the fact that the employees here concerned were engaged in production is not determinative," because the test is "the *effect upon interstate commerce* of the labor practice involved."[126]

Four years later, the Court in *United States v. Darby*[127] overturned *Dagenhart* and upheld an application of the Fair Labor Standards Act to a manufacturer of lumber, prohibiting interstate shipment of products manufactured by employers who did not comply with the Act's wage and hours requirements. "[W]hile manufacture is not of itself interstate commerce," the Court reaffirmed Congress's ability to regulate noncommercial activity by regulating the shipping of goods in commerce.[128]

Wickard v. Filburn[129] is customarily considered the true turning point in the great expansion of the commerce power. But as the preceding jurisprudential history reveals, much of the heavy lifting had been accomplished by 1942. *Wickard* has memorable facts to recommend its position of popularity—the single wheat farmer in that case could not grow some wheat for his family's consumption without penalty because, in the

125. 301 U.S. 1 (1937).

126. *Id.* at 40 (emphasis added). The Court said that "although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential *or appropriate* to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." *Id.* at 37 (emphasis added). Of course, given the facts in *Jones & Laughlin*, it is at least arguable that any understanding of the Commerce Clause would permit Congress to regulate a nation-wide entity such as the Jones & Laughlin Steel Company. The Court likely did not have to stretch the Commerce Clause by articulating a new test to uphold the application of the Wagner Act to companies with offices in many States. That such enterprises did not exist in 1789 is irrelevant.

127. 312 U.S. 100 (1941).

128. *Id.* at 113.

129. 317 U.S. 111 (1942).

aggregate, this behavior would interfere with the interstate wheat market. But the legal analysis in the case—the act may be production, it may be "local," but "it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce,"[130]—should have been expected.

Not much changed in Commerce Clause jurisprudence over the next five decades. Then, in 1995, the Court struck down federal legislation, the Gun-Free School Zones Act,[131] as exceeding Congress's power to regulate commerce.[132] More recently, the Court held unconstitutional the provision of the Violence Against Women Act[133] that created a federal civil remedy for the victims of a crime motivated at least in part by animosity toward women.[134] The Court reiterated its judgment from *Lopez* that the Act was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[135] This judgment did not end the Court's analysis, however, and the Court next applied the *Wickard* test for "substantial effects" on interstate commerce.[136] Even applying the more expansive "substantial effects" test, the Court struck down the law, reasoning that Congress did not have the professed power under the Commerce Clause.[137]

Despite some caterwauling to the contrary, this recent "revival" of the Commerce Clause as a limited power was not revolutionary. Neither of these statutes regulated conduct that was either interstate or economic in nature. Neither law logically required uniformity across the States. Although the Court had not invalidated a federal statute on these grounds in many years, the Court need not have, and did not, overrule the New Deal cases to reach its conclusions.

Recall for a moment, after this condensed journey through

130. *Id.* at 125.
131. 18 U.S.C. § 922(q) (1990).
132. United States v. Lopez, 514 U.S. 549 (1995).
133. 42 U.S.C. § 13981 (1995).
134. United States v. Morrison, 529 U.S. 598 (2000).
135. *Id.* at 610 (quoting *Lopez*, 514 U.S. at 561).
136. *See* Wickard v. Filburn, 317 U.S. 111 (1942).
137. The Court also concluded that Congress did not have the power to enact the legislation under Section 5 of the Fourteenth Amendment, upon which Congress had also rested its power. *See Morrison*, 529 U.S. at 619-27.

the case law, the actual language of the Clause and its purpose. The Clause grants Congress the power to make interstate trade regular, to smooth out the burdensome discrepancies of interstate buying and selling. The Court's interpretation has strayed from the original understanding of the Clause. The extent of this wandering may be questioned, but the essential fact is not debatable. The question then is how to recover the original understanding and how to respect it today to the extent feasible, given the state of our economy and the law.

V. APPLYING THE ORIGINAL UNDERSTANDING TO CURRENT PROBLEMS

The commerce power is an affirmative grant of power to Congress. Even though Congress may overstep the original boundaries of that power, there is an "opposite danger of overreacting to the exercise of national power. The fact that the pendulum has swung too far in the direction of centralization should not produce a knee-jerk hostility to federal power. In many circumstances, federal regulation is necessary and constitutionally legitimate."[138]

In identifying those circumstances, courts and legislators alike need to keep in mind the purposes of the Clause, as well as the nature of the current problem. "The commerce power was established by men who did not foresee the scope and intricate interdependence of today's economic activities. But that does not make it wrong for judges to forbid States the power to impose burdensome regulations . . . ."[139] When the world has changed but the underlying constitutional principle remains, the task for those "in this generation [is] to discern how the framers' values, defined in the context of the world they knew, apply to the world we know."[140] The world we know *includes* the long-standing jurisprudence on the commerce power because "[w]hen there is a known principle to be explicated the evolution of a doctrine is inevitable."[141]

This measure of practicality is required because the reality is

138. Robert H. Bork, *Federalism and Federal Regulation: The Case of Product Labeling*, WORKING PAPER SERIES No. 46, at 4 (Wash. Legal Found. July 1991).

139. Ollman v. Evans, 750 F.2d 970, 996 (D.C. Cir. 1984) (Bork, J., concurring).

140. *Id.* at 995.

141. *Id.*

that the New Deal is not going to be undone, certainly not by the stroke of a judicial pen. That does not mean, however, that courts should not approach new problems (i.e., legislation), as in *Lopez* and *Morrison*, by examining the original understanding and using it as a touchstone in deciding the case. It may be possible for courts to begin moving back in the direction of the original understanding, without necessarily upending decades of case law on which expectations have settled.

A. The Current Problem

During the founding era, States were likely to view one another as rivals—not quite as foreign governments, but still as potential military and commercial threats. That the state of our Union has fundamentally shifted away from this direct rivalry is doubtless. States nonetheless remain capable of and responsible for pursuing their specific interests—sometimes to the exclusion or detriment of other States or the nation as a whole. State laws, state regulations, and state courts are all potential arenas for both intentional and inadvertent clashes among the States.

State legislatures, after all, perform their duties by protecting their own citizens and by encouraging the prosperity of their citizens and their state. Often, States do this by pursuing their own regulatory regimes. Although each regime may be independently justified, the resulting diversity of potentially conflicting regulations can substantially impede firms engaged in interstate commerce.

States, moreover, have divergent interests stemming from varying characteristics. A centrally located state, for example, may enact heavier commercial trucking fees than a remote State seeking to increase "imports." A State that derives much of its prosperity from production may look askance at other States' laws that make tort recovery easier, and vice versa.

Each State may rightly view the actions of other States as a form of implicit discrimination. A seemingly neutral rule about business incorporation or damage awards may operate to shift wealth from one type of State to another. States may not be aware that their choice of commercial law is interfering with the flow of commerce among the States, raising barriers to the sale of products in some States and to the production those products in others. Even if aware of such interference, each

State's wish to alter preferential laws that have gotten out of hand may be frustrated by pragmatic state legislatures that are unwilling to act if all other States retain their preferential laws.

Similarly, state courts will often apply jurisdictional rules to adjudicate those cases in which the court determines that the State has a strong interest. The legal test for exercising personal jurisdiction, and for retaining a case under the doctrine of *forum non convienens*, for example, requires the court to consider the interest of the State and the value of jurisdiction to each party, one of whom will be a citizen of the state.[142]

In addition, juries are often in a position to find guilt or liability against an out-of-state defendant, in favor of an in-state plaintiff. Indeed, the fear that state court systems would not always be able to apply the law without favoritism toward its own citizens was an impetus for the creation of federal diversity jurisdiction; in a more neutral federal court, each party would stand as neither an insider nor an outsider. State courts, on the other hand, might fail to "administer justice as impartially as those of the nation."[143]

This potential discrimination could raise barriers to interstate commerce by imposing detrimental de facto legal requirements on products and services sold within the state, even if the product or service originated in another state. In so doing, States may project their legal standards *outside* of their own jurisdiction and interfere with the functioning of a nationwide market. The effect of this combined "discrimination" by each State against the others, left unchecked, is similar in kind, if not degree, to the problems that plagued the States and the nation under the Articles of Confederation.

B. Reform

State tort law today is different in kind from the state tort law known to the generation of the Framers. The present tort system poses dangers to interstate commerce not unlike those faced under the Articles of Confederation. Even if Congress would not, in 1789, have had the power to displace state tort

142. *See* Joel P. Trachtman, Economic Analysis of Prescriptive Jurisdiction and Choice of Law (2001) (unpublished manuscript, on file with authors).

143. Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809); *see also* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928); 3 DEBATES, *supra* note 21, at 533.

law, the nature of the problem has changed so dramatically as to bring the problem within the scope of the power granted to Congress. Accordingly, proposals, such as placing limits or caps on punitive damages, or eliminating joint or strict liability, which may once have been clearly understood as beyond Congress's power, may now be constitutionally appropriate.[144]

The threat state tort law presents to the national flow of goods and services has been well-documented. State tort law is approaching uniformity across States, but not in the sense admired by the drafters of the Commerce Clause. At least two realities of the current system allow one or a few States to set rules nationwide: (1) plaintiffs can often choose to sue national corporations in the jurisdiction most favorable to a large recovery; and (2) national firms engaged in interstate commerce must, at a minimum, conform to the standards set by the strictest state. A lack of congressional action allows standards to be set by a particular state instead of by the one government in which all States have a voice. This turns the intended meaning of Commerce Clause upside down, allowing a single State to set the national standards.[145]

The national movement of goods among the States makes it virtually impossible for a manufacturer to be able to keep its goods from being sold in each state. Accordingly, the harm each State can do with its tort laws to benefit its own citizens can affect the flow of goods in all States, possibly making some goods disappear from the market altogether. Legislation removing otherwise intractable barriers to interstate commerce and competition comes within the domestic portion of the Commerce Clause: "[I]t is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the several States was to insure uniformity of regulation against *conflicting* and *discriminating* state legislation."[146]

This is particularly true if the tort systems of certain States operate to discriminate in favor of their citizens, explicitly or

144. *See* Ollman v. Evans, 750 F.2d 970, 995-96 (Bork, J., concurring).

145. State laws establishing labeling requirements on products similarly interfere with interstate commerce, burdening the country's manufacturers by allowing whichever State sets the most stringent rules to, in effect, set the agenda for the entire country. *See* Bork, *supra* note 138.

146. Kidd v. Pearson, 128 U.S. 1, at 21 (1888) (emphasis added).

implicitly. All States have consumers and sellers, but some States have very few manufacturers, and thus may adopt rules which discriminate against primarily out-of-state manufacturers. Discriminatory or preferential state laws can thus lead to a tug of war, played out in the state court system, between dissatisfied consumers and manufacturers—a war which can take on monumental proportions when a national class action is certified. Even if it is not discrimination in that sense, a wilderness of different state tort standards impedes interstate commerce by requiring either a whole variety of a single product or a uniform standard set by the strictest state. Congress can use its power under the Commerce Clause to address this situation.

Some States may not necessarily seek to aid either the interest of manufacturers or of consumers at the expense of the other, but may still adopt rules—such as leaving the designation of punitive damages to the jury's unconstrained discretion—which have the effect of benefiting that state's consumers, while spreading the cost of high awards among all consumers of the goods nationally. Even if a State may have manufacturers who are being hurt by high punitive damages awards, its incentive to cap or reduce its own awards may be limited by the fact that the State would be harming its own consumers, who might win lower awards, without necessarily helping manufacturers, who would be subject to high punitive damage awards in other States.[147]

The Commerce Clause was adopted, in part, to address this kind of collective action problem. Each State's consumers would always have benefited from free trade among the States, but the manufacturer in any one State would be harmed if its goods were taxed when going into other States and its competitors's goods were not taxed coming into its own. As Hamilton explained, part of the reason for the Commerce Clause was to give Congress the power to solve this dilemma:

147. *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1494-98 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)) ("[T]he principal countervailing consideration in favor of centralized government: if the costs of government action are borne by the citizens of State C, but the benefits are shared by the citizens of States D, E, and F, State C will be unwilling to expend the level of resources commensurate with the full social benefit of the action.").

> The opportunities which some States would have of rendering other tributary to them by commercial regulations would be impatiently submitted to by the tributary States. The relative situation of New York, Connecticut, and New Jersey would afford an example of this kind. New York, from the necessities of revenue, must lay duties on her importations. A great part of these duties must be paid by the inhabitants of the two other States in the capacity of consumers of what we import. New York would neither be willing nor able to forego this advantage. Her citizens would not consent that a duty paid by them should be remitted in favor of the citizens of her neighbors; nor would it be practicable, if there were not this impediment in the way, to distinguish the customers in our own markets.[148]

The federal government has at times acknowledged the modern parallel. The Reagan Administration, for example, concluded that product liability law required federal standardization. "Implicit in this decision was a determination that conflicting state product liability laws have created such significant burdens on interstate commerce that preemptive federal legislation was necessary to provide consistent nationwide treatment of product liability disputes."[149] Years later, the burden on interstate commerce has not lessened. Although the details of specific proposals may be open to policy disputes, the power of Congress under the original understanding of the Commerce Clause to rectify this burden should be acknowledged.

C. The Environment

Environmental law is often the regulation of a byproduct of commercial activity, but not necessarily of commerce itself. Indeed, environmental laws may just as frequently act as an *impediment* to interstate commerce. Congress may therefore have a dual role under the Commerce Clause vis-à-vis environmental regulation. The national government has the responsibility to prevent state environmental regulation from unnecessarily burdening interstate commerce. It also has the power to regulate certain environmental aspects of interstate commerce.

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148. THE FEDERALIST NO. 7, at 31 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

149. C. Boyden Gray, *Regulation and Federalism*, 1 YALE J. ON REG. 93, 96 (1983).

The Founders would have viewed the physical environment—such as agricultural customs, land use, and common area disputes—as purely local concerns.[150] Of course, the modern problem of environmental pollution did not exist at the drafting of the Constitution. Still, "[t]he framers and ratifiers of the Constitution established rules and standards for determining the scope of national authority; that those rules and standards produce different outcomes in later circumstances is neither surprising nor troubling."[151]

One difficulty is that environmental regulation is often partially local *and* partially federal. This power sharing is in keeping with the Founders' understanding of state control over local affairs and potential federal control over interstate affairs.[152] Unfortunately, interstate commerce may suffer even under this distribution of power. "For example, individual States may operate specific programs more effectively than the federal government, but the combined effect of disparate state regulatory standards may intolerably burden interstate commerce, thus requiring uniform federal regulation."[153]

The second role of the federal government in environmental regulation presents more difficulty. One prominent example recently before the Supreme Court was the "Migratory Bird Rule" under which the Army Corps of Engineers, which is responsible for much environmental work, interpreted the Clean Water Act to grant it the power to exercise jurisdiction over intrastate waters visited by migratory birds.[154] Without deciding the constitutional question, the Supreme Court determined that the new regulation was "an administrative interpretation of a statute invok[ing] the outer limits of

150. *See* THE FEDERALIST NO. 17, at 86 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

151. *See* McConnell, *supra* note 147, at 1491.

152. *See* Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1 (1999).

153. Gray, *supra* note 149, at 93. President George W. Bush has recently proposed a solution to this dilemma: devolve the enforcement of federal environmental statutes to the States. Under such a system, States may be able to use their superior local knowledge of the state's needs and characteristics, while operating within a uniform national system that does not allow one State to shift its environmental costs onto another. *See* Eric Pianin, *Bush Seeks to Trim EPA, Shift Resources to States*, WASH. POST, July 23, 2001, at A1.

154. *See* Solid Waste Agency v. United States Army Corps of Engineers, 531 U.S. 159 (2001).

Congress' power," and therefore required the missing "clear indication that Congress intended that result," in order to be upheld.[155] The circuit court had concluded otherwise. "The aggregate effect of the 'destruction of the natural habitat of migratory birds' on interstate commerce, the court held, was substantial because each year millions of Americans cross state lines and spend over a billion dollars to hunt and observe migratory birds."[156]

Reworking this analysis with the original purpose of the Commerce Clause in mind, we notice first that the object identified as the good in interstate commerce is the migratory bird, while the object regulated is the intrastate water. Second, it is possible to conclude that the real interstate commerce "good" is travel and inducements to travel, since the migratory birds themselves are not being bought and sold across state lines. Finally, as the Supreme Court remarked in its brief discussion on the constitutional difficulty under the Commerce Clause, "[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats . . . would result in a significant impingement of the States' traditional and primary power over land and water use."[157]

The Court's analysis seems consistent with the original role assigned to Congress by the Founders. To allow the federal government to regulate completely intrastate waters, for seemingly non-commercial motivations, would impede the States' ability to exercise their traditional control over predominantly local concerns. More important, it is not apparent why Congress would need to regulate intrastate waters in this way to facilitate interstate commerce.[158]

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155. *Id.* at 172.

156. *Id.* at 166 (quoting Solid Waste Agency v. United States Army Corps of Engineers, 191 F.3d 845, 850 (7th Cir. 1999)). On the stronger constitutional footing of the "navigation" analysis in *Gibbons*, the Army Corps' original regulations under the Act extended only to those waters and "wetlands" that were part of or connected to navigable waters.

157. *Id.* at 174.

158. It might be responded that there is a collective action problem on the state level over who will take responsibility for environmental damage that spans state borders. Unlike the collective action problem frustrating national tort reform efforts, however, the problem in the environmental context is the *failure* of States to act, not irrepressible antagonistic state regulation. State inaction does not lead to discrimination by one State against another, and obviously does not lead to a cacophony of conflicting state laws. Accordingly, the analysis of whether the federal government should act under the commerce power differs.

D. Criminal Law

As the heart of the States's police power, criminal law has traditionally fallen outside the province of federal regulation. Many of today's federal criminal laws are inconsistent with the original understanding of the Commerce Clause. Congress often seems to have forgotten that, as an original matter, the federal government has "no general right to punish murder committed within any of the States," and "cannot punish felonies generally."[159] Even though most crime has nothing to do with "commerce," today "[f]ew crimes, no matter how local in nature, are beyond the reach of the federal criminal jurisdiction."[160] And the federalization of criminal law is increasing, notwithstanding the decisions in *Lopez* and *Morrison*.

The story of the Commerce Clause criminal law is not black and white, however. There are areas, as the subtle nature of the commerce power would suggest, where the federal government is vested with the power to intervene in the criminal law. As Chief Justice Marshall acknowledged, Congress has the power to enact criminal laws covering federal commercial crimes, such as piracy or counterfeiting.[161] Marshall also believed that Congress could pass criminal laws, under the Necessary and Proper Clause, in order to carry out other enumerated powers. Thus, Congress could make it a federal crime to rob a post office under the power to establish post offices and post roads, he concluded.[162] Similarly, Congress could pass criminal laws protecting federal property under Congress's authority to maintain federal property.

Although Congress may not, consistent with the original understanding of the Commerce Clause, rely on that Clause to "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce," Congress can regulate criminal conduct in interstate commerce.[163] If constitutional powers "keep pace with the progress of the country," for instance, the commerce power

159. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 426, 428 (1921).

160. Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 3 (1997).

161. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 416-17 (1819).

162. *See id.* at 417.

163. United States v. Morrison, 529 U.S. 598, 617 (2000).

may appropriately extend to federal wiretapping laws.[164] Crimes committed on the Internet, another prominent example, almost all of which interfere with the ability of consumers to conduct business or buy and sell in a fundamentally interstate commercial forum, can be addressed most effectively on a national level. The nature of the crime may justify the exercise of the Commerce power, but Congress should not adopt new crime legislation unless it is consistent with the purpose of that power.[165]

E. Transportation Regulation

The federal regulation of certain aspects of transportation has a long constitutional pedigree. The maintenance of roads and travelways was of utmost importance to the commercial success of the young nation. "The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State," was considered "essential to the complete control and regulation of interstate commerce."[166] Amendments to prohibit Congress from exercising its power to lay or repair highways without state consent failed.[167] The amendments themselves suggest that at least their authors believed Congress would otherwise have such a power already.

There must nonetheless be a limit to what Congress can regulate in the name of transportation. If diverse state speed limits would not interfere with the ability of goods and services to travel freely from State to State, as one might assume they would not, the ability of Congress to establish travelways and to regulate interstate commerce should not suffice to support using the Commerce Clause to require state uniformity. Congressional regulation is not in keeping with the purpose of

164. *See* Pensacola Tel. Co. v. W. Union Tel. Co., 96 U.S. 1, 9 (1877).

165. There may be a separate and additional justification for rejecting the federal government's intrusion into States' traditional law enforcement role. The Domestic Violence Clause of the Constitution requires the federal government to get permission from a State before it can intervene in internal state violence. *See* U.S. CONST. art. IV, § 4 ("[t]he United States shall . . . protect each of [the States] against Invasion; and on the Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence"); Jay S. Bybee, *Insuring Domestic Tranquillity: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1 (1997).

166. California v. Central Pacific Ry. Co., 127 U.S. 1, 39 (1887).

167. *See* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 19, at 406.

the Commerce Clause simply because the object being regulated is in interstate commerce. The regulation of a good in interstate commerce should be aimed at the good's quality *as* an object in interstate commerce. To complete the example above, if speed limits do not burden interstate commerce, Congress should not be able to set maximum speeds just because vehicles travel at State-set speeds in interstate commerce and regulation would promote the safety of the people of the several States without violating the States' police power.[168]

IV. CONCLUSION

In the jurisprudential paradigm of the post-New Deal, Congress has few obvious restrictions imposed upon it from outside by the courts. Congress can nonetheless continue to strive to fulfill the oath each member of Congress takes to uphold the Constitution. The commerce power has expanded beyond its original scope, but Congress can regulate under the commerce power with an eye toward the original purpose of the Clause.

At the same time, legislators must keep in mind that the purpose of the Commerce Clause was to remove barriers to interstate commerce, and that the original understanding of the Clause permits federal regulation of the purchase and sale of goods in commerce to address barriers created by discriminatory or inconsistent state laws. As long as Congress hews to the purposes of the Clause, and does not try to leverage its power inappropriately, it should not hesitate to act.

168. Although Congress can plainly put conditions on the grants it makes to the States, there must be limits on its exercise of the Spending Clause power as well. Insisting that federal transportation funds be used for their allocated purpose is legitimate; using those funds to secure a commitment that is unconnected to the funds' purpose, however, is much more problematic. To illustrate, it is one matter for Congress to insist that a grant it makes for mass transportation improvements not be used to build a museum. But Congress abuses its Spending Clause power when it conditions transportation monies on the state's agreement to build a museum, set a certain speed limit, or ban cigarettes. *See, e.g.*, Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873 (1997).