THE MEANING OF "REGULATE COMMERCE" TO THE CONSTITUTION'S RATIFIERS[*]

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[*] Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] *Bibliographical Footnote*: This note collects all sources cited in this article more than once.

Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010) [hereinafter *Balkin, Commerce*];

Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001) [hereinafter *Barnett I*];

Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003) [hereinafter *Barnett II*];

I. PREVIOUS SCHOLARSHIP

A. Views of "Commerce": Traditional and "Mega"

The Constitution grants Congress power to "regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes."[2] For the Constitution's first 150 years, it generally was accepted that "Commerce" referred to mercantile trade and its many incidents.[3]

Since that time, however, several writers favoring a more interventionist federal government have claimed that the Founders understood "Commerce" to be a much more comprehensive term. Thus, in 1937, Walton Hale Hamilton and Douglas Adair argued that the Founders understood "Commerce" to comprehend all economic relationships, including production as well as trade.[4] In 1953, William Winslow Crosskey elaborated this position,[5] and in 1999 Grant S. Nelson and Robert J. Pushaw published an article agreeing with Crosskey.[6]

The effect of adopting this view is to authorize, even without resort to the Necessary and Proper Clause,[7] congressional regulation of all economic

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THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (John P. Kaminski et al. eds., 1976-2021) (40 volumes in the online edition) [hereinafter DH];

Robert G. Natelson, *The Legal Meaning of "Commerce" In the Commerce Clause*, 80 ST. JOHN'S L. REV. 789 (2006) [hereinafter *Natelson, Commerce*];

— *The Original Understanding of the Indian Commerce Clause: An Update*, 23 FEDERALIST SOC'Y REV. 209 (2022) [hereinafter *Natelson, Update*].

[2] U.S. CONST. art. I, § 8, cl. 3.

[3] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 303 (1936) (noting that "the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade' "); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 549–50 (1935) (noting the distinction "between commerce 'among the several States' and the internal concerns of a State"); United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) (describing commerce as "the commercial intercourse between nations and parts of nations").

[4] The Hamilton-Adair book is discussed in *Natelson, Commerce*, *supra* note 1, at 791-93.

[5] *Id.* at 793 (discussing Crosskey's work).

[6] Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1 (1999).

[7] U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

transactions triggering interstate externalities—which for practical purposes means the entire American economy.[8]

Two currently-active scholars, Jack Balkin and Akhil Amar, go further. They contend that, as understood by the Founders, "Commerce" actually denoted human interactions of all forms, economic and non-economic.[9] They argue that during the 18th century, the word "commerce" was interchangeable with the word "intercourse," and that either could denote all social relationships.[10] Under this view, the Constitution empowers Congress to regulate *all* social interchange generating externalities across jurisdictional lines—subject only to the Constitution's itemized limits, such as the Bill of Rights.

In this article, I refer collectively to both non-traditional views as the "mega-Commerce Clause hypothesis." The phrase "mega-Commerce Clause" communicates its effect: It converts a moderately broad, specific congressional power into a grant more sweeping than any other in the Constitution. The label "hypothesis" reflects its status as a suggestion based on, at least so far, fairly scanty evidence.

The mega-Commerce Clause hypothesis might seem implausible if not for the standing of its sponsors and its congeniality with dominant academic political leanings.[11] One problem with the hypothesis is that it does not fit well textually within the Constitution as a whole. Normally we presume that when the same expression appears in more than one place in the same document, its meaning remains constant. But construing the appearance of

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[8] Modern Supreme Court jurisprudence permits Congress to regulate all economic activities that "substantially affect" commerce, which seems effectively to comprehend the entire economy. However, outside the realm of insurance, *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) (holding that insurance is within the core meaning of the word "Commerce"), the basis of this expansive reading seems to be the Necessary and Proper Clause rather than the Commerce Clause per se. Robert G. Natelson, *Tempering the Commerce Power*, 68 MONT. L. REV. 95, 115-17 (2007). *See also id*. at 117-23 (pointing out that the incidental powers doctrine, embodied in the Necessary and Proper Clause, is inconsistent with the Court's broad approach). A narrower view of the Necessary and Proper Clause, such as that signaled by Chief Justice John Roberts in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 558-61 (2012), without expanding the construction of "Commerce," would reduce Congress's economic power.

[9] *See generally Balkin, Commerce*, *supra* note 1; AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107-08 (2005) (arguing that "Commerce" includes "all forms of intercourse in the affairs of life").

[10] *E.g. Balkin, Commerce*, *supra* note 1, at 1, 5-6, 15-18.

[11] Law professors are overwhelmingly left of center, and therefore presumably support a large and active federal establishment. Adam Bonica et al., *The Legal Academy's Ideological Uniformity*, 47 J. LEGAL STUD. 1 (2018).

"Commerce" in the Commerce Clause to mean "the entire economy" or "all human relationships" seems inconsistent with its appearance in the Port Preference Clause, where the word is employed in a narrow mercantile sense.[12] Moreover, the mega-Commerce Clause hypothesis converts several other enumerated powers into surplus: For example, if Congress may regulate all *economic* relationships, then there is no need for the Postal or Intellectual Property Clauses.[13] If Congress may regulate all *human* relationships, there is no need for provisions authorizing Congress to "declare the Punishment of Treason"[14] or to prescribe how records are proven for full faith and credit purposes[15]—nor even for a power to "constitute tribunals inferior to the supreme Court."[16]

The mega-Commerce Clause hypothesis also is ahistorical: It squarely contradicts numerous representations made to the public by the Constitution's sponsors during the ratification debates of 1787-90. For example, the Constitution's advocates repeatedly represented that if the document were ratified, federal authority would not extend to the governance of real estate titles and transactions, local businesses, domestic relations, and host of other economic and non-economic activities.[17]

Additionally, three surveys of how the founding generation used the word "commerce" reveal little support for the hypothesis: As explained in Part I(B), those surveys have found that usages of "commerce" to mean anything broader than mercantile trade were relatively rare—particularly in the legal context.

This article reports the results of a fourth, more precise survey. This survey was designed to capture the meaning of (1) the word "Commerce" as it appears in the Constitution, (2) to the very people who debated and ratified that document, and (3) during the very period it was debated and ratified. Like its predecessors, the new survey finds virtually no historical support for the mega-Commerce Clause hypothesis. This article further explains that

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[12] U.S. CONST. art. I, § 9, cl. 6 ("No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.").

[13] U.S. CONST. art. I, § 8, cls. 7 & 8.

[14] *Id.*, art. III, § 3, cl. 2.

[15] *Id.*, art. IV, § 1.

[16] *Id.*, art. I, § 8, cl. 9.

[17] I have collected these representations in the following articles: *More News on the Powers Reserved Exclusively to the States*, 20 FEDERALIST SOC'Y REV. 92 (2019); *The Founders Interpret the Constitution: The Division of Federal and State Powers*, 19 FEDERALIST SOC'Y REV. 60 (2018); *The Enumerated Powers of States*, 3 NEV. L. J. 469 (2003).

the hypothesis rests on an unexamined, and inaccurate, assumption about the 18th-century meaning of the word "intercourse."

B. Prior Surveys of Founding-Era Usage

Scholars have published three broad surveys on usages of the word "commerce" before, during, and after the founding era. The goal of these surveys was to ascertain the relative frequencies of the use of "commerce" to mean mercantile trade, all economic activities, or all human interactions.

The results of the first survey were published in 2001. Randy Barnett examined then-available materials from the constitutional debates of the 1780s, judicial decisions before 1835, and other sources.[18] He found that mercantile trade was the overwhelmingly dominant sense of "commerce." In fact, the wider meanings hardly appeared at all. In a second survey, summarized in a 2003 article, Professor Barnett examined all appearances of the word in Benjamin Franklin's popular newspaper, the *Pennsylvania Gazette*, between 1728 and 1800. The results were similar.[19]

I published the third survey in 2006.[20] To account for the legal nature of the Constitution and the high level of legal literacy among the general public during the founding era, I collected all appearances of "commerce" in (1) reported English court cases issued between 1500 and 1800, (2) reported American cases decided before 1790, and (3) 18th-century legal treatises available in the Oxford University and Middle Temple libraries and in the *Eighteenth Century Collections Online* database.

Just as Professor Barnett had found that in his sources "commerce" almost always meant mercantile trade and seldom anything else, I found that the same was true throughout Anglo-American legal discourse. I also identified a tight connection between the concept of commercial regulation and the body of Anglo-American jurisprudence known as the *lex mercatoria* or law merchant. I elaborated on that connection in a 2022 article published in the *Federalist Society Review*.[21]

C. Weaknesses in Prior Surveys

These surveys yielded remarkably consistent results from a wide variety of sources. But they remain open to criticism on at least three grounds.

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[18] *Barnett I*, *supra* note 1.
[19] *Barnett II*, *supra* note 1.
[20] *Natelson, Commerce*, *supra* note 1.
[21] *Natelson, Update*, *supra* note 1.

First: Their very comprehensiveness could yield misleading results. The ratifiers' understanding of constitutional meaning was formed between September 17, 1787—the day the Constitution was released to the public—and May 29, 1790, the day the thirteenth state, Rhode Island, ratified the document. (If one includes Vermont, then the *terminus post quem* was January 21, 1791.) However, the meanings of words vary over time, and when a word has several definitions, the relative frequency of each definition may change.[22] Thus, usages from early in the 18th century[23] and from previous centuries[24] are only weak evidence of what a term meant during the ratification era. Court decisions from the 19th century[25] are even less reliable.

Second: All three surveys examined usages of the word "commerce," and Professor Barnett's first survey also studied, using more restricted sources, appearances of the verb "regulate."[26] This approach is open to the objection that the Constitution does not use either word in isolation. The Commerce Clause phrase is "regulate Commerce"; the Port Preference Clause phrase is "Regulation of Commerce."

Third: In 2001, access to ratification-era materials was much more limited and difficult than it is today. Thus, Professor Barnett consulted what was available: the essays in *The Federalist* and certain documents from the state ratifying conventions.[27] However, *The Federalist* comprises only a tiny fraction of the material now available from the public ratification debate, and we now have more complete records of the ratifying conventions as well.

II. THE NATURE OF THIS STUDY

Recently, the editors of the *Documentary History of the Ratification of the Constitution*[28] completed publication of all the volumes in that series except those devoted to the Bill of Rights. The editors have transferred much of the voluminous supplemental material previously available only in difficult-

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[22] *E.g.*, Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL'Y 1, 45-51 (2008) (finding that while the verb "to coin" has a primary and secondary meaning, the frequency of the secondary meaning was higher during the founding era than it is today).

[23] As in *Barnett II*, *supra* note 1.

[24] As in *Natelson, Commerce*, *supra* note 1.

[25] As in *Barnett I*, *supra* note 1.

[26] *Barnett I*, *supra* note 1, at 139-45.

[27] *See Barnett I*, *supra* note 1.

[28] DH, *supra* note 1.

to-search microform into easy-to-search print volumes. They have indexed everything, both individual series within the wider set (such as the four volumes dedicated to the ratification in Massachusetts) and the 41-volume set as a whole.[29]

Additionally, the editors have placed all volumes and as-yet-unbound supplemental material on a website that enables the user to search for particular words and phrases.[30] They have rendered the volumes downloadable in Portable Document Format (PDF) so that each can be used and searched separately, and so volumes can be combined for easier search.

I took full advantage of the editors' remarkable achievement to create a survey that is both targeted and comprehensive. It is *targeted* in that it focuses not merely on use of the word "commerce" over a long period, but on the meaning of the specific constitutional phrase "regulate Commerce" (and its variants) to the participants in the ratification debates at the very time they were participating in those debates. This survey is *comprehensive* because the newly-complete *Documentary History* enables us to examine almost every recoverable public usage.

Using paper indices, the website, and PDF copies, I searched all volumes for documents containing (1) the Commerce Clause phrase "regulate Commerce," (2) the Port Preference Clause phrase "Regulation of Commerce," and (3) the following closely related terms: (a) regulations of commerce, (b) regulate our commerce, (c) regulation of our commerce, (d) regulations of our commerce, (e) commercial regulation(s), and (f) regulations respecting commerce. In this article, I call these expressions the "target terms."

My search generated hundreds of hits. My next task was to preserve only appearances of the target terms in the founding-era material, discarding appearances in the editors' scholarly apparatus. So I eliminated tables of contents, indices, commentary, and footnotes. Then, because the *Documentary History* reproduces some items in more than one volume, I eliminated all duplications.

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[29] There are 41 volumes in the digital edition. The number of the bound, physical volumes differs. The Pennsylvania supplemental documents form one volume in the digital edition and three (volumes 32, 33, and 34) in the bound edition, and the pagination is different. Most of the supplemental volumes for particular states (such as that of Massachusetts) in the digital edition thus far have been issued only in microform, not in bound volumes. Moreover, the comprehensive index volumes appear only in the bound edition.

[30] University of Wisconsin-Madison Libraries, The documentary history of the ratification of the Constitution, https://search.library.wisc.edu/digital/ATR2WPX6L3UFLH8I.

Next, I examined each surviving document to identify those containing clues as to the meaning of the target phrases in that document. If the author merely quoted the Commerce Clause or used one of the targeted phrases without explanation, the document was dropped from the set.

This winnowing process left an initial set of 59 documents. One was a collection of notes of the Massachusetts ratifying convention by Theophilus Parsons, a leading Federalist delegate to that convention. The notes recorded a speech by Parsons' colleague, Thomas Dawes. To ensure the accuracy of Parsons' notes, I examined the more complete report of Dawes' speech in the *Documentary History*. Because the notes connected the speech to the target terms, and the speech further explained those terms, I added the full report of the speech to the set. This raised the document set to 60.

Some of these 60 contained just a single usage of a single target term, but many featured multiple uses. Only one document featured the expression "regulations respecting commerce," but it did so in company with the far more common phrase "regulate commerce." No document included the expression "regulations of our commerce."

All of the documents in the set were issued between September 17, 1787, and May 29, 1790, except for six pertaining to the 1786 Annapolis Convention. Virginia called that gathering specifically to consider "the trade of the United States" and to consider a "uniform system in their commercial regulations."[31] The Annapolis Convention served as a backdrop to the ratification discussion—especially about commerce—and participants in that discussion sometimes referred back to it.

The document set spans a wide spectrum of material: It encompasses legislative resolutions and debates, circular letters, personal correspondence, and records of the state ratifying conventions—not just the partial convention transcripts previously available, but also notes taken by individual participants. Included as well are newspaper columns and speeches by seven framers of the Constitution: William Davie, Alexander Hamilton, Nathaniel Gorham, James Madison, Charles Cotesworth Pinckney, Hugh Williamson, and Luther Martin. All of these were Federalists except for Martin.

The document set's newspaper columns, pamphlets, and broadsides provide even more variety. In addition to other published materials, there are two essays from the "Federal Farmer" (the most important Virginia Anti-Federalist essayist), two from "Agrippa" (the most important Massachusetts

[31] Resolution of the Virginia Legislature, 21 January, 1786, in 1 DH, *supra* note 1, at 180.

Anti-Federalist essayist), two from "Candidus" (another Massachusetts Anti-Federalist), and one each from "Centinel" (the most important Pennsylvania Anti-Federalist essayist), Hanno (a Massachusetts Anti-Federalist), the "Flat-bush Farmer" (another New York Federalist), and "A Native of Virginia" (a Virginia Federalist). There was no difference between how Federalists and Anti-Federalists defined the target terms.

The entire document set is itemized in the Addendum to this article.[32]

These documents shed light on the target terms from several different directions: As explained in Part III of this article, they confirm the virtual interchangeability among the phrases (1) "regulate trade," (2) "regulate commerce," and (3) "regulate trade and commerce." They identify, as Part IV shows, many of the activities considered to be subject to "regulating commerce." They further delineate two ways in which the ratifiers *excluded* laws or activities from the target terms.

Part V addresses two pillars of the mega-Commerce Clause hypothesis. The first is that members of the founding generation sometimes equated "commerce" with "intercourse." The other is that they sometimes discussed non-mercantile activities (such as agriculture and manufacturing) in conjunction with commerce. Part V demonstrates that the dominant founding-era meaning of "intercourse" was not as broad as advocates of the mega-Commerce Clause hypothesis assume. It also explains that when the Founders discussed non-mercantile activities in conjunction with regulating commerce, they were not including non-mercantile activities within the category of "commerce." Rather, they were referring to the *consequences* of regulating commerce for other aspects of life.

Part VI is a short conclusion

III. REGULATE COMMERCE = REGULATE TRADE

All three prior surveys have observed a close affinity—usually identity—between the meanings of (1) "commerce," (2) "trade," and (3) "trade and commerce." When the various forms of "regulate" are added into the mix, the identity survives.

The Virginia legislature called the Annapolis Convention on January 21, 1786, "to take into consideration the *trade* of the United States; to examine the relative situations and *trade* of the said States; to consider how far a uniform system in their *commercial regulations* may be necessary to their com-

[32] Addendum, *available at* https://i2i.org/wp-content/uploads/Commerce-Ratif-addendum.pdf.

mon interest and their permanent harmony."[33] Other documents pertaining to the convention similarly referred interchangeably to "regulating commerce" and "regulating trade." Thus, a February 19, 1786, circular letter from Virginia attorney general Edmund Randolph (later a leading framer of the Constitution) invited other states to send commissioners (delegates), and, referring to Virginia's formal convention call, opined, "It is impossible for me to decide how far the uniform system in *commercial regulations*, which is the subject of that resolution, may or may not be attainable."[34] Four days later Virginia Governor Patrick Henry sent a similar letter, but characterized the convention's mission as "framing such regulations of *trade* as may be judged necessary to promote the general interest."[35]

When empowering its convention commissioners, the New Jersey legislature authorized them to

> take into Consideration the *Trade* of the United States: to examine the relative Situation and *Trade* of the said States; to consider how far an uniform System in their *commercial Regulations* and other important Matters may be necessary to their common Interest and permanent Harmony.[36]

The convention's own report employed variants of the phrases "regulate commerce" and "regulate trade" interchangeably throughout.[37]

The Annapolis Convention was a topic of discussion during the ratification era. In 1788, a Brooklyn, New York essayist calling himself "A Flat-Bush Farmer" summarized that assembly's work: "The Convention who met at Annapolis two years ago were sent to regulate commerce . . . [but they] reported to the different States the impropriety of merely regulating trade."[38] The same year, the French diplomat Gaspard Joseph Amand Ducher wrote to the Comte de la Luzerne and, discussing the "annapolis

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[33] *Resolution of the Virginia Legislature, Jan. 21, 1786*, 1 DH, *supra* note 1, at 180 (italics added).

[34] *Edmund Randolph to the Executives of the States*, Feb. 19, 1786, 1 DH, *supra* note 1, at 180 (italics added).

[35] *Governor Patrick Henry to the Executives of the States*, Feb. 23, 1786, 1 DH, *supra* note 1, at 181 (italics added).

[36] *The New Jersey Legislature and the Appointment of Delegates to the Annapolis Convention*, Mar. 14, 1786, 3 DH MICROFORM SUPPLEMENT–N.J., *supra* note 1, at 37.

[37] *Proceedings and Report of the Commissioners at Annapolis, Maryland*, Sept. 11-14, 1786, 1 DH, *supra* note 1, at 182-83.

[38] "A Flat-Bush Farmer" (broadside), Apr. 21, 1788, 21 DH, *supra* note 1, at 1472, 1473.

Congress," mentioned the current state of "commercial regulations," in conjunction with a "large coastal trade."[39]

The same pattern appears throughout the entire ratification record. In *Federalist* No. 42, for example, James Madison repeatedly used variations of "regulate commerce" and "regulate trade" interchangeably.[40] An Anti-Federalist writing under the name "Hanno" wrote, "That commercial regulations . . . will be beneficial, is agreed on all hands: but great attention is necessary to perfect a system of trade and revenue."[41] The Massachusetts Anti-Federalist "Agrippa" similarly employed regulation of commerce and regulation of trade as synonyms.[42] The document set contains a substantial number of other writings that draw the same equivalency, including writings composed both by Federalists[43] and Anti-Federalists.[44]

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[39] Gaspard Joseph Amand Ducher to Comte de la Luzerne, Feb. 2, 1788, 16 DH, *supra* note 1, at 11, 13.

[40] THE FEDERALIST NO. 42 (James Madison), 15 DH, *supra* note 1, at 427. *See id*. at 428 ("regulation of foreign commerce"), 429 ("regulate the commerce"), 430 ("regulating foreign commerce," "regulate the trade," "regulation of commerce"), & 431 ("trade").

[41] "Hanno," MASS. GAZETTE, Nov. 13, 1787, 4 DH, *supra* note 1, at 225, 226.

[42] "Agrippa," *Letter III*, MASS. GAZETTE, 4 DH, *supra* note 1, at 432, 433:

> The other class of citizens to which I alluded was the ship-carpenters. [N]obody objects against a system of commercial regulations for the whole continent [but i]t is a very serious question whether giving to Congress the unlimited right to regulate trade would not injure them still further. It is evidently for the interest of the state to encourage our own trade as much as possible. But in a very large empire, as the whole states consolidated must be, there will always be a desire of the government to increase the trade of the capital, and to weaken the extremes.

[43] *To be or not to be? Is the Question*, N.H. GAZETTE, April 16, 1788, 28 DH, *supra* note 1, at 291, 292 (stating that "a proper regulation of commerce by Congress" will lead to "An increased revenue, from a proper and universal regulation of trade"); Hugh Williamson, *Speech at Edenton, N.C.*, Nov. 8, 1787, 30 DH, *supra* note 1, at 10, 14 ("It has been objected in some of the Southern States, that the Congress, by a majority of votes, is to have the power to regulate trade. It is universally admitted that Congress ought to have this power, else our commerce, which is nearly ruined, can never be restored"); "Marcus," *Letter IV*, NORFOLK & PORTSMOUTH J., Mar. 12, 1788, 30 DH, *supra* note 1, at 93, 94 ("We must have treaties of commerce, because without them we cannot trade to other countries.").

[44] "The Federal Farmer," *Letter XI*, 17 DH, *supra* note 1, at 265, 309 (describing the Commerce Clause as granting "the sole power to regulate commerce with foreign nations, or to make all the rules and regulations respecting trade and commerce between our citizens and foreigners"); James Monroe, *Remarks at the Virginia Ratifying Convention*, 9 DH, *supra* note 1, at 1108 ("Treaties, Sir, will not extend your commerce. Our object is the regulation of commerce and not treaties. . . . It is not to the advantage of the United States, to make any compact with any nation with respect to trade."); Richard Henry Lee to Edmund Pendleton, May 26, 1788, 18 DH, *supra* note 1, at 74, 77 ("The danger of Monopolized Trade may be avoided by calling for the consent of 3 fourths of the U. States on regulations of Commerce.").

IV. THE CONTENT OF "REGULATING COMMERCE"

A. More Historical and Legal Context

This Part IV reviews what the document set tells us about the content of "regulate commerce" and its variations. Before proceeding further, however, I should introduce the reader to some historical and legal context.

1. The Lex Mercatoria or Law Merchant

In an earlier article, I explained that 18th-century Americans equated regulating "commerce" or "trade" across jurisdictional lines with the body of jurisprudence called the *lex mercatoria* or *law merchant*.[45] Contemporaneous treatises on the law merchant inform us of the scope of that jurisprudence. The scope was somewhat broader than one might think merely from reading the phrases "regulate trade" and "regulate commerce." The law merchant or lex mercatoria embraced the following:

- the law of bankruptcy;[46]
- regulation and licensing of merchants, brokers (factors), and others involved in trade, including requirements of oaths, bonds, and recordkeeping;
- regulation of commercial paper—notes, drafts, and the like;
- price controls;
- all aspects of ships and navigation;
- prohibitions on certain forms of trade and of activities associated with trade, including territorial restrictions, both outside and within the legislature's jurisdiction;
- regulations of inventory, such as packing and shipping, marking and labeling—and flat prohibitions on inter-jurisdictional trading of certain goods (contraband);
- related financial charges, including but not limited to customs and duties;
- administration of commercial treaties;

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[45] *Natelson, Update*, *supra* note 1.

[46] The Constitution included a separate bankruptcy power in addition to the Commerce Clause, U.S. CONST. Art. I, § 8, cl. 4, probably to ensure that Congress could regulate intrastate as well as interstate bankruptcies.

- marine insurance;
- incorporation of trading entities;
- certain criminal measures, such as penalties for piracy and unauthorized mercantile activities; and
- the appointment of commissioners (agents) to administer the system.[47]

Notice that the lex mercatoria applied only to commerce across jurisdictional lines. In the British Empire, that meant commerce with foreign nations and among units of the British Empire—as well as trade with Native Americans during the limited time the government in London managed the Indian trade. The lex mercatoria did not apply to the regulation of commerce within England. Under the proposed Constitution, the prospective domain of Congress's lex mercatoria power was commerce with foreign nations, among the states, and with the Indian tribes. As one North Carolina Federalist recognized, the new inter-jurisdictional Commerce Power was the same as had been exercised by the British government.[48] It would not apply to purely in-state transactions.

2. The Dispute About Navigation Acts

Almost no participants in the ratification debates questioned the wisdom of the Constitution's grant to Congress of power over the law merchant. This unanimity prevailed even among those Anti-Federalists most intent on retaining maximum discretion at the state level—a fact that is, by the way, a good indication of how restricted the scope of the congressional Commerce Power was understood to be. The principal controversy over regulating commerce was a dispute between the Federalists and Southern Anti-Federalists over the *congressional procedure* for adopting federal "navigation acts."

In Anglo-American practice, a navigation act was a species of statute regulating commerce with foreign nations and among units of the British Empire (and prospectively, among the states). Navigation acts covered more than navigation—just as, as I have noted elsewhere, the Anglo-American

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[47] *Id*. at 221-23.

[48] *A North Carolina Citizen on the Federal Constitution*, Apr. 1788, 30 DH, *supra* note 1, at 124, 138 (reflecting on Anti-Federalist fears by stating, "We submitted the regulation of our commerce to the Brittish Parliament, a sett of men in whose election we had no choice and are now affraid to commit the same matter to men of our own chusing.").

"land tax" (direct tax) covered more than land.[49] Navigation acts prescribed which ships could carry which cargos to which ports and which items could not be traded at all. They imposed financial exactions on trade ("customs," "tonnage," "imposts," and other kinds of "duties").[50] They set forth disclosure and bonding requirements. And they prescribed civil and criminal penalties for violation of their regulations.[51]

In other words, navigation acts covered a large subset of the law merchant. They did not cover all of it. For example, they seem not to have addressed bankruptcy or commercial paper. But neither did they extend to subjects outside the law merchant.

Although Federalists pointed to prospective benefits from a congressional power to regulate commerce,[52] Southern Anti-Federalists feared that a navigation act adopted by a bare majority in Congress representing only Northern interests might impose restrictions on shipping and imports that would raise the price of goods purchased by Southerners. This would enrich Northerners at Southern expense.

However, the solution offered by Southern Anti-Federalists was *not* to abolish the congressional Commerce Power. Their solution was to amend the Constitution to require that navigation acts be approved by either two-thirds[53] or three-fourths[54] of each chamber of Congress. This, they believed, would ensure the benefits of central regulation without sectional discrimination.

B. Subjects Mentioned As Within Regulating Commerce

Partly due to the concerns of Southern Anti-Federalists, the discussion on the Commerce Clause included many references to navigation—including carriers and the carrying trade, freight charges, ship construction,

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[49] Robert G. Natelson, *What the Constitution Means by "Duties, Imposts, and Excises"—and Taxes (Direct or Otherwise)*, 66 CASE WESTERN RES. L. REV. 297, 312 (2015).

[50] In American usage particularly, the term "duties" comprehended all indirect taxes, including imposts, customs, tonnage, and excises, as well as impositions levied not to raise revenue but to influence trade. *Id.* at 318-29.

[51] *E.g.*, 4 Geo. iii, c. 15 (1764) (imposing requirements of all these kinds). This act led to much colonial dissatisfaction.

[52] *Infra* Part V(B).

[53] *Address of the Antifederalist Minority of the Maryland Convention*, May 1, 1788, 12 DH, *supra* note 1, at 659, 666 (proposing a two thirds requirement).

[54] Richard Henry Lee to Edmund Pendleton, May 26, 1788, 18 DH, *supra* note 1, at 74, 77 (proposing a three-fourths requirement).

and the like.[55] This discussion also included frequent mention of the following:

- persons involved in trade: merchants and tradesmen,[56] shipbuilders,[57] and sailors;[58]

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[55] There are many such references within the document set:

References to Ships: "A Native of Virginia," Apr. 2, 1788, 9 DH, *supra* note 1, at 655, 670 (pamphlet) ("foreign bottoms"); *Antifederal Discoveries*, BALTIMORE J., Mar. 18, 1788, 11 DH, *supra* note 1, at 404, 405 ("vessels"); "Marcus," *Letter IV*, Norfolk & Portsmouth J., Mar. 12, 1788, 30 DH, *supra* note 1, at 93, 95 (vessels, carriers); William Grayson, *Remarks at the Virginia Ratifying Convention*, Jun. 16, 1788, 10 DH, *supra* note 1, at 1299 (referring to a navy); Charles Cotesworth Pinckney, *Remarks in the S.C. House of Representatives*, Jan. 17, 1788, 27 DH, *supra* note 1, at 116, 123 (ship building, fisheries); Hugh Williamson, *Speech at Edenton, N.C.*, Nov. 8, 1787, 30 DH, *supra* note 1, at 10, 14 (carrying trade), & 15 (ship building); Jabez Bowen to John Adams, Aug. 31, 1789, 25 DH, *supra* note 1, at 591 (coasting and other "Vessells").

General references to navigation: "Centinel," *Letter III*, PHILA. INDEP. GAZETTEER, Nov. 8, 1788, 14 DH, *supra* note 1, at 55, 57 ("marritime affairs"); Alexander Hamilton, *Remarks at the New York Ratifying Convention*, 22 DH, *supra* note 1, at 1704, 1727 (identifying the northern states as the navigating states); Rawlins Lowndes, *Remarks in the South Carolina Legislature*, Jan. 17, 1788, 27 DH, *supra* note 1, at 125 (referring to ships, freight, and the carrying trade); *North Carolina Delegates to Governor Richard Caswell*, Sept. 18, 1787, 13 DH, *supra* note 1, at 215, 216 (navigation and ship building).

Foreign diplomats also made the connection: Antoine de la Forest to Comte de la Luzerne, New York, May 16, 1788, 12 DH, *supra* note 1, at 736 (navigation); Gaspard Joseph Amand Ducher to Comte de la Luzerne, Feb. 2, 1788, 16 DH, *supra* note 1, at 11, 13 (navigation, navigators).

Navigation acts: Luther Martin, "Genuine Information" *Address III,* Mar. 28, 1788, 11 DH, *supra* note 1, at 456, 468; *Address of the Antifederalist Minority of the Maryland Convention*, May 1, 1788, 12 DH, *supra* note 1, at 659, 666; "Candidus," *Letter I*, INDEP. CHRON. Dec. 6, 1787, 4 DH, *supra* note 1, at 393, 396 (also referencing "carriers"); "Candidus," *Letter II*, INDEP. CHRON. Dec. 20, 1787, 5 DH, *supra* note 1, at 493 & 497 (also referencing shipbuilding and the carrying trade); "Hanno," MASS. GAZETTE, Nov. 13, 1787, 4 DH, *supra* note 1, at 225, 226; Edward Carrington to Thomas Jefferson, Oct. 23, 1787, 8 DH, *supra* note 1 at 93, 94 (also referencing carriers and freights).

Navigation of the Mississippi River: Samuel McDowell et al., *Circular Letter to the Court of Fayette County, Ky.*, February 28,1788, 16 DH, *supra* note 1, at 261, 262; Harry Innes to John Brown, Feb. 20, 1788, 16 DH, *supra* note 1, at 152, 153.

[56] Publications: *Antifederal Discoveries*, BALTIMORE J., Mar. 18, 1788, 11 DH, *supra* note 1, at 404, 405 (merchants); "Candidus," *Letter II*, INDEP. CHRON., Dec. 20, 1787, 5 DH, *supra* note 1, at 493, 497 (merchants and tradesmen); "Curtius," *Letter III*, N.Y. DAILY ADV'R, Nov. 3, 1787, 19 DH, *supra* note 1, at 174, 175 ("that enlightened order in society, the mercantile"); "Sydney," N.Y.J., Jun. 13 & 14, 1788, 20 DH, *supra* note 1, at 1153, 1157 (complaining of impositions on traders).

Correspondence: Samuel Blachley Webb to Joseph Barrell, Jan. 13, 1788, 15 DH, *supra* note 1, at 362, 363 ("the Mercantile Interest").

[57] "Agrippa," *Letter III*, MASS. GAZETTE, Nov. 30, 1787, 4 DH, *supra* note 1, at 342, 343 (ship carpenters).

[58] "A Native of Virginia" (pamphlet), Apr. 2, 1788, 9 DH, *supra* note 1 at 655, 671.

- imports and exports;[59]
- imposts and other financial duties[60] and the resulting revenue;[61]
- merchandise[62]—that is, the articles of trade, including foodstuffs,[63] luxury items,[64] and slaves;[65]

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[59] Publications: "Centinel," *Letter III,* PHILA. INDEP. GAZETTEER, Nov. 8, 1788, 14 DH, *supra* note 1, at 55, 57 ("excessive importations"); THE FEDERALIST NO. 7, 14 DH, *supra* note 1, at 130, 133 (Alexander Hamilton) ("duties on her importations"); *id*. No. 42 (James Madison), 15 DH, *supra* note 1, at 427, 430 ("A very material object of this [commerce] power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter"); "A Plebeian," *An Address to the People of the State of New York*, Apr. 17, 1788, 20 DH, *supra* note 1, at 942, 956 (complaining that the country imports more than it exports).

Convention debates: James Madison, *Remarks at the Virginia Ratifying Convention*, Jun. 11, 1788, in 9 DH, *supra* note 1, at 1153 (smuggling).

Correspondence: Jabez Bowen to John Adams, Aug. 31, 1789, 25 DH, *supra* note 1, at 591 (duty free imports).

[60] Publications: A Native of Virginia" (pamphlet), Apr. 2, 1788, 9 DH, *supra* note 1, at 655, 670 ("duties"); "Candidus," *Letter II*, INDEP. CHRON. Dec. 20, 1787, 5 DH, *supra* note 1, at 493, 494 (imposts), & 497 ("duties of impost and excise"); THE FEDERALIST NO. 7, 14 DH, *supra* note 1, at 130, 133 (Alexander Hamilton) ("duties on her importations"); PROVIDENCE GAZETTE, May 23, 1789, 25 DH, *supra* note 1, at 512 ("the Impost and other Regulations of Commerce").

Convention debates: Theophilus Parsons, *Notes of [Massachusetts] Convention Debates*, Jan. 21, 1788, 6 DH, *supra* note 1, at 1294, 1296 (reporting speech of Thomas Dawes, Jr., discussing "imposts and excises"); James Madison, *Remarks at the Virginia Ratifying Convention*, Jun. 11, 1788, in 6 DH, *supra* note 1, at 1153 (imposts).

Correspondence: Jabez Bowen to John Adams, Aug. 31, 1789, 25 DH, *supra* note 1, at 591, 592 (paying duties on merchandise); Gaspard Joseph Amand Ducher to Comte de la Luzerne, Feb. 2, 1788, in 16 DH, *supra* note 1, at 11, 13 (customs, duties, rebates, bounties, tonnage).

[61] "A Flat-Bush Farmer" (broadside), Apr. 21, 1788, 21 DH, *supra* note 1 at 1472, 1474 (referring to the revenue from commerce); "A Jerseyman," *To the Citizens of New Jersey*, TRENTON MERCURY, Nov. 6, 1786, 3 DH, *supra* note 1 at 145, p. 147 ("the proper regulation of our commerce would be insured; the imposts on all foreign merchandise imported into America would still effectually aid our Continental treasury"); Hugh Williamson, *Speech at Edenton, N.C.*, Nov. 8, 1787, 30 DH, *supra* note 1 at 10, 14 ("a vast revenue for the general benefit of the nation").

[62] THE FEDERALIST NO. 42 (James Madison), 15 DH, *supra* note 1, at 427, 430 (merchandise); *To be or not to be? Is the Question*, N.H. GAZETTE, April 16, 1788, 28 DH, *supra* note 1, at 291, 292 (carrying merchandise after paying duties).

[63] Nathaniel Gorham, *Remarks at the Massachusetts Ratifying Convention,* Jan. 25, 1788, in 6 DH, *supra* note 1, at 1352, 1354 (beef, butter, and pork); Harry Innes to John Brown, Feb. 20, 1788, 16 DH, *supra* note 1, at 152, 153 (fish oil and rice).

[64] "Centinel," *Letter III*, PHILA. INDEP. GAZETTEER, Nov. 8, 1788, 14 DH, *supra* note 1, at 55, 57 ("foreign merchandise and luxuries"); "Mechanic," INDEP. GAZETTEER, Apr. 23, 1788, 34 DH, *supra* note 1, at 1217, 1218 ("foreign merchandise, manufactures, and even laces, trinkets, toys, and gewgaws").

- restrictions on trade, including monopolies[66] and government regulations prohibiting certain kinds of trade,[67] and employing restrictions to win trade concessions from foreign governments.[68]

Thus, the ratification-era discourse does not mention every item encompassed by the lex mercatoria, but all the items mentioned are within the lex mercatoria.

C. Subjects Mentioned As Excluded from "Regulating Commerce"

The founding generation's understanding of what regulating commerce was, and was not, was so clear that there was little need to enumerate items excluded from that category. There were, as mentioned earlier, numerous Federalist representations about limits on federal power under the Constitution. However, they were targeted more at calming apprehensions about the scope of the General Welfare[69] and Necessary and Proper Clauses[70] than about the much better understood scope of the Commerce Clause.

Only two items in the document set mention exclusions from the Commerce Clause. An author writing under the pseudonym "Deliberator" responded to Tench Coxe's representations[71] about the limits on federal

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[65] THE FEDERALIST NO. 42 (James Madison), 15 DH, *supra* note 1 at 427, 429 (decrying the slave trade); Luther Martin, "Genuine Information," *Address VIII*, Jan. 22, 1788, 11 DH, *supra* note 1, at 196 (same); "Deliberator," FREEMAN'S J., Feb. 20, 1788, 33 DH, *supra* note 1, at 902, 904 (regretting that "Congress may, under the sanction of that clause in the constitution which empowers them to regulate commerce, authorize the importation of slaves").

[66] Publications: "Agrippa," *Letter XII*, MASS. GAZETTE, Jan. 15, 1788, 5 DH, *supra* note 1, at 720, 723; "Marcus," *Letter IV*, NORFOLK & PORTSMOUTH J., Mar. 12, 1788, 30 DH, *supra* note 1, at 93, 94; "Sydney," N.Y.J., Jun. 13 & 14, 1788, 20 DH, *supra* note 1 at 1153, 1157.

Correspondence: Richard Henry Lee to Edmund Pendleton, May 26, 1788, 18 DH, *supra* note 1, at 74, 77.

[67] Publications: THE FEDERALIST NO. 22, 14 DH, *supra* note 1, at 436, 437 (Alexander Hamilton) ("prohibitions, restrictions, and exclusions"); NEWPORT HERALD, Sept. 13, 1787, 26 DH SUPPLEMENTAL DOCUMENTS-R.I., *supra* note 1, at 40, 41 (saving money by banning foreign manufactures); PROVIDENCE GAZETTE, May 23, 1789, 25 DH, *supra* note 1, at 512 (same).

Convention debate: Alexander Hamilton, *Remarks at the New York Ratifying Convention*, 22 DH, *supra* note 1, at 1704, 1727 (restrictions on foreign trade).

Correspondence: Harry Innes to John Brown, Feb. 20, 1788, 16 DH, *supra* note 1, at 152, 153 (prohibitions on imports).

[68] "Marcus," *Letter IV*, NORFOLK & PORTSMOUTH J., Mar. 12, 1788, 30 DH, *supra* note 1, at 93, 95; William Davie, *Remarks at the N.C. Ratifying Convention* (Hillsborough), Jul. 24, 1788, 30 DH, *supra* note 1, at 233, 243.

[69] U.S. CONST. art. I, § 8, cl. 1.

[70] *Id.*, art. I, § 8, cl. 18.

[71] "A Freeman" (Tench Coxe), *Letter I*, PA. GAZETTE, Jan. 23, 1788, 15 DH, *supra* note 1, at 453, 458.

power. "Deliberator" seemed to agree with Coxe that inspections of produce were outside the scope of the Commerce Clause standing alone. However, "Deliberator" asserted that inspection laws were within Congress's authority when the Necessary and Proper Clause is added to the Commerce Clause.[72] In other words, "Deliberator" contended that inspection laws were not regulations of commerce per se, but would be within Congress's authority to enact because they are incidental to regulating commerce. As discussed below, Chief Justice John Marshall disagreed with the conclusion that Congress could mandate inspections of produce.[73]

The other item discussing an exclusion from the Commerce Clause is both more authoritative and more sweeping. In a widely-publicized speech defending the Constitution, James Wilson stated:

> For instance, the liberty of the press, which has been a copious source of declamation and opposition, what control can proceed from the federal government to shackle or destroy that sacred palladium of national freedom? If indeed, a power similar to that which has been granted for the regulation of commerce, had been granted to regulate literary publications, it would have been as necessary to stipulate that the liberty of the press should be preserved inviolate, as that the impost should be general in its operation.[74]

The implication of this statement goes well beyond freedom of the press. The necessary predicate for Wilson's statement that the "regulation of commerce" does not extend to "literary publications" is that as a general proposition the regulation of commerce does not extend to production. There is no principled way to exclude newspapers, books, and broadsides from the scope of the Commerce Clause unless one also excludes agriculture, manufactures, mining, and arts and crafts. The Federalist representations on the limits of federal power confirm this conclusion.[75]

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[72] "Deliberator," FREEMAN'S J., Feb. 20, 1788, 33 DH, *supra* note 1, at 902, 903:

> "Congress cannot enact laws for the inspection of the produce of the country." [quoting Coxe]. Neither is this strictly true. Their power "to regulate commerce with foreign nations and among the several States, and to make all laws which shall be necessary and proper for carrying this power (among others vested in them by the constitution) into execution," most certainly extends to the enacting of inspection laws.

[73] *Infra* note 85 and accompanying text.

[74] James Wilson, *Speech in the State House Yard, Philadelphia*, Oct. 6, 1787, 2 DH, *supra* note 1, at 167, 168.

[75] *See* the sources cited *supra* note 17.

V. CLARIFICATIONS

A. Alexander Hamilton and the Word "Intercourse"

One item in the document set might be used as evidence in support of the mega-Commerce Clause hypothesis. It is a report of a speech by Alexander Hamilton delivered on June 27, 1788, to the New York ratifying convention. This is the relevant excerpt (I have italicized the critical words):

> The great leading objects of the federal government, in which revenue is concerned, are to maintain domestic peace, and provide for the common defence. In these are comprehended *the regulation of commerce; that is, the whole system of foreign intercourse*; the support of armies and navies, and of the civil administration.[76]

We should approach this passage with caution. Hamilton did not write these words, and there is nothing precisely like them in his essays in *The Federalist*. This passage was transcribed from Hamilton's speech by a shorthand reporter. A minor discrepancy between what was said and what was transcribed usually does not make much difference in the speaker's overall point, but in this case it could. If, for example, Hamilton actually said "and" instead of "that is," then the fragment could not support a mega-Commerce Clause reading.

I will assume, nevertheless, that the reported version of the speech is accurate. This assumption offers an opportunity to address a common—although fallacious—argument raised by mega-Commerce Clause advocates. This argument is that "commerce" means more than "trade" because speakers in the founding era and in the early Republic sometimes equated commerce with intercourse, and dictionary definitions of "commerce" often included the word "intercourse." Chief Justice John Marshall's opinion in *Gibbons v. Ogden* is cited in support of the argument. Representative is the following, penned by Professor Jack Balkin:

> In the eighteenth century, however, "commerce" did not have such narrowly economic connotations. Instead, "commerce" meant "intercourse" and it had a strongly social connotation. . . .What is the original meaning of "commerce"? Samuel Johnson's dictionary, roughly contemporaneous with the Founding, defines "commerce" as "Intercourse; exchange of one thing for another, interchange of anything;

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[76] Alexander Hamilton, *Remarks in the New York Ratifying Convention*, Jun. 27, 1788, 22 DH, *supra* note 1, at 1921, 1955 (italics added).

> trade; traffick." Johnson's secondary definition of commerce is "common or familiar intercourse." . . . By 1824, in Gibbons v. Ogden, counsel for Ogden tried to argue that "commerce" meant only trade or exchange. Chief Justice Marshall bluntly rejected the argument:
>
> > This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic [i.e., trade],[77] but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.
>
> Marshall clearly did not suggest that treating navigation as commerce was a non-literal usage or that the Necessary and Proper Clause was required: "All America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation . . . . [T]he attempt to restrict it comes too late."[78]

Of course, Marshall did not need to enlist the Necessary and Proper Clause to encompass navigation because navigation was within the core meaning of "regulating commerce"—the lex mercatoria. But what of the equation of "commerce" with "intercourse"?

Although Professor Balkin examined the definition of "commerce" in a contemporaneous dictionary, he did not examine the definition of "intercourse." He seems to have assumed that "intercourse" necessarily carried a very broad meaning. But here is the entry in Samuel Johnson's *Dictionary*, the source Balkin cited for the definition of "commerce":

> INTERCOURSE. . . .
>
> 1. Commerce; exchange.
> 2. Communication.[79]

Relying on any one 18th-century dictionary is risky—particularly Johnson's, which can be idiosyncratic. So let us check Johnson's entry against two others. Thomas Sheridan's 1787 dictionary defined "intercourse" as

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[77] Professor Balkin's interjection of "trade" to define "traffic" is an oversimplification. Johnson's actual definition of "traffick" is "1. Commerce; merchandising; large trade. 2. Commodities; subject of traffick." SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (8th ed. 1786) (unpaginated) (defining "traffick"). It is impossible to recreate what was in Marshall's mind when he distinguished traffic, commerce, and intercourse.

[78] *Balkin, Commerce, supra* note 1, at 1, 15, & 19.

[79] JOHNSON, *supra* note 77 (unpaginated) (defining "intercourse").

"Commerce, exchange; communication."[80] William Perry's 1788 first American edition defined it as "commerce; communication."[81]

Johnson stands vindicated, for these entries are all very similar. Note the common pattern, however: "Exchange" and "communication" were secondary and tertiary definitions. And even they do not encompass all human relationships. The primary (i.e., most common) definition of "intercourse" was: *commerce!*

Thus, when an 18th-century speaker referred to commerce as intercourse, he likely was being tautological: "commerce is commerce." Tautology sometimes makes good rhetoric.

Now let us return to *Gibbons v. Ogden*. Was Marshall being tautological? Probably so: Here are his words: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the *commercial intercourse* between nations . . . "[82] Marshall limited the noun "intercourse" by the adjective "commercial." This phrase—"commercial intercourse"—is exactly the same one the Annapolis convention employed in its report when describing its mission.[83] And as we already have seen, that mission had been described interchangeably as addressing "the regulation of commerce" and "the regulation of trade."[84]

Another part of Marshall's opinion in *Gibbons* confirms that that he did not use the word "intercourse" expansively. That part of the opinion addressed laws for the inspection of goods:

> That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not

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[80] THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1789) (unpaginated) (defining "intercourse").

[81] WILLIAM PERRY, ROYAL STANDARD ENGLISH DICTIONARY (1st American ed. 1788) (unpaginated) (defining "intercourse").

[82] *Gibbons*, 22 U.S. at 189-90 (italics added).

[83] *Proceedings and Report of the Commissioners at Annapolis, Maryland*, Sept. 11-14, 1786, 1 DH, *supra* note 1, at 182.

[84] *Supra* Part III.

> surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.
>
> No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation.[85]

Apologists for federal power always seem to overlook this passage.[86] But the passage is important because Marshall specifically declined to extend the Commerce Power to include work on a product "before it becomes an article of . . . commerce."

Marshall, like James Wilson, was a nationalist. Yet both rejected the mega-Commerce Clause hypothesis: They agreed that the Commerce Power generally does not extend to production.[87] Marshall, as is clear from his words in *Gibbons*, did not think of either "Commerce" or "intercourse" as comprising all social relationships or even all aspects of the economy.

In summary: Those who argue that the Constitution's use of the word "Commerce" has a very broad definition because speakers sometimes equated "commerce" with "intercourse" assume that "intercourse" always had a broad definition. In fact, however, the most common meaning of "intercourse" was merely "commerce," a term usually interchangeable with mercantile trade. Thus, when Hamilton referred to "the whole system of foreign intercourse," he very likely meant nothing more than "the whole system of foreign trade."

B. Commercial Regulation and Its Consequences

The founding generation recognized that human activities are interdependent. Thus, when arguing in favor of a congressional power to "regulate Commerce," the Constitution's supporters predicted that the prudent exercise of that power would lead to favorable consequences for *non-mercantile* human activities. In other words, regulation of commerce—particularly restrictions on foreign imports and foreign shipping—could not only pro-

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[85] *Gibbons*, 22 U.S. at 203.

[86] *E.g.*, Wickard v. Filburn, 317 U.S. 111, 122 (1942) (enlisting Marshall in extending the Commerce Power to agricultural production without addressing this language).

[87] *Supra* notes 74 & 75 and accompanying text. I say "generally" because under the Necessary and Proper Clause, Congress should be able to regulate aspects of production that are mere incidents of commerce—labeling, for example.

mote American trade, but also could stimulate American agriculture and manufacturing, raise land prices, create jobs, and promote immigration.

Our document set contains a substantial number of quotations from advocates of the Constitution predicting non-mercantile benefits from the central regulation of commerce.[88] It also includes corresponding statements of regret that previous congressional impotence had permitted injury to occur.[89]

Advocates of the mega-Commerce Clause hypothesis sometimes misread such statements as implying that the Founders thought the non-commercial activities benefitting from commercial regulation were part of "Commerce" itself.[90] The documents examined here do not support that position. Nor do they support the modern Supreme Court doctrine that when non-mercantile activities "substantially affect" commerce, Congress may regulate them. The documents state only that the benefits of regulating *commerce itself* could spill over into other realms.

Thus, Hugh Williamson, one of the Constitution's framers, argued in a North Carolina speech that regulation of commerce would bring widespread benefits. But the only specific regulation he suggested was barring foreign vessels from American ports,[91] a standard term in navigation acts. A

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[88] *E.g.*, "Agrippa," *Letter III*, MASS. GAZETTE, Nov. 30, 1787, 4 DH, *supra* note 1, at 342, 343 (claiming benefits for ship carpenters, although questioning other benefits); "An American," *To Richard Henry Lee*, Dec. 28, 1787-Jan. 3, 1788, 15 DH, *supra* note 1, at 165, 168 (citing benefits to agriculture and manufacturing); "Candidus", *Letter I*, INDEP. CHRON., Dec. 6, 1787, 4 DH, *supra* note 1, at 393 (agriculture and manufactures); "Candidus," *Letter II*, INDEP. CHRON., Dec. 20, 1787, 5 DH, *supra* note 1, at 493, 497 (citing the benefit to, in addition to merchants and tradesmen, shipbuilding, agriculture, and manufactures); "A Flat-Bush Farmer" (broadside), Apr. 21, 1788, 21 DH, *supra* note 1, at 1472, 1474 (citing benefits to government revenue); *To be or not to be? Is the Question*, N.H. GAZETTE, April 16, 1788, 28 DH, *supra* note 1, at 291, 292 (claiming benefits for agriculture, woollen manufactures, land values, immigration, and tax revenue); NEWPORT HERALD, Sept. 13, 1787, 26 DH SUPPLEMENTAL DOCUMENTS-R.I., *supra* note 1, at 40, 41 (claiming that regulations of commerce "will make an annual saving of one third of the imports of foreign manufactures immediately, which will give full employ to our laboring poor").

[89] *E.g., Newport Mechanick's Meeting*, c. 20-22 March 1788, 24 DH, *supra* note 1, at 119 (lamenting, because of a lack of central commercial regulation, "the decay of our trade, the ruin of our mechanicks, and the want of employ for the industrious labourers"); William Davie, *Remarks to the Hillsborough (N.C.) Convention*, Jul. 24, 1788, 30 DH, *supra* note 1, at 233, 243 (attributing to the lack of commercial regulation "a general decay of trade, the rise of imported merchandise, the fall of produce, and an uncommon decrease of the value of lands. Foreigners have been reaping the benefits and emolument which our citizens ought to enjoy").

[90] *Natelson, Commerce*, *supra* note 1, at 842 n.258 (summarizing this view).

[91] Hugh Williamson, *Speech at Edenton, N.C.*, Nov. 8, 1787, 30 DH, *supra* note 1, at 10, 14-15.

New Jersey Federalist writing as a "A Jerseyman" emphasized benefits to agriculture, manufacturing, government revenue, and immigration. These were to be accomplished by the levying of imposts and "heavy duties" on foreign imports.[92]

The most comprehensive statement on this subject in the document set is the address to the Massachusetts ratifying convention by Thomas Dawes, a prominent Federalist who later served as a justice of the state supreme judicial court. Here are some excerpts from Dawes' speech, as reported by the *Documentary History*:

> Mr. Dawes said, he thought the powers in the paragraph under debate should be fully vested in Congress. We have suffered, said he, for want of such authority in the federal head. . . . Our agriculture has not been encouraged by the imposition of national duties on rival produce . . . A vessel from Roseway or Halifax [both in Nova Scotia] finds as hearty a welcome with its fish and whale bone at the southern ports, as though it was built, navigated and freighted from Salem or Boston. And this must be the case, until we have laws comprehending and embracing alike all the states in the union. . . .
>
> Congress has not had power to make even a trade law, which shall confine the importation of foreign goods to the ships of the producing or consuming country: If we had such a law, we should not go to England for the goods of other nations; nor would British vessels be the carriers of American produce from our sister states . . . .
>
> Our manufactures are another great subject, which has received no encouragement by national duties on foreign manufactures, and they never can by any authority in the old confederation . . . . Has Congress been able, by national laws to prevent the importation of such foreign commodities as are made from such raw materials as we ourselves raise[?]. It is alledged, that the citizens of the United States have contracted debts within the last three years, with the subjects of Great-Britain, for the amount of near six millions of dollars, and that consequently our lands are mortgaged for that sum . . . . If we wish to encourage our own manufactures— to preserve our own commerce—to raise the value of our own lands, we must give Congress the powers in question. . . .[93]

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[92] "A Jerseyman," *To the Citizens of New Jersey*, TRENTON MERCURY, Nov. 6, 1786, 3 DH, *supra* note 1, at 145, 147. *See also* BALTIMORE GAZETTE, May 22, 1788, 13 DH, *supra* note 1, at 112 (predicting "a system of commercial regulations, which upon the whole may tend to the revival and establishment of our credit, and the encouragement of our trade and manufactures . . .").

[93] *Remarks of Thomas Dawes at the Massachusetts Ratifying Convention*, Jan. 21, 1788, 6 DH, *supra* note 1, at 1287-89. Theophilus Parsons summarized the speech in his notes this way:

Observe that while Dawes wished to encourage manufacturing and raise the value of American lands, the methods he suggested all were traditional exercises of the lex mercatoria: imposition of financial duties, restrictions on imports, and limits on foreign ships.

VI. CONCLUSION

The survey reported in this article demonstrates that when Americans considered ratifying the Constitution, they understood the power "to regulate Commerce" as meaning only that Congress could administer the traditional law merchant. This was a body of law Americans usually referred to interchangeably as "regulating commerce" or "regulating trade." Although the term "intercourse" sometimes was applied to the same concept, the definition of "intercourse" when so applied was a limited one meaning simply "commerce."

The province of the law merchant was wider than governing trade per se—it also included subjects such as bankruptcy and commercial paper—but it still was circumscribed by clearly understood boundaries. As a general proposition it did not encompass non-economic activities, nor even most economic activities: Land use, real estate transactions, inheritance, and production of most kinds all were excluded.

The survey illustrates once again that the federal system crafted by the framers and adopted by the ratifiers was designed to serve only limited purposes. Of course, a system designed for limited purposes is now being tasked with addressing far more. This mismatch may well be a leading cause of prevailing public dissatisfaction with the performance of the federal government. That, however, is a subject for another time.

> Congress should have the power of imposts and excises—that they encourage agriculture by checking the importation and consumption of foreign produce—necessity of Congress having the regulation of commerce—talks about agriculture and manufactures—population from migration—convenient places for mills for manufacturing. But we cannot encourage manufactures until Congress have these powers— when they have these powers, Congress will have but little occasion for direct taxation.

Theophilus Parsons, *Notes of Convention Debates*, Jan. 21, 1788, 6 DH, *supra* note 1, at 1294, 1296.

Other Views:

- Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010), *available at* https://repository.law.umich.edu/mlr/vol109/iss1/1/.
- Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1 (1999), *available at* https://heinonline.org/HOL/LandingPage?handle=hein.journals/ilr85&div=9&id=&page=.
- The Commerce Clause, Interpretation & Debate, National Constitution Center, https://constitutioncenter.org/the-constitution/articles/article-i/clauses/752.