

# OBAMACARE AND THE ORIGINAL MEANING OF THE COMMERCE CLAUSE: IDENTIFYING HISTORICAL LIMITS ON CONGRESS'S POWERS

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*Article I of the Constitution authorizes Congress “to regulate Commerce among the several States.” The Supreme Court has long interpreted this Commerce Clause as allowing Congress to legislate if it merely could have had a rational basis for determining that the activity regulated, considered in the aggregate nationwide, “substantially affects” interstate commerce.*

*The Court devised this extremely deferential standard of review in response to political pressure during the New Deal and has consistently reaffirmed it. The result has been to grant Congress nearly unrestrained discretion, because it could reasonably find that just about any activity, when added up nationally, “substantially affects” the interstate economy. No Justice has ever explained how this expansive construction of the Commerce Clause can be reconciled with its original meaning.*

*Recently, Akhil Amar and Jack Balkin have attempted to provide such a justification. They make two claims about the historical meaning of the Commerce Clause. First, the word “commerce” signified “intercourse”—all interactions, not merely economic but also social and political. Second, the phrase “among the states” authorized Congress to legislate in the national interest or when states acting separately could not adequately address an issue. Accordingly, Amar and Balkin contend that Congress can intervene whenever it might reasonably conclude that it should regulate interactions that extend beyond one state’s boundaries and create problems that can only be*

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*resolved at the national level. This interpretation would sustain all significant modern Commerce Clause legislation, such as that dealing with employment, civil rights, the environment, and Obamacare.*

*The foregoing reading of “commerce” and “among the states” is plausible only if considered in a linguistic vacuum, not in historical context. Indeed, Professors Amar and Balkin have not cited anyone during the Constitution’s framing, ratification, or early implementation period who suggested that those words, as used in the Commerce Clause, permitted Congress to reach all interactions that had out-of-state impacts. Rather, as I will demonstrate, the historical evidence reveals that the Founders understood “commerce” as including only commercial interactions—voluntary sales of products and services and accompanying activities intended for the marketplace, such as manufacturing goods for sale, paid transportation, and banking. Congress could regulate such “commerce” if it concerned more than one state. This market-based limitation is critical because the Constitution did not grant Congress general authority, but rather carefully enumerated its powers and left all other powers to the states or the People.*

*My “market” theory of the Commerce Clause would support most, but not all, federal laws. To take a topical example, application of this approach would have resulted in upholding most provisions of Obamacare, because they regulate “commerce” (the sale of health insurance products and services) that concerns more than one state. Nonetheless, the mandate that all individuals purchase medical insurance would have been struck down because Congress cannot require Americans to buy products or services, as such transactions are not voluntary sales in the market. Recognizing this basic insight about the nature of “commerce” would have provided the Court with a principled rationale to invalidate the “individual mandate,” instead of reaching this outcome as it did by manufacturing a new exception to the “substantially affects” test. More generally, the “market” theory coherently resolves most of the larger disputes about the extent of Congress’s power under the Commerce Clause.*

Judges and scholars have long debated the meaning and scope of Congress's power "[t]o regulate Commerce . . . among the several States."<sup>1</sup> Since the New Deal era, the Supreme Court has interpreted this Interstate Commerce Clause as authorizing Congress to legislate as long as it could have had a rational basis for determining that the activity regulated, considered in the aggregate nationwide, "substantially affects" interstate commerce.<sup>2</sup>

This standard of review is toothless because Congress could reasonably conclude that just about any activity, added up nationally, has such an effect. Indeed, the Court devised this test for the very purpose of ceding virtually absolute regulatory authority to the political branches.<sup>3</sup> No Justice has ever explained how this expansive construction of the Commerce Clause can be squared with the historical meaning of its text. Moreover, the last major attempt to do so, by William Crosskey in 1953,<sup>4</sup> elicited savage criticism by eminent scholars.<sup>5</sup>

Recently, Akhil Amar and Jack Balkin have revived the idea that the exercise of well-nigh unbridled Commerce Clause power is consistent with its original meaning.<sup>6</sup> They claim that, in the eighteenth century, the word "commerce" meant "intercourse"—all interactions, not merely economic but also social (including networks of communication and transportation, even if used for non-business purposes, as well as personal friendships and conversations) and political (e.g., foreign affairs and immigration).<sup>7</sup> Professors Amar and Balkin contend that this generous definition of "commerce" reinforces the Constitution's basic structural principle contained in Resolution VI of the Virginia Plan submitted to the Philadelphia Convention: Congress can "'legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual [state] Legislation.'"<sup>8</sup> Amar and Balkin's interpretation would justify almost all modern Commerce Clause laws (such as those governing employment,

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1. U.S. CONST. art. I, § 8, cl. 3.

2. See *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). The Court crafted the "substantially affects" and "aggregation" elements of this test from 1937 to 1942, then added the "rational basis" qualifier in 1964. See *infra* notes 194–201 and accompanying text.

3. See *infra* notes 194–201 and accompanying text.

4. 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 50–292 (1953).

5. See, e.g., Irving Brant, *Mr. Crosskey and Mr. Madison*, 54 COLUM. L. REV. 443 (1954); Ernest J. Brown, Book Review, 67 HARV. L. REV. 1439 (1954).

6. Professor Amar sketched this thesis in his magisterial study of our evolving Constitution. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 107–08 (2005). His argument was fully developed in Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010).

7. See, e.g., AMAR, *supra* note 6, at 107–08; Balkin, *supra* note 6, at 5–6, 15–29.

8. See, e.g., AMAR, *supra* note 6, at 108 n.\* (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 131–32 (Max Farrand ed., rev. ed. 1966) [hereinafter RECORDS]). The quoted sentence is an amended version of Resolution VI. See Balkin, *supra* note 6, at 8–11 (describing the Convention's treatment of this resolution).

agriculture, civil rights, and the environment), because they rest on Congress's reasonable conclusion that it must regulate interactions—whether economic or not—that extend beyond one state's boundaries in either their operations or effects.<sup>9</sup>

The foregoing theory supplies badly needed analytical coherence for the modern Court's Commerce Clause jurisprudence. Nevertheless, the historical conclusions of Professors Amar and Balkin are hardly the most logical ones that can be drawn from the evidence.

Indeed, it seems facially implausible to suggest that the Commerce Clause encompasses *all* interactions—right down to gossiping with your friends. Rather, as Grant Nelson and I have demonstrated, the Framers and Ratifiers most likely understood “commerce” as including only *commercial* interactions—voluntary sales of products and services and related activities intended for the marketplace, such as the manufacturing of goods for sale, banking, transportation for a fee, and paid labor.<sup>10</sup> Furthermore, contrary to the assertions of Amar and Balkin, the Constitution's drafters refused to grant Congress general legislative authority to enact any laws it deemed in the national interest or of interstate concern (the tentative Virginia Plan approach).<sup>11</sup> Instead, they restricted Congress by enumerating its powers, thereby leaving all powers not listed to the states or the People (i.e., beyond the reach of *any* government, the better to promote freedom).<sup>12</sup> It is this vision of popular sovereignty, limited government, federalism, and liberty that structures our Constitution.<sup>13</sup>

The aforementioned themes will be developed in three Parts. Part I examines the Commerce Clause's original “meaning” (the ordinary definition of its words), “intent” (its drafters' purposes), and “understanding” (the way its Ratifiers and early implementers comprehended it).<sup>14</sup>

9. See, e.g., AMAR, *supra* note 6, at 108; Balkin, *supra* note 6, at 6, 22–23, 27, 31–41, 49–51.

10. We have compiled abundant historical documentation of this usage of “commerce.” See 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, 9–42 (1999).

11. See *id.* at 25–26 (setting forth evidence to support this point).

12. See *id.*; see also *infra* notes 78–82, 102–29, 135–36 and accompanying text (fleshing out this idea).

13. See Nelson & Pushaw, *supra* note 10, at 26–30, 43–46 (citing sources illustrating these constitutional principles).

14. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 4–5 (1996). Of course, these three categories often lead to the same result, as the Framers typically intended to use language according to its ordinary meaning, and the Ratifiers so understood the Constitution's words.

Moreover, any useful theory of constitutional interpretation must account for over two centuries of legislative, executive, and judicial developments. Therefore, I have always followed Professor Amar's “Neo-Federalist” methodology, which attempts to identify genuinely originalist principles that can be applied without requiring the federal government (particularly the Court) to abandon longstanding practice and precedent. See, e.g., Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 397–99 (1996); see also Robert J. Pushaw, Jr., *A Neo-Federalist Analysis of Federal Question Jurisdiction*, 95 CALIF. L. REV. 1515, 1516, 1541–42 (2007).

This historical inquiry reveals that the Commerce Clause authorized Congress to regulate voluntary market-oriented activities, but not mere social interactions.

Part II describes how the Supreme Court initially embraced this conception of “commerce,” abandoned it after Reconstruction in favor of a narrow definition that confined Congress to regulating only trade and transportation, and invented the vacuous “substantially affects” test in the late 1930s.

Part III illustrates the practical consequences of adopting different approaches to the Commerce Clause in the context of the Patient Protection and Affordable Care Act (“ACA” or “Obamacare”),<sup>15</sup> which imposes an “individual mandate” on Americans to purchase health insurance.<sup>16</sup> In *National Federation of Independent Businesses v. Sebelius*,<sup>17</sup> Justices Ginsburg, Breyer, Sotomayor, and Kagan applied the traditional deferential standard of review in concluding that Congress could rationally have determined that the activity regulated—decisions about medical insurance, including the failure to buy it—substantially affected interstate commerce when viewed in the aggregate nationally.<sup>18</sup> Chief Justice Roberts and his four fellow Republican appointees, however, emphasized that every case employing this test had concerned legislation governing existing commercial “activity”—as distinguished from the ACA’s novel attempt to reach inactivity by forcing people to purchase an unwanted product.<sup>19</sup> Accordingly, the Court ruled that the “individual mandate” had exceeded Congress’s Commerce Power<sup>20</sup>—the first time since 1936

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Professor Balkin adopts a far more flexible interpretive mode. See Balkin, *supra* note 6, at 4 (maintaining that constitutional interpretation requires fidelity to the text’s original meaning and underlying principles and purposes, but not to the expected *applications* of those principles, because each generation of Americans can implement the Constitution according to the needs of their time); see also JACK M. BALKIN, *LIVING ORIGINALISM* (2011) (describing his approach as rooted in history yet allowing for the Constitution to evolve organically). Professor Balkin strikes me as less concerned with objective historical inquiry than with trying to justify the Court’s modern “living Constitution” jurisprudence with some eighteenth-century sources. See Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185 (2003) (contrasting originalism with “living constitutionalism” and other methodologies such as textualism, structuralism, and precedentialism).

The key point, however, is that Professors Amar and Balkin agree with me that the Constitution’s language and history are critical. Therefore, the question is whether the text of the Commerce Clause, read in historical context, can plausibly be stretched to encompass “all interactions.”

15. Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

16. *Id.* § 1501, 124 Stat. at 242–44.

17. 132 S. Ct. 2566 (2012).

18. *Id.* at 2609–28 (Ginsburg, J., concurring in part, and dissenting in part).

19. *Id.* at 2585–93 (Roberts, C.J.); accord *id.* at 2644–50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

20. *Id.* at 2586–93 (Roberts, C.J.); accord *id.* at 2644–48 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). Ultimately, however, the Chief Justice sided with the four liberals in sustaining the individual mandate as a legitimate exercise of Congress’s Taxing Power. See *id.* at 2593–2600 (Roberts, C.J.); *id.* at 2629 (Ginsburg, J., concurring in part, and dissenting in part).

that a non-trivial federal law met that fate.<sup>21</sup> Professors Amar and Balkin would have upheld the ACA on the ground that health care and related insurance “interactions” may be federally regulated because their impacts generate problems across state lines that cannot be resolved effectively by individual states.<sup>22</sup> By contrast, Professor Nelson and I would have invalidated the “individual mandate” because a required transaction, by definition, is not *voluntary* market activity and hence not “commerce.”<sup>23</sup>

#### I. THE ORIGINAL MEANING, INTENT, AND UNDERSTANDING OF THE COMMERCE CLAUSE

Article I, Section 8, Clause 3 of the Constitution authorizes Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” My dispute with Professors Amar and Balkin centers on the historical sense of the word “commerce,” not the other language of the Commerce Clause.

For example, we agree that the phrase “to regulate” has always referred to “prescribing rules for” and includes prohibitions—contrary to the interpretation offered by Randy Barnett.<sup>24</sup> Furthermore, the terms “foreign Nations” and “Indian Tribes” have self-evident meanings, and they are relevant here only insofar as they illuminate Congress’s power under the so-called Interstate Commerce Clause.<sup>25</sup> Finally, as to that Clause, Amar and Balkin concur with Nelson and me that the Framers and Ratifiers did not use “among the several States” synonymously with “*between* people of different states”—a crabbed reading urged by Professor Barnett, Justice Thomas, and Raoul Berger.<sup>26</sup> Rather, Congress could regulate not only commerce that actually crossed state lines, but also that which occurred within one state but affected other states.<sup>27</sup>

21. See *infra* notes 188–215 and accompanying text. The Rehnquist Court struck down a few provisions of two minor federal statutes. See *infra* notes 202–11 and accompanying text.

22. See *infra* notes 294–96 and accompanying text.

23. See *infra* notes 299–302 and accompanying text.

24. See Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 NW. U. L. REV. 695, 714 (2002) (refuting the argument that “regulations” did not encompass “prohibitions,” presented in Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 139–46 (2001)); see also Balkin, *supra* note 6, at 28–29 (to similar effect).

25. Professors Amar and Balkin believe that the Commerce Clause empowers Congress to regulate all “interactions” with Native Americans and other countries, whereas I would limit that Clause to market-based activity. See *infra* notes 139–60 and accompanying text.

26. See Nelson & Pushaw, *supra* note 10, at 42 n.172 and accompanying text (citing *United States v. Lopez*, 514 U.S. 549, 587–96 (1995) (Thomas, J., concurring)); Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 703–06 (1996); Pushaw & Nelson, *supra* note 24, at 712–13 (discussing Barnett, *supra* note 24); Balkin, *supra* note 6, at 29–47 (rejecting the narrow interpretation of “among the several states”). Like Balkin, Amar concludes that Congress could address any problem that “spilled across” state lines. AMAR, *supra* note 6, at 108.

27. See AMAR, *supra* note 6, at 108; Balkin, *supra* note 6, at 29–47; Nelson & Pushaw, *supra* note 10, at 11, 42–49; Pushaw & Nelson, *supra* note 24, at 697, 701, 712–13.

Such interstate impacts are almost inevitable nowadays, given our nationally integrated economy.<sup>28</sup>

Therefore, if the Framers and Ratifiers subscribed to the capacious definition of “commerce” proffered by Amar and Balkin, there would be no effective limits on Congress. But the original meaning, intent, and understanding of “commerce” were not that expansive.

### A. *The Commerce Clause in Historical Perspective*

#### 1. *The Ordinary Meaning of “Commerce” in 1787*

The common usage of the Constitution’s language is critical because the Convention delegates voted to keep their proceedings secret for thirty years, thereby seeking to ensure that the Constitution’s ratification and early implementation would rest solely upon the document.<sup>29</sup> Because the Constitution’s text is binding law, the Framers wrote it with care and used words to convey their normal meaning.<sup>30</sup> This everyday parlance can be gleaned from contemporaneous sources such as dictionaries, books, newspaper articles, and pamphlets.

##### a. “Commerce” as Market-Oriented Activity

As Professor Nelson and I have shown, such evidence supports the following definition of “commerce”: “the voluntary sale or exchange of property or services and all accompanying market-based activities, enterprises, relationships, and interests.”<sup>31</sup> Hence, “commerce” encompassed all actions intended for the marketplace—including the sale of goods; their production through manufacturing, mining, farming, fishing, and forestry; and related business services such as banking, transportation, and insurance.<sup>32</sup> Indeed, such production and services were often referred to as “branches of commerce”—a phrase that reflects the prevailing organic conception of commerce as a unified series of market activities and transactions.<sup>33</sup>

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28. As we explained:

[T]he Commerce Clause retains the same *legal* meaning today that it had in 1787. What has changed is *factual* reality: As America has moved from an overwhelmingly agrarian economy rooted in self-sufficient households and local communities to an integrated national market economy based on manufacturing and service, the scope of the Clause has commensurately increased.

Nelson & Pushaw, *supra* note 10, at 8–9 n.34.

29. See 1 RECORDS, *supra* note 8, at xi–xii. During Ratification, some of those who attended the Convention did refer to its proceedings, but those statements had no legal weight.

30. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188–89 (1824) (“[T]he enlightened patriots who framed our [C]onstitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.”).

31. Nelson & Pushaw, *supra* note 10, at 9.

32. *Id.* at 9–10, 13–25 (citing numerous supporting primary sources).

33. *Id.* at 15–16 (detailing usage of the phrase “branches of commerce” by prominent eighteenth-century writers such as Adam Smith and Daniel Defoe).

Our market-centered approach, while broad, imposed certain restrictions. For example, Congress could not reach acts taken solely to satisfy personal or household needs (such as growing a backyard garden) or matters of exclusively moral, social, or cultural concern (like violent crime).<sup>34</sup> Additionally, “commerce” extends only to voluntary—not compelled—market transactions.<sup>35</sup>

Professor Nelson and I acknowledged, however, that “commerce” had two other possible eighteenth-century definitions. One was narrow (trade), the other expansive (interaction).<sup>36</sup> Neither captures the most likely usage of “commerce” in the Commerce Clause.

#### b. “Commerce” as the Sale of Goods

“Commerce” undoubtedly included “trade”—buying, selling, and shipping goods.<sup>37</sup> Justice Thomas and Professors Barnett, Berger, and Epstein have argued that the Commerce Clause incorporated *only* that meaning.<sup>38</sup> Nelson and I, however, have compiled hundreds of historical documents showing that many people in the eighteenth century—

34. *Id.* at 10–12, 21, 27, 41, 78, 109–10; see also Conrad J. Weiler, Jr., *Explaining the Original Understanding of Lopez to the Framers: Or, the Framers Spoke Like Us, Didn't They?*, 16 WASH. U. J.L. & POL'Y 163, 190–91 (2004) (demonstrating that, in the eighteenth century, people contrasted “commerce” in the market with the “domestic economy” of producing the basics of life at home or on the farm).

35. Professor Nelson and I also criticized the Court for using “commerce” and “economics” synonymously:

[W]e do not equate “commerce” with modern “economics,” which covers virtually all human endeavors and interactions, including areas such as crime and religion. Although all conduct has economic consequences, it does not thereby become “commercial” in nature. Similarly, we recognize that economists would find artificial our effort to distinguish production and services for the marketplace from similar activities undertaken for personal or home use. Rather, they would treat all such actions as an integrated whole because of the effect of home-oriented economic activities on market supply, demand, and price. Again, defining “commerce” to include all economic impacts would enable Congress to regulate everything, and thereby drain the Commerce Clause of any meaningful content.

Nelson & Pushaw, *supra* note 10, at 109–10. Consequently, I am puzzled that Professors Amar and Balkin repeatedly say that Nelson and I have adopted an “economic” theory of the Commerce Clause. See, e.g., AMAR, *supra* note 6, at 541–42 n.15 (asserting that Nelson and I “insist[] that the clause applies only to interstate economic matters”); Balkin, *supra* note 6, at 19 (“Grant Nelson and Robert Pushaw . . . have offered an economic theory of commerce.”); *id.* (claiming that we have “argue[d] that ‘commerce’ stands for ‘economic behavior,’ or ‘the economy’”); *id.* at 20 n.66 (stating that we have advocated a “purely economic meaning”); *id.* at 26 (same).

Relatedly, Balkin argues that “the notion that ordinary household activity that contributes to pollution or to other social problems is not economic is particularly ironic. . . . [because] one of its earliest meanings was household management.” *Id.* at 43 n.147. The real irony is that the word “commerce,” as used in the Commerce Clause, excluded such home economics.

36. Nelson & Pushaw, *supra* note 10, at 14–17, 19.

37. See *id.* at 17 (“[‘C]ommerce’ sometimes conveyed a narrower sense, referring solely to the buying and selling of goods.”).

38. See *United States v. Lopez*, 514 U.S. 549, 584–87 (Thomas, J., concurring); Barnett, *supra* note 24, at 104–31; Berger, *supra* note 26, at 696, 701–14, 717; Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1387–99 (1987).



including Framers and Ratifiers—contemplated that “commerce” also covered market-oriented production and services.<sup>39</sup>

Moreover, writers in the 1700s routinely used the introductory phrase “to regulate” (or “regulations of”) before “commerce” to signal that this word should be given its broader market connotation.<sup>40</sup> Thus, “to regulate commerce” had a specific meaning: to enact rules to govern all activities intended for the market—sweeping in not merely trade and transportation but also the production of goods, banking, insurance, business associations, commercial paper and securities, wages, and bankruptcy.<sup>41</sup>

The most pertinent examples are the numerous Acts of Parliament regulating commerce with the colonies in the seventeenth and eighteenth centuries.<sup>42</sup> These statutes reflected the dominant theory of mercantilism, whereby each European country sought to maximize its wealth by creating a favorable balance of trade, particularly by exploiting the natural resources of foreign nations (or, preferably, their own colonies), manufacturing those raw materials into products to export, and controlling shipping.<sup>43</sup> Accordingly, British regulations of commerce went far beyond the mere sale of goods and encompassed all market-oriented activities.<sup>44</sup>

In short, I agree with Professors Amar and Balkin that the ordinary eighteenth-century definition of “commerce” included—but was not limited to—trade and transportation of goods.<sup>45</sup> Hence, our debate is over how far “commerce” can reasonably be extended beyond that core.<sup>46</sup>

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39. See Nelson & Pushaw, *supra* note 10, at 9–42; Pushaw & Nelson, *supra* note 24, at 696–700, 704–11; see also Weiler, *supra* note 34, at 172–93 (reaching a similar conclusion, supported by additional historical materials).

40. See Nelson & Pushaw, *supra* note 10, at 17 (citing sources).

41. Other scholars have provided numerous eighteenth-century examples of this usage of the phrase “to regulate commerce.” See CROSSKEY, *supra* note 4, at 115–86, 290–92; Weiler, *supra* note 34, at 172–90.

42. The framework 1660 Act regulated shipping, trade, merchants, labor, and production (including quotas and duties on specified goods). See Statutes at Large (Danby Pickering ed. 1765), Navigation Act, 15 Car. 2, c. 7, sect. 5 (1660) (Eng.). Parliament continually amended such statutes, which were enforced through both Privy Council decisions reviewing colonial laws and Board of Trade instructions. These commercial regulations were often labeled “Navigation Acts,” yet they covered not merely shipping but also the entire system of trade, production of goods (especially through manufacturing and agriculture), and related activities such as labor, investment, banking, and technology. See Weiler, *supra* note 34, at 186–89 (documenting this conclusion). Thus, the terms “navigation acts” and “regulations of commerce (or trade)” were used interchangeably.

43. See Nelson & Pushaw, *supra* note 10, at 17–19 (citing sources). European governments advanced their commercial goals and interests not merely directly through commercial legislation, but also indirectly through tax policy (especially duties on imports) and diplomatic and military actions. *Id.*

44. *Id.* at 17–18.

45. See Balkin, *supra* note 6, at 16–19 (rejecting the “trade” theory as too restrictive); *id.* at 20 (concluding that the Commerce Clause proposal advanced by Nelson and me, and the similar approach urged by scholars such as Crosskey and Walter Hamilton, are “a definite improvement on the trade theory because [they] can account for a greater share of the data”).

46. For an alternative approach that falls between the strict “trade” definition of commerce and the Nelson/Pushaw “market” thesis, see Robert G. Natelson, *The Legal Meaning of “Commerce” in*

c. “Commerce” as Interaction

Professor Nelson and I also noted that “‘commerce’ had a secondary meaning—all human interactions (‘intercourse,’ in eighteenth-century parlance),” but concluded that “[w]hen used in the context of government regulations . . . , ‘commerce’ included only those human activities geared toward the marketplace.”<sup>47</sup> Professors Amar and Balkin, however, elevate the secondary definition of “commerce” to the primary one and suggest that both usages had equal currency in the late 1700s. Here is Professor Amar’s entire analysis of this issue:

“[C]ommerce” also had in 1787, and retains even now, a broader meaning referring to all forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets. Bolingbroke’s famous mid-eighteenth-century tract, *The Idea of a Patriot King*, spoke of the “free and easy commerce of social life,” and other contemporary texts referred to “domestic animals which have the greatest [c]ommerce with mankind” and “our Lord’s commerce with his disciples.”<sup>48</sup>

The latter example invites skepticism that the Framers used “commerce” to mean “intercourse” in the Commerce Clause, as they explicitly rejected the idea that the federal government could regulate religious affairs.<sup>49</sup> Further doubt arises because Professor Amar cites as supporting authority only one source, the *Oxford English Dictionary* (“OED”), and relies solely upon its secondary definition of “commerce.”<sup>50</sup> He does not mention the following primary definition:

1. Exchange between men of the products of nature or art; buying and selling together; trading; exchange of merchandise, especially as conducted on a large scale between different countries or districts; *including the whole of the transactions, arrangements, etc., therein involved.*<sup>51</sup>

Therefore, “commerce” principally referred to the entirety of “transactions” and “arrangements” involved in “buying and selling” merchandise, including the products of “nature” (such as timber, fruits, vegetables, fish, and minerals) and “art” (i.e., goods fashioned from such

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*the Commerce Clause*, 80 ST. JOHN’S L. REV. 789 (2006) (arguing that the Framers used “commerce” to signify mercantile trade—activities engaged in by merchants, such as sales of goods (and sometimes land), associated financing and commercial paper, and related transportation).

47. Nelson & Pushaw, *supra* note 10, at 19 (citing sources).

48. See AMAR, *supra* note 6, at 107.

49. See, e.g., 3 RECORDS, *supra* note 8, at 310 (Edmund Randolph) (“[N]o power is given expressly to [C]ongress over religion.”).

50. See AMAR, *supra* note 6, at 542 n.16 (citing OXFORD ENGLISH DICTIONARY 677 (1978)) Perhaps anticipating this criticism, Professor Amar adds that his textual argument “is not that ‘Commerce’ *must* be read to apply beyond economic matters, but only that it *may* properly be read this way, if constitutional context and structure so warrant.” *Id.* I do not believe that “commerce” can appropriately be interpreted as reaching mere social interactions, given the Constitution’s drafting and ratification background and its structure. See *infra* Part I.A.2.

51. See 2 OXFORD ENGLISH DICTIONARY, *supra* note 50, at 677 (emphasis added).

raw materials), “especially as conducted on a large scale between different countries or districts”—a description that perfectly parallels Article I’s language “with foreign Nations” and “among the several States.”<sup>52</sup> Ironically, then, Amar’s lone authority, the OED, supports the “market” rather than “interaction” theory.

Echoing Amar, Professor Balkin asserts:

In the eighteenth century, . . . “commerce” did not have such narrowly economic connotations. Instead, “commerce” meant “intercourse” and it had . . . strongly social connotations. “Commerce” was interaction and exchange between persons or peoples. To have commerce with someone meant to converse with them, meet with them, or interact with them. . . . [Commerce] also included networks of transportation and communication through which people traveled, interacted, and corresponded with each other.<sup>53</sup>

An obvious problem with this thesis is that Americans, who prized freedom of expression and association, would never have imagined that the Commerce Clause enabled Congress to regulate conversations, correspondence, and social interactions.<sup>54</sup> For now, I will bracket this difficulty with the specific original intent and understanding. Rather, I will examine the more general sources of contemporaneous usage that Professor Balkin offers to substantiate his “intercourse” definition. He has cherry-picked the relatively few references to his preferred meaning (and even those are sometimes ambiguous), while ignoring or downplaying the massive evidence showing that the primary definition of “commerce” was trade and other market-based activities.

#### i. “Commerce” in Ordinary Parlance

In determining the common understanding of words, a logical place to begin is with dictionaries. Professor Balkin cites one: Samuel Johnson’s, which defines “commerce” primarily as “[i]ntercourse; exchange of one thing for another, interchange of anything; trade; traffick” and secondarily as “common or familiar intercourse.”<sup>55</sup> *Johnson’s Dictionary* actually undercuts Balkin’s thesis, in two ways. First, it indicates that the main definition of “commerce” was trade, as well as market arrangements related to the exchange of goods.<sup>56</sup> Second, other forms of “inter-

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52. See Nelson & Pushaw, *supra* note 10, at 9–10, 13–16, 49–50 (documenting this point).

53. Balkin, *supra* note 6, at 5–6; see also *id.* at 15–16 (reiterating this view). Balkin defines “commerce” as “interaction, association, sociability, and the movement of persons.” *Id.* at 18. He thereby conflates “commerce” with the next word in the Commerce Clause, “among,” which means “associated with” or “the mingling of.” See Nelson & Pushaw, *supra* note 10, at 43 n.173.

54. The First Amendment spelled out this proposition: “Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . . .”

55. Balkin, *supra* note 6, at 15 & nn.44–45 and accompanying text (citing SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (9th ed. 1790)).

56. See Nelson & Pushaw, *supra* note 10, at 15 n.53 (citing the fourth edition from 1773, which adds this “market” component to the basic “trade” definition).

course” were clearly a less frequent meaning<sup>57</sup>—as illustrated by Johnson’s references not to contemporaneous authors but rather to sixteenth-century writers like Richard Hooker, who used “commerce” in an archaic way as connoting interactions with God.<sup>58</sup>

Furthermore, Balkin does not refer to any other eighteenth-century dictionaries, regular or legal. They uniformly define “commerce” as trade (often including related market-oriented activities) and mention “intercourse” (if at all) as a less common meaning.<sup>59</sup>

Instead of these standard references, Balkin mines unusual sources, which shed little light on the Anglo-American sense of “commerce.” For instance, he emphasizes the use of “*commercium*” (the Latin root of “commerce”) to signify “community” (by Kant, in positing the need for community to truly contemplate human existence) and “correspondence” (describing the exchange between Leibniz and others over whether Newton invented calculus).<sup>60</sup> But Latin usage by European philosophers and mathematicians is hardly probative of what regulations of “commerce” meant to the lawyers who wrote the Constitution. Nor is Montesquieu’s coining of the phrase “sweet commerce” to describe how people’s exchange of commodities tended to foster social and cultural understanding, tolerance, and peace.<sup>61</sup>

By contrast, the most relevant thinker was Locke, whose ideas profoundly influenced both the Declaration of Independence and the Constitution.<sup>62</sup> Locke articulated the common understanding of “commerce” as market exchange.<sup>63</sup>

57. Indeed, the fifth edition contains two entirely separate entries: (1) “commerce,” a noun, defined as “[e]xchange of one thing for another; trade; traffick;” and (2) “to commerce,” a verb, defined as “[t]o hold intercourse.” SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (5th ed., corrected 1773)). The first edition also distinguishes “commerce” from “to commerce,” although not as sharply.

58. See Balkin, *supra* note 6, at 15 n.44 (setting forth Johnson’s citation to Hooker’s description of churches as places for “*commerce* . . . between God and us”); see also Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICH. L. REV. FIRST IMPRESSIONS 55, 56 (2010) (noting that the “intercourse” meaning had become antiquated). Again, Hooker’s usage cannot be the sense intended in the Commerce Clause, because Congress could not regulate religious affairs. See *supra* note 49 and accompanying text.

59. See Nelson & Pushaw, *supra* note 10, at 14–19 (compiling numerous sources). Legal dictionaries are especially relevant because the Constitution was a legal document drafted primarily by lawyers. See Natelson & Kopel, *supra* note 58, at 56–58 (quoting definitions of “commerce” from many eighteenth-century dictionaries, both ordinary and legal, to refute the argument that “commerce” commonly meant “intercourse”).

60. See Balkin, *supra* note 6, at 16 n.50 (citing sources).

61. See *id.* at 17 & n.51 (citing a secondary work summarizing Montesquieu’s sentiment).

62. See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 8, 13–14, 48–49, 62–63, 151–53, 162–63, 218–19, 283–92, 370–72 (1969).

63. Professor Balkin notes that *Johnson’s Dictionary* includes the following example: “In any country, that hath *commerce* with the rest of the world, it is almost impossible now to be without the use of silver coin. *Locke.*” Balkin, *supra* note 6, at 15 n.44. He does not comment on that quote, but it reinforces the “market” thesis.

## ii. The Legal Usage of “Commerce”

Turning to legal sources available in 1787, Professor Balkin does not cite any English or American statutes or cases. Instead, he relies solely on treaties “of Amity and Commerce” between the United States (under the Articles of Confederation) and France, Prussia, Morocco, Sweden, and the Netherlands for the proposition that “commercial relations with other nations would keep America peaceful and safe while avoiding dangerous political and military alliances.”<sup>64</sup> Although that statement may be true, these treaties do not support Balkin’s notion that the Commerce Clause extended to all interactions, for two reasons.

First, the treaty with Prussia uses two different words: (1) “commerce,” to describe trade, navigation, and productive activities like fishing; and (2) “intercourse,” to denote the friendly social and political relations sought.<sup>65</sup> Other treaties similarly distinguish “commerce” from “correspondence”<sup>66</sup> or “amity.”<sup>67</sup>

Second, such treaties illuminate the Framers’ intent not about the Commerce Clause, but rather about the President’s power to make treaties with the advice, consent, and two-thirds approval of the Senate.<sup>68</sup> Treaties could address all affairs (not merely commercial ones) with foreign countries. For instance, the 1782 treaty with the Netherlands contains separate provisions concerning peace and friendship; trade and navigation; employment of professionals such as attorneys and notaries; inheritance; and the treatment of criminals.<sup>69</sup> By contrast, a legislature’s power “to regulate commerce” was limited to market-based activities, as illustrated by many Acts of Parliament.<sup>70</sup> These statutes are the most relevant evidence of the intended meaning of “to regulate commerce,” and neither Balkin nor Amar mentions them.

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64. Balkin, *supra* note 6, at 17 & n.53 (citing treaties).

65. See, e.g., Treaty of Amity and Commerce, Between his Majesty the King of Prussia and the United States of America, U.S.-Prussia, July 9–Sept. 10, 1785, 8 Stat. 84 (stressing a desire to fix rules of “intercourse and commerce” between these two countries, with the latter word used to describe trade, shipping, and the carrying of products on vessels).

66. See, e.g., Treaty of Amity and Commerce, Concluded Between his Majesty the King of Sweden and the United States of North America, U.S.-Swed., Apr. 3, 1783, 8 Stat. 60 (employing this phrase, and devoting one article to friendship and peace, and another article to trade and navigation); Treaty of Amity and Commerce, Between the United States of America and His Most Christian Majesty, U.S.-Fr., Feb. 6, 1778, 8 Stat. 12 (to similar effect).

67. See, e.g., Treaty of Peace and Friendship, Between the United States of America, and His Imperial Majesty the Emperor of Morocco, U.S.-Morocco, Jan. 1–Jan. 25, 1787, 8 Stat. 100; Treaty of Amity and Commerce Between Their High Mightiness the States General of the United Netherlands, and the United States of America, U.S.-Neth., Oct. 8, 1782, 8 Stat. 32.

68. See U.S. CONST. art. II, § 2, cl. 2.

69. Treaty of Amity and Commerce Between Their High Mightiness the States General of the United Netherlands, and the United States of America, *supra* note 67, at 32.

70. See *supra* notes 39–44 and accompanying text.

### iii. The “Interaction” Theory and Drafting Imprecision

These professors have merely demonstrated that one possible definition of “commerce” in 1787 was “interaction”—not that this was the ordinary meaning or the one most likely incorporated into the Commerce Clause. Tellingly, they never explain why the Constitution’s authors did not use the word “intercourse,” if that is what they intended. The Framers would have been foolish to gamble that later readers would divine that “commerce” had been used in its less familiar sense as “intercourse” (a point no one seemed to have grasped until 2004).<sup>71</sup> It is similarly difficult to fathom why the drafters would have compounded this problem by inserting the phrase “to regulate” before “commerce,” which invariably signified that “commerce” should be given its market-oriented connotation.<sup>72</sup> In short, the Amar/Balkin thesis assumes that the Framers committed inexplicable drafting errors.

The usual premise is that the Constitution’s authors chose words to convey their most natural meaning. This presumption should be especially strong where adopting a secondary definition (like “commerce” as “intercourse”) would effectively grant Congress unrestricted powers, contrary to the basic principle that they were limited. Under such circumstances, the presumption can be overcome only if clear evidence proves that the Founders intended to use a term in its secondary sense, and it was generally understood this way.<sup>73</sup>

Remarkably, however, Professors Amar and Balkin present no evidence that *anyone* who drafted or ratified the Constitution believed that “commerce,” as used in the Interstate Commerce Clause, meant “intercourse.” This silence contrasts with the many statements showing that “commerce” signified all market-based transactions.

## 2. *The Interstate Commerce Clause in the Convention and Ratification Debates*

Admittedly, the historical evidence does not disclose a single original intent and understanding of the Commerce Clause. Nonetheless, contemporaneous sources such as the Convention and Ratification rec-

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71. See *infra* notes 83–245 and accompanying text.

72. See *supra* notes 40–44 and accompanying text. Neither Amar nor Balkin mentions, much less addresses, the fact that the word “commerce” always had a market-based meaning when preceded by the phrase “to regulate.”

73. For example, Article III of the Constitution repeatedly refers to “courts.” The most prevalent definitions of the word “court” are, in order: (1) an “enclosed area” or “yard;” (2) “a princely residence;” (3) “[a]n assembly held by the sovereign;” and (4) “a court of judicature.” See 2 OXFORD ENGLISH DICTIONARY, *supra* note 50, at 1090–91. As used in Article III, however, it is clear that the Framers and Ratifiers had in mind that fourth definition.

ords do reveal that some interpretations are more reasonable than others.<sup>74</sup> The Amar/Balkin reading is the least plausible.

a. The Pre-1787 Background

The Constitution replaced the Articles of Confederation, which created a weak central government lacking the same “great powers” that other nations like England and France possessed: to regulate commerce, raise revenue, and control military and foreign affairs.<sup>75</sup> Among other resulting problems, the national Congress could not prevent the all-powerful states from pursuing disastrous economic policies (such as debtor forgiveness),<sup>76</sup> and other countries exploited this situation.<sup>77</sup>

The Convention delegates could not, however, simply establish a unitary government with “great powers” and abolish the states. The Framers’ solution was to write a Constitution in which the new sovereign—“We the People”—delegated some of their powers to their representatives in the federal government (through a listing of subjects of truly national and interstate concern), left other regulatory matters to the states, and placed certain powers beyond the reach of any government.

The enumeration of powers had a different purpose and effect depending on whether international or domestic subjects were involved. The Articles of Confederation formed a loose alliance of sovereign states, which on their own could not effectively address either foreign affairs or interstate commerce.<sup>78</sup> Once the Constitution created a truly national government, it could necessarily control things that affected the country as a whole (such as warmaking and diplomacy), because all nations had such authority. Nonetheless, out of an abundance of caution, and because states had previously (and disastrously) attempted to exercise such powers, the Framers spelled out the federal government’s specific powers in international relations and allocated them between Congress and the President. This enumeration had no implications for federalism, however, because no state could now plausibly claim any authority to, for example, declare war or execute a treaty.

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74. Determining the “intent” of the Framers is difficult because many of them had different overall purposes, goals, and interests or did not publicly express their views on particular constitutional provisions. Similar challenges arise in discerning the “understanding” of the Ratifiers. See Nelson & Pushaw, *supra* note 10, at 8 n.33 (discussing such issues). Despite these problems, however, the historical materials help to narrow the range of plausible interpretations. Most importantly, we should accord the Constitution’s words their commonly accepted meaning, especially where Convention or Ratification delegates articulated that ordinary meaning and no one objected or offered an alternative understanding. If no one ever mentioned that the language of a clause was being used in a non-standard sense, there is no basis for inferring that such an unusual definition was intended or understood.

75. See Nelson & Pushaw, *supra* note 10, at 21–50.

76. See *id.* at 22–25, 31–34.

77. See THE FEDERALIST NO. 11, at 65–73 (Hamilton) (Jacob E. Cooke ed., 1961). Of special concern, Great Britain had cut off America from the lucrative West Indies trade. *Id.* at 67–68.

78. See WOOD, *supra* note 62, at 132–61, 354–63, 393–429, 463–67.

By contrast, the listing of powers over matters wholly internal to the United States (e.g., regulating interstate commerce and establishing federal courts) inevitably raised federalism concerns because interpretations about the extent of such powers affected the states' reserved authority.<sup>79</sup> Most pertinently, each state retained the ability to regulate commerce within its borders, and it was not clear when such commerce would have external effects significant enough to justify congressional action under the Interstate Commerce Clause.<sup>80</sup>

This background is crucial in discerning the meaning of that Clause. The Convention delegates were prominent politicians, lawyers, merchants, and plantation owners.<sup>81</sup> They knew from experience that Parliament's "regulations of commerce" (often called "navigation acts") had helped make Great Britain wealthy by governing all activities throughout the Empire connected to the marketplace—including trade in goods, their production, shipping, technology, commercial paper, secured transactions, business associations, and compensated services such as labor, banking, and insurance.<sup>82</sup> When the Framers granted Congress power "to regulate Commerce," they had in mind such comprehensive legislation. Of course, they had to adapt the English approach to accommodate uniquely American ideas like popular sovereignty, a written Constitution that circumscribed the national government's powers, and federalism.

#### b. Convention and Ratification Records

Everyone grasped that "commerce," at the very least, included the sale of goods and paid transportation.<sup>83</sup> This consensus is not surprising, as a key purpose of the Commerce Clause was to enable the new national government to provide for uniform regulation of interstate trade and shipping, thereby rectifying the severe economic problems caused by the

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79. See Nelson & Pushaw, *supra* note 10, at 25–30.

80. *Id.* at 29–30. The Supreme Court attempted to capture the foregoing analysis in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315–18 (1936). Professor Balkin correctly points out errors in the Court's historical account. See Balkin, *supra* note 6, at 27–28 & n.100. Nonetheless, the basic idea remains sound: The enumeration of powers as to international matters that concern the United States as a whole had no implications for federalism because only the national government could possess them, whereas the catalogue of domestic powers did raise the possibility of conflicts with state power.

Balkin also recognizes that "Congress's powers to regulate domestic commerce are more constrained," which he attributes to the use of the word "among" before "the several states," in contrast to the term "with" before the phrases "foreign Nations" and "Indian Tribes." *Id.* at 29 & n.102.

81. See FORREST McDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* 86–88 (1958) (describing the commercial backgrounds of the Framers).

82. See, e.g., Weiler, *supra* note 34, at 185–89 (citing sources); see also Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), reprinted in 2 *THE FOUNDERS' CONSTITUTION* 517, 518 (Philip B. Kurland & Ralph Lerner eds., 1987) ("[England's] commercial vocabulary is the parent of ours. A primary object of her commercial regulations is well known to have been the protection and encouragement of her manufactures[.]"). This understanding has been summarized *supra* notes 10, 39–46, 70, 72 and accompanying text.

83. Many Framers and Ratifiers explicitly said so, and no one ever contested this point.



states' protectionist policies (such as restrictions on imported goods and discriminatory taxes).<sup>84</sup> Several scholars have concluded that the original understanding of "commerce" *exclusively* concerned selling and transporting goods.<sup>85</sup>

Professors Balkin and Amar join Grant Nelson and me in rejecting that constricted view, albeit for the wrong reason (that "commerce" was understood to mean "interactions").<sup>86</sup> Rather, advocates of the narrow definition have erroneously assumed that the Founders used the word "commerce" to mean "trade" and the phrase "navigation acts" to refer solely to shipping (our modern definition of "navigation").<sup>87</sup> In fact, the Framers and Ratifiers always employed the phrase "navigation acts" as a shorthand for detailed, English-style "regulations of commerce," and the debate in Philadelphia was not over that meaning but rather whether Congress should be able to enact such laws by an ordinary or two-thirds majority.<sup>88</sup>

Professor Nelson and I have set forth other direct evidence that confirms the anticipated reach of the Interstate Commerce Clause to encompass market-based production and services.<sup>89</sup> For example, in his opening speech to the Convention, Edmund Randolph contended that the national government must be granted power over "commerce" to encourage not merely trade but also "navigation," "agriculture," "manufactures," and "great national works."<sup>90</sup> Similarly, Charles Pinckney described America's "commercial interests" as including "trade," "fisheries," and crops such as "[w]heat," "tob[acco]," and "[r]ice & [i]ndigo."<sup>91</sup>

During the Ratification debates, Alexander Hamilton argued that "the proper objects of federal legislation" included "commerce," "com-

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84. See Nelson & Pushaw, *supra* note 10, at 21–35 (citing sources).

85. We have always acknowledged that the core definition of "commerce" was trade and transportation; that some Americans thought that the Commerce Clause reflected that meaning alone; and that most of the recorded remarks at the Convention and Ratification debates concerned trade and shipping. See Nelson & Pushaw, *supra* note 10, at 9 & n.37, 15 & n.53, 17 & n.64, 101 & n.478; Pushaw & Nelson, *supra* note 24, at 696 & n.17, 705–06.

Indeed, it makes sense that the delegates would most frequently discuss pressing practical problems that cried out for solutions, such as state trade restrictions and taxes that were impeding interstate navigation and trade. However, such remarks do not prove that the Framers intended to limit Congress to such matters and prevent it from addressing other subjects that were commonly understood as "regulations of commerce," such as commercial production and banking. See Nelson & Pushaw, *supra* note 10, at 35–42; see also Balkin, *supra* note 6, at 21 (making a similar point). In any event, the records reveal many statements that did reflect the broader view. See *infra* notes 87–96 and accompanying text.

86. See Balkin, *supra* note 6, at 8–29.

87. This misunderstanding traces back to the seminal article advancing the restrictive "trade and transportation" theory. See Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941).

88. See 2 RECORDS, *supra* note 8, at 183, 374–75, 449–53, 563, 631–32.

89. See Nelson & Pushaw, *supra* note 10, at 25–42; Balkin, *supra* note 6, at 17–19.

90. See 1 RECORDS, *supra* note 8, at 26.

91. See 2 *id.* at 449.

mon resources,” “production,” and “manufactures.”<sup>92</sup> Other leading Framers thought that Congress had power to regulate manufacturing (including by ensuring the security of contracts)<sup>93</sup> and to establish corporations.<sup>94</sup> Other examples of this market-centered understanding of “commerce” could be multiplied.<sup>95</sup> Moreover, many prominent Federalists declared that Congress could regulate “branches of commerce”—a phrase that signaled related activities such as transportation, banking, insurance, and the production of goods for sale.<sup>96</sup>

In sum, everyone who spoke about the Interstate Commerce Clause during the Convention and Ratification debates contemplated that “commerce” included at least trade and transportation, and many others understood that Congress would also regulate related market affairs. Conversely, no one said that the Commerce Clause extended to all “interactions.”

Professor Amar does not mention this silence. Professor Balkin tries to paper it over by citing famous Americans who used “commerce” to mean “intercourse”<sup>97</sup>—but never in the context of interpreting or explaining *the Commerce Clause*. Furthermore, these sources, such as George Washington’s Farewell Address in 1796, do not even support his claim that “commerce” commonly referred to social interactions.<sup>98</sup>

92. See 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 265–66 (Jonathan Elliot ed., 2d ed. 1891) [hereinafter DEBATES]. Hamilton elsewhere explained that Congress would regulate commerce in a way that would promote the closely related interests of merchants, manufacturers, artisans, and farmers. See, e.g., THE FEDERALIST NO. 35, *supra* note 77, at 216–21; THE FEDERALIST NO. 60, *supra* note 77, at 406–08.

93. See 2 DEBATES, *supra* note 92, at 492 (James Wilson).

94. See 2 *id.* at 616. During the Ratification debates, the widely shared (albeit not universal) view was that the Commerce Clause included the power to create corporations and mercantile monopolies. See Nelson & Pushaw, *supra* note 10, at 38–39 (citing sources).

95. See Nelson & Pushaw, *supra* note 10, at 35–42 (providing such illustrations).

96. See *supra* note 33 and accompanying text; see also Pushaw & Nelson, *supra* note 24, at 706–07 (setting forth references to “branches of commerce”).

97. See Balkin, *supra* note 6, at 15–18, 24–27.

98. Balkin relies heavily on an edited passage from this Address as “[a] striking example of the idea of commerce as intercourse that produces social cohesion.” *Id.* at 17. Although Washington did perceive the connection between commerce and socio-political unity, he did not treat these concepts as indistinguishable, as the full text of his remarks shows:

The *North*, in an unrestrained intercourse with the *South*, protected by the equal laws of a common government, finds in the productions of the latter great additional resources of maritime and commercial enterprise and precious materials of manufacturing industry. The *South* in the same intercourse, benefitting by the agency of the *North*, sees its agriculture grow and its commerce expand. . . . The *East*, in a like intercourse with the *West*, already finds, and in the progressive improvement of interior communications by land and water will more and more find a valuable vent for the commodities which it brings from abroad or manufactures at home.

Washington’s Farewell Address to the People of the United States (Sept. 19, 1796), *reprinted in* S. DOC. NO. 106-21 (2000). Washington was describing commercial, not social, “intercourse”: The North used the South’s “resources of maritime and commercial enterprise” and its raw materials for manufacturing goods, which in turn provided a market for the South’s agriculture products and benefitted its commercial development; the West similarly supplied an outlet for the East’s manufactured and imported goods, which would grow as transportation improved. Strengthening such interstate markets would be one means of fostering the Union. So would avoiding entangling alliances with foreign nations. Thus, Washington’s theme was preserving and promoting the United States; he was not interpreting the Commerce Clause.

## c. The Alleged “Structural Principle” of Resolution VI

Perhaps recognizing the textual and historical deficiencies of their definition of “commerce,” Professors Amar and Balkin assert that the Commerce Clause should be construed in light of the overarching structural principle articulated in Resolution VI of the Virginia Plan: Congress can legislate where (1) there are national interests, (2) states acting individually are incompetent to address a problem, or (3) state laws might disrupt national harmony.<sup>99</sup> Balkin and Amar argue that the Convention’s Committee of Detail simply fleshed out this general Resolution VI postulate by listing specific exemplary legislative powers, and in doing so did not intend to limit Congress.<sup>100</sup> This structural principle illuminates their proposed original meaning of the Commerce Clause: Congress could regulate all interactions that extended beyond one state’s boundaries in either their *operations* (most notably, transportation and communication and their networks) or *effects* (actions in one state that had spillover impacts or generated “collective action” problems, such as pollution).<sup>101</sup>

The foregoing version of history is demonstrably wrong. Resolution VI did not express a basic constitutional principle, for the obvious reason that it was not incorporated into the Constitution.<sup>102</sup> This omission was deliberate, and the Framers and Ratifiers surely did not think that Resolution VI had been implicitly manifested in Article I’s enumeration of powers and hence should guide interpretation of its clauses.<sup>103</sup>

The Virginia Plan kicked off the Convention by setting forth fifteen resolutions—tentative proposals subject to continual debate and amendment.<sup>104</sup> Many delegates specifically attacked Resolution VI for

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99. See, e.g., AMAR, *supra* note 6, at 108 n.\* (citing 2 RECORDS, *supra* note 8, at 131–32); Balkin, *supra* note 6, at 8–13, 23 (summarizing Convention records discussing Resolution VI and considering its ramifications for the Commerce Clause).

100. Professor Amar maintains that the Committee “translat[ed] these [resolutions] into the specific enumerations of Article I.” AMAR, *supra* note 6, at 108 n.\*. Professor Balkin develops this point in detail. Balkin, *supra* note 6, at 8–13, 23.

101. See Balkin, *supra* note 6, at 8, 29–31 (laying out this argument, which had initially been alluded to in AMAR, *supra* note 6, at 107).

102. Professor Balkin concedes this problem, but downplays its unfavorable implications for his thesis. See Balkin, *supra* note 6, at 11.

103. Professor Lash persuasively shows that (1) no Framer or Ratifier said or implied that Congress’s Article I powers should be construed in light of Resolution VI (which never made it into the Constitution), and (2) such an approach would destroy the constitutional principle that everyone recognized as fundamental: that the federal government was limited to its enumerated powers and that all other powers were reserved to the states. See Kurt T. Lash, “Resolution VI”: *The Virginia Plan and Authority to Resolve Collective Action Problems Under Article I, Section 8*, 87 NOTRE DAME L. REV. (forthcoming 2012).

104. See 1 RECORDS, *supra* note 8, at 20–22. These temporary resolutions did not state fundamental structural principles that courts should use in construing actual constitutional provisions. If that were so, then the Court should invalidate the Senate, which contradicts the basic constitutional precept of Resolutions IV and V that legislative representation must be by population. See *id.* at 20–21. Similarly, the President does not comply with the Resolution VII structural principle that he must be chosen by the National Legislature. *Id.* at 21. Likewise, as Resolution VIII requires, the Justices

giving the national legislature vague, general authority instead of enumerated powers, thereby threatening the states' jurisdiction.<sup>105</sup> Other Framers (including Randolph, who had introduced the Plan) acknowledged the validity of those concerns,<sup>106</sup> which reflected the consensus that the Constitution should carve out particular powers for the national government and leave all other powers to the states (or to the People collectively, and thus beyond the reach of any government).<sup>107</sup> Randolph and others promised to specify the Legislature's powers after the Convention had resolved problems that were logically prior to that task—most importantly, whether legislative representation would be by population or by treating states equally.<sup>108</sup>

After weeks of debate, the delegates agreed to a set of resolutions and asked the Committee of Detail to turn them into a draft Constitution, with the universal understanding that principles like popular sovereignty and limited federal government would be honored.<sup>109</sup> Among other things, the Committee changed Resolution VI's general, Parliament-style legislative authority into a specific list of powers. No one objected to this alteration or proposed that the draft Constitution be amended to re-insert Resolution VI (or even mentioned this resolution), almost certainly because the Committee had faithfully fulfilled the delegates' wishes of restricting Congress to enumerated powers.<sup>110</sup>

A related point is that the Convention did not perceive that this draft Constitution had implicitly enacted the Resolution VI principle as an enumeration of powers, each of which should be construed generously in light of that precept. If the delegates had shared that belief, it is incomprehensible that they then proposed to grant Congress numerous additional specific powers which it already possessed (under Balkin's

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should meet with high executive officials in a Council of Revision to reject unwise federal and state laws. *Id.* at 21.

105. See Nelson & Pushaw, *supra* note 10, at 25–26 n.104 (citing delegates' statements).

106. See Lash, *supra* note 103 (manuscript at 4–11) (setting forth the assurances of Edmund Randolph and Nathaniel Gorham in response to the federalism-based criticisms of Charles Pinckney, John Rutledge, and Pierce Butler).

107. See Nelson & Pushaw, *supra* note 10, at 25–30 (compiling numerous supporting sources).

108. See 1 RECORDS, *supra* note 8, at 60 (Randolph); 2 *id.* at 17 (Gorham); see also Lash, *supra* note 103 (manuscript at 4–6, 13, 20, 31) (deeming Resolution VI a “placeholder” until the Convention could turn to the difficult project of determining which powers should be given to the federal government).

109. See *supra* notes 13, 73, 75–82, 103–07 and accompanying text.

110. Curiously, Professor Balkin interprets this absence of criticism as proof that the Convention understood that the Committee had merely enacted the general principle of Resolution VI (i.e., legislative authority to enact any laws in the national interest or of interstate concern) as a list of powers in Article I, which should be construed broadly in light of that principle. See Balkin, *supra* note 6, at 10–11. Balkin cannot be correct, however, because many delegates thereafter proposed to grant Congress numerous additional specific powers that would have been totally unnecessary if they had understood the draft Constitution as subsuming Resolution VI. See *infra* notes 111–14 and accompanying text.

Thus, the Framers actually intended Article I, Section 8 to clarify that Resolution VI's language about Congress having power to regulate “all cases” meant specific instances that the Convention would later determine to be matters of national interest or separate state incompetence. See Lash, *supra* note 103 (manuscript at 18–20).

theory).<sup>111</sup> To take but one example, Madison recommended allowing Congress to confer corporate charters “where the interest of the U. S. might require & the legislative provisions of individual States may be incompetent.”<sup>112</sup> If Balkin is correct, the Father of the Constitution did not grasp that Article I already gave Congress such power via Resolution VI, which authorized Congress “to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent . . . .”<sup>113</sup> The Convention delegates must have been similarly ignorant, because they rejected Madison’s proposal without ever noticing that it was redundant.<sup>114</sup>

The implausibility of the Balkin/Amar position becomes even more apparent when one considers that the Convention records were confidential, and therefore the public was unaware of Resolution VI and had to vote on the Constitution based solely on its text.<sup>115</sup> Article I confined Congress to the “legislative Powers *herein granted*,”<sup>116</sup> listed eighteen such powers (each with a particular purpose and function, despite certain overlaps),<sup>117</sup> and by necessary implication left any powers not enumerated to the states or the People<sup>118</sup>—a concept later spelled out in the Tenth Amendment.<sup>119</sup> Indeed, many Ratifiers repeatedly stressed that these interlocking ideas of popular sovereignty, limited government, federalism, and liberty structured our Constitution.<sup>120</sup>

111. See 2 RECORDS, *supra* note 8, at 324–634; see also Natelson & Kopel, *supra* note 58, at 60 (making this point).

112. See 2 RECORDS, *supra* note 8, at 615.

113. See 2 *id.* at 131–32. Furthermore, the repeated references to the states being “incompetent” to address certain problems suggest that they were *unable* to do so—not that their solutions might be less wise or effective than those favored by the federal government.

114. See 2 *id.* at 616; see also Lash, *supra* note 103 (manuscript at 22–27) (maintaining that the treatment of Madison’s proposal refutes Balkin’s thesis about Resolution VI).

115. See *supra* note 29 and accompanying text; see also Lash, *supra* note 103 (manuscript at 21, 24–25, 31–32) (explaining that the Framers’ intent is manifested in Article I, Section 8’s enumeration of powers, not in the temporary and ultimately abandoned language of Resolution VI). The delegates were content to take their chances during ratification with a Constitution that did not contain the supposedly essential structural principle of Resolution VI.

116. U.S. CONST. art. I, § 1 (emphasis added).

117. See *infra* notes 132–38, 151–56 and accompanying text (discussing these intersections).

118. Even ardent nationalists like Hamilton recognized this point. See THE FEDERALIST NO. 32, *supra* note 77, at 203.

119. See Nelson & Pushaw, *supra* note 10, at 25–26 (citing historical sources). Professor Balkin downplays the Tenth Amendment’s relevance by arguing that Article I delegated to the federal government the powers emanating from the Resolution VI principle. See Balkin, *supra* note 6, at 7, 11. But the Tenth Amendment is germane precisely because Article I specifies powers instead of adopting the Resolution VI language.

120. This theme pervades *The Federalist*. See, e.g., THE FEDERALIST NO. 10, *supra* note 77, at 64–65 (Madison); THE FEDERALIST NO. 32, *supra* note 77, at 199–200 (Hamilton); THE FEDERALIST NO. 39, *supra* note 77, at 256 (Madison); THE FEDERALIST NO. 45, *supra* note 77, at 313 (Madison); THE FEDERALIST NO. 51, *supra* note 77 (Madison); THE FEDERALIST NO. 82, *supra* note 77, at 553–54 (Hamilton). For relevant comments by other leading Founders, see Nelson & Pushaw, *supra* note 10, at 25–30, 43–46; see also Lash, *supra* note 103 (manuscript at 19, 27, 33, 38–39) (making a similar historical argument).

During the Ratification process, no one mentioned Resolution VI, much less claimed it was the Constitution's animating principle.<sup>121</sup> Professor Balkin's suggestion that James Wilson did so in Pennsylvania is incorrect.<sup>122</sup> Similarly, during the formative years of the Republic, no member of Congress, the executive branch, or the judiciary uttered a word about Resolution VI, even after the Convention records were published in 1821.<sup>123</sup>

In fact, the first assertion that this resolution embodied a structural postulate of plenary Article I power over matters of national interest or interstate concern came in a 1934 article by Robert Stern, a neophyte Justice Department lawyer (and non-historian) attempting to persuade the Court to uphold New Deal legislation.<sup>124</sup> The Court promptly rejected his claims about Resolution VI.<sup>125</sup> Even though Stern's scholarly im-

121. See Lash, *supra* note 103 (manuscript at 13–14).

122. Balkin asserts that Wilson had in mind Resolution VI in a speech to the Pennsylvania Ratifying Convention when he declared that the federal government had no power over internal state powers, but only over

[w]hatever object of government extends, in its operation or effects, beyond the bounds of a particular state. . . . But though this principle be sound and satisfactory, its application to particular cases would be accompanied with much difficulty, because, in its application, room must be allowed for great discretionary latitude of construction of the principle. In order to lessen or remove the difficulty arising from discretionary construction on this subject, an enumeration of particular instances, in which application of the principle ought to take place, has been attempted with much industry and care.

Balkin, *supra* note 6, at 8, 11 (quoting 2 DEBATES, *supra* note 92, at 424–25). There are three problems with Balkin's reliance on Wilson.

First, "the principle" Wilson referred to was not Resolution VI (which exclusively concerned Congress's power, and which he did not mention), but rather federalism—the appropriate division of federal and state power, which Wilson had often recognized at the Convention. See 1 RECORDS, *supra* note 8, at 37, 137, 153–54, 157–58, 167; 2 *id.* at 25–26; see also Lash, *supra* note 103 (manuscript at 31–33) (establishing that Wilson was referring to federalism, not the general federal power set forth in Resolution VI).

Second, Wilson was not interpreting the Commerce Clause. At most, his statement suggests that he might attach a broad meaning to the phrase "among the several States"—not that he thought that "commerce" meant "social intercourse." Indeed, Balkin cites no comments by Wilson to that effect, whereas Nelson and I have quoted several of Wilson's remarks indicating that he shared the "market" understanding of "commerce." See Nelson & Pushaw, *supra* note 10, at 19–20 & n.74, 38 n.150.

Third, the version of the speech Balkin reprints was published long after it was given and was not in general circulation during the key months of ratification. Rather, a different version—shorn of the broad "operations or effects" and "discretionary latitude" language—was first published and widely distributed. See Lash, *supra* note 103 (manuscript at 35–38) (providing extensive documentation for this conclusion).

123. In an 1833 letter, Madison explained that Resolution VI's words were not "left in their indefinite extent to Legislative discretion. [Rather, a] selection [and] definition of the cases embraced by them was to be the task of the Convention." 3 RECORDS, *supra* note 8, at 526; Lash, *supra* note 103 (manuscript at 15–16) (citing this statement).

124. See Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1337–41 (1934). Stern's chief historical evidence is that none of the Convention delegates criticized the Committee of Detail for changing Resolution VI into the enumerated powers of Article I, which he interprets to mean that they assumed Article I enacted the principle of Resolution VI. *Id.* at 1340. This inference makes little sense. See *supra* notes 109–14 and accompanying text. Moreover, even if it were plausible, it would be a thin historical reed upon which to build a theory of gargantuan congressional power.

125. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 291–97 (1936); see also Lash, *supra* note 103 (manuscript at 12) (noting that the Court has never again entertained this notion).

partiality is dubious, his article has been relied upon uncritically by Balkin<sup>126</sup> and other distinguished legal academics.<sup>127</sup>

In short, the Commerce Clause did not authorize Congress to “regulate whatever crosses state lines” or has an effect beyond one state’s borders and generates externalities, as Balkin asserts.<sup>128</sup> Rather, Congress could regulate only “commerce” (i.e., market-based activities) that concerned more than one state.

Moreover, read in the context of the entire Constitution and its underlying political theory of federalism, the Commerce Clause fosters a crucial Federalist idea: that national uniformity is beneficial in advancing commerce but destructive in robbing each state of its independent ability to grapple with contentious social, cultural, and moral issues.<sup>129</sup> Neither Amar nor Balkin brings up this vital concept, and their notion that “commerce” included mere social interactions would obliterate it.

#### d. Overlapping Versus Absolute Powers

Professor Balkin further maintains that the enumerated powers are not isolated grants but rather overlap because they are mere manifestations of the global Resolution VI principle that the federal government must control matters of “federal” concern (i.e., those requiring a uniform national approach because states are incapable of addressing them individually).<sup>130</sup> This point supports Balkin’s claim that the decision to list powers was not designed to limit Congress.<sup>131</sup>

I share Professor Balkin’s premise that the enumerated powers were generous and sometimes intersected. Indeed, Professor Nelson and I developed this idea in detail. To summarize, the Framers sought to give the new national government the traditional “great powers” over commerce, revenue, and military and foreign affairs, which were seen as closely related under the mercantilist conception of political economy.<sup>132</sup>

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126. See Balkin, *supra* note 6, at 10 n.34 (citing Stern, *supra* note 124, at 1340).

127. See, e.g., Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010) (cited in Balkin, *supra* note 6, at 12 n.37, 13 n.38); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 554–59, 564–65 (1995) (cited in Balkin, *supra* note 6, at 22 n.77, 23 n.80, 31 n.113, 33 n.120, 35 nn.124 & 126, 43 nn.142 & 146).

128. Balkin, *supra* note 6, at 30.

129. See Nelson & Pushaw, *supra* note 10, at 11–12, 26–30, 113–19 (amplifying and supporting this point).

130. See Balkin, *supra* note 6, at 11–13, 25.

131. *Id.* at 13 (suggesting that people should refer to the United States not as “a government of limited and enumerated powers . . . [b]ut [one] . . . of federal and enumerated powers”).

132. See *supra* notes 42–44, 75–82, 88 and accompanying text (describing mercantilism). Governments comprehensively regulated commerce—including through tax policy, such as by imposing duties on imports—and viewed diplomatic and military action as crucial to advancing the nation’s commercial goals and interests. Nelson & Pushaw, *supra* note 10, at 17–19 (citing sources). Prominent Federalists like Madison, Wilson, Hamilton, and Jay stressed that regulations of commerce were connected to taxation, military affairs, and foreign policy. *Id.* at 17–18, 34–37, 49–50. Professor Balkin

Therefore, the Constitution's drafters and Ratifiers viewed many Article I clauses as mutually reinforcing. Most obviously, national regulations of commerce would complement similar uniform laws governing revenue, bankruptcy, trademarks, patents, currency, weights and measures, postal services, and naturalization.<sup>133</sup> Likewise, Commerce Clause legislation would work hand-in-hand with statutes enacted under constitutional provisions concerning spending, war powers, and treaty-making.<sup>134</sup>

We agree with Balkin, then, that the Article I powers were intended to be broad and overlapping. It does not logically follow, however, that they are infinitely elastic, converge into a giant blob of plenary legislative authority, or impose no meaningful restraints on Congress. Rather, the very act of granting Congress certain powers indicated that others were withheld,<sup>135</sup> and even the most nationalistic Framers and Ratifiers assured Americans that those other powers would be committed to the states or the People.<sup>136</sup>

There was one major exception to such reserved powers: The Constitution's creation of a genuinely national government necessarily endowed it with the core authority possessed by all nations to deal with other sovereigns in matters such as war, treaties, and immigration.<sup>137</sup> In this international realm, the federal government had exclusive control, and the enumeration of powers in Article I simply distinguished Congress's share of such powers from those given to the President in Article II.<sup>138</sup>

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recognizes that the Founders viewed trade, diplomacy, and military strategy as intertwined. Balkin, *supra* note 6, at 25.

133. See Nelson & Pushaw, *supra* note 10, at 25, 31–35. Although some of these enumerated Article I categories (like bankruptcy and trademark) might have been inferred from the phrase “to regulate Commerce,” the Framers wisely made each of these powers explicit to avoid any misunderstandings, even at the risk of some redundancy. See Pushaw & Nelson, *supra* note 24, at 704 n.65.

134. See Nelson & Pushaw, *supra* note 10, at 25, 31–35, 49–50.

135. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824) (“The enumeration presupposes something not enumerated . . .”).

136. See *supra* notes 11–13, 78–82, 105–07, 116–20, 129 and accompanying text.

137. See *supra* notes 75–80 and accompanying text. Admittedly, such residual federal authority seems to be in tension with the notion of limited and enumerated powers. See Balkin, *supra* note 6, at 27–28. Indeed, I have previously flagged this problem: “[E]numeration appears to foreclose the assertion of powers not listed. Nonetheless, the Constitution has always been construed as allowing the federal government to imply powers needed to effectuate the affirmative grants in Articles I, II, and III.” Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 741 (2001). I argued that inherent powers were legitimate only when their exercise was indispensably necessary (not merely helpful, useful, or convenient) and rooted in well-known historical practices. See *id.* at 741–42, 847–48. Although I concentrated on the judiciary, my analysis can also be applied to the authority of Congress and the President to address other nations.

138. See Pushaw, *Justiciability*, *supra* note 14, at 407–19 (explaining how the Framers greatly strengthened the federal government, especially in the international sphere, but prevented it from becoming oppressive by separating its powers and ensuring checks and balances among its branches).



## e. The Unitary Meaning of “Commerce” in the Commerce Clause

The foregoing analysis also helps us evaluate Amar and Balkin’s insight that the single phrase “to regulate Commerce” presumably has the same meaning in each of the three different contexts to which it applies (“among the States,” “with foreign Nations,” and “with the Indian Tribes”).<sup>139</sup> This observation buttresses their argument that defining “commerce” as “intercourse” makes the most sense of the Commerce Clause as a whole, because Congress can (and has) invoked its power to regulate commerce with Indian Tribes and foreign nations to govern not merely trade and business but all interactions (and altercations) with those entities.<sup>140</sup>

I concur with Amar and Balkin that “to regulate Commerce” should have the same basic meaning as to each of the three elements of the Commerce Clause. That agreement does not, however, lead me to their conclusion that this meaning must be “all intercourse” because that is how the “Foreign” and “Indian” components of the Clause have been interpreted. Rather, the Commerce Clause originally authorized Congress to regulate market-oriented activities with other countries and Indian Tribes, whereas different constitutional provisions (such as those regarding war and treaty-making) empowered Congress to reach other interactions. Moreover, to the extent that these individual textual grants left any gaps, under the new constitutional system no other political body except the federal government could deal with other nations<sup>141</sup>—including Indian Tribes, which were technically considered separate sovereigns.<sup>142</sup>

This background sheds light on the claim of Professors Amar and Balkin that their theory best explains Congress’s power over all foreign affairs, whether economic or not.<sup>143</sup> In fact, the Nelson/Pushaw approach

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139. They reason that, because “commerce” should have the same definition throughout the Clause, any differences in congressional power must be attributable to the words “with” and “among.” See Balkin, *supra* note 6, at 6–7 (citing AMAR, *supra* note 6, at 108). Professor Balkin acknowledges that (1) later constructions of these three provisions might differ because they each serve distinct purposes, and (2) the Constitution contains additional textual restrictions on Congress’s powers (such as the requirement that all duties, imposts, and excises be uniform) that may apply differently to distinct types of commerce. *Id.* at 14–15.

140. See AMAR, *supra* note 6, at 107; Balkin, *supra* note 6, at 6–7, 13, 23–29.

141. See *supra* notes 78–79, 132, 134, 137–38 and accompanying text.

142. See DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* 4–5, 40–41, 99–103 (2001) (demonstrating that the Constitution recognized the sovereignty of Indian Tribes). Unlike genuinely autonomous nations such as France, however, Indian Tribes had a unique and inferior status because of their location within the United States and their dependence on its government. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

Professors Amar and Balkin might respond that the establishment of a truly national government also implied its control over all interstate interactions. But such an inference, especially if it swept in merely social, moral, or cultural affairs, would undermine federalism in a way that inherent power to deal with other nations would not. See *supra* notes 10–13, 71–73, 75–82, 99–129, 135–38 and accompanying text.

143. See AMAR, *supra* note 6, at 107–08; Balkin, *supra* note 6, at 6, 12–13, 23–29.

gets to that same result, albeit through a more complicated route.<sup>144</sup> In our view, the Foreign Commerce Clause primarily focused on trade and market transactions with other countries and their inhabitants,<sup>145</sup> whereas other constitutional provisions addressed non-commercial interactions: the multiple clauses involving warmaking,<sup>146</sup> the Treaty Power,<sup>147</sup> the authority “[t]o establish [a] uniform Rule of Naturalization;”<sup>148</sup> the power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;”<sup>149</sup> and the federal courts’ jurisdiction over “controversies” involving foreign nations, citizens, and subjects.<sup>150</sup>

Of course, there was some overlap among the various enumerated powers. Most obviously, the Treaty Power often produced agreements between the United States and a foreign sovereign about trade and its incidents, which Congress could implement under the Commerce Clause to govern market-based activities between people in these countries.<sup>151</sup> Likewise, Congress’s control over immigration rested primarily on its power over naturalization<sup>152</sup> and the law of nations,<sup>153</sup> but this subject had sometimes been conceived in English history as an aspect of regulating commerce because immigration often involves paid transportation and affects wages and production.<sup>154</sup> Thus, the “market” theory of the Commerce Clause would not impede Congress’s ability to deal with immigration, contrary to Balkin’s suggestion.<sup>155</sup> More generally, the very adop-

144. See Nelson & Pushaw, *supra* note 10, at 21–35, 49–50.

145. A recent and exhaustive analysis of the Foreign Commerce Clause’s text, history, and implementing precedent concluded that this provision “establish[ed] uniformity over U.S. commerce with foreign nations so that the United States could act as a single economic unit.” See Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 965 (2010). Professor Colangelo treated this Clause as concerned solely with trade and similar economic matters, and he did not mention that it might extend to other “interactions.”

146. See U.S. CONST. art. I, § 8, cls. 1, 11–16; *id.* art. II, § 2, cl. 1. For a detailed analysis of these provisions, see Robert J. Pushaw, Jr., *The “Enemy Combatant” Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1017–23 (2007).

147. U.S. CONST. art. II, § 2, cl. 2.

148. U.S. CONST. art. I, § 8, cl. 4.

149. U.S. CONST. art. I, § 8, cl. 10.

150. See U.S. CONST. art. III, § 2, cl. 1; see also AMAR, *supra* note 6, at 542 n.19 (acknowledging that these Article III provisions, in tandem with the Necessary and Proper Clause, could be deployed to reach a result similar to his interaction theory).

151. See *supra* notes 68–70, 134 and accompanying text.

152. Balkin recognizes that Congress’s ability to govern immigration can be inferred from the Naturalization Clause (or from the war powers). See Balkin, *supra* note 6, at 26.

153. See Natelson & Kopel, *supra* note 58, at 58–60 (citing Vattel’s 1758 treatise—the bible of international law to the Founders—for the proposition that immigration was considered part of the law of nations); see also *supra* notes 75–82, 132–38 and accompanying text (stressing that, because the Constitution created a truly national government, that government necessarily had control over all dealings with foreign countries, including immigration).

154. See *supra* notes 39–44 and accompanying text; see also Balkin, *supra* note 6, at 27 (conceding this point, but arguing that the “trade” and “market” theories would not reach immigrants traveling on foot from Mexico or Canada, and that therefore the “interaction” thesis provides a superior and simpler explanation for Congress’s power).

155. See Balkin, *supra* note 6, at 26. Balkin contends that the Commerce Clause must cover immigration (and other social interactions) because an exception to that Clause restricted Congress’s

tion of the Constitution dictated that the national government would exclusively handle foreign relations.<sup>156</sup>

Professors Amar and Balkin also assert that their thesis provides the most cogent justification for Congress's power to legislate as to noneconomic interactions with Indian Tribes, such as crimes on Indian lands.<sup>157</sup> But they do not cite, much less address, significant historical evidence showing that this Indian Commerce Clause did concern trade and related activities.<sup>158</sup> Furthermore, they do not fully appreciate that, if

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power to prohibit "the Migration or Importation of such Persons as any of the States now existing shall think proper to admit" until 1808. *See id.* (citing U.S. CONST. art. I, § 9, cl. 1). He speculates that "Migration" might include the movement of "free white immigrants." *Id.* Although that is a plausible textual reading of this clause, at the time it was well understood to prevent Congress from banning the slave trade before 1808. Indeed, Professor Amar himself notes this fact in arguing that the Constitution was proslavery. *See* AMAR, *supra* note 6, at 20, 91, 97, 119–20, 264, 268–69.

This background places into context Randolph's statement during Ratification, which Balkin cites as support: "To what power in the general government is the exception made respecting the importation of negroes? Not from a general power, but from a particular power expressly enumerated. This is an exception from the power given them of regulating commerce." Balkin, *supra* note 6, at 26 n.94 (quoting 3 DEBATES, *supra* note 92, at 464). This remark actually reinforces the Nelson/Pushaw argument that (1) the Framers and Ratifiers understood the federal government to have not "general power," but "particular power(s) expressly enumerated;" and (2) the Commerce Clause power was restricted to market-based activity (here, trade in slaves, who were legally deemed property).

Finally, even if one construed "Migration" as referring to the immigration of free blacks, the clause at issue would be an exception to Congress's power to control immigration though the provisions pertaining to naturalization and legislating about the law of nations.

156. *See supra* notes 78–80 and accompanying text. Indeed, such unitary federal control was a desperately needed change from the Articles of Confederation, which had foolishly left foreign policy to individual states. *See supra* notes 75–80 and accompanying text.

157. *See* AMAR, *supra* note 6, at 107; Balkin, *supra* note 6, at 6–7, 13, 23–29. The Convention delegates initially approved an independent clause (taken from the Articles of Confederation) granting Congress power to regulate "affairs" with Indians, but the Committee of Style changed this word to "commerce" and combined this provision with the other two subjects of the Commerce Clause. *See* 2 RECORDS, *supra* note 8, at 321, 493. Although no one explained this switch, the most logical inference from a purely linguistic standpoint would be that the Framers limited Congress by replacing a broad word ("affairs") with a narrower one ("commerce"). However, Professors Balkin and Amar contend that this change in wording did not likely affect the meaning or scope of Congress's power. *See* Balkin, *supra* note 6, at 23 & n.82; AMAR, *supra* note 6, at 107. This argument intuitively seems correct, as it would be odd to suppose that a Constitution designed to strengthen the national government would give Congress less power over Indian Tribes than the Articles of Confederation had. Thus, the substitution of "commerce" for "affairs" as to Indian Tribes is the strongest evidence Amar and Balkin have for their "interaction" definition.

Unfortunately, we do not know why the Committee of Style made this alteration. For instance, the committee members may simply have thought that using the single word "commerce" was stylistically more elegant than using both that term and "affairs." Another possibility (which I find most plausible) is that the drafters contemplated that Congress would invoke the Indian Commerce Clause to pass laws pertaining to trade and other market-oriented transactions with the Tribes, but would rely on other constitutional provisions and principles to address noncommercial aspects of relations with Indians.

158. The only comprehensive study of "Commerce with the Indian Tribes" concluded that this phrase signified mercantile trade with Indians and closely related activities such as controlling the behavior of merchants (including through criminal sanctions against those who dealt unscrupulously with Indians). *See* Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201 (2007). Generally speaking, I find Natelson's "mercantile" interpretation of the word "commerce" an improvement over the narrow "trade" theory, yet still unduly restrictive because it does not reach certain market-based subjects like manufacturing goods and insurance. *See supra* note 46 and accompanying text. Although my research has focused on "Commerce among the several

Congress has power under the Commerce Clause to regulate a particular subject of commerce, Congress can protect that regulatory scheme by criminally prohibiting interference with it.<sup>159</sup> Finally, because Indian Tribes were seen as distinct nations, noncommercial interactions with them could be addressed through the military and treaty powers of Congress (and the President) and the federal government's inherent authority over such issues.<sup>160</sup>

In short, Professors Amar and Balkin correctly emphasize that the word "commerce" should be consistently defined in the three categories to which it extends: "among the States," "with foreign Nations," and "with Indian Tribes." That unitary meaning, however, is not all "interactions," but rather only the "commercial" (i.e., market) kind.

f. Summary

Overall, Balkin and Amar have proffered an interpretation of the Commerce Clause that rests on a seldom used eighteenth-century definition of "commerce" as "intercourse" which no Framer or Ratifier endorsed and which would undermine the Constitution's federalist structure by granting Congress virtually unlimited regulatory power vis-a-vis the states. By contrast, I continue to believe that the Framers carefully chose the term "commerce" to convey its broad, yet bounded, market-based meaning. Early Congresses, Presidents, and courts generally shared that understanding.

3. *Early Implementations of the Interstate Commerce Clause*

In America's formative years, Congress invoked the Interstate Commerce Clause to enact laws concerning trade, commercial shipping, and other business matters. Moreover, many members of Congress and Supreme Court Justices expressed a market-oriented vision of "commerce." Conversely, no one in the early federal legislative, executive, or judicial branches ever said that the Interstate Commerce Clause authorized Congress to reach all interactions. Professors Amar and Balkin have cited a few federal statutes and cases to prop up the opposite conclusion, but they do not withstand scrutiny.

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States" rather than the Indian Commerce Clause, I believe Congress has the power to regulate all market-oriented activities as part of "commerce." In any event, neither Balkin nor Amar mentions any of the evidence Natelson adduces to support his conclusions.

159. See Nelson & Pushaw, *supra* note 10, at 148–49 (describing this longstanding "protective principle"). Professor Balkin recognizes the protective principle, but says that its acceptance means that the Nelson/Pushaw market proposal "merge[s] into the interaction theory." Balkin, *supra* note 6, at 26. It is true that our approaches converge on this point, but that does not lead me to embrace the "interaction" thesis *in toto*.

160. See *supra* notes 78–79, 132–38, 141–42, 156 and accompanying text. Congress could also pass any laws that it deemed "necessary and proper" to effectuate the powers listed in Articles I, II, and III, including those concerning military and foreign affairs. See U.S. CONST. art I, § 8, cl. 18.

## a. Acts of Congress

To support his thesis, Professor Amar offers only one historical document construing the Commerce Clause: the First Congress's 1790 statute regulating Trade and Intercourse with the Indian Tribes, which extended to noneconomic interactions such as crimes committed on Indian lands.<sup>161</sup> Amar's reliance on this source is puzzling, for three reasons. First, as he recognized long ago, early federal statutes do not necessarily incorporate the original intent and understanding of the Constitution, but rather can also reflect purely political considerations.<sup>162</sup> Second, Amar has never before attempted to substantiate a novel reading of a constitutional provision with a single source, but instead has supplied detailed historical evidence.<sup>163</sup> Third, this statute may not have been enacted pursuant to the Indian Commerce Clause, but rather appears to have implemented the Treaty Power—a distinction explained earlier.<sup>164</sup> Specifically, President Washington requested this law to extend trade to Indians “agreeably to the treaties of Hopewell.”<sup>165</sup>

This third criticism also applies to Professor Balkin's reliance on the 1790 Act and successor laws concerning Indian Tribes,<sup>166</sup> as well as on the

161. AMAR, *supra* note 6, at 108 n.\* (citing An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790)).

162. See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 259–60 (1985).

163. See, e.g., *id.* at 210–64.

164. See *supra* notes 157–60 and accompanying text. Furthermore, even if the statute had been passed under the Indian Commerce Clause, the Nelson/Pushaw “market” theory allows Congress to protect its commercial regulatory schemes by criminalizing interference with them. See *supra* note 158 and accompanying text. Thus, the Act's extension to noneconomic crimes committed on Indian lands does not necessarily undermine our approach.

165. See 1 ANNALS OF CONGRESS 68 (1789) (Joseph Gales ed., 1834); see also Natelson, *supra* note 158, at 255–56 (maintaining that the Trade and Intercourse Act was passed under the Treaty Power, not the Commerce Clause).

166. See Balkin, *supra* note 6, at 24 & n.85, 25 (citing statutes from 1790, 1793, 1796, 1799, 1802, and 1834). Balkin admits that these laws, beginning in 1796, did enforce treaty obligations, but claims that the 1790 and 1793 Acts did not. *Id.* at 25 & n.86.

The Trade and Intercourse Act of June 20, 1834, ch. 161 § 20, 4 Stat. 729, 732, prohibited selling, bartering, exchanging, or giving liquor to Indians. The Supreme Court upheld Congress's power to enact this statute on the ground that “[i]t relates to buying and selling and exchanging commodities, which is the essence of all commerce, and it regulates the intercourse between the citizens of the United States and those tribes, which is another branch of commerce . . . .” *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 417 (1865). Balkin cites *Holliday* and the 1834 law as evidence of his thesis. See Balkin, *supra* note 6, at 25 n.87. However, the Court appears to use the word “intercourse” to cross-reference commercial transactions in liquor (“buying and selling and exchanging”). See *Holliday*, 70 U.S. (3 Wall) at 417.

Similarly, Balkin relies on *United States v. Kagama*, 118 U.S. 375, 378 (1886). See Balkin, *supra* note 6, at 25 n.88. That case actually undercuts Balkin's idea that Congress can reach noncommercial activities like crimes because “commerce” is “intercourse.” In *Kagama*, the Court rejected as “strained” the government's suggestion that the Indian Commerce Clause could be stretched to empower Congress to punish common law crimes like murder “without any reference to their relation to any kind of commerce.” See *Kagama*, 118 U.S. at 378–79. Instead, the Court concluded that Congress necessarily had inherent power to define and punish such crimes because it was the only government capable of doing so and had always performed this role as part of its duty to protect Indians. *Id.* at 384–85; see also Nelson & Pushaw, *supra* note 10, at 126 n.568 (discussing *Kagama*).

1794 Treaty with England.<sup>167</sup> More revealingly, he does not mention any statute enacted under the Interstate Commerce Clause that manifests his “interaction” definition.

b. Cases

The landmark Supreme Court decision construing the Commerce Clause is *Gibbons v. Ogden*.<sup>168</sup> Professor Balkin cites *Gibbons* for the proposition that “commerce” meant “‘intercourse’—that is, interactions, exchanges, interrelated activities, and movements back and forth, including, for example, travel, social connection, or conversation.”<sup>169</sup> More specifically, Balkin invokes this case to assert that the Commerce Clause enables Congress to regulate “transportation networks, whether they are used for commercial or noncommercial purposes.”<sup>170</sup> *Gibbons*, however, does not say or imply such things. On the contrary, the Marshall Court unequivocally endorsed the “market” theory.

The case arose because Ogden’s monopoly on his New York-to-New Jersey ferry route, conferred by the New York Legislature, had been infringed when Gibbons began to operate his ferry under a license granted pursuant to a 1793 federal statute regulating “vessels to be employed in the coasting trade.”<sup>171</sup> In an opinion by Chief Justice Marshall, the Court rejected Ogden’s contention that Congress had exceeded its power because “commerce” exclusively concerned “traffic” (buying, selling, or exchanging commodities) and thus did not include navigation:

This [argument] would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, 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.<sup>172</sup>

The Court concluded that the Commerce Clause “has been universally understood . . . to comprehend navigation.”<sup>173</sup> The Chief Justice also dismissed Ogden’s alternative claim that, if the Clause covered navigation, it must be restricted to cargo rather than passenger ships: “[N]o

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167. See Balkin, *supra* note 6, at 17 n.53 (citing Treaty of Amity, Commerce and Navigation, Between His Britannic Majesty and the United States of America, U.S.-U.K., Nov. 19, 1794, 8 Stat. 116). Moreover, that treaty differentiates between “commerce” (including navigation) and social and political relations. See *id.* at 17.

168. 22 U.S. (9 Wheat.) 1 (1824).

169. Balkin, *supra* note 6, at 15–16 (citing *Gibbons*, 22 U.S. (9 Wheat.) at 189–90); see also *id.* at 21 (“John Marshall . . . use[d] the words ‘commerce’ and ‘intercourse’ interchangeably.”); *id.* at 23 (repeating this statement, but conceding that Marshall recognized that the “primary focus” of the Clause was “commercial intercourse”).

170. *Id.* at 23.

171. *Gibbons*, 22 U.S. (9 Wheat.) at 1–3.

172. *Id.* at 189–90; see also *id.* at 193 (declaring that the Commerce Clause has “been universally admitted . . . [to] comprehend every species of commercial intercourse”).

173. *Id.* at 215.

clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hire.”<sup>174</sup> Marshall’s repetition of the phrase “for hire” after “transporting” belies Balkin’s assertion that *Gibbons* recognizes Congress’s power to regulate even non-commercial transportation, and supports the Nelson/Pushaw thesis that the Commerce Clause authorizes Congress to reach only the paid kind.<sup>175</sup>

More generally, the Court expressly defined “commerce” as “*commercial* intercourse . . . in all its branches,”<sup>176</sup> which has two distinct ramifications. First, “commerce” is a particular type of “intercourse”—“commercial” (and hence does not reach social, sexual, and other types of “intercourse”). Second, this “commercial intercourse” extends to “all its branches”—a then-popular metaphor, repeated elsewhere in the opinion,<sup>177</sup> which conveyed an organic vision of commerce as an interrelated series of market activities (including navigation).<sup>178</sup> Although Chief Justice Marshall appropriately confined his opinion to the disputed issue of shipping, Justice Johnson in a concurrence spelled out the broad intended scope of “commerce” as sweeping in activities such as paid labor and other services, “mediums of exchange” like commercial paper, communications, and related agencies and operations.<sup>179</sup>

The Court also defined “among the several States” as referring only to commerce which concerns more than one state.<sup>180</sup> Conversely, internal state commerce was part of the “immense mass of legislation” not surrendered to the national government.<sup>181</sup>

In sum, the Marshall Court perfectly captured the original meaning, intent, and understanding of the Commerce Clause: “commercial intercourse . . . in all its branches” that affects more than one state.<sup>182</sup> The Court never suggested that the Clause reached all interstate interactions

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174. *Id.* at 215–16.

175. See Pushaw & Nelson, *supra* note 24, at 708–09 (making this point in the different context of criticizing Randy Barnett’s argument that the Court in *Gibbons* limited “commerce” to the compensated transportation of goods, not people).

176. See *Gibbons*, 22 U.S. (9 Wheat.) at 189–90 (emphasis added); *id.* at 216 (referring to “navigation, as a branch of commerce”).

177. *Id.*

178. See, e.g., ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 690, 713–15 (Edwin Cannan ed., 1937) (describing banking and insurance as “Branches of Commerce”); Nelson & Pushaw, *supra* note 10, at 15–16, 40, 45–46 (citing numerous other eighteenth-century writers who used this figure of speech, including several Framers and Ratifiers).

179. See *Gibbons*, 22 U.S. (9 Wheat.) at 229–30 (Johnson, J., concurring).

180. *Id.* at 195 (majority opinion).

181. *Id.* at 203.

182. *Id.* at 189–90. Professor Balkin claims that Justice Story endorsed the “intercourse” theory of the Commerce Clause. See Balkin, *supra* note 6, at 19 n.60 (citing 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1057–62 (5th ed. 1994)); see also *id.* at 21, 23 (same). Actually, Story quotes *Gibbons* verbatim for the proposition that “commerce” is “commercial intercourse.”

and affairs, contrary to Balkin's assertions.<sup>183</sup> Nor has any Justice ever made such a sweeping claim.

## II. SUBSEQUENT INTERPRETATIONS OF THE COMMERCE CLAUSE

Professors Balkin and Amar agree with Nelson and me that the Court's Commerce Clause jurisprudence has evolved haphazardly in common law fashion and could be improved by resurrecting the genuine original meaning. Their "interaction" version of originalism, however, would be no more effective in restraining Congress's power than the Court's "substantial effects" approach. By contrast, the "market" theory accommodates most modern legislation but would strike down certain excesses, such as regulations of transportation, farming, and the environment that intrude into the private, non-commercial realm.

### A. *The Evolution of the "Substantial Effects" Test*

The Court did not revisit *Gibbons* until the industrial revolution of the late nineteenth century prompted Congress to enact laws addressing pressing matters such as railroads and monopolies.<sup>184</sup> The Court sought to restrict Congress, mainly by defining "commerce" to include only trade and transportation—not productive activities.<sup>185</sup> Most importantly, the Court invalidated congressional attempts to regulate manufacturing<sup>186</sup> and labor.<sup>187</sup>

A majority of Justices stuck with this narrow construction in striking down New Deal legislation that grappled with such problems as agricul-

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183. Professor Balkin contends that his proposal is superior because its definition of "commerce" as "intercourse" directly encompasses a huge variety of activities that should be within Congress's purview, most notably transportation and communication networks. Balkin, *supra* note 6, at 16–21. He finds the Nelson/Pushaw approach less satisfying because we supposedly must use "commerce" non-literally so that (1) a part ("commerce") stands for a larger whole ("all forms of business and economic activity"); and (2) a word ("commerce") that denotes one thing ("trade") also refers to related matters (like transportation used to engage in trade). *Id.* at 19. This argument collapses, however, once one realizes that the entire phrase "to regulate Commerce" directly authorized legislation over all market-based activity. For example, "regulations of commerce" literally included paid navigation.

Furthermore, Professor Balkin's belief that, in modern America, Congress *should* control all aspects of transportation and communications networks (including personal, non-market usages) has no bearing on whether the Framers *did* confer such power in the original Commerce Clause. Perceived modern exigencies should not influence historical analysis.

184. See Nelson & Pushaw, *supra* note 10, at 67–79; Balkin, *supra* note 6, at 50–51.

185. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 297–310 (1936) (citing cases endorsing this narrow understanding of "commerce" to justify striking down a federal statute regulating the coal industry).

186. See, e.g., *United States v. E. C. Knight Co.*, 156 U.S. 1, 11–17 (1895) (ruling that Congress lacked power under the Commerce Clause to extend antitrust laws to a national corporation's purchase of sugar refineries that gave it control of ninety-eight percent of the sugar market, because manufacturing was not "commerce").

187. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 272–76 (1918) (holding that Congress could not ban child labor).



tural overproduction, labor strife, and industrial woes.<sup>188</sup> In the 1936 elections, however, Americans decisively reelected President Roosevelt and a clear majority of his Democratic allies in Congress.<sup>189</sup>

The Court yielded to political realities, realizing that its continued resistance might trigger a constitutional crisis. Unfortunately, the Justices did not grasp that many New Deal statutes could have been upheld simply by reviving the original meaning of “commerce” as activities geared toward the market. For example, the National Labor Relations Act (NLRA)<sup>190</sup> regulated the provision of services for money, and the Agricultural Adjustment Act (AAA)<sup>191</sup> primarily addressed the production of food for sale.

Instead, the Court ignored history altogether and cobbled together a legal test that would enable it to blindly defer to Congress. In 1937, a slim majority of Justices sustained the NLRA on the ground that Congress could regulate any activity—even noncommercial or intrastate—that “substantially affected” interstate commerce.<sup>192</sup> The same rationale applied to federal minimum-wage and maximum-hour laws.<sup>193</sup> Perhaps most significantly, in *Wickard v. Filburn*,<sup>194</sup> the Court upheld the AAA as extended to a small farmer who had grown wheat in excess of his federally imposed quota and used it for home consumption.<sup>195</sup> The Court deemed it irrelevant that the farmer (1) had not been engaged in “commerce” (raising wheat for sale), and (2) had acted within one state (indeed, only on his farm).<sup>196</sup> Similarly immaterial was the farmer’s “trivial” impact on interstate commerce; rather, Congress could determine the “substantial effect” by aggregating all the regulated activity (here, home-grown wheat) nationwide.<sup>197</sup>

As the Justices well knew, virtually all statutes would meet this toothless “substantial effects”/“aggregate” test, and they did.<sup>198</sup> Nonethe-

188. See, e.g., *Carter Coal*, 298 U.S. at 297–310 (invalidating a federal law dealing with production and labor in the coal industry); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542–50 (1935) (striking down the National Industrial Recovery Act, which sought to control many industries and trades—even small and local outfits—by establishing “fair competition” codes and regulating employees’ wages and hours).

189. See BRUCE ACKERMAN, 1 *WE THE PEOPLE: FOUNDATIONS* 50–57, 61–66, 101–22, 129–30 (1991) (describing the radical effect of this election on the Court).

190. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended 29 U.S.C. §§ 151–169 (2006)).

191. Pub. L. No. 75-430, 52 Stat. 31 (1938) (codified as amended in scattered sections of 7 U.S.C.).

192. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34–40 (1937).

193. *United States v. Darby*, 312 U.S. 100, 113–19 (1941) (upholding the Fair Labor Standards Act).

194. 317 U.S. 111 (1942).

195. *Id.* at 113–28.

196. *Id.* at 120–25. By contrast, under the “market” theory, the fact that the farmer was growing the wheat for personal use rather than for sale would have categorically prevented Congress from regulating this activity. See Nelson & Pushaw, *supra* note 10, at 82–83.

197. *Wickard*, 317 U.S. at 127–29.

198. Indeed, the Court sustained every federal law enacted under the Commerce Clause from 1937 until 1994. See Nelson & Pushaw, *supra* note 10, at 79–88 (citing cases).

Professor Balkin argues that Justice Black embraced the “interaction” thesis in *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 549–53 (1944), which upheld Congress’s power to

less, the Court made that test even weaker when, in sustaining the Civil Rights Act of 1964 against small hotels and restaurants that racially discriminated, it declared that Congress did not actually have to demonstrate the “substantial effect” on interstate commerce.<sup>199</sup> Rather, it would suffice if the Court could conceive of some “rational basis” for the law.<sup>200</sup> Of course, Congress always might have had some reason for concluding that an activity, considered cumulatively, substantially affected interstate commerce. Thus, the Court effectively abdicated judicial review and upheld every federal statute, most notably novel criminal and environmental laws.<sup>201</sup>

### B. *The Failed “Counterrevolution”*: Lopez, Morrison, and Raich

This total deference ended with *United States v. Lopez*,<sup>202</sup> when five conservative Justices struck down the Gun-Free School Zones Act (GFSZA), which made it a federal crime to possess a firearm near a school.<sup>203</sup> Creatively reinterpreting its precedent,<sup>204</sup> the Court announced that when Congress regulated an area of “traditional state concern” (like crime or education), the “rational basis”/“substantial effects” test would be applied forcefully to invalidate laws like the GFSZA that were not “commercial,” considered either by themselves or as “an essential part of a larger regulation of economic activity.”<sup>205</sup>

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regulate the insurance business. See Balkin, *supra* note 6, at 23 n.79 and accompanying text. On the contrary, Justice Black expressly relied upon the *Gibbons* definition of “commerce” as “commercial intercourse.” See *Underwriters Ass’n*, 322 U.S. at 550–51 (emphasis added) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189–90, 194 (1824)). He declared: “No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause.” *Id.* at 552–53 (emphasis added). This statement nicely captures the Nelson/Pushaw “market” theory, and we recognized that Congress could regulate insurance as the sale of a service in a multi-billion dollar national industry. See Nelson & Pushaw, *supra* note 10, at 85.

199. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255–58 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 298–305 (1964).

200. *McClung*, 379 U.S. at 304.

201. See *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 268–83 (1981) (upholding a federal statute addressing the environmental impacts of mining); see also *Hodel v. Indiana*, 452 U.S. 314, 321–29 (1981) (sustaining a statutory provision regulating a mining technique that threatened a minuscule amount of farmland); *Perez v. United States*, 402 U.S. 146, 147–57 (1971) (affirming the conviction of a small-time loan shark who operated exclusively within New York, on the ground that Congress could rationally have determined that all loan sharking, added up nationwide, substantially affected interstate commerce).

202. 514 U.S. 549 (1995).

203. *Id.* at 556–68 (citing statute).

204. *Lopez* conflicted with established doctrine, as Congress could reasonably have found that the possession and use of guns near schools, added up across the country, substantially affected interstate commerce (for example, by negatively affecting education, which would decrease students’ economic prospects). See *id.* at 602–03 (Stevens, J., dissenting); *id.* at 603–15 (Souter, J., dissenting); *id.* at 615–44 (Breyer, J., dissenting). In fact, the Court had specifically upheld Congress’s power to prohibit the possession of firearms (e.g., by felons). *Scarborough v. United States*, 431 U.S. 563, 569–77 (1977). The majority managed to distinguish, rather than reverse, such precedent.

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

Unfortunately, the *Lopez* standards were opaque. For openers, the Court did not explain *which* federal laws addressing “traditional state concerns” would trigger heightened scrutiny or why it had allowed Congress to enact over three thousand criminal laws and massive educational regulations.<sup>206</sup> Similarly, the Justices in the majority explicitly declined to define “commerce” and instead left the content of this term to be worked out on a case-by-case basis.<sup>207</sup> Finally, *Lopez* does not contain any objective criteria (e.g., dollar thresholds) for distinguishing “substantial” from “insubstantial” effects on interstate commerce.<sup>208</sup>

A few years later, in *United States v. Morrison*,<sup>209</sup> the same bare majority invalidated a provision of the Violence Against Women Act (VAWA) which granted a federal tort remedy to victims of gender-motivated assaults.<sup>210</sup> The Court ruled that Congress had invaded an area of “traditional state concern” (criminal and tort law) and had no rational basis for concluding that gender-based violence was “commerce” (either inherently or as part of a larger economic regulatory scheme) or “substantially affected” interstate commerce.<sup>211</sup>

The GFSZA and VAWA were novel and symbolic vote-getting measures that largely duplicated existing state legislation. When it came time to strike down a longstanding federal statute that really mattered, Justices Kennedy and Scalia flinched. In *Gonzales v. Raich*,<sup>212</sup> they joined with the four *Lopez/Morrison* dissenters in holding that Congress could have rationally determined that it must prohibit even noncommercial, intrastate activity—the growth, possession, and use of marijuana for medical purposes as authorized by state law—because doing so was essential to effectuating its larger regulation of interstate economic activity (the multibillion dollar marijuana industry).<sup>213</sup> Three dissenting Justices argued that Congress had interfered with subjects of historical state concern (criminal law and medical care) and that the defendants had not engaged in any “commercial” activity because they had used the marijuana for personal medical purposes, not for sale.<sup>214</sup>

Although the Court in *Raich* did not overrule *Lopez* or *Morrison*, it seemingly confined those cases to federal statutes that (1) have never before been challenged as exceeding Congress’s power (as contrasted with those the Court has previously upheld, such as anti-drug, civil rights, and

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206. See Robert J. Pushaw, Jr., *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?*, 42 HARV. J. ON LEGIS. 319, 331–32 (2005).

207. *Id.* at 331.

208. See *id.*; see also Balkin, *supra* note 6, at 44 (contending that the Court mistakenly focused on whether an activity is “commercial” or “economic,” instead of whether the spillover effects of that activity were economic).

209. 529 U.S. 598 (2000).

210. *Id.* at 601–19.

211. *Id.* at 617–18.

212. 545 U.S. 1 (2005).

213. *Id.* at 5–33.

214. *Id.* at 42–57 (O’Connor, J., dissenting); *id.* at 57–74 (Thomas, J., dissenting).

environmental laws), and (2) purported to cover activity that cannot reasonably be characterized as “commercial,” either by itself or as part of a larger economic regulatory scheme. Because statutes meeting those two criteria are quite rare, the Court appeared to have reverted back to a posture of near-complete deference to Congress.<sup>215</sup>

C. *How the “Market” and “Interaction” Approaches Would Affect Precedent*

Professors Amar and Balkin would welcome the return of such virtually unrestrained congressional power. Indeed, they candidly admit that their definition of “commerce” as “interaction” imposes no real limits, but rather posit that any such restrictions are contained in the phrase “among the several States.”<sup>216</sup> Specifically, Professor Balkin proposes that Congress can regulate interactions only if it could reasonably conclude that they extend beyond a state’s boundaries in either their operations (such as transportation networks) or effects (most notably, actions in one state that produce spillovers or “collective action” problems) in such a way that requires a federal solution.<sup>217</sup> Put differently, a court could strike down a federal law only when Congress was “grandstanding”—that is, could not plausibly claim that an activity had such external impacts.<sup>218</sup> Professor Balkin suggests that such grandstanding may have occurred with the GFSZA and VAWA.<sup>219</sup>

This “anti-grandstanding”/“reasonableness” principle, however, would not check Congress. To illustrate, Professor Balkin says that his test would have led to the invalidation of the GFSZA, but hastens to add that this law would have been perfectly constitutional if enacted as part of a broader regulation of interstate commerce.<sup>220</sup> Hence, even *Lopez*’s modest outer limit could easily be evaded, and Balkin’s theory would perversely encourage Congress to legislate even more expansively.<sup>221</sup>

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215. See Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879 (2005) (contending that *Lopez* and *Morrison* were modest rulings that invalidated two minor statutes based upon vague standards which could have been applied in *Raich* either to uphold or strike down the federal marijuana law, and urging the Court to adopt concrete rules drawn directly from the Commerce Clause that focus on whether the regulated activity is market-oriented “commerce”).

216. See Balkin, *supra* note 6, at 6–7, 14–15, 23, 29–44; AMAR, *supra* note 6, at 108.

217. See Balkin, *supra* note 6, at 6, 10, 13, 30–44.

218. *Id.* at 41–42, 44, 49.

219. *Id.* at 41–45.

220. *Id.* at 41–42; see also *id.* at 41 (criticizing the GFSZA because it was “a freestanding prohibition unconnected to a larger federal scheme of regulation of education . . . or gun trafficking”).

221. See *id.* at 41–42 (acknowledging that his theory would have this effect, and recommending that in close cases “Congress must make its desired regulation an integral part of a more comprehensive scheme that does address a genuine federal problem”); see also *Gonzales v. Raich*, 545 U.S. 1, 43 (2005) (O’Connor, J., dissenting) (assailing the notion of “giv[ing] Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause—nestling questionable assertions of its authority into comprehensive regulatory schemes”).

Furthermore, he contends that Congress had power to enact VAWA under Section 5 of the Fourteenth Amendment to combat discrimination.<sup>222</sup> Thus, he has failed to identify a single real-world statutory provision beyond Congress's compass.

I need not belabor the point that Balkin and Amar do not seek to place serious restraints on Congress, because they concede as much in their casebook when they ask: "Would [our] approach lend itself to principled doctrinal exposition and enforcement in courts? If not, does it nonetheless set out a workable distinction for a constitutionally conscientious congressperson?"<sup>223</sup> The answer to these questions seems plainly to be "no."

First, because much modern Commerce Clause legislation is "grandstanding" (that is, enacted for symbolic effect to show that Congress cares), the Court could not meaningfully distinguish between unlawful and lawful "grandstanding." If the Court were to redirect its focus to "spillover effects" and "collective action problems," Congress would likely adapt by creatively compiling "findings" that would meet this test—just as it has previously manufactured evidence purporting to show that wholly intrastate, non-commercial activities "substantially affect" interstate commerce, as in VAWA.<sup>224</sup> Although some Justices might initially try to rein in Congress, at some point they would probably cave in, as they did in *Raich*.<sup>225</sup>

Second, even if I generously assumed that the Amar/Balkin proposal "set out a workable distinction for a constitutionally conscientious congressperson,"<sup>226</sup> most members of Congress do not merit that description. Rather, they tend to pass laws without worrying about constitutionality, particularly restrictions on Article I legislative power and federalism. This practice would have dismayed our Founders, but not shocked them, as they understood the standard political theory that government actors and institutions naturally seek to maximize their power.<sup>227</sup> Indeed, that is precisely why the Framers established independent federal courts to prevent Congress and the President from exceeding their constitutional bounds.

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Professor Balkin argues that the issue is not the amount of federal regulation, but rather whether it reasonably addresses a federal problem. Balkin, *supra* note 6, at 41. This vision of federalism underestimates the deleterious effects of displacing state law.

222. Balkin, *supra* note 6, at 43.

223. PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 622 (5th ed. 2006).

224. See *supra* notes 209–11 and accompanying text.

225. See *supra* notes 212–15 and accompanying text.

226. BREST, LEVINSON, BALKIN, AMAR & SIEGEL, *supra* note 223, at 622.

227. This tendency induced the Framers to separate government powers and provide for their checking and balancing, which would channel the inherent ambition of politicians into a system that would avoid tyranny. See, e.g., *THE FEDERALIST* NOS. 47–51 (Madison).

In brief, Professors Amar and Balkin do not come up with any genuine, judicially enforceable constraints on Congress's Commerce Clause power. By contrast, the "trade" theory would require striking down almost all federal laws enacted over the past eight decades. Professor Nelson and I steer a middle course between these extremes. We would uphold most federal legislation, but thwart Congress's attempts to reach certain non-market activities.

Our approach supplies a legally principled way for the Court to sustain the vast majority of federal statutory provisions. Most notable are those regulating (1) the production of goods for sale (e.g., through manufacturing and agriculture) and any accompanying environmental, health, and safety impacts; (2) services such as labor, banking, insurance, and the provision of public accommodations (including antitrust and antidiscrimination laws that ensure a free market in such services); and (3) crimes that entail the voluntary sale of goods (such as illegal drugs) and services (such as prostitution and gambling).<sup>228</sup>

In most cases, application of either the "market" or "interaction" theories would result in upholding Commerce Clause legislation, albeit by following different analytical paths. For instance, Professor Nelson and I recognized Congress's power to enact the National Labor Relations Act and the Fair Labor Standards Act because they govern "commerce" (the exchange of a service for money) that has impacts in more than one state.<sup>229</sup> Professors Balkin and Amar would also sustain such laws on the alternative ground that Congress could reasonably have concluded that interactions involving labor relations, wages, and working conditions generate spillover effects and collective action problems that require a federal solution.<sup>230</sup> Similarly, the Nelson/Pushaw and Amar/Balkin approaches would lead to the same result, but through different reasoning, as applied to antidiscrimination laws<sup>231</sup> and commercial crimes like loan sharking.<sup>232</sup> Many other examples could be adduced.

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228. See Nelson & Pushaw, *supra* note 10, at 9–12, 107–13, 119–27, 136–52, 158–63 (detailing this argument).

229. *Id.* at 124.

230. See Balkin, *supra* note 6, at 3, 21, 23, 32–34.

231. We would uphold the Civil Rights Act of 1964, which prohibits race discrimination by public accommodations, because it ensures a free market in accessing specific existing commercial establishments (such as hotels and restaurants) that sell goods and services. See Nelson & Pushaw, *supra* note 10, at 124–25. Professor Balkin would sustain this statute on the ground that discrimination is a federal problem because it (1) has spillover effects on states that ban discrimination, which those states cannot counteract, and (2) affects Americans' ability to participate fully in interstate networks of transportation and communication. Balkin, *supra* note 6, at 36–39. A difficulty with Balkin's theory that "commerce" includes mere personal and social interactions is that it would allow Congress to address discrimination by prohibiting private individuals from discriminating based on race, ethnicity, or gender as to overnight or dinner guests in their home. The "market" theory prevents such federal invasions into personal and home decisions.

Professor Balkin might respond that the Civil Rights Act raises a problem for our approach because it does not govern the *voluntary* sale of products and services intended for the marketplace, but rather forces public accommodations to do business with people they would not otherwise serve. Although this argument has force, the whole purpose of the Commerce Clause was to enable Congress to ensure

Unlike Professors Balkin and Amar, however, we would strike down certain statutory provisions that do not regulate voluntary market-oriented activity, even if they are contained in legislation that is otherwise valid. To illustrate, we would uphold federal laws that govern the sale of agricultural commodities and their prior production for the market, but would overturn *Wickard* because Congress should not be allowed to prohibit the mere growth, possession, or use of crops like wheat solely for personal consumption.<sup>233</sup> For similar reasons, we would approve federal legislation criminalizing the sale of drugs like marijuana, but not their individual possession and use (contrary to *Raich*).<sup>234</sup> Likewise, we would sustain federal statutes regulating environmental impacts resulting from market activity (such as industrial manufacturing), but not those provisions targeting personal, at-home activities such as barbecuing.<sup>235</sup> Finally, we would permit federal laws regulating transportation businesses (e.g., ships, trucks, airplanes, and buses), but not those reaching travel for personal or family reasons.<sup>236</sup>

By contrast, Professors Amar and Balkin applaud decisions like *Wickard*<sup>237</sup> and *Raich*,<sup>238</sup> and they would uphold all provisions of federal

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a free market in interstate commerce, undistorted by state practices, and antidiscrimination laws achieve precisely that goal. Promoting an open interstate market that permits all Americans to participate equally is quite different from requiring them to buy particular products and services (e.g., to spend a certain dollar amount at restaurants each year) or forcing sellers to deal with customers (e.g., ordering motels to rent rooms even to intoxicated people who will likely damage the room and disturb the other patrons). The only exception is where a refusal to do business violates the consumer's constitutional rights.

A much stronger reason that Congress could enact the Civil Rights Act is that state-licensed accommodations were discriminating against people because of their race in violation of the Equal Protection Clause, thereby enabling Congress to combat such discrimination under Section 5 of the Fourteenth Amendment. See Balkin, *supra* note 6, at 37–38 (arguing that the Fourteenth Amendment should have been a valid alternative basis for this legislation, and criticizing the Court's jurisprudence to the contrary).

232. See *Perez v. United States*, 402 U.S. 146 (1971) (upholding Congress's Commerce Clause power to ban loan sharking on the ground that Congress could reasonably have concluded that this activity, considered in the aggregate, substantially affected interstate commerce). Professor Nelson and I agree with this result because loan sharking is a compensated service (an illegal type of banking) that concerns more than one state. Nelson & Pushaw, *supra* note 10, at 127. Professor Balkin would broadly allow Congress to regulate all aspects of multi-state organized crime because it involves interactions that spill across state borders which cannot be handled by any state acting alone. Balkin, *supra* note 6, at 43.

233. See *supra* notes 34–35, 194–97 and accompanying text.

234. See *supra* notes 212–15, 225, 228 and accompanying text.

235. See Nelson & Pushaw, *supra* note 10, at 141–47. We recognized that the cumulative impact of such personal uses might create externalities that affected other state economies, but concluded that these private activities were beyond Congress's power because they did not constitute "commerce." *Id.* at 142–43, 145.

236. *Id.* at 109–10, 119–22, 127–29, 145–47. For instance, as to the Mann Act, we would permit Congress to ban the transportation of women across state lines to engage in prostitution (the sale of a service), but not to pursue "immoral purposes" (such as consensual affairs). *Id.* at 127–29 (citing this statute and cases interpreting it).

237. See Balkin, *supra* note 6, at 34 (deeming *Wickard* an "easy case" presenting a problem—volatility in agricultural production and prices—that demanded a federal solution because no individual state could control other states' agricultural policies, even though they had spillover effects).

statutes dealing with the environment<sup>239</sup> and transportation and communications networks.<sup>240</sup> They criticize our “market” approach on the ground that the exceptions we require would undermine the overall congressional scheme.<sup>241</sup> In their view, Congress has power, either implied (from the Commerce Clause) or express (in the Necessary and Proper Clause) to enact any statutory provisions that it believes would best effectuate its legislation.<sup>242</sup> The Amar/Balkin position, then, presumes that the Constitution’s main purpose is to allow the federal government to amass as much power as possible and to exercise it with maximum efficiency.

The Framers and Ratifiers, however, thought that “We the People” would be able to control the national government by keeping it within its written boundaries, particularly through judicial review and countervailing state authority.<sup>243</sup> The Court therefore should enforce Article I limits—including the requirement that Congress can regulate only “commerce” (i.e., market-based activity) that occurs “among the several States.” If such judicial review prevents Congress from invading the non-commercial realm (especially personal and home matters), we should not only tolerate but welcome such “inefficiencies” because they give life to a Constitution based on popular sovereignty, limited federal government, federalism, and liberty.<sup>244</sup> Those fundamental constitutional principles disappear if we construe the Commerce Clause, either by itself or in conjunction with the Necessary and Proper Clause, as granting Congress virtually unfettered power.<sup>245</sup> Unfortunately, since the New Deal the Court

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238. See *id.* at 35 n.128 (citing *Raich* for the proposition that Congress should be able to reach even non-market, internal state activities if necessary to effectuate a general regulatory scheme addressing an issue that is both interstate and substantial).

239. See *id.* at 35–36, 43–44 (arguing that Congress must have power to control all air and water pollution because of spillover effects and collective action problems, and faulting the “market” approach because it would prevent Congress from regulating pollution that is not caused by economic activity).

240. *Id.* at 5–6, 18–23, 30–31, 39–40. Balkin sets forth these specific examples to illuminate his (and Amar’s) theme that the Commerce Clause extends to all interactions that have interstate impacts. Professor Amar’s one-page treatment does not include any of these particular illustrations, but his general analysis leaves no doubt that he would agree with them. AMAR, *supra* note 6, at 108.

241. See, e.g., Balkin, *supra* note 6, at 35–36 (rejecting any exceptions to federal environmental legislation).

242. See, e.g., *id.* at 6, 18–19, 33–44; AMAR, *supra* note 6, at 107–113, 361–62.

243. See *supra* notes 12–13, 78–80, 102–29, 135–36 and accompanying text.

244. See *supra* notes 11–13, 78–82, 109–29, 135–36 and accompanying text.

245. See RAKOVE, *supra* note 14, at 180 (noting that the Constitution’s drafters did not believe that the Necessary and Proper Clause “would covertly restore the broad discretionary conception of legislative power in the Virginia Plan”). Professors Balkin and Amar rely on Chief Justice Marshall’s recognition that Congress had vast discretion to choose any means it determined were most useful and appropriate to effectuate its exercise of enumerated powers. See Balkin, *supra* note 6, at 33 n.121, 49 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413–20 (1819)); AMAR, *supra* note 6, at 110–11 (same). But the Court also cautioned that federal statutes had to “consist with the letter and spirit of the [C]onstitution” (including the principles of limited federal power and state autonomy) and that “should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land.” *McCulloch*, 17 U.S. (4 Wheat.) at 421, 423.



has adopted just such an interpretation, and the Balkin/Amar approach leaves its jurisprudence intact.

The only exception is the recent decision on the ACA (“Obamacare”).<sup>246</sup> This landmark law provides a perfect lens through which to examine the differences that result from application of the Court’s doctrine, the “interaction” thesis, and the “market” approach.

### III. CONGRESS’S COMMERCE CLAUSE POWER TO ENACT OBAMACARE

The ACA reforms health insurance in two key ways. First, the statute makes such insurance readily available at a reasonable price, with taxpayers subsidizing part of the premiums for poorer Americans.<sup>247</sup> Second, Obamacare requires insurance companies to provide coverage despite preexisting conditions or lifetime medical costs incurred.<sup>248</sup> To effectuate these two reforms, Congress has imposed an “individual mandate”: Americans must purchase minimum health insurance coverage or pay a penalty.<sup>249</sup> Otherwise, millions of freeloaders (usually younger and healthier people) would not buy insurance until they became ill, at which stage insurers would be obligated to cover them—a scenario which would effectively shift billions in costs to those who had maintained coverage all along.<sup>250</sup>

The individual mandate marked the first time Congress had ever asserted power under the Commerce Clause to force Americans to purchase a product or service. This innovation meant that no cases were directly on point. Consequently, in reviewing the ACA in *National Federation of Independent Businesses v. Sebelius*,<sup>251</sup> the Justices had to extrapolate from their precedent, which *Lopez* had refashioned to allow discretionary judgments based on vague standards.<sup>252</sup> Predictably, application of those standards led to divergent results.

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Professor Balkin does acknowledge that “[a] regulation is ‘proper’ if it is consistent with the Constitution, including its underlying structural principles . . . [such as] the Tenth Amendment.” Balkin, *supra* note 6, at 49. For reasons already explained, however, Balkin’s theory does not set any genuine boundaries on federal power.

246. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

247. Patient Protection and Affordable Care Act § 1401.

248. *Id.* § 2705.

249. *Id.* § 1501.

250. *See id.* § 1501(a)(2) (congressional findings). Congress declared that “[t]he individual responsibility requirement . . . is commercial and economic in nature, and substantially affects interstate commerce . . . .” *Id.* § 1501(a)(1). Courts are not, however, bound by Congress’s assertion that something is “commercial” or has substantial commercial effects. *See United States v. Morrison*, 529 U.S. 598, 614 (2000).

251. 132 S. Ct. 2566 (2012).

252. *See supra* notes 202–08 and accompanying text.

A. National Federation: *Exposing the Flaws of Current Commerce Clause Doctrine*

The conflicting opinions in the *Obamacare* case deserve careful attention. Ultimately, they reveal the hopeless legal inadequacy of the Court's approach to the Commerce Clause.

1. *The Majority Opinions*

Chief Justice Roberts's opinion canvassed several issues.<sup>253</sup> His four fellow Republicans (Scalia, Kennedy, Thomas, and Alito) wrote separately, but joined him in holding that the individual mandate exceeded Congress's authority under the Commerce and Necessary and Proper Clauses.<sup>254</sup> Initially, this majority concluded that the ACA mandate did not "regulate Commerce," because that phrase assumed the existence of commercial activity to be regulated—as contrasted with compelling Americans who were not engaged in such activity to buy an unwanted product and thereby create commerce.<sup>255</sup>

The Court then made the related point that the Commerce Clause had previously been interpreted as extending only to commercial "activity," not *inactivity*.<sup>256</sup> Thus, approving the individual mandate would enable Congress to order citizens to purchase other products (for instance, vegetables to improve health or new cars to help that industry) and claim that its own requirement "substantially affects" interstate commerce.<sup>257</sup>

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253. Most importantly, he joined the four liberal Justices in sustaining the individual mandate as a valid exercise of the Taxing Power. See *National Federation*, 132 S. Ct. at 2593–2600 (Roberts, C.J.); accord *id.* at 2629 (Ginsburg, J., concurring in part, and dissenting in part). I will not discuss that ruling or any other aspect of the case that does not concern the Commerce Clause.

254. *Id.* at 2585–93 (Roberts, C.J.); accord *id.* at 2644–50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). The Court adopted the argument that had been developed by Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J. L. & LIBERTY 581 (2011). Barnett's article weaves together the original ideas that he had been expounding in numerous opinion pieces since *Obamacare* was introduced in 2009.

255. "To regulate" means "to adjust by rule," which contemplates preexisting conduct that must be adjusted. See *National Federation*, 132 S. Ct. at 2586 (Roberts, C.J.); *id.* at 2644 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). The majority noted that, if the power to "regulate" included the ability to "create," many constitutional provisions would be redundant. See *id.* at 2587 (Roberts, C.J.); *id.* at 2644 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). For instance, the Constitution grants Congress power to create an army and navy, then confers a separate power to regulate these armed forces. *Id.* at 2586 (Roberts, C.J.) (citing the pertinent constitutional clauses and providing other examples, such as Congress's distinct powers to coin money and to regulate its value).

Although Congress has sometimes required certain conduct (e.g., jury duty, draft registration, filing taxes, and buying a firearm for militia service), none of those mandates were enacted pursuant to the Commerce Clause. *Id.* at 2586 n.3 (Roberts, C.J.). Moreover, all of these directives had to do with basic duties that citizens owe their government. See Barnett, *supra* note 254, at 606–07, 630–32, 636–37.

256. See *National Federation*, 132 S. Ct. at 2587–91 (Roberts, C.J.) (citing *Raich*, *Lopez*, *Perez*, *Wickard*, and *Jones & Laughlin*); *id.* at 2643, 2646, 2648–50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

257. See *id.* at 2587–88 (Roberts, C.J.) (stressing that allowing Congress to address inaction by mandating specific conduct would lead to unrestricted federal authority); see also *id.* at 2649–50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (to similar effect). The Chief Justice declared: "The

The majority distinguished *Wickard* as concerning farmers who were involved in the economic activity of raising wheat and whose conduct (including growing extra wheat) substantially affected interstate commerce; Congress did not command farmers to cultivate wheat or consumers to buy it.<sup>258</sup> The Court ruled that, although failures to act (viewed in the aggregate) might significantly affect the interstate economy, permitting Congress to reach inactivity would destroy our Constitution of limited and enumerated powers and “fundamentally chang[e] the relation between the citizen and the Federal Government.”<sup>259</sup>

Chief Justice Roberts and his Republican colleagues rejected the Government’s attempt to recharacterize the inactivity of the uninsured as the “activity” of self-insuring (or relying on others) to pay for medical care when the need later arose.<sup>260</sup> The Commerce Clause authorized only the regulation of people who were currently engaged in commercial activity, not a class of individuals (such as the uninsured) who might participate in such activity at an unknown future date.<sup>261</sup>

Finally, the majority held that the Necessary and Proper Clause allowed Congress to enact laws “derivative of” and “incidental to” an express power (such as the Commerce Clause), not to assert new and independent substantive powers (here, targeting persons who were not partaking in commercial activity).<sup>262</sup> In other words, the individual mandate was not a “proper” means of effectuating the Commerce Clause because it undermined the Constitution’s very structure, especially the principle of limited and enumerated powers.<sup>263</sup>

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Framers gave Congress the power to *regulate* commerce, not to *compel* it, and for over 200 years both our decisions and Congress’s actions have reflected this understanding.” *Id.* at 2588.

258. *See id.* at 2587–88 (Roberts, C.J.) (citing *Wickard v. Filburn*, 317 U.S. 111, 114–15, 127–29 (1942)); *id.* at 2643, 2648 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

259. *See id.* at 2588 (Roberts, C.J.); *see also id.* at 2645–49 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

260. *See id.* at 2589–90 (Roberts, C.J.); *id.* at 2647–49 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

261. *See id.* at 2590–91 (Roberts, C.J.) (citing case law recognizing that Congress could regulate classes of existing commercial *activities*, such as loan sharking and marijuana sales, but not classes of *individuals* whose defining feature was their inactivity); *see also id.* (dismissing the argument that the Court should disregard these legal principles because health insurance was unique and closely related to medical care consumption and financing); *id.* at 2647–48 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (emphasizing that the individual mandate zeroes in on those who are not participants in the health care market).

262. *See id.* at 2591–93 (Roberts, C.J.); *id.* at 2646 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

263. *See id.* at 2592–93 (Roberts, C.J.); *id.* at 2646 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). Furthermore, Congress had other ways to achieve its objectives, whereas in *Raich* the ban on possessing and consuming marijuana was the only practical means to implement the overall scheme regulating interstate commerce in that drug. *See id.* at 2591–93 (Roberts, C.J.); *id.* at 2646–47 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

## 2. *The Dissent*

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, chastised the majority for refusing to defer to Congress's judgments about national economic policy, as the Court had done since 1937.<sup>264</sup> Under this precedent, Congress could rationally have determined that the ACA (including its mandate) regulates economic matters that, considered in the aggregate, substantially affect interstate commerce.<sup>265</sup> Justice Ginsburg described Obamacare as broad legislation that addressed Americans' decisions about how to pay for health care services and goods—a market in which everyone will eventually participate.<sup>266</sup> She noted that most Americans cannot afford to purchase non-routine medical care from their assets, and therefore they obtain insurance.<sup>267</sup> Unfortunately, however, millions of uninsured people simply consume health care services (often by going to emergency rooms, where by law they must be treated) and never pay, which shifts massive costs to the insured (whose premiums are increased) or taxpayers.<sup>268</sup> Justice Ginsburg concluded that the uninsured thereby exerted a substantial, multi-billion dollar effect on interstate commerce which justified passage of the ACA, including its individual mandate.<sup>269</sup>

Furthermore, she contended that the Commerce Clause's language and precedent nowhere distinguished "activity" from "inactivity."<sup>270</sup> On the contrary, the Court in *Wickard* recognized that Congress could regulate interstate commerce in wheat by "forcing some farmers into the market to buy what they could provide for themselves."<sup>271</sup> Similarly, cases like *Wickard* and *Raich* countenanced federal regulation of current conduct (even noncommercial) because of its predicted future impact on interstate commerce.<sup>272</sup>

Finally, Justice Ginsburg maintained that, even if the Obamacare mandate itself were deemed to reach non-commercial and local matters, under the Necessary and Proper Clause Congress could reasonably have decided that the mandate was "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut un-

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264. See *id.* at 2609, 2615–17, 2619 (Ginsburg, J., concurring in part, and dissenting in part).

265. See *id.* at 2609–28 (Ginsburg, J., concurring in part, and dissenting in part).

266. See *id.* at 2610–11, 2620 (Ginsburg, J., concurring in part, and dissenting in part); see also *id.* at 2617, 2634 (characterizing the foregoing of insurance as an "economic" decision).

267. See *id.* at 2610 (Ginsburg, J., concurring in part, and dissenting in part).

268. See *id.* at 2610–11, 2619–20, 2623 (Ginsburg, J., concurring in part, and dissenting in part) (making this point, and observing that this "free ride" was not true of any other market, so that the ACA mandate would not be a precedent for imposing similar orders in other businesses, such as the automobile or food industries).

269. See *id.* at 2612–15 (Ginsburg, J., concurring in part, and dissenting in part).

270. See *id.* at 2621–23 (Ginsburg, J., concurring in part, and dissenting in part).

271. See *id.* at 2621 (Ginsburg, J., concurring in part, and dissenting in part) (citing *Wickard v. Filburn*, 317 U.S. 111, 129 (1942)).

272. See *id.* at 2617–20 (Ginsburg, J., concurring in part, and dissenting in part).

less the intrastate activity were regulated.”<sup>273</sup> Congress rationally found that the mandate was crucial to carry into effect its overall regulatory program of reforming health insurance, because otherwise its goal of universal and affordable coverage would be thwarted, and the statutory guarantee of obtaining insurance would reward those who chose to wait until they had a major illness to buy a policy.<sup>274</sup>

### 3. *Analysis of the Opinions*

*National Federation* illustrates the intractable difficulties with the Court’s current Commerce Clause approach. Indeed, the case confirms the conclusion I reached shortly after the *Raich* decision, which commentators from across the political spectrum had read as signaling the Court’s abandonment of its quest to impose meaningful constraints on Congress:

[I]t is impossible to determine whether the majority or the dissent [in *Raich*] correctly applied the *Lopez* or *Morrison* standards, because they are so malleable as to justify either result. Moreover, as the Justices implement these standards prudentially on a case-by-case basis, it is unwise to extrapolate far-reaching implications from any single decision. Just as many scholars prematurely heralded *Lopez* as the beginning of a Commerce Clause revolution, others now may be too quick to characterize *Raich* as the end. Finally, the Court’s discretionary application of protean standards guarantees both accusations of political manipulation and continuous uncertainty for Congress, lower court judges, and lawyers.<sup>275</sup>

The ACA accentuated such problems because it presented an issue of first impression: Could Congress, acting under the Commerce Clause, require Americans to buy specified products?<sup>276</sup> Existing precedent (even if it were clear) could not definitively answer that question. Thus, it was not surprising that members of Congress, lawyers, federal judges, and scholars would apply that case law differently.

Perhaps most significantly, Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito emphasized that both Congress and the Court had always read the Commerce Clause as authorizing only the regulation of existing commercial “activity,” not “inactivity.”<sup>277</sup> It is true that every Commerce Clause case says that Congress can regulate “activ-

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273. See *id.* at 2625–26 (Ginsburg, J., concurring in part, and dissenting in part) (citing *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

274. See *id.* at 2613–15, 2617, 2625–26 (Ginsburg, J., concurring in part, and dissenting in part). Hence, the individual mandate did not compel the purchase of an unwanted product, because everyone will need (and want) health care, and Congress merely insisted that they pay for it in advance through insurance. *Id.* at 2617–20.

275. See Pushaw, *Medical Marijuana*, *supra* note 215, at 884.

276. See *National Federation*, 132 S. Ct. at 2642 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

277. See *supra* notes 256–61 and accompanying text.

ity” that substantially affects interstate commerce.<sup>278</sup> Nonetheless, the Court was not using that word in contradistinction to “inactivity,” for the obvious reason that none of the statutes being reviewed involved the failure to act.<sup>279</sup> Rather, the Court (particularly in its recent *Lopez/Morrison/Raich* trilogy) was contrasting “commercial” activity with “noncommercial” activity.<sup>280</sup> Therefore, it was an open question whether Congress could regulate “inactivity” under the Commerce Clause.

Similarly murky was the applicability of *Wickard* and *Raich*. Justice Ginsburg embraced the position, previously articulated by most legal analysts, that the ACA could be upheld under a straightforward application of those two cases.<sup>281</sup> As the majority explained, however, those decisions were distinguishable.<sup>282</sup> Most pertinently, *Wickard* concerned a commercial farmer (even though the particular AAA provision in dispute reached his non-economic activity of growing wheat for home use),<sup>283</sup> and *Raich* permitted the extension of federal drug statutes to people who were not involved in the marijuana trade at all, but rather simply cultivated, possessed, and used marijuana for personal medical reasons.<sup>284</sup> Obamacare took a further step: The federal government targeted persons who had taken no actions whatsoever, unlike the defendants in *Raich* or *Wickard*.<sup>285</sup> Indeed, Congress’s own legal experts acknowledged that the individual mandate thereby raised “a novel issue.”<sup>286</sup>

A federal law will not be struck down, however, merely because it breaks new ground.<sup>287</sup> Rather, the determination about its constitutional-

278. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 17–18, 20–26, 28–30, 32 (2005); *United States v. Morrison*, 529 U.S. 598, 607–27 (2000); *United States v. Lopez*, 514 U.S. 549, 552–67 (1995); *Wickard v. Filburn*, 317 U.S. 111, 118–29 (1942). In the seminal decision, the Court stated that Congress had power to control “activities” that had a “close and substantial relation to interstate commerce.” *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

279. See *Florida v. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1285–86 (N.D. Fla. 2011) (making this observation).

280. See *supra* notes 205, 207, 211, 213 and accompanying text.

281. See *supra* notes 270–74 and accompanying text. For prior articulations of that argument, see, e.g., *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 542–47 (6<sup>th</sup> Cir. 2011); *Mead v. Holder*, 766 F.Supp.2d 16, 29–40 (D. D.C. 2011); *Liberty Univ., Inc. v. Geithner*, 753 F. Supp.2d 611, 630–34 (W.D. Va. 2010); Balkin, *supra* note 6, at 46–47.

282. See *supra* notes 256–59, 263 and accompanying text.

283. See *Wickard v. Filburn*, 317 U.S. 111, 113–28 (1942), discussed *supra* notes 194–97 and accompanying text.

284. See *Gonzales v. Raich*, 545 U.S. 1, 5–33 (2005); see also *supra* notes 212–15 and accompanying text (examining *Raich*).

285. See *National Federation*, 132 S. Ct. at 2587–88, 2590–93 (Roberts, C.J.) (noting that *Wickard* and *Raich* did not involve mandating the purchase of products and services); Barnett, *supra* note 254, at 605, 615–20 (stressing that all previous cases had concerned Acts of Congress that regulated affirmative economic activities in which individuals had freely chosen to engage and that did not dictate participation in such activities).

286. See CONG. RESEARCH SERV., R40725, REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS 6 (July 24, 2009).

287. The Chief Justice said that if Congress had never asserted a specific power for over two centuries (here, addressing inactivity by compelling the purchase of a product), that historical practice is

ity depends primarily on how the Court has previously treated exercises of the Commerce Power. Although that precedent is not a model of clarity, the fairest reading of it suggests that the entire ACA should have been sustained.

Most pertinently, *Lopez*, *Morrison*, and *Raich* focused on whether the overall federal regulatory scheme was “commercial” and had substantial interstate effects. If not, Congress could not act. If so, Congress could select any means—even those that were non-economic or intrastate—that it reasonably deemed essential to implement its larger regulatory program. For example, *Morrison* held that VAWA’s grand scheme of prohibiting gender-based violence did not involve “commerce” or actions that had trans-state impacts. The facts bore out that conclusion: The rapists in Virginia were not engaged in commerce, and their crimes had no out-of-state ramifications. By contrast, in *Raich* the Court ruled that the comprehensive legislative framework did concern interstate commerce (marijuana sales) and hence deferred to Congress’s choice of means—banning even the local and non-commercial growth, possession, and use of marijuana—that it had ascertained were necessary to effectuate that scheme. Similarly, *Wickard* allowed Congress to forbid the non-commercial, intrastate raising of wheat to promote its larger regulatory agenda of stabilizing the national market in agricultural commodities.

Applying this Commerce Clause approach to the ACA, Congress’s overall regulatory scheme indisputably dealt with “commerce” (health insurance) that had huge interstate effects.<sup>288</sup> Thus, the dispositive issue was whether Congress had reasonably determined that the individual mandate was an essential part of that scheme. The Court has traditionally respected Congress’s discretionary policy judgments about what means will best achieve its legislative goals.<sup>289</sup> That deferential approach, deeply rooted in case law, persuaded even stalwart conservative Republican

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evidence that Congress does not have such authority. See *National Federation*, 132 S. Ct. at 2586 (Roberts, C.J.) (citing *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010)). Yet that same “novelty” argument could be made against all pioneering federal legislation, including labor and employment statutes, the Civil Rights Act, and environmental laws. Obviously, all new statutes are novel. The uniqueness of the individual mandate, then, is not necessarily fatal to its constitutionality.

288. See ACA, 42 U.S.C. § 18091(a)(2) (congressional findings). To my knowledge, no one has contested this fact.

289. The Rehnquist Court’s key contribution to Commerce Clause jurisprudence was to confine Congress to legislating only as to activity that was “commercial,” either of itself or as “an essential part of a larger regulation of economic activity.” See *United States v. Lopez*, 514 U.S. 549, 561 (1995). Later cases repeated that quoted language. See *United States v. Morrison*, 529 U.S. 598, 617–18 (2000); *Gonzales v. Raich*, 545 U.S. 1, 24–25, 30 (2005).

If Congress was regulating interstate commerce, however, it had discretion—either implicit in the Commerce Clause or explicit in the Necessary and Proper Clause—to select any means that were reasonably calculated to achieving its regulatory objectives. This extremely deferential standard of review traces back to *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406–15 (1819). That is why the four dissenting Justices invoked *McCulloch* and its progeny (including a host of modern cases) to criticize the majority for not showing appropriate respect for Congress’s economic judgments. See *National Federation*, 132 S. Ct. at 2615–17, 2625–27 (Ginsburg, J., concurring in part, and dissenting in part).

Circuit Court judges, such as Jeffrey Sutton and Laurence Silberman, to sustain the ACA under the Commerce Clause.<sup>290</sup> Such decisions suggest either that (1) lower federal courts feel more bound to obey Supreme Court precedent than the Justices themselves, or (2) the cases are so vague that they can be manipulated to rationalize almost any result. Neither alternative reflects well on the Court.

In sum, a majority of Justices in *National Federation* held that the Commerce Clause authorized Congress to regulate only existing commercial activity, even where inactivity (such as not buying health insurance) “substantially affected” the interstate economy.<sup>291</sup> Four dissenting Justices reached the opposite conclusion.<sup>292</sup> Although I believe that the dissenters presented the better interpretation and application of the relevant precedent, those decisions set forth standards so malleable that the majority’s treatment of them was also quite plausible.

Further tinkering with the current Commerce Clause test is unlikely to cure its defects because they are foundational. Political expediency, not legal principle, induced the Court to make up the “substantially affects” and “aggregate” touchstones during New Deal, to add the “rational basis” component in the 1960s, and to craft the recent exclusions for “noneconomic” conduct (*Lopez*) and “inactivity” (*National Federation*). Therefore, the Court should adopt a fresh approach—one that articulates clear legal rules that are grounded in the Commerce Clause’s text, history, and underlying structural postulates, yet does not dismantle the modern American government.

In my view, Professor Nelson and I have supplied just such an analytical framework, whereas Professors Amar and Balkin have not.<sup>293</sup> I will now try to further defend that claim by contrasting the “interaction” and “market” theories in the context of the ACA.

### B. Applying the “Interaction” Thesis

Balkin and Amar predicted that the ACA would be sustained under current Supreme Court doctrine, for the reasons later set forth by Justice Ginsburg.<sup>294</sup> However, they put forward an alternative rationale: Con-

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290. See *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 554–66 (6<sup>th</sup> Cir. 2011) (Sutton, J., concurring); *Seven-Sky v. Holder*, 661 F.3d 1, 14–20 (D.C. Cir. 2011) (Silberman, J.).

291. See *supra* notes 254–63 and accompanying text.

292. See *supra* notes 264–74 and accompanying text.

293. See *supra* notes 6–13, 29–246 and accompanying text.

294. She devoted the bulk of her opinion to summarizing and applying modern precedent. See *National Federation*, 132 S. Ct. at 2609, 2616–28 (Ginsburg, J., concurring in part, and dissenting in part). In a brief historical background, however, Justice Ginsburg implicitly endorsed the Amar/Balkin perspective when she declared: “The Framers’ solution [to the problems caused by the Articles of Confederation] was the Commerce Clause, which, as they perceived it, granted Congress the authority to enact economic legislation ‘in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent.’” *Id.* at 2615 (citing 2 RECORDS, *supra* note 8, at 131–32)). This version of history helped support her conclusion that Congress could legitimately step in because states acting individually could not handle the problem posed by the uninsured,



gress could have reasonably concluded that it must regulate health care and insurance “interactions” because their effects created problems across state borders that could not be resolved by individual states and hence required a federal solution.<sup>295</sup> Most notably, a state like Massachusetts that provided for universal coverage, guaranteed issue of policies, and individual mandates faced a collective action problem because those generous laws would (1) attract sick people from other states (thereby raising costs for everyone in Massachusetts), (2) induce insurers to do business in other states where they could turn down patients with preexisting conditions that would be very expensive, and (3) encourage young and healthy persons to move to other states where they could avoid buying insurance.<sup>296</sup>

Balkin and Amar rejected the argument that the individual mandate was not a regulation of “commerce” because people who do nothing cannot be engaged in commerce.<sup>297</sup> Rather, they contended that the failure to insure was an economic decision that had a great cumulative impact on interstate commerce in health care.<sup>298</sup>

In short, Amar and Balkin would have upheld Obamacare in its entirety under the Commerce Clause. Indeed, it was an easy case for them. The ACA, however, provides yet another example of the central difficulty with their approach: It places no real restrictions on Congress.

### C. *The “Market” Theory*

Professor Nelson and I would have sustained all provisions of the ACA except for the individual mandate. Our proposal hinges on defining “commerce” as “the *voluntary* sale or exchange of property or services and all accompanying market-based activities, enterprises, relationships, and interests.”<sup>299</sup> Such “commerce” nearly always occurs “among the several States” because of America’s interdependent economy.<sup>300</sup>

Therefore, our approach would allow Congress to regulate the general subjects of health care and insurance because they involve the sale of products and services in the market. Indeed, we have long maintained—contrary to “trade” theorists—that Congress can regulate the insurance

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as states that provided universal health-care coverage would be at a competitive economic disadvantage vis-a-vis states that did not. *Id.* at 2612, 2614–16, 2628. Although this argument sounds logical, its premise is faulty: The Commerce Clause was not designed to grant Congress general legislative authority. *See supra* notes 99–129 and accompanying text.

295. *See* Balkin, *supra* note 6, at 44–47; Akhil Reed Amar, *Good Policy or Bad, It’s Clearly Constitutional*, L.A. TIMES, Jan. 20, 2010, at A21.

296. *See* Balkin, *supra* note 6, at 46.

297. *See id.*; Akhil Reed Amar, *Constitutional Showdown*, L.A. TIMES, Feb. 6, 2011, at A25 [hereinafter Amar, *Showdown*].

298. *See* Balkin, *supra* note 6, at 47; Amar, *Showdown*, *supra* note 297, at A25.

299. Nelson & Pushaw, *supra* note 10, at 9 (emphasis added).

300. *See supra* notes 27–28, 229, 231–32 and accompanying text.

business, a traditional “branch of commerce.”<sup>301</sup> Furthermore, the market for medical care and insurance is self-evidently interstate.

Nonetheless, Congress cannot require citizens to buy insurance (or anything else) because those would not be *voluntary* sales in the market.<sup>302</sup> Consequently, the individual mandate is not a regulation of “commerce” and falls outside the scope of Congress’s power under the Commerce Clause. Because Congress cannot reach anything that is not “commerce,” there is no need to proceed to the second step and consider the mandate’s interstate impacts.

Before 2010, Congress implicitly grasped this “voluntariness” requirement because it never forced people to purchase things and then claimed that *its very mandate* constituted “commerce” with substantial interstate effects. Abandoning the element of free will would open up a Pandora’s Box, as the following example illustrates. Today I voluntarily chose to engage in exactly one commercial transaction: buying an airline ticket. I did not participate in (or even think about) thousands of other markets—performing legal work for a fee, purchasing a new sofa, grabbing a cup of coffee at Starbucks, opening up a bank account, and so on. If Congress can involuntarily drag me and millions of others into those markets (or any others) on the notion that such daily non-decisions are “commerce” and cumulatively exert a “substantial effect” on the interstate economy, then any remaining Commerce Clause limits would crumble.

Despite the legal, historical, and practical benefits of the “market” analysis, Professors Amar and Balkin (and many others) will undoubtedly criticize it on at least three grounds. First, they might dismiss it as simplistic. I prefer to characterize the Nelson/Pushaw approach as simple—setting forth clear legal rules derived from the Commerce Clause that can be impartially applied to any federal statute, including Obamacare. More seemingly sophisticated and complex constructions of the Commerce Clause, such as the “substantially affects” and “interaction” theories, treat the Clause not as a law which imposes intelligible and enforceable restrictions on Congress, but rather as an infinitely malleable provision that can be shaped to justify virtually any statute. Thus, these approaches are also simplistic—they simply allow Congress to regulate almost everything.

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301. Nelson & Pushaw, *supra* note 10, at 10, 13, 15, 17, 19, 85, 108.

302. “Voluntary” means “proceeding from the will or from one’s own choice or consent . . . unconstrained by interference.” See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1402 (11<sup>th</sup> ed. 2003). The individual mandate is plainly not “voluntary” because it directly compels Americans to purchase a product. Professor Nelson and I would also prevent Congress from reaching the same result indirectly, especially through prohibitions that effectively force consumers to buy specific goods or services. We concede that, in certain situations, the line between “voluntary” and “involuntary” sales might not always be bright. The possibility of such difficult determinations, however, is not a sufficient reason to permit Congress to mandate purchases.

Second, my critics might protest that invalidating the individual mandate would undercut the ACA's general regulatory scheme.<sup>303</sup> That objection, however, can be made about any attempt to place genuine legal limits on Congress under the Commerce Clause—for example, by striking down federal statutory provisions purporting to govern the mere possession of wheat or marijuana. I concede that carving such exceptions prevents Congress from controlling everything in any manner it desires, as opposed to regulating “commerce among the States.” But that is the price we pay for having a written Constitution that enumerates the federal government's powers.<sup>304</sup> Accordingly, if Congress wishes to reform health care and insurance, it must do so within the boundaries set forth by the Commerce Clause. If that Clause (or the Necessary and Proper Clause) gives Congress absolute discretion to choose any means to effectuate its regulation of health insurance, then the federal government can mandate not merely the purchase of health insurance but also sleeping schedules, exercise regimes, food choices, alcohol consumption, and many other personal decisions.<sup>305</sup> Such unrestrained federal power is hardly “proper,” as it would destroy all limits on the federal government and, concomitantly, the individual liberty that those restraints preserve.<sup>306</sup>

Third, Professor Amar and Justice Ginsburg have asserted that Congress has long exercised its other powers in ways that regulate “inactivity,” such as by mandating jury and military service.<sup>307</sup> The main historical example offered is the Militia Act of 1792, which ordered men to join militias and purchase suitable equipment and supplies (such as muskets).<sup>308</sup> This same argument can be made against the Nelson/Pushaw distinction between “voluntary” and “involuntary” sales of goods and services.<sup>309</sup> My response is that the “voluntariness” requirement inheres in the word “commerce”—a term not found in the Militia Clause or other provisions that have been read as allowing Congress to impose mandates.<sup>310</sup> Moreover, such mandates have been exceedingly rare, and their constitutionality has apparently never been tested in court.<sup>311</sup>

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303. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2612–15, 2625–26 (2012) (Ginsburg, J., concurring in part, and dissenting in part).

304. See *supra* notes 11–13, 73, 78–80, 102–29, 135–36, 243–45 and accompanying text.

305. See *supra* notes 254–63, 285, 302–03 and accompanying text.

306. See *supra* notes 244–45 and accompanying text.

307. See Amar, *supra* note 295, at A21; *National Federation*, 132 S. Ct. at 2627 n.10 (Ginsburg, J., concurring in part, and dissenting in part).

308. See Amar, *Showdown*, *supra* note 297, at A25.

309. The “activity vs. inactivity” distinction, which has been devised specifically in response to Obamacare, can be attacked as a *post hoc* rationalization. Not so our “market” theory of the Commerce Clause (including the element of voluntary sales), which was published in 1999 and has been applied in ways that reach both liberal and conservative results. See Nelson & Pushaw, *supra* note 10, at 4–13, 107–73.

310. To illustrate, Congress can “raise and support Armies.” U.S. CONST. art. I, § 8, cl. 12. By the late eighteenth century, some governments had done so by conscripting men into military service. Consequently, the text of that provision, read in historical context, can be interpreted as authorizing Congress to have a draft—although such power was hotly debated for many years, and its exercise triggered riots during the Civil War. By contrast, in 1787 regulations of “commerce” had never been

## IV. CONCLUSION

An interpretation of the Commerce Clause that gives Congress virtually unbridled power would seem to be impossible to reconcile with the original meaning, intent, and understanding of the Constitution. Therefore, Akhil Amar and Jack Balkin have undertaken a quixotic task in arguing that Congress's exercise of such plenary power is consistent with the Framers' and Ratifiers' vision of the Commerce Clause.

The audacity and ingenuity of Professors Amar and Balkin, however, cannot hide the weakness of their historical analysis. They have not cited anybody involved in the Constitution's drafting, ratification, or formative implementation who said or implied that the Commerce Clause authorized Congress to regulate all interactions that affected more than one state.

Indeed, the historical evidence overwhelmingly demonstrates that the Commerce Clause confined Congress to regulating market-based activities—certainly including the sale of goods and paid transportation, and likely extending to related matters such as the production of goods for sale and compensated services. More generally, the “interaction” theory contradicts the Founders' consensus that the Constitution limited the federal government to its enumerated powers and entrusted all other powers to the states and the People. In a nutshell, Professors Balkin and Amar have set forth an original, but not an originalist, account of the Commerce Clause.

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understood to include imposing a mandate to buy goods or services, and was never so interpreted until 2010.

The only possible counter-example is the Civil Rights Act of 1964, which prohibits race discrimination by public accommodations. That statute, however, is unlike the ACA because it does not mandate the purchase of any products and services (for instance, at hotels or restaurants), but merely grants racial minorities the equal opportunity to patronize such establishments if they so choose. *See supra* notes 199–200, 231 and accompanying text; *see also* Thomas More Law Ctr. v. Obama, 651 F.3d 529, 558 (6th Cir. 2011) (Sutton, J., concurring) (pointing out that the Civil Rights Act regulates public accommodations that are already involved in interstate commerce, rather than ordering citizens to open up hotels, restaurants, and similar businesses).

311. For example, I am not aware of any congressional attempts to enforce the “arms purchase” requirement of the Militia Act or any cases which examined its constitutionality. Thus, precedents for any kind of federal mandates are weak, and they are nonexistent as to the Commerce Clause.