The Legal Meaning of "Commerce" in the Commerce Clause

by
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"**Commerce**, *(Commercium)* Traffick, Trade or Merchandise in Buying and Selling of Goods. See *Merchant.*"

"Merchant, *(Mercator)* is one that buys and trades in any Thing. . . But every one that buys and sells is not . . . a *Merchant;* only those who traffick in the Way of Commerce.... Those that buy Goods, to reduce them by their own Art or Industry . . . are Artificers and not *Merchants*. . ."

– Definitions in Giles Jacob's *A New Law-Dictionary* (1762)

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I. CONTENDING DEFINITIONS OF "COMMERCE"

For many years there has been a simmering quarrel in the legal literature over the scope of the term "commerce" in the Constitution's Commerce Clause.[2] Before 1937, the Supreme

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[2]U.S. CONST. art. I, §8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

BIBLIOGRAPHICAL NOTE: This footnote collects alphabetically the secondary sources cited more than once in this Article. The sources and short form citations used are as follows:

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Court's interpretation was that the Clause authorized Congress to regulate only buying and selling across state lines – the sort of thing we might label economic exchange, economic intercourse, or mercantile trade.[3] In that year, Walton Hale Hamilton, an economist and law professor with ties to Roosevelt administration, wrote a short book called *The Power to Govern: The Constitution – Then and Now.*[4] Douglass Adair, later an eminent historian, was listed as co-author, but subsequently disclaimed most of the credit (or blame) for the project.[5]

Although appearing in book form and sometimes cited in scholarly literature,[6] *The Power to Govern* was squarely in the tradition of American political pamphleteering. Professor Hamilton apparently had lost his position with the National Recovery Administration when the Supreme Court declared that agency's enabling legislation unconstitutional.[7] *The Power to Govern* was dominated by an

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[3]*E.g.*, United States v. E.C. Knight, 156 U.S. 1 (1895); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Carter v. Carter Coal Co., 298 U.S. 238 (1936). In *Carter* the Court held, "the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade.'" *Id.* at 303.

[4]W. HAMILTON, *supra* note 2.

[5]Trevor Colbourn, *Introduction,* in FAME AND THE FOUNDING FATHERS: ESSAYS BY DOUGLASS ADAIR at p. x (1974). Adair was a very young man, having just obtained his masters degree and not yet his doctorate, who was serving as Hamilton's research assistant. He later said the production was "chiefly the writing of Walton Hamilton; he was extremely generous to add my name on the title page." *Id.* at n.1.

[6]*E.g.* Nelson & Pushaw, *Rethinking*, *supra* note 2, at 8 n.34.

[7]Hamilton was a member of the National Recovery Administration Board in 1934-35. Richard T. Fleming, *The Handbook of Texas Online*,

attack on the Court's Commerce Clause jurisprudence.[8] Hamilton found politically unacceptable the Court's retention of a constitutional distinction between commerce and production.[9] "The word 'commerce' has no natural boundaries,"[10] he declared. "[A] newer common sense declares that industry lacks the capacity for self-government; that regulation lies beyond the state's [*sic*] competence; and that the only choice is between Federal control and chaos."[11]

Much of *The Power to Govern* was devoted to arguing that the Commerce Clause should be reinterpreted to grant Congress authority to regulate the entire national economy. Professor Hamilton supported this argument with historical citations purporting to show that the Court had erred in limiting "commerce" to mercantile trade. On the contrary, he maintained, during the founding era, "'commerce' had come to be a glorious domain. It included trade, manufacture, and the staples; comprehended all arrangements which lay outside the domestic [i.e., home] economy."[12]

Hamilton's broadside could be dismissed as the idiosyncratic rant of a disappointed former officeholder. What came next, could not. In *Politics and the Constitution in the History of the United States*,[13] published in 1953, University of Chicago law professor William Winslow Crosskey devoted scores of densely-packed pages to arguing that when eighteenth century English speakers used the term "commerce" they did not necessarily limit themselves to traffic and trade. Rather they intended to designate, quite often anyway, the entire scope of gainful economic activity: "[I[t would seem that 'commerce' . . .is used," he wrote, "to mean the whole economy, the whole system of exchange, the whole congeries of interrelated gainful activities, which the American nation is to carry on."[14] He further asserted that the Supreme Court had misapprehended the constitutional phrase "among the several

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http://www.tsha.utexas.edu/handbook/online/articles/HH/fha38.html. The case that declared the National Industrial Recovery Act unconstitutional was A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[8]W. HAMILTON, *supra* note 2, at 9-18. The particular decision he chose in his opening was Carter v. Carter Coal Co., 298 U.S. 238 (1936), not the case that had cost him his job, but rather the Court's most recent pronouncement.

[9]298 U.S. at 301-04.

[10]W. HAMILTON, *supra* note 2, at 14.

[11]*Id.* at 193. *See also id.* at 17 (stating, "A growing opinion has it that competition is inadequate to its economic task; that the matter lies beyond the competence of the several states; and that the real choice is between federal regulation and industrial disorder.").

[12]W. HAMILTON, *supra* note 2, at 61.

[13]CROSSKEY, *supra* note 2. The material on the Commerce Clause is concentrated at 1 *id.* at 69-109.

[14]*Id.* at 95. *See also id.* at 117 (stating that "the power conferred by the clause becomes one 'to govern *generally* every species of gainful activity carried on by Americans'").

States."[15] It did not mean "between states," he said. It meant "throughout the nation."[16] By the original understanding of the Constitution, that is, the Commerce Clause empowered Congress to regulate not only mercantile trade crossing state lines, but all gainful economic activity throughout the country. The authority of Congress extended to interstate – and intrastate – agriculture and land use, mining, services, and manufacturing.

Professor Crosskey's interpretation of "among the several States" has not won many adherents. However, commentators continue to be attracted to his broad definition of "commerce." Professors Robert J. Pushaw, Jr. and Grant S. Nelson are two distinguished examples.[17] In 2005, Professor Akhil Reed Amar pushed the argument yet further, averring that "commerce" meant *all* forms of intercourse, economic or not.[18]

By contrast, other commentators continue to argue that "commerce" in the Constitution means only mercantile trade. So maintained Professor Richard Epstein in his 1987 article on the Commerce Clause.[19] Professor Epstein derived most of his contemporaneous evidence of meaning from the constitutional text.[20] In *United States v. Lopez,*[21] Justice Clarence Thomas weighed in on this side, as did Professor Raoul Berger.[22] Justice Thomas and Professor Berger went beyond the text to cite prior and contemporaneous evidence of the ordinary lay (non-legal) meaning of "commerce," much of it gleaned from eighteenth century dictionaries.[23]

In 2001, Professor Randy Barnett published the results of a survey of appearances of "commerce" in various eighteenth century sources: lay dictionaries, the debates at the 1787 federal convention, the debates in the state ratifying conventions, and in the *Federalist Papers.*[24] He concluded that the word was used almost exclusively in the sense of exchange/economic intercourse. In 2003 he followed up with a tally of all appearances of "commerce" in the *Pennsylvania Gazette* (Benjamin Franklin's newspaper) during the period 1728-1800. He found that the Crosskey meaning of "all gainful economic activity" was rare, and that "commerce" almost always signified exchange to the exclusion of other economic activities: "[I]t is impossible here [he wrote] to convey the overwhelming consistency of the usage of 'commerce' to

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[15]U.S. CONST. art. I, §8, cl. 3.

[16]*See* CROSSKEY, *supra* note 2, at 50-83.

[17]Nelson & Pushaw, *Rethinking*, *supra* note 2; Nelson & Pushaw, *Critique*, *supra* note 2; Pushaw, *Methods*, *supra* note 2.

[18]AMAR, *supra* note 2, at 107-08.

[19]Epstein, *supra* note 2, at 1389.

[20]*See generally* Epstein, *supra* note 2. Professor Epstein also examined subsequent court decisions.

[21]514 U.S. 549 (1995).

[22]Berger, *supra* note 2, at 702-03.

[23]*Lopez*, 514 U.S. at 585-86 (Thomas, J., concurring); Berger, *supra* note 2, at 702-03.

[24]Barnett, *Original*, *supra* note 2.

refer to trading activity (especially shipping and foreign trade) without listing one example after another."[25] In 2002, Professors Pushaw and Nelson published an article contradicting some of the findings in the first Barnett study.[26] In 2003, Professor Pushaw developed his case yet further.[27]

The post-New Deal Supreme Court has not amended its earlier, narrow definition of the word "commerce,"[28] but it repeatedly has sustained regulation of matters outside that definition by implicitly or explicitly enlisting the Necessary and Proper Clause.[29] The Court's view of the Necessary and Proper Clause is that the Clause provides Congress with an additional source of power by which Congress may govern conduct "substantially affecting" mercantile activities. The Justices' most recent – and clearest – statement of this view appears in *Gonzales v. Raich*,[30] where the majority explicitly relied on the Necessary and Proper Clause,[31] and Justice Scalia reinforced that reasoning in a concurring opinion.[32]

II. THE EFFECT ON "COMMERCE" OF NEW NECESSARY AND PROPER CLAUSE SCHOLARSHIP

For many years, the precise function of the Necessary and Proper Clause remained a mystery among modern constitutional commentators and judges.[33] In the vale of uncertainty, one could credibly guess that it otherwise narrow Commerce Power, as the Court did in *Raich*. Recently, however, the original meaning of the Clause has come to light, and the results suggest quite a different interpretation.[34]

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[25]Barnett, *New*, *supra* note 2, at 859.

[26]*See generally* Nelson & Pushaw, *Critique*, *supra* note 2 (taking issue with Professor Barnett's reading of some of the evidence).

[27]Pushaw, *Methods*, *supra* note 2.

[28]*E.g.* Wickard v. Filburn, 317 U.S. 111, 128 (1942) (identifying controlling the prices at which commodities are bought and sold as regulating commerce); United States v. Darby, 312 U.S. 100, 113 (1941) (stating that "manufacture is not of itself interstate commerce").

[29]*E.g. Wickard*, 317 U.S. at 124 (accepting limitations of production as an "appropriate means to the attainment of [the] legitimate end" of regulating prices). The Necessary and Proper Clause reads, "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, §8, cl. 18.

[30]125 U.S. 2195 (2005).

[31]*Raich*, 125 U.S. 2199.

[32]*Raich*, 125 U.S. 2216 (Scalia, J., concurring).

[33]*See, e.g.*, Mark A. Graber, *Unnecessary and Unintelligible*, 12 CONST. COMMENT. 167 (1995) (calling the Clause "unintelligible").

[34]Among recent studies, see, *e.g.* Epstein, *supra* note 2, at 1397-98; Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183 (2003); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993). The conclusions stated in the text are heavily documented in Natelson, *Necessary and Proper*, *supra* note 2.

The Constitution's drafters were firm believers in an "agency theory" of government. The constitutional structure of congressional powers reflects that belief. Article I, Section 8 in general – and most particularly the Necessary and Proper Clause – tracks the structure of eighteenth century agency documents, especially powers of attorney.[35] Under then-prevailing law, express powers set forth in such agency instruments carried with them (unless disclaimed) various incidental powers.[36] Incidental powers enabled the agent to engage in subordinate activities absolutely necessary, reasonably necessary, or both customary and convenient for exercising the principal powers. A modern analogue appears in the Supreme Court's 2004 decision in *Hamdi v. Rumsfeld*,[37] in which the Court held that congressional authorization to the President to conduct a war on terror carried with it authority to undertake actions "incident" to war. Actions "incident" to war were those that were "necessary and appropriate" – implied in warfare by agreement and practice – such as detention of enemy combatants.[38]

Eighteenth century scriveners, like scriveners today, frequently inserted in legal instruments language that had no substantive force of its own. In particular, they commonly added references to incidents that, if not referred to, would follow from the grant of the principal. Lord Coke had said of such wording, "*expressio eorum quae tacitè insunt nihil operatur*" – the expression of those things that are silently inherent has no legal effect – and had noted that despite its lack of substantive effect, inserting such language was sometimes good practice.[39]

To alert parties to existing law and forestall later quibbles about the extent of agency authority, scriveners often placed in agency and trust documents language signaling the existence of incidental powers. The Necessary and Proper Clause was based on one of several common phrases used for this purpose.[40] Conscious that some might otherwise quibble about the extent of federal authority

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[35]Natelson, *Necessary and Proper*, *supra* note 2, at 267-76. *See also* 2 ELLIOT'S DEBATES, *supra* note 2, at 148 (reporting James Iredell as likening the Constitution to "a great power of attorney").

[36]Natelson, *Necessary and Proper*, *supra* note 2, at 277-84.

[37]542 U.S. 507 (2004).

[38]*Id.* at 518.

[39]Boroughe's Case, 4 Co. Rep. 72b, 76 Eng. Rep. 1043, 1044 (K.B. 1596) (reporter's commentary):

> The 3d point (the great doubt of the case) which was resolved was, that in this case the patentee ought to (a) demand the rent upon the land; and their principal reason was grounded upon a rule in law, sc. that the expression of a clause which the law implies, works nothing, (b) *expressio eorum quæ tacite insunt nihil operatur et expressa non prosunt quæ non expressa proderunt*: and yet, as (c) Littleton saith, it is well done to put in such clauses to.

Id., 4 Co. Rep. at 73b, 76 Eng. Rep. at 1044.

[40]Natelson, *Necessary and Proper*, *supra* note 2, at 274-76 (setting forth numerous examples). Since the publication of that article, many other examples have come to light. *See, e.g.*, McKreth v. Fox, 4 Bro. P.C. 258, 267 2 Eng. Rep. 175, 181 (H.L. 1791) (summarizing a private trust deed with similar language).

For statutory examples, see CHARLES NASON COLE, A COLLECTION OF LAWS 434 (1761) (granting commissioners of works "necessary or proper" powers); *An Act for Dividing and Inclosing Several*

(particularly since the Articles of Confederation had explicitly excluded implied powers[41]), the drafters of the Constitution – as conscientious students of Coke – added their own "necessary and proper" language.

In accordance with Coke's *nihil operatur* maxim, the Necessary and Proper Clause, like a few other parts of the Constitution,[42] was not a substantive grant, but only a rule of construction – a restatement of existing law with no independent legal effect. Indeed, the Necessary and Proper Clause was represented and sold to the ratifying public on precisely this basis.[43]

If that Clause added nothing of substance to Congress' authority, then the meaning of each federal power must be tested by asking what that scope would be *in absence of* the Necessary and Proper Clause. If this is true, then the scope of the Commerce Power depends heavily on how one defines "commerce." The Crosskey definition of "commerce" serves the goals of those who favor modern federal regulatory state, since it empowers Congress to regulate all gainful activity, even without resort to incidental powers.[44] However, the narrower definition of commerce, coupled with the correct interpretation of the Necessary and Proper Clause, leaves Congress only with authority to regulate commerce and incidental authority over other subjects. That incidental authority is not extensive, for the

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Common Fields and Grounds Within the Manor of Fillingham *in the County of* Lincoln 4 (granting commissioners "necessary or proper" powers) (on file with the author); *An Act for Dividing and Inclosing the Common Field. . . in the Township and Parish of Stretton* 20 (granting "convenient or necessary" powers) (on file with the author); STATUTES AT LARGE, 8 Geo. iii, c. 16 (1768) (granting commissioners the power to make "proper" installations as they may deem "necessary").

Moreover, orders from the House of Lords to lower courts frequently contained necessary and proper language. *See, e.g.*, John Earl of Buckingham v. Drury, 3 Bro. P.C. 492, 505, 1 Eng. Rep. 1454, 1462 (H.L. 1762) ("and that the said court do give all necessary and proper directions for carrying this judgment into execution"); West v. Erisey, 1 Bro. P.C. 225, 233, 1 Eng. Rep. 530, 536 (H.L. 1727) ("and the Court of Exchequer was to give all necessary and proper directions for the making this judgment effectual").

[41]ARTS. CONFED. art. II (limiting congressional powers to those expressly granted).

[42]*E.g.*, the Supremacy Clause, U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

On the Supremacy Clause, along with the Necessary and Proper Clause, as merely declaratory rules of construction, see THE FEDERALIST NO. 33, *supra* note 2, at 158 (Alexander Hamilton) ("[These clauses] are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers.").

[43]Natelson, *Necessary and Proper*, *supra* note 2, at 292-314.

[44]*E.g.*, Pushaw, *Methods*, *supra* note 2, at 1201 (stating, "Does anyone seriously believe that Congress or the Court will, or should, dismantle the entire Commerce Clause framework?"). Professor Pushaw also quotes Robert Bork to the effect that "It appears that the American people would be overwhelmingly against such a change." *Id.* at 1202.

Cf. Nelson & Pushaw, *Critique*, *supra* note 2, at 699 (calling the Barnett thesis "radically destabilizing").

founders' doctrine of incidental powers was fairly limited in scope. Incidental powers could be used only to serve the principal grant,[45] and by definition, an incident was not something discrete from nor of equal dignity with the principal.[46] For example, a bailiff given authority to manage an estate could make short-term leases, but did not thereby obtain the power to convey a freehold.[47]

This interpretation poses few problems for pre-New Deal jurisprudence, which focused largely on distinguishing permissible regulation of interstate commerce and permissible incidental regulation from impermissible governance of other activities.[48] However, this interpretation is inconsistent with much of the post-New Deal jurisprudence involving the Commerce Power. Regulation of massive and discrete economic categories such as manufacturing, mining, and agriculture seems to be much more than a mere incident of overseeing mercantile trade.[49]

I think it is fair to say that thus far proponents of the narrow interpretation of "commerce" have had the better of the semantic argument.[50] My own immersion in the rhetoric of the founding era seems to confirm Professor Barnett's conclusion that in common discourse, and particularly in the public debates over the Constitution, "commerce" nearly always meant "exchange,"[51] and that proffered evidence for a

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[45]*Cf.* McCullough v. Maryland, 17 U.S. (4 Wheat.) 316, 358-59 (1819) (Marshall, C.J.) (stating that Congress may not adopt legislation unrelated to an enumerated power upon the "pretext" that it serves an enumerated power).

[46]JACOB, *supra* note 2 (unpaginated) (defining "incident" as "a Thing necessarily depending upon, appertaining to, or following another that is more worthy or principal").

[47]*See* 3 CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY 538-40 (1747) (listing powers within and without the implied authority of the bailiff of a manor).

[48]*See, e.g.* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (holding that navigation was understood by the founding generation as part of commerce); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (distinguishing commerce from manufacture); Carter v. Carter Coal Co., 298 U.S. 238 (1938) (distinguishing commerce from mining); Stafford v. Wallace, 258 U.S. 495 (1922) (determining what activities are and are not in the "flow" of commerce to determine if they are incidental to the commerce power); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (using direct and indirect effects on commerce for distinguishing what is and isn't incident to the commerce power).

[49]*See* Robert G. Natelson, *Essay: It's Incidental: Fixing the Commerce Power* (forthcoming).

[50]I have been able to find no response to Barnett, *New*, *supra* note 2, which cites over 1500 instances of the use of the word "commerce" in a leading American newspaper spanning over seven decades.

Professors Nelson and Pushaw did respond to some of Professor Barnett's readings in Barnett, *Original*, *supra* note 2. *See* Pushaw, *Critique*, *supra* note 2, at 705-11. But they concede that "[t]he core meaning of 'commerce' is, and always has been, the sale of goods," *id.* at 705. Since all parties were seeking the usual and ordinary meaning of the word, rather than just some possible meanings, this seems a serious concession.

[51]*See, e.g.*, MCDONALD, *supra* note 2, at 132 (discussing the widely held view that societies evolve into different stages according to their dominant economic activity: (1) hunting and gathering, (2) herding, (3) tillage agriculture, (4) commerce, (5) manufacturing). Thus, "commerce" identifies only one

broader non-legal meaning usually dissolves under scrutiny.[52] Perhaps, however, the Crosskey interpretation of the Commerce Clause can be saved by shifting the nature of the inquiry. Previously, the disputants have focused on contemporaneous evidence of the ordinary *lay* meaning of "commerce."[53] Perhaps they should have focused on the *legal* meaning of the word.

After all, the Constitution is not a lay document but a legal document. Nearly two-thirds of the delegates to the convention that prepared it were lawyers.[54] The initial draft was prepared by the Committee of Detail, four of whose five members were eminent attorneys.[55] The author of the final version, Gouverneur Morris, was a lawyer.[56] Even most of the major figures who represented the meaning of the Constitution to the ratifying public were lawyers. With the significant exception of Tench Coxe, all of the principal federalist essayists were of that profession.[57] Most of the delegates to the state ratifying conventions were not lawyers, but almost all the principal federalist floor managers and

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of those gainful activities.

Moreover, while Professor Akhil Amar is correct that the term "commerce" could mean intercourse of all kinds, AMAR, *supra* note 2, at 107, the founding generation simply did not use the word that way in speaking of the federal government's prospective powers. *See generally* Barnett, *Original*, supra note 2, at 114-24 (summarizing results of survey of every appearance of "commerce" in the federal and state conventions and in the Federalist Papers). *See also infra* Part VI.

[52]For example, I examined uses of "commerce" in an Internet version of ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776), a work cited by both Crosskey and Nelson/Pushaw for an expansive meaning of the word. Nelson & Pushaw, *Rethinking*, *supra* note 2, at 14 n.51, 15 n.55 & 16 n.58. However, a word-search for "commerce" on the site resulted *overwhelmingly* in the narrow, mercantile definition. Broader uses in Smith's treatise are unusual. The curious reader can check for himself or herself: *See generally* http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/smith/wealth/.

[53]*E.g. Lopez*, 514 U.S. at 585-86 (Thomas, J., concurring); Nelson & Pushaw, *Critique*, *supra* note 2, at 700 (arguing that lay meaning should control); W. HAMILTON, *supra* note 2, at 55-57; Berger, *supra* note 2, at 702-03. Professors Barnett and Epstein have provided extensive evidence of legal meaning, but only beginning in 1824. *See* Epstein, *supra* note 2, at 1399-1454. Professor Crosskey did include a short treatment of the probable meaning among lawyers of the phrase "among the States." 1 CROSSKEY, *supra* note 2, at 77-83.

[54]MCDONALD, *supra* note 2, at 220 (stating that 34 of the 55 delegates were lawyers).

[55]The lawyers were James Wilson, Oliver Ellsworth, John Rutledge, and Edmund Randolph The non-lawyer was Nathaniel Gorham. *See* Natelson, *Necessary and Proper*, *supra* note 2, at 269-71. Wilson, Ellsworth, and Rutledge all served later on the Supreme Court. Randolph was the first attorney general of the United States. *Id.*

[56]RICHARD BROOKHISER, GENTLEMAN REVOLUTIONARY: GOUVERNEUR MORRIS – THE RAKE WHO WROTE THE CONSTITUTION 15-16 (2003).

[57]Natelson, *Enumerated*, *supra* note 2, at 479-80. This source lists all the principal essayists except John Dickinson, who also was a lawyer. On Dickinson, see MILTON E. FLOWER, JOHN DICKINSON: CONSERVATIVE REVOLUTIONARY (1983). Dickinson clerked in a Philadelphia law office, *id.* at 10 before studying at London's Middle Temple. *Id.* at 18-19.

spokesmen were. Even a fair number of the anti-federalist leaders, notably Patrick Henry and the putative authors of the "Brutus" and "Federal Farmer" essays, were lawyers.[58] Most important of all, the delegates to the ratifying conventions and participating members of the public knew that if the Constitution were approved it would be construed by legally-trained judges and by public officials, who would be guided by lawyers.[59]

One could make a case, therefore, that the crucial meaning of "commerce" is not its ordinary meaning but its legal meaning. When the public ratifies a legal document it does so in the expectation that the document will contain legal terms of art. Did the legal meaning of "commerce" include all economic activity – or even more?

III. SOURCES OF EIGHTEENTH CENTURY LEGAL MEANING

Modern citations to eighteenth century legal sources tend to be dominated by Blackstone's *Commentaries*[60] with an occasional reference to Edward Coke.[61] But the corpus of contemporaneous legal works was far richer than that.

There were dozens of volumes of reported cases, supplemented from time to time by the reporters' own commentary. These volumes were compiled either by the reporters themselves or by others, relying on the reporters' notes.[62] Deep study of such material was a central feature of the founders' legal education. John Dickinson, for one, related in a series of letters from London's Middle

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[58]The most commonly suggested author of "Brutus" is Robert Yates of New York, 2 THE ANTI-FEDERALIST 358 (HERBERT J. STORING ED., 1981), and of the "Federal Farmer," Richard Henry Lee of Virginia. *See generally* Forrest McDonald, *Introduction* in Richard Henry Lee, *Letters from the Federal Farmer* in EMPIRE AND NATION xiv-xvi (2d ed. 1999).

[59]*See, e.g.,*13 DOCUMENTARY HISTORY, *supra* note 2, at 534 (reproducing an anti-federalist tract setting forth hypothetical future judicial opinion construing the General Welfare Clause).

[60]Wilfrid Prest, *Blackstone, Sir William (1723–1780), legal writer and judge,* in THE OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004-05) (containing a short biography).

[61]A search of the Westlaw "Journal and Law Review" (JLR) database on February 6, 2005 using the query, "'william blackstone' /s commentaries" resulted in 4540 documents identified. A search on the same date using the query "'Edward Coke' /s institutes" resulted in 486 documents. *See infra* note 89 (documenting the neglect of other crucial authors).

[62]*See generally* JOHN WILLIAM WALLACE, THE REPORTERS ARRANGED AND CHARACTERIZED WITH INCIDENTAL REMARKS (1882) (discussing the biographies, methodology, and relative reputations of the various English case reporters).

Temple[63] his immersion in the reports of Coke,[64] Edmund Plowden,[65] William Salkeld,[66] and Peyton Ventris.[67]

Seven of the fifty-five delegates to the federal convention had been trained in London's Inns of Court.[68] So had a significant portion of the American bar,[69] including several important ratification figures who did not attend the federal convention.[70] As students, they had listened in the audience as the royal justices heard, decided, and explained current controversies. Some had no doubt seen, and everyone had heard of, the great Lord Mansfield, the chief justice whose work in the years immediately preceding (1756-88) had gone far toward perfecting the English law of commerce.[71]

One did not have to be educated in the Inns of Court to benefit from the contemporaneous outpouring of law books. Giles Jacobs' *New Law-Dictionary*,[72] a popular work in American law

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[63]H. Trevor Colbourn (ed.), *A Pennsylvania Farmer at the Court of King George: John Dickinson's London Letters, 1754-1756*, 86 PA. MAGAZINE OF HISTORY & BIOGRAPHY 241 & 417 (1962) (setting forth the content of Dickinson's letters from London to his parents). His references are: to Coke, *id.* at 257, 422, 441 & 451; Plowden, *id.* at 257, 423 & 451; Salkeld, *id.* at 451, and Ventris, *id.* at 451. He also mentions Littleton – perhaps Coke's commentary on his work. *Id.* at 423.

[64]Allen D. Boyer, *Coke, Sir Edward (1552-1634), lawyer, legal writer, and politician*, in THE OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004-05) (containing a short biography).

[65] Christopher W. Brooks, *Plowden, Edmund (c.1518–1585), law reporter*, in THE OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004-05).

[66]W. R. Williams, *Salkeld, William (1671–1715), serjeant-at-law and law reporter*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004-05).

[67]Paul D. Halliday, *Ventris, Sir Peyton (1645–1691), judge and politician*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004-05).

[68]E. ALFRED JONES, AMERICAN MEMBERS OF THE INNS OF COURT (1924). *See id.* at 21-22 (John Blair), 61-63 (John Dickinson), 102 (William Houston), 104 (Jared Ingersoll), 134-36 (William Livingston), 170-71 (Charles Pinckney), 171-72 (Charles Cotesworth Pinckney).

[69]CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 18 (1966) (stating that between 1750 and 1775, four colonies [Maryland, Pennsylvania, South Carolina, and Virginia] had nearly 150 lawyers educated at the Inns).

[70]*See, e.g., id.* at 124-25 (Henry Lee, a federalist speaker at the Virginia ratifying convention) & 216-17 (Alexander White, author of one of the published enumerations of state powers and a leading federalist spokesman in Virginia).

[71]MCDONALD, *supra* note 2, at 114-15 (describing Lord Mansfield's jurisprudence and the American reaction). *See also* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (taking judicial notice of the founding generation's knowledge of a leading Mansfield decision).

[72]JACOB, DICTIONARY, *supra* note 2.

libraries,[73] contained so much exposition on the topics it covered that it seems more a treatise than a dictionary. Jacob's offering, however, was only one of several competing law dictionaries on the market.[74] There were other overviews of the legal system available as well: besides the *Institutes* of Coke[75] and that relative latecomer, William Blackstone,[76] there were treatises by Thomas Wood,[77] Henry Finch,[78] and John Fortescue.[79] There were tracts focused on special areas, including commercial law.[80] There was an abundance of form-books.[81] There were competing multi-volume "abridgments" and "digests" that organized all of English law by topic, summarizing statutes and case holdings with crisp accuracy. The best known were by Matthew Bacon,[82] John Comyns,[83] Knightly D'Anvers,[84] William Nelson[85] and, most famously, by Charles Viner.[86]

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[73]On the popularity of various works, including Jacob's Dictionary, see JOHNSON, *supra* note 2, at 59-64.

[74]*See, e.g.*, THOMAS BLOUNT, A LAW-DICTIONARY AND GLOSSARY (3d ed. 1717); JOHN COWELL, A LAW DICTIONARY OR THE INTERPRETER (1777); CUNNINGHAM, *supra* note 2; WILLIAM RASTALL, TERMES DE LA LEY (mult. eds.); THE STUDENT'S LAW-DICTIONARY (1740).

[75]COKE, *supra* note 2.

[76]Blackstone's *Commentaries* were not published until 1765-69. *See* Wilfred Prest, *Blackstone, Sir William (1723-1780), Legal Writer and Judge*, in THE OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004-05).

[77]THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND (1754).

[78]HENRY FINCH, LAW OR DISCOURSE THEREOF (1759).

[79]JOHN FORTESQUE, DE LAUDIBUS LEGUM ANGLIAE (John Selden ed. 1737).

[80]*See, e.g,* BEAWES, *supra* note 2; MALLOY, *supra* note 2.

[81]*E.g.* GILBERT HORSMAN, PRECEDENTS IN CONVEYANCING (1785) (3 vols.); GILES JACOB, THE ACCOMPLISHED CONVEYANCER (1716). For the relevance of conveyancing books to constitutional law, see Natelson, *Necessary and Proper*, *supra* note 2, at 273-76.

[82]BACON, *supra* note 2.

[83]COMYNS, DIGEST, *supra* note 2.

[84]KNIGHTLY D'ANVERS, A GENERAL ABRIDGMENT OF THE COMMON LAW (3 vols.) (1725-37).

[85]WILLIAM NELSON, AN ABRIDGMENT OF THE COMMON LAW (3 vols.) (1725-27).

[86]CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY (1742 ff) (23 vols.). Viner subsequently endowed the Vinerian Chair in Common Law at Oxford under the condition that William Blackstone be the first occupant. He thus made Blackstone's *Commentaries* possible. On Viner's life, see David Ibbetson, *Viner, Charles (bap. 1678, d. 1756), legal writer and university benefactor* in THE OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004-05). On the influence of his "Abridgment," see W. S. HOLDSWORTH, CHARLES VINER AND THE ABRIDGMENTS OF ENGLISH LAW (1923).

This flood gushed out of Britain and into America.[87] To be sure, books were expensive, and many a country lawyer was without any of them, but the lawyers among the leading Founders were not in that category. Moreover, works that seem obscure today were not so then. One survey of eighteenth century American law libraries found more copies of D'Anvers' *Abridgment* than copies of Blackstone.[88] Modern constitutional commentary has tended to neglect most of this material, but undeservedly so.[89]

IV. ESSENCE OF THIS STUDY

Was the legal meaning of "commerce" different from the lay meaning? To find out, I collected evidence from eighteenth century legal works at the Bodleian Library at the University of Oxford, England, with additional excursions to Oxford's Codrington Library and the library at the Middle Temple in London, one of England's Inns of Court.[90] Using the Justis database of English Reports, I examined every use of the term "commerce," both in English and in Law French, in cases reported after the Year Books and prior to 1800. I also examined the use of the term in all available English dictionaries and abridgments, and in various legal treatises.

The process was a lengthy one, but the findings may be summarized quickly: Changing the terms of the debate makes no difference. In legal discourse the term "commerce" was almost always a synonym for exchange, traffic, intercourse. When used economically, it referred to mercantile activities: buying, selling, and certain closely-related conduct, such as navigation and commercial finance. It rarely, if ever, encompassed all gainful economic activity. If the excerpts and footnotes in the following pages seem repetitive at times, it is because the sources repeat the same general meanings – even the same specific definitions – over and over again. They must have been burnt into the minds of every lawyer in the founding generation with even a passing interest in the subject.

V. THE MEANING OF "COMMERCE" IN DIFFERENT LEGAL SOURCES

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[87] *See generally* JOHNSON, *supra* note 2.

[88] *Id.* at 59. Multiple copies of D'Anvers' work also showed up in WILLIAM HAMILTON BRYSON, CENSUS OF LAW BOOKS IN COLONIAL VIRGINIA 46 (1978)

[89] For example, as of February 6, 2006 there were only 46 articles in the entire Westlaw "journals and law reviews" (JLR) data base referencing any works in Giles Jacob's copious bibliography. Only some of these were on constitutional law topics. They were almost exclusively citations to Jacob's law dictionary, rather than to his many other works. At least Jacob fared better than his competitor Thomas Blount, who garnered only 12 citations in the same database. The query "Edmund Plowden" – an author the founding generation considered in the same general rank as Coke and Blackstone – produced only 33 entries. Even more sparse were citations to Knightly D'Anvers' popular (although incomplete) *Abridgment.* There were only two – both by me.

The most astonishing statistic is that Charles Viner's *Abridgment* – the most complete and celebrated of his day – was cited in only 35 articles. I was responsible for two of those.

Compare these statistics with the very heavy modern reliance on Blackstone and Coke, *supra* note 61.

[90] Although almost all of this material was available in America, England was the most convenient locale for examining it in places relatively close together.

A. *The Cases*

English Reports reproduces reports of all English cases from the Year Books until modern times. Cases decided before 1800 are found in 50 volumes.[91] As noted above, I used a searchable database to identify all uses of the word "commerce," both in English and in law French, in those volumes.[92] "Commerce" appeared approximately 471 times, of which a small number were part of proper names.[93] In addition, there were six uses of the Latin term *commercium*, a word closely identified – and to all appearances interchangeable – with its English derivative.[94] Commerce and *commercium* were sprinkled throughout both court opinions and the arguments of counsel. I did not distinguish those uses, because I was trying to ascertain the meanings of the term in legal circles generally.

I found that in the case law, judges and counsel used the words *commercium* and "commerce" in ways similar to those that Professor Barnett identified in lay discourse. The Latin term, which *always* carries a sense of traffic or exchange,[95] always was used that way in the cases – particularly being applied to merchants and their financial instruments.[96] The more frequently used English word had, with rare

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[91]These are volumes 1-3, 9, 21-29, 72-100, 123-125, 145, 161, 167, 168, and 170. There may be minor spillage of older cases into other volumes, and these volumes include a small number of cases decided after 1800 (not used in this article), but the numbers are not significant.

[92]Because I admitted cases from throughout the eighteenth century, a few of the cases cited here were decided shortly after the Constitution was ratified. I generally give very little weight to post-ratification evidence, Natelson, *Necessary and Proper*, *supra* note 2, at 247-48, but the few cases cited here are merely confirmatory of the vast bulk of prior cases. *Cf. id.* Moreover, it is unlikely that the English legal understanding of "commerce" was altered because the United States ratified a Constitution that contained the word.

[93]The figure is "approximately" 471, because there are occasional misspellings in the data base. I tried to catch these, but may have missed a few. The proper names include, the French Code of Commerce, a Chambre of Commerce, and a ship by that name.

[94]*Infra* notes 95 & 96 and accompanying text.

[95]*See* LEWIS, *supra* note 2. All of the definitions of *commercium* partake of the meaning of traffic and exchange. They include
(1) "Commercial intercourse, trade, traffic, commerce,"
(2) "The right to trade as merchants, a mercantile right,"
(3) "an article of traffic, merchandise, wares,"
(4) "intercourse, communication, correspondence, fellowship,"
(5) "forbidden intercourse, illicit commerce . . .*stupri*" [a word used of sexual trangression]
Id. at 378.

[96]Williams v. Williams, Carth. 269-270, 90 Eng. Rep. 759 (K.B. 1693) (reciting in a promisory note case, "That the City, of London is an ancient city, *quodq; habetur & a tempore cujus contrarium memoria hominum non existit habebatur quædam antiqua & laudabilis consuetudo inter mercatores & al' personas commercium exercen'. . . Cumque etiam quidam Joh'es Pullin existen' persona quæ per viam Merchandisand' commercium habuit. . . &c.*, that is: "in which [city] prevails and from a time the mind of man running not the contrary has prevailed a certain old and praiseworthy custom among merchants and other persons engaged in commerce. . . And also a certain John Pullin, an existing person

exceptions, a similar meaning. It was associated with the buying and selling of items created by others,[97] together with certain closely allied activities. "Commerce" encompassed the activities of merchants,[98]

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who carried on commerce in the matter of merchandizing, etc."); Woolvil v. Young, 5 Mod. 367, 87 Eng. Rep. 710 (K.B. 1697) (Every man is *negotians* [*sic*] in the kingdom; and if the plaintiff would have brought his case within the *custom of merchants*, he ought to have said *commercium habentes*, or have shewn that the bill signed was a *bill of exchange.* It is true, in the case of *Sarsfeild v. Witherly*, the declaration was, that the defendant Witherly was *residens et negotians* at London, &c. without saying *commercium habens*; but it appeared upon the whole frame of the declaration that it was a *bill of exchange.*") (emphasis in original); Bromwich v. Lloyd, 2 Lut. App.1582, 1585, 125 Eng. Rep. 870, 871 (K.B. 1704) (using *commercium* in a promissory note case); Gull v. Carswell, Burrell. 295, 167 Eng. Rep. 580 (Adm. 1709) (referring to *commercium* with India).

See also Cramlington v. Evans, 2 Vent. 296, 300, 86 Eng. Rep. 449, 452 (Exch. 1690) ("*fuit quædam consuet. int. mercator.& al. personas infra hoc regn. Angl. residen. & commerc. habentes usitat. & approbat. quod si aliquis mercator vel al. person. infra hoc regn. Angl' residen. fecerit aliquam billa [sic] excambii secund. usum mercator. . . .*," that is, "there was a certain custom among merchants and other persons residing and carrying on commerce in this Kingdom of England, used and approved, that if some merchant or other person residing in this Kingdom of England shall have made some bill of exchange according to the practice of merchants...").

Translations in this article are by the author.

[97]In addition to cases *infra passim*, see, *e.g.*, Luke v. Bridges, Prec. Ch. 146, 148, 24 Eng. Rep. 70, 71 (Ch. 1700) (referring to commerce in securities); Anonymous, 3 Salk. 157, 91 Eng. Rep. 750 (court and date not given) ("*Permutatio, vicina est empitoni*, but exchanges were the original and natural way of commerce, precedent to buying, for there was no buying till money was invented now, in exchanging, both parties are buyers and sellers, and both equally warrant").

See also Evans v. Cramlington, Skin. 265, 266, 90 Eng. Rep. 120, 121 (Ch. 1687) ("commerce is a word of too large signification, and may comprehend pedlers, or they who sell corn, &c.").

[98]Bellasis v. Hester, 3 Raym. Ld. 336, 92 Eng. Rep. 719 (K.B. 1697) (referring to "persons in the way of merchandising, trading and using commerce within this realm"). *See also* Vallezjo v. Wheeler, Lofft. 631, 98 Eng. Rep. 836 (K.B. 1774):

> The author whom I shall beg leave to cite next is Savary, who says, "Barratry of the master, in the language of commerce and merchandize [*sic*], means the larcinies [*sic*], disguising and alteration of merchandizes which master or crew may occasion; and generally all kinds of cheating, tricks and malversations, which they often employ to deceive the merchant, freighter and others who are interested in the vessel."

Lofft. at 635, 98 Eng. Rep. at 838.

See also id., Lofft. at 638, 98 Eng. Rep. at 840 ("In Postlethwaite's Dictionary of Trade and Commerce, which I understand to be generally esteemed one of the best books upon the subject, by gentlemen conversant in mercantile transactions. . .").

See also Tuerloote v. Morrison, Yelverton 198, 80 Eng. Rep. 130 (K.B. 1611) (merchant successful in suit for slander because protection warranted by public needs for commerce); Pippon v. Pippon, Ridg. T. H. 165, 169, 27 Eng. Rep. 791, 793 (Ch. 1744) ("It would affect the commerce of this kingdom to a very great degree; merchants abroad have debts here, and if those should be distributed according to the laws of *England*, it would be a most mischievous thing to the commerce of this country"); reported also sub nom. Pipon v. Pipon, Amb. 799, 801, 27 Eng. Rep. 507, 508 (Ch. 1744) ("it could not be done, and would be extremely mischievous, and greatly affect the commerce of these kingdoms; no foreign merchant would know how to deal here").

factors (commodity brokers),[99] carriers,[100] traffickers with foreign nations,[101] and consignees.[102] Among

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See also Le Case del Union del Realm, d'Escose, ove Angleterre , Moo. K.B. 790, 72 Eng. Rep. 908 (K.B. 1606) ("Commerce and Merchandizing by Merchants of both Nations"); Hussey v. Jacob, 2 Raym. Ld. 93-94, 92 Eng. Rep. 582, 583 (K.B. 1703) (referring to "merchants, and other persons using commerce").

[99]Cocksedge v. Fanshaw, 1 Doug. 119, 130, 99 Eng. Rep. 80, 87 (K.B. 1779) (corn factors); Farrington v. Lee, 1 Mod. 268, 86 Eng. Rep. 873 (C.P. 1677) (factors who work for merchants involved in "trade and commerce").

See also Greenway v. Barker, Godb. 260, 78 Eng. Rep. 151 (K.B. 1612) (explaining why there is a court of admirality):

> A mans life is in danger by reason of traffique, and merchants venture all their estates; and therefore it is but reasonable that they have a place for the trial of contracts made upon the sea by them or their factors. . . . And so long as there hath been any commerce and traffique by this kingdom, so long there hath been a Court of Admiralty.
> Godb. at 261, 78 Eng. Rep. at 152.

[100]Francis v. Wyatt, 1 Bl.W. 483, 485, 96 Eng. Rep. 279, 280 (K.B. 1764) (characterizing a public livery stable as a "branch of commerce").

[101]Collingwood v. Pace, Bridg. O. 410, 434, 124 Eng. Rep. 662 (C.P. 1661):

> So that, by the common law, a merchant might, go beyond the sea, without licence, for the business of traffic and merchandize; and a merchant, who is beyond the seas upon traffic and merchandize, is supposed to have *animum revertendi*; and his case (it being *pro bono publico* to go beyond the sea for traffic and commerce) is like the case of an ambassador, who being beyond sea only on his master's errand, his children are natural born subjects. . .

Bridg. O. at 434, 124 Eng. Rep. at 675.

See also Bruse v. Harcourt, Park. 274, 145 Eng. Rep. 778 (Exch. 1709) (reporting on a seizure of French wine, as forfeited by statute "for prohibiting all trade and commerce with France"); Tarleton v. M'Gawley, Peake. 270, 272, 170 Eng. Rep. 153, 154 (K.B. 1793) ("Law, for the defendant, contended that the plaintiffs being engaged in a [foreign] trade which by the law of that country was illicit, could not support an action for an interruption of such illicit commerce"); Boucher v. Lawson, Cas. T.H. 85, 87, 95 Eng. Rep. 53, 54 (Ch. 1735); *also reported at* Cun. 144, 146, 94 Eng. Rep. 1116, 1117 (Ch. 1735) (referring to illegal export of gold "illicit commerce"); Eyre v. Eyre, 2 Ves. Sen. 86, 28 Eng. Rep. 56, 57(Ch. 1750) (counsel arguing that a ruling he opposed would "hurt commerce" with India).

Thus, the foreign ministers who negotiated commercial treaties sometimes were referred to as "agents of commerce." *See, e.g.*, Rex v. Inhabitants of Openshaw, 3 Burr. 1477, 1481, 97 Eng. Rep. 936, 938 (K.B. 1764) (Mansfield, C.J.).

[102]*See* Golden v. Manning, 3 Wils. K.B. 429, 95 Eng. Rep. 1138 (K.B. 1773):

> Serjeant Glynn è contrà, for the defendants, contended. That when they received the goods at their warehouse in Birmingham, they only undertook to carry them from thence to their warehouse in London and no further, and that it was the duty of Ireland the consignee, upon the arrival of the goods at London, to have then sent and inquired for the same, according to the advice thereof which he must have received from his correspondent the plaintiff at Birmingham, as is the constant and invariable custom and usage amongst merchants and traders, both in respect to foreign and inland trade and

the carriers encompassed by "commerce" were navigators.[103] This treatment of navigation as part of commerce, by the way, confirms fully Chief Justice Marshall's view of the matter, expressed in *Gibbons v. Ogden.*[104] It also answers satisfactorily Professor Mark A. Killenbeck's question posed a few years ago when he asked how the First Congress thought it could regulate in detail the conduct of sailors unless it had adopted a "substantial effects" view of the commerce power.[105]

As in lay language, "commerce," was frequently coupled with the word "traffic," as "traffic and commerce."[106] Less commonly, it was coupled with "intercourse."[107] Most common was in the phrase

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commerce.
Id. at 3 Wils. K.B. 433, 95 Eng. Rep. at 1141.

[103]Attorney-General v. Richards, 2 Anst. 603, 607, 145 Eng. Rep. 980, 981 (Ch. 1795) (stating, "So in the case of *The City of Bristol v. Morgan*, cited in Lord Hale's treatise De Portibus Maris, p. 81. The bill stated the benefit of navigable rivers for commerce, and the right to have all purprestures therein abated.") (emphasis in original); Penn v. Lord Baltimore, 1 Ves. Sen. 444, 454, 27 Eng. Rep. 1132, 1138 (Ch. 1750) ("for the great beneficial advantages, arising to the crown from settling, *&c.* is, that the navigation and the commerce of this country is thereby improved"); Scot v. Schawrtz [*sic*], 2 Com. 677, 693, 92 Eng. Rep. 1265, 1272 (Exch. 1739) (stating, "it would be almost impracticable, and make commerce very hazardous, if every merchant was to search out the nativity of every mariner whom he employed, and in case of mistake or misinformation was to forfeit his ship and cargo.").

See also Philips v. Baillie, 3 Doug. 374, 376, 99 Eng. Rep. 703, 705 (K.B. 1784) ("It is said in Beawes [a leading treatise], that, 'even in times of peace, convoys are ordered by the Government, to guard and defend our trading vessels from the assaults of pirates, or encroachers on our commerce, more especially in our fisheries and other parts of the West Indies, where they may be exposed to such attacks by commercial intruders.'").

See also Greenway v. Barker's Case, Godb. 260, 261, 78 Eng. Rep. 151, 152 (C.P. 1613) (identifying commerce with admiralty).

[104]22 U.S. (9 Wheat.) 1 (1924):

> All America understands, and has uniformly understood, the word "commerce," to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense. . .

Id. at 190.

[105]Mark A. Killenbeck, *The Qualities of Completeness: More? or Less?*, 97 MICH. L. REV. 162, 1649-50 (1999). The answer is that Congress did not need a "substantial effects" approach because the accepted legal doctrine was that regulating navigation was part of regulating commerce.

[106]*E.g.* Case of Mines, 1 Pl. Com. 310, 316, 75 Eng. Rep. 472, 481 (Exch. 1568) ("commerce and traffick"); Le Case de Mixt Moneys, Dav. 18, 80 Eng. Rep. 507 (P. C. [Ire.] 1604) ("auters usant ascun traffique ou commerce"); Collingwood v. Pace, Bridg. O. 410, 434, 124 Eng. Rep. 662, 675 (C.P. 1661) ("it being *pro bono publico* to go beyond the sea for traffic and commerce"); Waller v. Travers, Hardr. 301, 303, 145 Eng. Rep. 467, 468 (Exch. 1662) ("commerce and traffick").

[107]*E.g.* Robinson v Bland, 1 Bl.W. 234, 237, 96 Eng. Rep. 129, 131 (K.B. 1760).

"trade and commerce,"[108] an expression that also appeared in the Articles of Confederation.[109] When used alone, however, "trade" sometimes had a wider meaning than "commerce." This was particularly true in certain statutory contexts, where Parliament had defined "trade" or "trader" in a specific way. Thus, the bankruptcy statutes referred to a class of "traders" that included some artificers.[110] Other statutes regulated the practice of some "trades" – meaning occupations.[111]

However, this occasionally-broader meaning of trade seems not to have spilled over very much to the word commerce. Some potentially gainful activities – such as gambling[112] and operating the post office[113]– explicitly were excluded from the term. Tradesmen were excluded from the class of "merchants" who carried on "trade and commerce."[114] Judges and lawyers referred to times or places in

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[108]The examples are legion. *See, e.g.*, Waller v. Travers, Hardr. 301, 145 Eng. Rep. 467, 468 (Exch. 1662); Saunderson v. Rolles, 4 Burr. 2064, 2069, 98 Eng. Rep. 77, 79 (K.B. 1767); Martin v. Strachan, Willes. 444, 452, 125 Eng. Rep. 1260, 1263 (H.L. 1744); Brown v. Harraden, 4 T.R. 148, 155, 100 Eng. Rep. 943, 947 (K.B. 1791).

[109]ARTS. CONFED. art. IV.

[110]*Infra* notes 206 & 207 and accompanying text.

[111]*See, e.g.*, Hobbs v. Young, 2 Salk. 610, 91 Eng. Rep. 517 (K.B. 1691) (referring to clothworker as being within statutory definition of trade); Simpson v. Hartopp, Willes. 512, 125 Eng. Rep. 1295 (K.B. 1744) (wide use of "trade" for law of distraint). *But see* Raynard v. Chase, 1 Burr. 2, 6, 97 Eng. Rep. 155, 157 (K.B. 1756) (Lord Mansfield refusing to extend act prohibiting exercising "trade" of a brewer without serving an apprenticeship to cover one in partnership with properly qualified brewer).

[112]*See* Robinson v. Bland, 1 Bl.W. 234, 238, 96 Eng. Rep. 129, 131 (K.B. 1760) (reporting William Blackstone as arguing that "the present is no mercantile question, but a transaction between two Englishmen happening to be at Paris together, clear of any commercial connexions"); apparently accepted by the court in Robinson v. Bland, 1 Bl.W. 256, 96 Eng. Rep. 141 (K.B. 1760).

[113]Whitfield v. Lord Le Despencer, 2 Cowp. 754, 98 Eng. Rep. 1344 (K.B. 1778) (Mansfield, C.J.):

> The post-master has no hire, enters into no contract, carries on no merchandize or commerce. But the post-office is a branch of revenue, and a branch of police, created by an Act of Parliament. As a branch of revenue, there are great receipts; but there is likewise a great surplus of benefit and advantage to the public, arising from the fund. As a branch of police, it puts the whole correspondence of the kingdom (for the exceptions are very trifling) under Government, and entrusts the management and direction of it to the Crown, and officers appointed by the Crown. There is no analogy therefore between the case of the post-master and a common carrier. *Id.* at 2 Cowp. 764, 98 Eng. Rep. at 1349

[114]*See, e.g.*, Farrington v. Lee, 1 Mod. 268-70, 86 Eng. Rep. 873-74 (C.P. 1677):

> Also this exception of accounts between merchants and their factors, must be liberally expounded for their benefit; because the law-makers, in making such an exception, had an eye to the encouragement of trade and commerce. The words of the exception are, "other than such accounts as concern the trade of merchandise, &c."
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> * * * *

which there was gainful economic activity but no commerce,[115] or commerce but not some other gainful economic activity.[116]

Commerce benefitted agriculture and manufacture by circulating their products, but it did not include agriculture or manufacture. The cases compared commerce to an enormous circulatory system, carrying articles throughout the entire Body Politic, as the blood in the human body carries oxygen and nourishment.[117] Thus, like the American Founders, English lawyers and judges understood the tight interrelationship between commerce and other parts of the economy, but they still distinguished them conceptually.[118]

Because commerce was so important and because it crossed jurisdictional lines, it was the subject of a special body of law.[119] This was the *Lex Mercatoria* or Law Merchant. At one point, it was

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> Atkyns, Justice. I think the makers of this statute had a greater regard to the persons of merchants, than the causes of action between them. And the reason was, because they are often out of the realm, and cannot always prosecute their actions in due time. The statute makes no difference betwixt *an account current*, and *an account stated*. I think, also, that no other sort of tradesmen but merchants are within the benefit of this exception; and that it does not extend to shop-keepers, they not being within the same mischief.

(emphasis in original)

[115]*E.g.* Attorney-General v. Graws, Amb. 155, 156, 27 Eng. Rep. 103-04 (Ch. 1752) (referring to land use when "trade and commerce were not [yet] introduced" but that "Afterwards, when trade and commerce were extended, the locking up of lands became of greater consequence"); Bright v. Eynon, 2 Keny. 53, 58, 96 Eng. Rep. 1104, 1106 (K.B. 1757) (Mansfield, C.J.) (referring similarly to "a time when there was little commerce"); Whitebread v. Brooksbanks, Lofft. 529, 535, 98 Eng. Rep. 783, 786 (K.B. 1774) (referring to growing of corn at time before "the vast introduction of commerce in the reign of Queen Elizabeth, and since"); Cocksedge v. Fanshaw, 1 Doug. 119, 130, 99 Eng. Rep. 80, 87 (K.B. 1779) (concluding that "commerce in corn" [wheat] must have arisen after the reign of Richard I [1189-99]).

[116]Clavell v. Littleton, 1 Eq. Ca. Abr. 149, 21 Eng. Rep. 950 (Ch. 1710) (Reporter's Comment stating that at a former time Londoners did not purchase real estate but rather employed their wealth in commerce).

[117]*E.g.* Waller v. Travers, Hardr. 301, 145 Eng. Rep. 467, 468 (Exch. 1662) (referring to "the advancement and encouragement of trade and merchandize, which are (as it were) the blood which gives nourishment to the body politick of this kingdom; and therefore it ought to receive a favourable and benign construction, for the better support and maintenance of trade and commerce, the advancement whereof is of great consideration in the eye of the law."); Le Case del Union d'Escose ove Angleterre (1091), Moo. K.B. 790, 794, 72 Eng. Rep. 908, 911 (K.B. 1606) ("The blood that passeth in the veins of the body natural by continual motion doth maintain and refresh the spirits of life. So Traffick, Commerce, and Contracts in a Body Politick do support, maintain and refresh the Common-wealth [*sic*].").

[118]*Infra* notes 260-267 and accompanying text.

[119]*See, e.g.*, 2 MOLLOY, 316-17 & 324-25. *See also infra* Part V(C)(1).

considered a branch of the royal prerogative,[120] but judges soon imported it into case law. This activity was particularly notable just before the Founding, due to the famous, and sometimes controversial, jurisprudence of Lord Mansfield, Chief Justice of the Court of King's Bench from 1756 until 1786.[121] William Blackstone, in his role as an advocate in *Robinson v. Bland*,[122] explained it thus:

> From mutual commerce and intercourse, which will quickly follow, arises the necessity not only of a law of nations to regulate that commerce and intercourse, but also of communicating in some degree with the laws of other countries, in respect to the contracts of individuals; in order to give a rule for traders hinc inde [hence and thence] to resort to, for the decision of their mercantile controversies. Therefore the lex mercatoria was interwoven into our own common law . .[123]

Yet even engrafted onto common law, the *Lex Mercatoria* was seen as something distinct. Unlike statutes and the traditional common law, the *Lex Mercatoria* was based on merchant custom and, of course, designed to be fairly standard everywhere.[124] The scope of its substantive coverage was roughly similar

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[120]*See* Brownlow v. Cox, 3 Bulst. 32, 81 Eng. Rep. 27 (K.B. 1615) (Coke, C.J.) (quoting Lord Bacon to the effect that "The Kings prerogative hath four columns or pillars. . .
The fourth, which concerns matters of commerce.").

[121]For a short biography, see James Oldham, *Murray, William, First Earl of Mansfield: 1705-1793* in THE OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004-05).

[122]1 Bl. W. 234, 96 Eng. Rep. 129 (K.B. 1760).

[123]1 Bl. W. 237-38, 96 Eng. Rep. at 131.

[124]*See* Luke v. Lyde, 2 Burr. 882, 97 Eng. Rep. 614 (K.B. 1759), in which Lord Mansfield quoted Cicero on the uniformity of natural law:

> the maritime law is not the law of a particular country, but the general law of nations: "non erit alia lex Romæ, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes et omni tempore, una eademque lex obtinebit."

Id., 2 Burr. at 887, 97 Eng. Rep. at 617.

The quotation is from Cicero's *de re publica*, Book 3, and can be rendered, "There will not be one law at Rome and another at Athens, one now and another later, but among all peoples and for all time, one and the same law will prevail." (My translation). *See* M. TULLIUS CICERO, DE RE PUBLICA, DE LEGIBUS 210-11 (Loeb ed. 1951) (providing text and another translation).

See also Burrows v. Jemineau, Sel. Ca. T. King 69, 70, 25 Eng. Rep. 228 (Ch. 1726) ("the law-merchant was an universal law, that it extends to all trading people, and not to be circumscribed by local or municipal laws; and if it were not so, it would be destructive to trade and commerce"); Scrimshire v. Scrimshire, 2 Haggard Consistory 395, 161 Eng. Rep. 782 (Consis. Ct. London 1752):

> In commercial affairs under the law merchant, which is the law of nations, there are instances where sentences for or against contracts abroad have been given, and received here on trials, as evidence, and have had their weight. And this has been allowed on a principle of the law of nations, which all countries by consent agree to, for the sake of carrying on commerce which concerns the public in general.

Id., 2 Haggard Consistory at 420, 161 Eng. Rep. at 791.

to the scope of "commerce:" buying and selling, navigation,[125] marine insurance,[126] factorage,[127] and negotiable instruments[128] and other aspects of commercial finance.[129] An occasional variant of the concept appeared in cases dealing with perpetutities. In such cases, commerce sometimes embraced the buying and selling of land.[130] This usage was rare, however; and the real point of the court in using the

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[125]*Supra* note 103 and accompanying text.

[126]Pray v. Edie, 1 T.R. 313, 99 Eng. Rep. 1113 (K.B. 1786) (referring to international ship and cargo insurance as commerce).

Cf. Earl of Chesterfield v. Janssen, 2 Ves. Sen. 125, 143, 28 Eng. Rep. 82, 93 (Ch. 1750, 1751) (stating that bottomry contracts are "necessary for trade and commerce");

[127]*Supra* note 99.

[128]BILLS OF EXCHANGE: *See, e.g.*, Allen v. Dockwra, 1 Salk. 127, 91 Eng. Rep. 119 (K.B. 1698) (governing bills of exchange by a rule to ensure against a development "prejudicial to commerce"); Master v. Miller, 1 Anstruther 225, 229-30, 145 Eng. Rep. 855, 856 (K.B. 1793) (similar language); Hussey v. Jacob, 3 Raym. Ld. 93, 92 Eng. Rep. 582 (K.B. 1703) (recognizing a special custom among merchants regarding bills of exchange); Belchier v. Parsons, 1 Keny. 38, 47, 96 Eng. Rep. 908, 911 (Ch. 1754) ("but since the increase of trade, and commerce, inland bills of exchange becoming more frequent, that has not been insisted on"); Bomley v. Frazier, 1 Strange 441, 93 Eng. Rep. 622, 623 (K.B. 1721) (stating that "The design of the law of merchants in distinguishing these [bills of exchange] from all other contracts, by making them assignable, was for the convenience of commerce, that they might pass from hand to hand in the way of trade, in the same manner as if they were specie"); Burrows v. Jemineau, Sel. Ca. T. King 69, 70, 25 Eng. Rep. 228 (Ch. 1726) (arguing that court should follow rule on foreign bills of exchange that was not "destructive to trade and commerce"); Scott v. Perry 3 Wils. K.B. 206, 212, 95 Eng. Rep. 1015, 1018 (K.B. 1771) (stating, per Lord Chief Justice de Grey, that "The Court ought to be very careful how they [*sic*] lay down the law, in cases of bills of exchange, which so highly concern trade and commerce"); Rawlinson v. Stone, 3 Wils. (K.B.) 1, 2-3, 95 Eng. Rep. 899, 900 (K.B. 1746) (discussing effect of indorsing of bills of exchange on merchants and effect on "trade and commerce"); Pillans v. Van Mierop, 3 Burr. 1663, 1672, 97 Eng. Rep. 1035, 1040 (K.B. 1765) (Mansfield, C.J.) (stating, "The true reason why the acceptance of a bill of exchange shall bind, is not on account of the acceptor's having or being supposed to have effects in hand; but for the convenience of trade and commerce. Fides est servanda."); King v. Thom, 1 T.R. 487, 488-89, 99 Eng. Rep. 1212, 1213 (K.B. 1786) (stating that following the usage and custom of merchants, the law has made certain securities negotiable for the "convenience of commerce").

BANK NOTES: *See* Miller v. Race, 2 Keny. 189, 194, 96 Eng. Rep. 1151, 1152 (K.B. 1758) (Mansfield, C.J.) (the law allows bank notes to pass as cash for the benefit of commerce). *See also* Miller v. Race, 1 Burr. 452, 97 Eng. Rep. 398 (K.B. 1758) (report of same case).

PROMISSORY NOTES: Brown v. Harraden, 4 T.R. 148, 100 Eng. Rep. 943 (K.B. 1791) (ruling that Parliament decided that for the benefit of "trade and commerce," promissory notes ought to have the same grace period as bills of exchange).

[129]*See, e.g.*, Eyre v. Eyre, 2 Ves. Sen. 86, 28 Eng. Rep. 56, 57(Ch. 1750).

[130]*See, e.g.*, Attorney-General v. Lady Downing, Wilm. 1, 27-28, 97 Eng. Rep. 1, 11 (Ch. 1767) (holding that in a "commercial country" the king ensures too much land is not "throw[n]....out of commerce"); Duke of Marlborough v. Earl Godolphin, 1 Eden. 404, 414, 28 Eng. Rep. 741, 745 (Ch. 1759) (stating that restrictions on alienation may keep property "*e commercio*").

word "commerce" was that restrictions on the alienation of land make it more difficult to raise the funds necessary for commerce in the narrower sense.[131]

As a synonym for traffic or intercourse, "commerce" occasionally denoted sexual relations, especially of the casual sort.[132] This also is a possible meaning of the Latin forebear, *commercium.*[133] However, the sexual use of "commerce" in the cases was far less common than the economic one. Even less common – indeed, in the cases almost non-existent – was the still wider sense of "social intercourse."[134]

And what of the Crosskey definition as "all economic activity?" Examples are hard to come by. There are a few instances that are ambiguous, in that they *arguably* (although not clearly) could be read as communicating a broader meaning.[135] In a handful of instances, the closely-related term "merchant" was

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[131]Murray v. Eyton, Raym. T. 338, 356, 83 Eng. Rep. 176, 185 (C.P. 1680) ("If it were to restrain such alienations as are favoured in law. . .whereby trade and commerce might be prevented, debts unpaid, and children unprovided for, which is the reason that the law disallows of perpetuities and conditions which restrain alienation"); Martin v. Strachan, Willes. 444, 452, 125 Eng. Rep. 1260, 1263 (H.L. 1744) ("To the public, as it was prejudicial to trade and commerce to have estates always continue in the same families without even a power of raising money upon them"); Duke of Norfolk v. Howard, 1 Vern. 163, 164, 23 Eng. Rep. 388, 389 (Ch. 1683) ("A perpetuity is a thing odious in law, and destructive to the commonwealth: it would put a stop to commerce, and prevent the circulation of the riches of the kingdom").

[132]*See, e.g.*, Robinson v. Cox, 9 Mod. 263, 265, 88 Eng. Rep. 439, 441 (Ch. 1739) (stating of a married man and a prostitute, "the same criminal commerce was continued between Mrs. Cox and Mr. Robinson even after the marriage"); Priest v. Parrot, 2 Ves. Sen. 160, 161, 28 Eng. Rep. 103, 104 (Ch. 1750, 1751) (referring to non-marital intercourse as "commerce"); Lindo v. Belisario, 1 Hag. Con. 216, 230-31, 161 Eng. Rep. 530, 535 (Consis. Ct. London 1795) (referring to commerce between the sexes); Hill v. Spencer, Amb. 836, 837, 27 Eng. Rep. 524 (Ch. 1725) (referring to adultery as "illegal commerce").

[133]*Supra* note 95.

[134]*Cf.* AMAR, *supra* note 2, at 107-08 (suggesting that the term has this wider meaning in the Commerce Clause).

[135]*See, e.g.*, Goddard v. Smith, 6 Mod. 261, 87 Eng. Rep. 1007 (K.B. 1704), also reported at 2 Salk. 767, 778, 91 Eng. Rep. 632, 633 (using the term "commerce" where it could mean either trade, other economic dealings, or other human interaction); Bosworth v. Hearne, Andr. 91, 95, 95 Eng. Rep. 312, 314 (K.B. 1738), stating:

> Now the grievance attempted to be guarded against by this by-law is, the annoyance occasioned by carts and drays being in the streets, whereby the general commerce of the city was much retarded: and this certainly ought to be taken care of, though it be to the detriment of a particular business.

While "general commerce" could refer to all business, obstructions in the street are more likely to impede exchange – commerce in the narrower sense.

Some cases include wording that at first glance might support the Crosskey definition, but on further investigation turn out not to. *See, e.g.*, Pray v. Edie, 1 T.R. 313, 99 Eng. Rep. 1113 (K.B. 1786). In *Pray*, 1 T.R. at 314, 99 Eng. Rep. at 1114, the phrase "general commerce" is used in a way that might

connected with non-mercantile occupations – specifically tailors and physicians[136] – whose activities in the market place might therefore be characterized as "commerce." However, this expansive definition of merchant was quite old, and seems to have been repudiated by the time of the Founding.[137]

B. Legal Dictionaries

When faced with a problematic word in a legal document today, the lawyer's first instinct often is to consult a legal dictionary. It is therefore remarkable that in the debate over "commerce," none of the chief participants, to my knowledge, have consulted eighteenth century legal dictionaries – lay dictionaries, to be sure, but none of the legal dictionaries used in America at the time.[138]

One of the most popular books in this class – if not the most popular – was the *New Law-Dictionary* of the productive Giles Jacob,[139] which had gone through eight editions by 1762. The edition of that year (as did other editions)[140] defined "commerce" as "**Commerce**, *(Commercium)* Traffick, Trade or Merchandise in Buying and Selling of Goods. See *Merchant.*"[141] Note the connection to the Latin word *commercium* that we observed in the cases. Note also that Jacob referred the reader to the word "merchant," which he defined as follows: " **Merch**
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support the Crosskey definition, except that the larger context is one of changes in the law applying to insurance of ships and cargoes in foreign trade and the effects of those changes on foreign merchants. *Id.*

[136]Pelham's Case, 1 Co. Rep. 3a, 14a, 76 Eng. Rep. 8, 30 (Exch. 1588) ("released and quit-claimed, to the said Henry Page, by the name of Henry Page, of London, merchant taylor," apparently in recognition the guild name); The King v. Middleton, 1 Keb. 625, 83 Eng. Rep. 1149 (K.B. 1663) (referring to a corporation of physicians as a corporation "for commerce"); Mayor and Commonalty of London v. Wilks, 2 Salk. 445, 91 Eng. Rep. 386 (K.B. 1704) (referring to "merchant-tailor" as a common term).

[137]Regina v. Harper, 2 Salk. 611, 91 Eng. Rep. 518 (K.B. 1705) ("the Court seemed to think a merchant-taylor was nonsense and unintelligible; they did not know what a merchant-taylor meant"); 15 CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY 361 (1743) (citing Regina v. Harper); JACOB, DICTIONARY, *supra* note 2 (unpaginated; defining "merchant") ("the Word *Merchant* formerly extended to all Sorts of Traders, Buyers and Sellers. But every one that buys and sells is not at this Day under the Denomination of a *Merchant*; *only those who traffick in the Way of Commerce*"); 2 COKE, *supra* note 2, at 668 (apparently distinguishing tailors from merchants).

[138]*See, e.g.*, OTIS, *supra* note 2, at 36 (citing the Jacob, Cowell, and Cunningham dictionaries).

[139]For Jacob's biography, see *Matthew Kilburn, Jacob, Giles (bap. 1686, d. 1744), legal and literary author,* in THE OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004-05). For the wide use of his work, see JOHNSON, *supra* note 2, at 59-64.

[140]JACOB, DICTIONARY, *supra* note 2. The edition thus cited is that of 1762. I have checked the editions of 1729 and 1750 and found substantially the same definitions. The definition owes much to other sources; see *infra* Part V(C)(2).

[141]JACOB, DICTIONARY, *supra* note 2 (unpaginated).

(*Mercator*) Is one that buys and trades in any Thing: And as Merchandise includes all Goods and Wares exposed to Sale in Fairs or Markets."[142]

However, one who bought and sold was not necessarily a merchant:

> the Word *Merchant* formerly extended to all Sorts of Traders, Buyers and Sellers. But every one that buys and sells is not at this Day under the Denomination of a *Merchant*; *only those who traffick in the Way of Commerce*, by Importation or Exportation, or carry on Business by Way of Emption, Vendition, Barter, Permutation or Exchange, and which make it their Living to buy and sell, by a continued Assiduity, or frequent Negotiation, in the Mystery [i.e., skill[143]] of Merchandising, are esteemed *Merchants*. Those that buy Goods, to reduce them by their own Art or Industry, into other Forms than they are of, and then to sell them, are Artificers and not *Merchants*: Bankers, and such as deal by Exchange, are properly called *Merchants.*[144]

Thus, merchants were different from artificers in that merchants did not make or improve goods. Farmers, miners, and manufacturers sold their goods to others, but that did not render them merchants.[145]

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[142]*Id.*

[143]*See* 2 COKE, *supra* note 2, at 668 (defining "mysterie" in this context as "ars, seu artificium" [skill or profession] – an occupation requiring skill).

[144]JACOB, DICTIONARY, *supra* note 2 (unpaginated).

[145]To be sure, the term "merchant-taylor" was found, implying that a tailor was a kind of merchant. *See, e.g.*, CUNNINGHAM, *supra* note 2 (unpaginated) ("A merchant taylor in a common term; *per Holt* Ch. J. 2 *Salk.* 445. *Mayor, &. Of London v. Wilks.*"). Apparently it was a guild name. In any event, the English courts disapproved the term , *supra* note 137, and Coke distinguishes between

Moreover, while other constructions are possible,[146] the most natural inference is that only merchants, and not artificers, "traffick[ed] in the way of Commerce" – that the artificer's sale of his product was not "commerce" as to him, although of course it was to the merchant. If this is so, then the definition of the term "commerce" inferrable from the leading legal dictionary was an exceedingly narrow one.

Jacob then explained that regulation of merchants is through a special branch of the law:

> *Merchants* were always particularly regarded by the Common Law; though the municipal Laws of *England*, or indeed of any one Realm, are not sufficient for the ordering and determining the Affairs of Traffick, and Matters relating to Commerce; Merchandise being so universal and extensive that it is impossible; therefore the *Law Merchant* (so called from its universal Concern) all Nations take special Knowledge of; and the Common and Statute Laws of this Kingdom leave the Causes of *Merchants* in many Cases to their own peculiar Law. *Ibid*. In the Reign of King *Ed*. 4. a *Merchant* Stranger made Suit before the King's Privy Council, for several Bales of Silk feloniously taken from him, wherein it was moved, that this Matter should be determined at Common Law; but it was answered by the Lord Chancellor, that as this Suit was brought by a *Merchant*, he was not bound to sue according to the Law of the Land.[147]

The rest of the discussion set some of the special rules applicable to merchants and identified some of the leading merchantile companies.

Jacob's definitions were not unusual. As we shall see, they recurred in contemporaneous treatises on commercial law.[148] Furthermore, two other contemporary dictionaries – that by Timothy Cunningham and the anonymous "Student's Dictionary" – contain definitions that closely track the language used by Jacob, including the distinction between artificers and merchants and the qualification that merchants, unlike others, trafficked in commerce.[149]

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merchants and other occupations, including that of "taylor." 2 COKE *supra* note 2, at 668.

[146]Based on this definition, one conceivably could argue that artificers trafficked in commerce also, but not as merchants did.

[147]JACOB, DICTIONARY, *supra* note 2 (unpaginated).

[148]*Infra* Part (V)(C)(2).

[149]*See* CUNNINGHAM, *supra* note 2 (unpaginated):

> Merchant, Every one that buys and sells, is not from thence to be denominated a merchant, but only he who trafficks in the way of commerce by importation or exportation; or otherwise in the way of emption, vendition, barter, permutation or exchange, and who makes it his living to buy and sell, and that by a continued assiduity, or frequent negociation in the mystery of merchandizing; but those that buy goods to reduce them by their own art or industry into other forms than formerly they were of, are properly called artificers, not merchants; not but merchants may, and do alter commodoties [*sic*] after they have bought them, for the more expedite fate of them, but that renders them not artificers, but the same is part of the mystery of merchants; but persons buying commodities, though they alter not the form, yet if they are such as sell the same at future days of payment for a greater price than they cost them, they are not

properly called merchants, but are usurers, though they obtain several other names, as warehouse keepers, and the like; but bankers, and such as deal by exchange are properly called merchants. 3 *Molloy* 456, 457 *cap*. 7 *felt*. 13. . . .
See also THE STUDENT'S LAW DICTIONARY; OR COMPLEAT ENGLISH LAW-EXPOSITOR:

Merchant, was formerly taken for one that bought and sold any Thing: But now this Appellation is properly restricted only to such as traffick in Commerce by Way of Importation or Exportation, or trade in the Way of Buying, Selling, Barter, or Exchange, and who continually make it their Livelihood to buy and sell: To these we may add Bankers, as well as those that deal by Exchange, who are likewise termed *Merchants*. Such as buy Wares, &c. to change them by their own Art or Industry into other Forms, are not *Merchants*, but properly Artificers. As the Laws of *England*, or those of any other Nation are not sufficient for determining the Affairs of Commerce and Merchandize, Traffick being so universal, that it is next to an Impossibility to do it; therefore all Nations, as well as we, take particular Notice of, and shew Regard to the *Law Merchant*, which is a Law among themselves; and the Causes of Merchants are in most Cases left to their own Law, which you may see in *Lex Mercat*.

C. Treatises:

1. Blackstone's Commentaries.

After its publication in 1765, Blackstone's *Commentaries* became the most popular legal treatise in America. Although its influence on the Founders can be overstated, it also is true that it was specifically cited twice at the federal convention.[150] Moreover, its nature as a summary of existing law offers important clues as to dominant legal usage.

Blackstone frequently employed the word "commerce." On two occasions, he used the term in a non-economic manner to mean general social intercourse among human beings.[151] The context of three economic uses is sufficiently undefined so that a reader could take the word in either the broad or narrow sense.[152] But by far, Blackstone's most common use was to mean mercantile exchange and its incidents.

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[150] 1 FARRAND, *supra* note 2, at 472 (Alexander Hamilton); 2 FARRAND, *supra* note 2, at 448 (John Dickinson).

[151] *See* 1 *id.* at *121 ("But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase ; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish."); 2 *id.* at *174 ("by perpetuities . . . estates are made incapable of answering those ends, of social commerce, and providing for the sudden contingencies of private life, for which property was at first established.").

[152] *See* 1 *id.* at *455 ("THESE artificial persons are called bodies politic, bodies corporate, (*corpora corporata*) or corporations: of which there is a great variety subsisting, for the advancement of religion, of learning, and of commerce") (emphasis in original); 1 *id.* at *459 ("some for the advancement and regulation of manufactures and commerce"). One could argue that "manufacture and commerce" is an example of the use of synonyms in "elegant variation," although I think it is more likely that Blackstone is referring to two separate branches of economic endeavor. The third unclear use appears at 4 *id.* at *421, and is discussed *infra* Part V(C)(1).

Thus, he ties the term tightly to trade,[153] traffic,[154] navigation,[155] buying and selling,[156] markets,[157] exchange with foreign nations,[158] and associated financial activities.[159] In other words, "commerce" was the sort of

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[153]1 *id.* at *161 ("Likewise, for the benefit of commerce, it is provided by statute . . . that any trader. . . served with legal process for any just debt"); 2 *id.* at *160 ("originally permitted only among traders, for the benefit of commerce"); 1 *id.* at *264 ("affairs of traffic and merchandize"); 2 *id.* at *290 ("And now, the whole of them is not only subject to be pawned for the debts of the owner, but likewise to be absolutely sold for the benefit of trade and commerce"); 2 *id.* at *456 ("And that the allowance of moderate interest tends greatly to the benefit of the public, especially in a trading country, will appear from that generally acknowleged principle, that commerce cannot subsist without mutual and extensive credit"); 2 *id.* at *385 ("since the introduction and extension of trade and commerce"); 2 *id.* at *398 ("By the rules of the antient common law, there could be no future property, to take place in expectancy, created in personal goods and chattels; because . . . the exigencies of trade requiring . . . a frequent circulation thereof, it would . . . put a stop to the freedom of commerce, if such limitations in remainder were generally tolerated and allowed.").

[154]1 *id.* at *253 ("and equally different from the bigotry of the canonists, who looked on trade as inconsistent with christianity, and determined . . . that it was impossible with a safe conscience to exercise any traffic"); 2 *id.* at *449 ("Thus, in the dark ages of monkish superstition and civil tyranny, when interest was laid under a total interdict, commerce was also at it's [*sic*] lowest ebb, and fell entirely into the hands of the Jews and Lombards: but when men's minds began to be more enlarged, when true religion and real liberty revived, commerce grew again into credit").

[155]1 *id.* at *283 ("the improvement of commerce, navigation, and correspondence").

[156]2 *id.* at *449 ("BUT property may also in some cases be transferred by sale, though the vendor hath none at all in the goods: for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end.").

[157]1 *id.* at *264 (listing among the king's powers to regulate commerce "the establishment of public marts, or places of buying and selling, such as markets and fairs"); 2 *id.* at *160 ("For both the statute merchant and statute staple are securities for money; the one entered into pursuant to the statute 13 Edw. I. *de mercatoribus*, and thence called a statute merchant ; the other pursuant to the statute 27 Edw. III. c. 9. before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of parliament in certain trading towns , and thence this security is called a statute staple. They are both, I say, securities for debts, originally permitted only among traders, for the benefit of commerce.").

[158]1 *id.* at *361 ("To encourage also foreign commerce").

[159]1 *id.* at *266 (discussing royal power over money, "the medium of commerce"); 2 *id.* at *119 (discussing the fact that alienation of estates tail permit them to be security for debts incurred in commerce); 2 *id.* at *160 ("For both the statute merchant and statute staple are securities for money. . . They are both, I say, securities for debts, originally permitted only among traders, for the benefit of commerce"); 2 *id.* at *161 (referring to hypothecation of land to serve needs of commerce); 2 *id.* at *313 (same); 2 *id.* at *456 ("And that the allowance of moderate interest tends greatly to the benefit of the public, especially in a trading country, will appear from that generally acknowleged principle, that commerce cannot subsist without mutual and extensive credit.").

thing merchants do[160] and the subject that was governed by the *lex mercatoria.*[161] As far as I can find, Blackstone never unambiguously employed "commerce" to mean "general economic activity." On the contrary, as was true of several English cases,[162] Blackstone sometimes used the word in a way that necessarily *excluded* some gainful economic activities. For example, he noted that the ancient Roman aristocracy treated commercial employment as dishonorable.[163] As he and every other educated Englishman knew, Roman senators were expected to focus on agriculture instead.[164] Similarly, Blackstone referred to transitions between earlier times when gainful economic activity did not include commerce and later times when it did.[165]

The following extract may assist in understanding Blackstone's view of commerce. The discussion pertains to the king's power over commercial relations. Observe how the passage prefigures two of the related powers the Constitution granted to Congress – to regulate weights and measures and to coin and regulate money. I have italicized words closely affiliated with the dominant usage of "commerce."

> ANOTHER light in which the laws of England consider the king with regard to domestic concerns, is as the arbiter of commerce. By commerce, I at present mean domestic commerce only. It would lead me into too large a field, if I were to attempt to enter upon the nature of *foreign trade*, it's [*sic*] privileges, regulations, and restrictions; and would be also quite beside the purpose of these commentaries, which are confined to the laws of England. Whereas no municipal laws can be sufficient to order and determine the very

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[160]2 *id.* at *160 (referring to a statute *de mercatoribus* [on merchants] "for the benefit of commerce"); 1 *id.* at *264 ("ANOTHER light in which the laws of England consider the king with regard to domestic concerns, is as the arbiter of commerce. By commerce, I at present mean domestic commerce only. It would lead me into too large a field, if I were to attempt to enter upon the nature of foreign trade, it's [*sic*] privileges, regulations, and restrictions. . . Whereas no municipal laws can be sufficient to order and determine the very extensive and complicated affairs of traffic and merchandize.").

[161]1 *id.* at *265 ("For which reason the affairs of commerce are regulated by a law of their own, called the law merchant or lex mercatoria, which all nations agree in and take notice of.").

[162]*Supra* notes 115 & 116 and accompanying text.

[163]WILLIAM BLACKSTONE, 1 COMMENTARIES *253 ("Very different from the genius of the Roman people; who in their manners, their constitution, and even in their laws, treated commerce as a dishonorable employment, and prohibited the exercise thereof to persons of birth, or rank, or fortune.").

[164]The *lex Claudia* of 218 B.C. impeded senatorial participation in trade. *See* OXFORD CLASSICAL DICTIONARY 247 (2d ed. 1970) (stating that one Quintus Claudius was the author of a law which forbade senators from owning sea-going vessels over a certain size and noting that smaller vessels "would suffice to transport their agricultural produce.").

[165]WILLIAM BLACKSTONE, 2 COMMENTARIES *385 ("But of later years, since the introduction and extension of trade and commerce").

See also 2 *id.* at *313: ("Besides, the new occasions and necessities, introduced by the advancement of commerce, required means to be devised of charging and incumbering estates, and of making them liable to a multitude of conditions and minute designations for the purposes of raising money, without an absolute sale of the land.").

> extensive and complicated affairs of *traffic* and *merchandize;* [*sic*] neither can they have a proper authority for this purpose. . . . For which reason the affairs of commerce are regulated by a law of their own, called the *law merchant* or *lex mercatoria*, which all nations agree in and take notice of. And in particular the law of England does in many cases refer itself to it, and leaves the causes of *merchants* to be tried by their own peculiar customs; and that often even in matters relating to *inland trade*, as for instance with regard to the drawing, the acceptance, and the transfer, of *bills of exchange*.
>
> WITH us in England, the king's prerogative, so far as it relates to mere domestic commerce, will fall principally under the following articles:
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> FIRST, the establishment of public *marts*, or places of *buying and selling*, such as *markets and fairs*. . .
> SECONDLY, the regulation of weights and measures. . .
> THIRDLY, as *money* is the medium of commerce, it is the king's prerogative, as the arbiter of domestic commerce, to give it authority or make it current. Money is an universal medium, or common standard, by comparison with which the value of all *merchandize* may be ascertained: or it is a sign, which represents the respective values of all commodities.[166]

Professors Nelson and Pushaw cite a passage from Blackstone that they present as evidence of a broader use.[167] The same passage was referenced by Crosskey,[168] and may have been gleaned from his work.[169] It reads as follows:

> Much also was done, under the auspices of [Edward III], for establishing our domestic manufactures; by prohibiting the exportation of English wool, and the importation or wear of foreign cloth or furs; and by encouraging clothworkers from other countries to settle here. Nor was the legislature inattentive to many other branches of commerce, or indeed to commerce in general: for, in particular, it enlarged the credit of the merchant, by introducing the statute staple; whereby he might the more readily pledge his lands for the security of his mercantile debts.
> And, as personal property now grew, by the extension of trade, to be much more considerable than formerly, care was taken, in case of intestacies, to appoint administrators particularly nominated by the law; to distribute that personal property among the creditors and kindred of the deceased, which before had been usually applied, by the officers of the

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[166] 1 *id.* at *263-65 (*italics added)*.

[167] Nelson & Pushaw, *Rethinking*, *supra* note 2, at 16.

[168] 1 CROSSKEY, *supra* note 2, at 101 & 2 *id.* at 1283 n.48.

[169] The Blackstone citation is adjacent to a reference to the same pamphlet in Nelson/Pushaw, as in Crosskey. 1 CROSSKEY, *supra* note 2, at 101; 2 *id.* at 1283 n.47. There is also an error common to the them: Each attributes the pamphlet to George Grenville, when in fact, it was written by Thomas Whately, Grenville's assistant. On Whately and his authorship of the pamphlet, see Rory T. Cornish, *Whately, Thomas (1726–1772), politician and author*, in THE OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004-05) (containing a short biography).

ordinary, to uses then denominated pious.[170]

However, this selection is at best ambiguous. The "branches of commerce" Blackstone refers to likely include only the concepts with which he immediately surrounded that phrase: export, immigration, and mercantile credit. Structurally, the phrase is as likely to include "intestacies" as "domestic manufactures," but intestacy was not commerce even under the broader definition.[171]

If, however, Blackstone did mean to label "domestic manufactures" a "branch of commerce," he did not necessarily mean it was commerce *per se*. Legal writers sometimes employed the term "branch" in the way we would use "root" – that is, as a *source* of commerce.[172] Thus, in Thomas Whateley's 1765 pamphlet, *The Regulations Lately Made Concerning the Colonies, And the Taxes Imposed Upon Them, Considered*[173] (sometimes erroneously attributed to George Grenville[174]), the author refers to sugar cane production and the consumption of luxuries as "Branch[es] . . . of Revenue."[175] Of course, sugar cane production and luxury goods are not "revenue," but they certainly can be sources of revenue. This use of "branch" to refer to both roots and offshoots – sources and outcomes – is another example of a Latinism in

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[170]WILLIAM BLACKSTONE, 4 COMMENTARIES *421.

[171]Thus, there were repeated federalist assurances that the law of decedent estates would be outside the national sphere – and *a fortiori* outside commerce. *See* 5 DOCUMENTARY HISTORY, *supra* note 2, at 568 (Nathaniel Peaslee Sargeant) (citing wills and administrators); 3 ELLIOT, *supra* note 1, at 40 (quoting Edmund Pendleton as stating at the Virginia ratifying convention that under the new Constitution Congress could not change Virginia's rules of descent); *id.* 620 (reporting James Madison, at the same convention, clearly implying that the national government would not have power over the law of descent); THE FEDERALIST, *supra* note 2, No. 29, at 141 (Alexander Hamilton, mocking the idea that the federal government will have control over the "rules of decent"); *id.* No. 33, at 160 (same).

[172]This was not always, or even usually, true, however. *See, e.g.*, Rex v. LeChevalier D'Eon, 3 Burr. 1513, 1528, 97 Eng. Rep. 995, 963 (referring to negotiable instruments as a branch of commerce); Planke v. Fletcher, 1 Doug. 251, 252, 99 Eng. Rep. 164 (K.B. 1779) (referring to shipping as a branch of commerce); Francis v. Wyatt, 1 Bl. W. 483, 485, 96 Eng. Rep. 279, 280 (K.B. 1764) (characterizing a public livery stable as a "branch of commerce").

Moreover, this usage is neither in Samuel Johnson's Dictionary nor in the Oxford English Dictionary. Neither, however, is the "broad" definition of commerce propounded by Professor Crosskey. *See* SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (unpaginated); 3 OXFORD ENGLISH DICTIONARY 552 (2d ed. 1989) (defining "commerce").

[173]WHATELY, *supra* note 2.

[174]*Infra* note 177.

[175]*Id.* at 71 (luxury linens) & 78 (sugar cane). *See also id.* at 45 (referring to beaver skins as an "Article of *American* Produce" and [apparently] a "Branch of *British* Manufacture") (italics in original), 50 (referring a whale fishery as a "Branch of Trade"); 55 (referring to naval stores as a "Branch of Trade"). Whately also used "branch" in a more modern sense to mean a "division." *Id.* at 78 (referring to a branch of manufacturing). *Cf. id.* at 88 (using "Branch of the Revenue" in a way that "branch" could mean either "source" or "division").

eighteenth century, for it parallels the double meaning of the common legal word *stirpes*.[176] However, when Whately used the term "commerce" alone – without "branch" – he employed it in the common sense of mercantile trade.[177]

In sum, almost all of Blackstone's references to economic "commerce" clearly partake of the narrow definition, and the few that do not are ambiguous at best.

2. *Other Treatises*

I examined the use of the term "commerce" and "merchant" in several other leading contemporary treatises. All yielded similar results.[178]

Insofar as I could find, Edward Coke did not define commerce in his *Institutes*, but his references to merchants all were closely connected with traffic and exchange.[179] In one passage he apparently distinguished merchants from agricultural and manufacturing workers.[180] As English cases had likened the circulation of commerce to the circulation of blood, Coke wrote that "trade and traffique is the livelihood of a merchant, and the life of the commonwealth. . . "[181]

Giles Jacob's *Lex Mercatoria or, the Merchant's Companion*[182] defined commerce as "Trade of

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[176]LEWIS, *supra* note 2, at 1760.

[177]*See, e.g.*, WHATELY, *supra* note 2, at 21 (referring to barter as the only "Commerce" among certain primitive Indians, although presumably not their only gainful economic activity); 64 (stating that America can produce "Provisions for Subsistence, Commodities for Commerce, and the raw Materials for Manufacturers to work with"); 89 (providing a parallel usage of "trade" and "commerce"); 91 (referring to "illicit Intercourse" as a kind of "Commerce"); & 96 (referring to illegal imports as "illicit Commerce").

Both Crosskey and Nelson/Pushaw cite Whately's pamphlet, which they erroneously attribute to George Grenville, as support for the view that commerce could mean all productive activities. As suggested by the text, I think they misunderstand Whately's meaning.

[178]Except, of course, with respect to the word "trader" when referring to the specific definition of that term in the bankruptcy statutes. *See infra* notes 206 & 207 and accompanying text.

[179]2 COKE, *supra* note 2, at 28 (referring to "trade and traffique" as the livelihood of a merchant). *See also id.* at 57 (connecting merchants with importing and exporting), 322-23 (connecting them with "trade and traffique"), 741 (connecting "merchant strangers" [aliens] with importing), and 743 (connecting merchants with "trade and traffique").

[180]2 COKE, *supra* note 2, at 668 (all lawfull [*sic*] arts, trades, and occupations, as taylor [*sic*], merchant, mercer, husbandman, labourer, and the like). *See also id.* at 507 (reporting on banishment of all Jews "saving merchants, and such as should get their living by the work of their hands").

[181]*Id.* at 28.

[182]GILES JACOB, LEX MERCATORIA OR, THE MERCHANT'S COMPANION (1729).

Buying and Selling of Goods."[183] The anonymous *General Treatise of Naval Trade and Commerce*[184] stated as follows:

> TRADE or Commerce is a Business or mutual Employment, arising from the Necessity Men are under of receiving from one another such Things as they are obliged to exchange for the Relief of their respective Necessities, and the Support of human Life, and is exercised in the Buying, Selling, Bartering and Exchanging of Wares and Commodities; and in a Naval Signification it extends to all Traffick or Merchandizing with other Countries.[185]

This work contained the same limitation on the definition of one who engages in commerce – a merchant – that appears in the legal dictionaries of the time.[186]

Windham Beawes' *Lex Mercatoria Rediviva* clearly distinguished the work of artificers – those who provided commodities – from commerce, which was the circulation and exchange of commodities:

> COMMERCE is almost as old as the Creation, and a very small Increase of Mankind proved its Utility, and demonstrated the natural Dependance our Species had upon one another: Their Employs were (by the Wise Disposition of Providence) suited to their Wants; and the diligent Discharge of the one (by his Blessing) rendered sufficient to supply the moderate Cravings of the other; and tho' Tilling of the Earth, or Feeding of Flocks, were the sole primevous Labours, yet (limited as they were) they could not be exercised by our first Parents, with that Comfort their great Creator designed them, without a mutual Correspondence and Traffick, as the Husband-man's Subsistance would have been poor without the Grasier's Help, and the latter's comfortless, under the Want of Corn, Fruits, and Pulse to his Milk; this led them to an Exchange of Commodities; and thus *Commerce* commenced in the Infant World.[187]

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[183] *Id.* at 389.

[184] *Supra* note 2.

[185] 1 GENERAL NAVAL, *supra* note 2, at 1.

[186] A Merchant, here in *England*, is one that buys and trades in any Thing: And as Merchandize includes all Goods and Wares exposed to Sale in Fairs or Markets, so the Word Merchant anciently extended to all Sorts of Traders, Buyers and Sellers. But every Man who buys and sells Goods is not at this Day under the Denomination of a Merchant; only those that Traffick in the way of Commerce, by Importation or Exportation, or carry on Business by way of Emption, Vendition, Barter, Permutation or Exchange, and which make it their Business to buy and sell, are esteemed Merchants.
1 GENERAL NAVAL, *supra* note 2, at 5-6.

[187] BEAWES, *supra* note 2, at 1.

Moreover, as did other authors, Beawes distinguished between merchants and artificers.[188]

The leading commercial law treatise at the time probably was Charles Molloy's *De Jure Maritimo.* Like other authors, Molloy paired commerce with trade and traffic.[189] Although one could find a hint of a broader definition in his prefatory comment that, "From whence it is that all Mankind (present or to come) are either Traders by themselves or others," he later became explicit that by commerce he meant exchange:

> Hence it is, that Men knowing each others [*sic*] Necessaries, are invited to *Traffick* and

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[188] *Id.* at 29 (erroneously paginated as page 1):

> THE Term Merchant (in Latin *Mercator*) or Trader, from *Tradendo*, as *Minshew* derives it, is in *England*, according to the general Acceptation of the Word, now confined to him who *buys* and *sells* any *Commodities in Gross*, or *deals in Exchange*; that *trafficks* in the Way of *Commerce*, either by *Importation or Exportation*; or that carries on Business by Way of *Emption, Vendition, Barter, Permutation*, or *Exchange*; and that makes a continued Assiduity or frequent Negociation in the Mystery of merchandizing his sole Business.
>
> It is true, that formerly every one, who was a Buyer or Seller in the Retail Way, was called a Merchant, and they continue to be deemed so still, both in *France* and *Holland*; but here Shopkeepers, or those who attend Fairs and Markets, have lost that Appellation.

One passage in Beawes book at first looks like it might support a broad economic definition of commerce. But it actually is a list of reasons why British commerce (in the sense of exchange) had been so successful: the commodities are copious and are high quality. Here is the passage:

> I shall in the Body of the Work speak of the *British Commerce* as it stands at present, and, in the mean Time, beg Leave to congratulate my Countrymen on their happy Situation for carrying it on, which is hardly to be equalled, not surpassed in any Country in the world. . .
>
> Her Lands may justly be counted, some of the most fertile, and their Products of Fruits, Provisions, &c. as plentiful and as good as any in *Europe*, and her Merchandizes more than other countries can boast of.
>
> Her different Counties, according to their Situation, produce Corn, and every Necessary of Life in Abundance, which, on many Occasions, have kept several of our Neighbours from starving.
>
> We have Hemp and Flax for the manufacturing our Linens and Canvas, now brought to great Perfection, and our Pastures feed an almost infinite Number of Cattle, which not only supply our Markets with excellent Food, but furnish us with fine Wools, and the best Leather in the World.
>
> Our Mines produce Iron, Lead, Tin, Copper, Coal, &c. in Abundance, and our Forests and Woods are so well stocked with Oak for Shipping, as seems to promise (under our well-regulated Laws) an inexhaustible Supply.
>
> Our Seas are well filled with their finny Inhabitants, which, according to the Steps lately taken by the Legislature for an Encouragement of our Fisheries, and ready Concurrence of our Merchants for Promoting so beneficial a Design, must prove productive of immense Riches to the Nation, besides occasionally providing comfortably for our Poor, which Advantages have for many Years past been reaped by our industrious Neighbours.

[189] *E.g.* MOLLOY, *supra* note 2, at iv ("traffick and commerce"); vi & viii ("trade and commerce").

> *Commerce* in the different Parts and Immensities of this vast World to supply each others Necessities, and to adorn the Conveniencies of human Life.[190]

Moreover, in his substantive discussion of merchants, he drew the same distinctions we have seen heretofore: merchants were those professionally engaged in "commerce," while manufacturers and the like were not merchants but "artificers." Molloy's entire defining section on merchants appears in the footnote.[191]

D. Abridgments and Digests

The eighteenth century saw a proliferation of digests, usually called "abridgments." These featured references to treatises and statutory as well as case law, but most of the references were from cases. The abridgments track pretty much the same material I already have quoted. The following comes from Matthew Bacon's abridgment:

> But these Privileges are not to be extended to every one who buys and sells; nor is he from thence, says *Molloy*, to be denominated a Merchant, which Appellation peculiarly belongs to him who trafficks in the Way of Commerce by Importation or Exportation; or otherwise, in the Way of Emption, Vendition, Barter, Permutation or Exchange; and who makes it his Living to buy and sell, and that by a continued Assiduity, or frequent Negotiation in the Mystery of Merchandizing; but those, who buy Goods to reduce them by their own Art or Industry in other Forms than formerly they were of, are properly called Artificers, not Merchants.[192]

Similarly, the 1780 edition of John Comyn's *Digest* stated:

> And, generally, every one shall be a Merchant, who trafficks by way of Buying and Selling, or Bartering of Goods or any Merchandize, within the Realm, or in Foreign

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[190] 1 MOLLOY, *supra* note 2, at iv.

[191] Those who have read earlier footnotes will find Molloy's language very familiar: Every one that buys and sells is not from thence to be denominated a *Merchant*, but only he who trafficks in the way of Commerce, by Importation or Exportation; or otherwise in the way of Emption [buying], Vendition [selling], Barter, Permutation, or Exchange, and which makes it his Living to buy and sell, and that by a continued Assiduity, or frequent Negotiation in the Mystery of *Merchandizing:* But those that buy Goods to reduce them by their own Art and Industry into other Forms than formerly they were of, are properly called Artificers, not Merchants: Not but Merchants may do and alter Commodities after they have bought them for the more expedite Sale of them, but that renders them not Artificers, but the same is part of the Mystery of Merchants; but Persons buying Commodities, though they alter not the Form, yet if they are such as sell the same at future Days of Payment for greater Price than they cost them, they are not properly called *Merchants*, but are *Usurers*, though they obtain several other Names, as *Warehouse-keepers*, and the like; but Bankers, and such as deal by Exchange, are properly called *Merchants.*
MOLLOY, *supra* note 2, at 319-20 (italics in original).

[192] 3 BACON, *supra* note 2, *Merchant and Merchandize* (unpaginated) (italics in original).

> Parts. *Sal*. 445.
>
> So, if a Man draw a Bill of Exchange, he will be a Merchant for that Purpose. *Vide Post*, (F. 4.)[193]

The general approach, therefore, is the same as we have seen. As I suggested earlier, the repetition of the same meanings, the same definitions, must have seared them into the minds of those founders with access to and interest in the subject.

VI. WHY THESE FINDINGS SHOULD BE NO SURPRISE

A. The Latinate nature of Eighteenth-Century English

One seeking to read intelligently the writings and debates of the eighteenth century must be prepared to know some Latin. These materials are filled with classical quotations[194] and blocks of untranslated Latin. This is particularly true of English judicial opinions.

Eighteenth century English tended to follow Latin models,[195] both because English was temporally closer to Latin, and because education was imbued heavily with literature written in that language.[196] A relevant symptom of the tie between Latin and eighteenth-century English is the connection between "commerce" and "*commercium*." The fact that the Latin word always denoted some sort of interchange[197] strongly suggests that its English counterpart was used that way as well.[198]

B. The Constitutional Text

As other writers have observed,[199] adopting a definition of "commerce" as broad as that proposed

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[193] 4 COMYNS, DIGEST, *supra* note 2, at 227 (italics in original).

[194] *See, e.g.*, Luke v. Lyde, 2 Burr. 882, 887, 97 Eng. Rep. 614, 617 (K.B. 1759) (reporting Lord Mansfield's unattributed quotation of Cicero, set forth *supra* note 124).

[195] *See* GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 93 (1979); MCDONALD, *supra* note 2, *passim* (discussing the Latinate English of the founding generation.).

[196] CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT (1994) (outlining the founders' devotion to the Greco-Roman classics and to the Latin language); Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807 (2002) (delineating classical influences).

[197] *Supra* note 95.

[198] *E.g.* 3 ELLIOT'S DEBATES, *supra* note 2, at 530 (George Mason, paraphrasing Virgil).
For this reason, as I have observed elsewhere, those are heavily handicapped who try to do constitutional interpretation without a working knowledge of the Old Tongue. Natelson, *General Welfare, supra* note 2, at 15 n.72.

[199] *E.g.* Epstein, *supra* note 2, at 1393-99.

by Professor Crosskey (or broader[200]) forces one to struggle vainly with the natural import of the Constitution's text. For one thing, if we read "Commerce among the several States" to mean "all gainful economic activity among the several States," then the clauses by which Congress is empowered to regulate commerce with "foreign Nations" and the "Indian Tribes" become either largely redundant or nonsensical.[201]

Even more seriously, if the Commerce Clause grants Congress power to regulate all economic activities, then some of Congress' other economic powers become surplus. To be sure, as Alexander Hamilton admitted, a very few phrases in the Constitution (such as the Supremacy and Necessary and Proper Clauses) *are* substantive surplus.[202] However, adopting the Crosskey definition of commerce leaves us with more of the document hanging useless.

For example, under the Crosskey interpretation, regulating bankruptcy would be a legitimate exercise of authority under the Commerce Clause. This would leave as surplus the express congressional power to adopt "uniform Laws on the subject of Bankruptcies throughout the United States."[203] This is more than a problem with form, since the English legal tradition thought of bankruptcy law as very distinct from, although affecting and benefitting,[204] commerce. Unlike commerce, which was governed mostly through the organic growth of the *lex mercatoria*, bankruptcy was created and regulated by statute.[205] Not surprisingly, the language in the two spheres was different. In the law of commerce, the word "trade" meant mercantile exchange. In the law of bankruptcy, the word "trader"[206] was defined to include many people engaged in gainful activity (e.g., manufacturers) who were not merchants.[207]

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[200]*Cf.* AMAR, *supra* note 2, at 107-08 (suggesting that the word in the Constitution means non-economic as well as economic interrelationships of all kinds among the states and with foreign nations).

[201]Epstein, *supra* note 2, at 1393-94; U.S. v. Lopez, 514 U.S. at 1643 (Thomas, J., concurring).

[202]THE FEDERALIST NO. 33, *supra* note 2, at 158 (Alexander Hamilton) ("[These clauses] are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers.").

[203]U.S. CONST. art. I, §8, cl. 4.

[204]WILLIAM BLACKSTONE, 2 COMMENTARIES *472 (stating, "at present the laws of bankruptcy are considered as laws calculated for the benefit of trade"); 4 COKE, *supra* note 2, at 277 (describing effect of bankruptcy on merchants and their trade).

[205]4 COKE, *supra* note 2, at 277-78 (describing contemporaneous bankruptcy law); WILLIAM BLACKSTONE, 2 COMMENTARIES *474-76 (same).

[206]Pursuant to 13 Eliz. I., c. 7 (1571).

[207]*See* Case of Bankrupts (Smith v. Mills), 2 Co. Rep. 25a, 76 Eng. Rep. 441 (K.B. 1589) (containing an exhaustive list of the professions considered and not considered "traders" within the meaning of the contemporaneous bankruptcy statutes); *See also* WILLIAM BLACKSTONE, 2 COMMENTARIES *474-77.

For more recent cases on the scope of the word "trader" within the meaning of the bankruptcy statutes, see *e.g.* Crisp v. Pratt, Cr. Car 549, 79 Eng. Rep. 1072 (K.B. 1639) (holding that an innkeeper, as such, is not a trader within the bankruptcy statutes); Crumpe v. Barne, Cr. Car 31, 79 Eng. Rep. 630 (K.B.

In addition to rendering nugatory the Bankruptcy Clause, the Crosskey definition of "commerce" would turn the Intellectual Property Clause[208] into surplus. It could have a similar effect on the power to build dockyards[209] to the extent done for economic purposes, and on the separate authority to "establish Post Offices and post Roads."[210] Indeed, the legal tradition saw both dockyard construction and the post office (like bankruptcy law) as aids to, but distinct from, commerce.[211]

If we add to Crosskey's definition of "commerce" his view that "among the several States" means "throughout the United States," then the damage to the text becomes even greater.[212] The legal tradition saw the power to regulate weights and measures as part of commerce-regulation.[213] Thus, its inclusion as a separate power makes sense only if authority to regulate "commerce among the several States" was limited to authority to regulate traffic between the states. Then a separate Weights and Measures Clause would extend congressional power on that subject into state interiors. Similarly, the legal tradition considered the

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1626) (holding that a shoemaker is a trader within the bankruptcy statutes); Dally v. Smith, 4 Burr. 2148, 98 Eng. Rep. 120 (K.B. 1768) (holding that a butcher is within the bankruptcy laws); Hankey v. Jones, 2 Cowp. 745, 98 Eng. Rep. 1339 (K.B. 1778) (Mansfield, C.J.) (drawing bills of exchange to pay large bills and reimbursing drawees with interest does not make one a trader within the bankruptcy laws); Hill v. Shish, 2 Shower. K.B. 512, 89 Eng. Rep. 1072 (K.B. 1687) (holding that goldsmiths were traders within the bankruptcy laws); Newton v. Trigg, 3 Mod. 327, 87 Eng. Rep. 217 (C.P. 1690) (holding that an innkeeper was not a trader for purposes of the bankruptcy statutes); Parker v. Wells, 1 Bro. P.C. 545, 1 Eng. Rep. 747 (H.L. 1787) (holding that a farmer who used his land to manufacture and sell bricks was a trader within the bankruptcy statutes); Saunderson v. Rowles, 4 Burr. 2064, 98 Eng. Rep. 77 (K.B. 1767) (Mansfield, C.J.): (holding that a "victualer" [restaurant owner] was not a trader for purposes of the bankruptcy laws since he didn't buy and sell on contracts).

See also BEAWES, *supra* note 2, at 487-88 (providing a list of persons who could be bankrupts) and 1 COMYNS, DIGEST, *supra* note 2, at 503-04.

My impression is that by the time of the founding a judicial reluctance had developed to include more non-merchants within the scope of the "trader," see, *e.g.*, *Saunderson*, *supra*, but non-merchant occupations were added when precedent so demanded. *See, e.g.*, *Parker*, *supra.*

[208]U.S. CONST. art. I, §8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

[209]U.S. CONST. art. I, §8, cl. 17 ("To exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of . . . dock-Yards").

[210]U.S. CONST. art. I, §8, cl. 7.

[211]*Supra* note 113 (post office distinct from commerce); *infra* note 220 (post office connected with commerce); *infra* note 221 (naval installations are aids to commerce).

[212]*Cf.* Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 194-95 (1924) (Marshall, C.J.) (noting that a construction allowing Congress to regulate purely internal commerce would defeat the purpose of the enumeration in the Commerce Clause).

[213]WILLIAM BLACKSTONE, 1 COMMENTARIES *265.

issuing and regulation of money as part of regulating commerce.[214] The Constitution's grant of authority to "coin Money, regulate the Value thereof, and of foreign Coin"[215] and to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States"[216] ensured that the Congress could govern the medium of exchange throughout the nation, not merely "among the several States." Adopt the Crosskey theory, however, and those powers become surplus as well. And if we adopt Professor Amar's theory that "commerce" means social intercourse of all kinds, the textual damage is even worse.[217]

Listing enumerated powers that become enervated by overly expansive interpretation of "commerce" reminds us of Justice Thomas' argument that the modern "substantial effects" test has similar results.[218] For that test renders surplus all enumerated powers over matters that substantially affect commerce: bankruptcy, intellectual property, money,[219] the post office, [220] forts,[221] weights and measures,[222] dockyards [223] – in other words, a very large chunk of Article I, Section 8. Intellectual honestly, therefore,

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[214]*Id.*

[215]U.S. CONST. art. I, §8, cl. 5.

[216]U.S. CONST. art. I, §8, cl. 6.

[217]His approach also turns some of Congress' other powers into surplus – *e.g.*, the "high seas" power, U.S. CONST art. I, §8, cl. 9, and the power to declare war, *id.*, cl. 10. Further, it creates irreconcilable conflicts. If Congress may regulate non-economic intercourse with foreign nations, then its powers are in direct conflict with the foreign affairs authority of the President. *Id.* art. II, §2, cl. 2. Further, the invasion portion of the Guarantee Clause, art. IV, §4, becomes problematic.

[218]United States v. Lopez, 514 U.S. 549, 588 (Thomas, J., concurring).

[219]The English legal tradition specifically connected money with the regulation of commerce. *See, e.g.*, An Information against Bates, Lane. 22, 23-24,145 Eng. Rep. 267, 268 (Exch. 1606) (referring to coinage as created in part for commerce and for the better security of merchants); Anonymous, 3 Salk. 157, 91 Eng. Rep. 750 (court and date not given) (referring to money as an aid to commerce); Case of Mines, 1 Pl. Com. 310, 75 Eng. Rep. 472 (Exch. 1568) (discussing the role of coin in promoting commerce); Le Case de Mixt Moneys, Dav. 18, 19, 80 Eng. Rep. 507 (K.B. [Ire.] 1604) ("money fuit invent, cibien [pour] facilitie de commerce").

[220]The English legal tradition also connected the post office with commerce, Lane v. Cotton, Carth. 487, 90 Eng. Rep. 880 (K.B. 1699) (stating that post offices were created "to advance trade and commerce for the benefit of the subject chiefly," *id.* at Carth. 488, 90 Eng. Rep. 881 and "for the ease and benefit of the subject in respect to commerce and trade," *id.* at Carth. 490, 90 Eng. Rep. 882. *See also* Rowning v. Goodchild, 3 Wils. K.B. 444, 450, 95 Eng. Rep. 1147, 1150 (1772) (referring to the benefit to "trade and commerce" from letter carrying), while holding that it was not itself commerce. *Supra* note 113.

[221]*Cf.* An Information against Bates, Lane. 22, 27, 145 Eng. Rep. 267, 271 (Exch. 1606) (referring to bulwarks and fortresses as created in part for commerce and for the better security of merchants).

[222]The English legal tradition connected this subject to commerce. *Supra* note 166.

[223]The English legal tradition connected naval installations to commerce. Corporation of Kingston upon Hull v. Horner, Lofft. 576, 583, 98 ER 807, 810-11 (K.B. 1774); The King v. The Dock

compels us to admit that such an interpretation is insupportable.

That the framers chose to enumerate so many economic powers separately – including some considered allied to commerce – thus confirms what we have discovered about the legal meaning of "commerce" at the time of the founding.

C. "Sexual Intercourse Among the Several States?"

It is beyond the scope of this paper to prove that "commerce" and "general commerce" could *never* refer to the economy as a whole. But to admit that it *might* be used that way, certainly is not to admit that the Constitution *does* use it that way.

To illustrate the point, recall that in the eighteenth century, "commerce" *could* mean "sexual intercourse."[224] Professor Crosskey argues, of course that "among the several States" means "throughout the United States," but I doubt if even he would read the Commerce Clause as authorizing Congress to regulate sexual intercourse throughout the United States."[225] Similarly, "commerce" *could mean* human social interaction generally, as in "The Duke had regular commerce with Queen Elizabeth and her court."[226] Yet surely the Constitution did not grant Congress authority to regulate all human relationships.[227] Professor Crosskey might distinguish these *reductiones ad absurda* by responding that the Founders were particularly concerned about economics. But of course the record shows they were very

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Company of Hull, 1 Term Report 219, 99 ER 1061 (K.B. 1786) (referring to "an Act of Parliament . . .for making and establishing Public Quays or Wharves at Kingston upon Hull, for the better securing His Majesty's Revenues of Customs, and for the benefit of Commerce"); An Information against Bates, Lane 22, 27, 145 ER 267, 271 (Exch. 1606) (referring to ports as aids to commerce).

[224]*Supra* notes 132 and accompanying text.

[225]No doubt by now the reader, assuming he has not wandered in more licentious directions, may be wondering about Justice Marshall's ringing statement in Gibbons v. Ogden, 22 U.S. 1 (1824): "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse." *Id.* at 199.

But it *was* no more – because traffic, commerce, and intercourse were all synonyms – whether one was referring to the economic, sexual, or social varieties. Justice Marshall was using a rhetorical device to drive home a point that was so obvious it should never have been contested at all. He did the same in several other leading opinions, inducing some modern readers to think there was some profound truth being enunciated with meaning beyond the immediate. I'm thinking, for example, of the phrase, "It is emphatically the province and duty of the judicial department to say what the law is" from Marbury v. Madison, 5 U.S. [1 Cranch] 137, 177 (1803), which is no more than an adaptation into simple English of the Latin-based word *jurisdiction.* Similarly: "we must never forget that it is a constitution we are expounding," McCullough v. Maryland, 17 U.S. 316, 407 (1819), which is merely an explanation for why the maxim *expressio unius est exclusio alterius* should not be applied in that particular context.

[226]*Supra* note 151.

[227]*Pace* Professor Amar, this position is clearly not tenable. *Cf.* AMAR, *supra* note 2, at 107-08 (extending the constitutional meaning of "commerce" to even non-economic relationships).

concerned about morality, religion, and other things, too.[228]

D. Prerevolutionary Colonial History

In the years before 1765, Parliament limited its principal intervention in colonial affairs to imperial commerce with a few supporting activities such as the post office. When Parliament sought to promote imperial agriculture and manufacturing, it did so mostly through trade laws rather than directly.[229] This was a familiar arrangement, and, the Americans thought, a successful one. So it was readily accepted by the leading colonial lawyer-pamphleteers of the 1760s – James Otis,[230] Daniel Dulany,[231] Richard Bland,[232] and John Dickinson[233] – all of whom argued for a similar divisions between central and colonial authority.[234]

In their arguments against Parliamentary taxation of the colonies, these pamphleteers sought to turn this former, practice legal division into a constitutional one. They were willing to accept Parliamentary jurisdiction over imperial trade and over certain closely-related affairs such as import duties

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[228]*See, e.g.*, 2 ELLIOT'S DEBATES, *supra* note 2, at 199-200 (reporting the discussion at the North Carolina ratifying convention on religion and morality); *id.* at 44, 90, 117-20, 148, 172 (reporting discussions at the Massachusetts ratifying convention on religion and morality); *id.* at 209, 217, 399, 402 (reporting discussions at the New York ratifying convention on religion and practical morality).

[229]See generally WHATELY, *supra* note 2 (discussing the use of trade laws in managing the imperial economy); Dickinson, *supra* note 2, at 28 (discussing how regulation of commerce had been used to promote the British economy) (Letter 5). *Cf.* supra note 170 and accompanying text (setting forth Blackstone's description of how manufacturing was improved in England by commercial regulations).

[230]OTIS, *supra* note 2.

[231]DULANY, *supra* note 2.

[232]BLAND, *supra* note 2.

[233]Dickinson, *supra* note 2.

[234]*See, e.g.*, DULANY, *supra* note 2, at 46-47:

> The Subordination of the Colonies, and the Authority of the Parliament to preserve it, have been fully acknowledged. Not only the Welfare, but perhaps the Existence of the Mother Country, as an independent Kingdom, may depend upon her Trade and Navigation, and these so far upon her Intercourse with the Colonies, that if this should be neglected, there would soon be an End to that Commerce, whence her greatest Wealth is derived, and upon which her maritime Power is principally founded. From these Consideration, the Right of the *British Parliament* to regulate the Trade of the Colonies, may be justly deduced. . .

See also Dickinson, *supra* note 2, at 7 & 37.

Bland's concession was grudging. BLAND, *supra* note 2 ("It must be admitted that after the Restoration the Colonies lost that Liberty of Commerce with foreign Nations they had enjoyed before that Time.")

and the post-office,[235] but opposed direct Parliamentary interference in internal colonial affairs. At the outside, of course, they argued only against internal taxation,[236] but eventually they claimed for American self-rule other aspects of the colonies' "internal police."[237]

In the 1770s, two later and more radical lawyer-propagandists, James Wilson and Thomas Jefferson, refused to concede to Parliament this commercial jurisdiction, contending that the colonies' sole connection with Britain was through a common Crown.[238] Yet Wilson at least was prepared to concede the authority over imperial commerce to the king, since commercial regulation was part of the royal prerogative.[239] Further, in 1774 the First Continental Congress promulgated as official policy a formula similar to those supported by the lawyer-pamphleteers: British control of commerce among entities in the empire; colonial assemblies' control of their "internal polity."[240]

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[235]OTIS, *supra* note 2, at 94 (tax on mariners; post office); DULANY, *supra* note 2, at 49-55 (supporting right of Parliament to regulate colonial post office, military in multiple colonies, and inheritance funds to pay commercial debts).

[236]*E.g.* OTIS, *supra* note 2, at 63 (opposing British taxation); DULANY, *supra* note 2, at 46 & 47 ("It is a common, and frequently the most proper Method to regulate Trade by Duties on Imports and Exports") and *passim* (opposing other British taxation); Dickinson, *supra* note 2, *passim* (opposing taxes imposed for the sake of raising revenue rather than regulating).

[237]BLAND, *supra* note 2 (claiming right of internal taxation and internal government); TREVOR COLBOURN, THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION 174-81 (1998 repr.) (1965) (discussing Bland's influence and ideas); Dickinson, *supra* note 2, at 4 (opposing Parliamentary mandates over the colonies); but see *id.* at 13 (acknowledging that British power to prohibit manufacture of iron and steel in colonies has not been contested, but not endorsing the power himself); THE POLITICAL WRITINGS OF JOHN DICKINSON, 1764-1774 173-77 (Paul Leicester Ford ed., Da Capo Press 1970) (1895) ("Resolutions Adopted by the Assembly of Pennsylvania Relative to the Stamp Act," claiming for colonies taxation power and trial by jury) and 193-96 ("A Petition to the King from the Stamp Act Congress," claiming for the colonies "full power of legislation" and trial by jury).

See also City of Boston, Instructions for their Representatives, in OTIS, *supra* note 2, at 107 (claiming for colonies the power to make local laws not repugnant to those of England).

[238]WILSON, *supra* note 2; THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (1774), available at http://www.yale.edu/lawweb/avalon/jeffsumm.htm.

[239]WILSON, *supra* note 2, at 34-35. *See also* Brownlow v. Cox, 3 Bulst. 32, 81 Eng. Rep. 27 (K.B. 1615) (Coke, C.J.) (quoting Lord Bacon to the effect that "The Kings prerogative hath four columns or pillars. . .The fourth, which concerns matters of commerce."); WILLIAM BLACKSTONE, 1 COMMENTARIES *263-65.

[240]*See* DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS, Oct. 14, 1774, available at http://www.yale.edu/lawweb/avalon/resolves.htm:

> **Resolved**, 4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British parliament, they are entitled to a *free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be*

The Articles of Confederation, ratified in 1781, departed from this formula in that they did not grant the central authority (Congress) power over inter-jurisdictional commerce.[241] The unsatisfactory nature of the results must have confirmed in Americans' minds the desirability of the pre-Stamp Act British Empire model. Accordingly, the Virginia General Assembly called for the conclave that became the Annapolis Convention of 1786, the goal of which was to be to formulate a plan of central commercial regulation.[242] The Annapolis Convention, in turn, adopted the resolution that led to the federal convention.[243] That conference created, with a few qualifications, [244] the division of power between local and central governments that the pre-Revolutionary lawyer-pamphleteers had recommended and the first Continental Congress had proclaimed. Any grant to the central authority of power to control "all gainful activity," therefore would have been a radical departure from what Americans had experienced and advocated previously.

E. Public Reception of the Commerce Clause and the Federalists' Representations of Meaning

Given the familiarity and comfort with the pre-Stamp Act British Empire model, it is no surprise that the Commerce Clause was uncontroversial with the ratifying public. You can sure that if any significant segment of the ratifying public – including anti-federalist lawyers – had read "The Congress shall have Power . . . To regulate Commerce" as "The Congress shall have Power . . . to regulate all interstate gainful Activities," it would have been hugely controversial. Yet a review of the records of the public ratification debate reveals almost no dissatisfaction with the grant to Congress of the commerce power; on the contrary, anti-federalists pronounced themselves quite satisfied with it.[245] To be sure, anti-

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> *preserved, in all cases of taxation and internal polity,* subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed: But, from the necessity of the case, and a regard to the mutual interest of both countries, *we cheerfully consent to the operation of such acts of the British parliament, as are bona fide, restrained to the regulation of our external commerce,* for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members; excluding every idea of taxation internal or external, for raising a revenue on the subjects, in America, without their consent.

(Emphasis added.)

[241] *See generally* ARTS. CONFED., available at http://www.yale.edu/lawweb/avalon/artconf.htm.

[242] *Resolution of the General Assembly of Virginia, January 21, 1786, Proposing a Joint Meeting of Commissioners from the States to Consider and Recommend a Federal Plan for Regulating Commerce,* available at http://www.yale.edu/lawweb/avalon/const/const03.htm.

[243] *See Proceedings of Commissioners to Remedy Defects of the Federal Government,* Sept. 11, 1786, available at http://www.yale.edu/lawweb/avalon/annapoli.htm.

[244] *E.g.*, in the realm of taxation. U.S. CONST. art. I, §8, cl. 1 (granting Congress the power to tax).

[245] *See, e.g.*, 2 ELLIOT'S DEBATES, *supra* note 2, at 124 (reporting Sam Adams, then an antifederalist, praising the Commerce Clause at the Massachusetts ratifying convention); Richard Henry Lee, *Letters from the Federal Farmer* in EMPIRE AND NATION 117 (2d ed. 1999) (stating that the commerce power and the power to regulate imposts together would give the union sufficient power). *See generally* DOCUMENTARY HISTORY, *supra* note 2 (revealing lack of controversy over the Commerce

federalists frequently charged that under the new Constitution Congress could tyrannize over America. But they almost invariably relied on *other* provisions in the instrument to support their argument: the General Welfare Clause,[246] the Necessary and Proper Clause,[247] and a few others.[248]

That is the negative evidence available on the point. Here is the positive: In response to anti-federalist claims that the Constitution would create a central government of excessive reach, leading federalist spokesmen – most of them lawyers – actually provided to the public lengthy lists of powers that, outside the capital district, only the states would enjoy. I have dubbed these the "enumerated powers of states."[249] Some of these reserved powers were non-economic: governance of religion, training the militia and appointing militia officers, control over local government, crimes *malum in se* (except treason, piracy, and counterfeiting), maintenance of state justice systems, and regulation of family affairs.[250] But others fit easily within the Crosskey definition of commerce: real property titles and conveyances; inheritance; the promotion of useful arts in ways other than granting patents and copyrights; control of personal property outside of commerce; governance of the law of torts and contracts, except in suits between citizens of different states; education; services for the poor and unfortunate; licensing of public houses; roads other than post roads; ferries and bridges; fisheries, farms, and other business enterprises.[251]

Since federalists often wrote pseudonymously, we do not know the identity of all those who made these published representations. But most of those who are known were leading, rather than peripheral, figures in the federalist cause. They included James Madison; Alexander Hamilton; James Wilson; Edmund Pendleton, chancellor of Virginia; James Iredell, North Carolina attorney general and judge and later U.S. Supreme Court Justice; John Marshall; Alexander Contee Hanson, a Congressman from Maryland; Nathaniel Peaslee Sargeant, a Justice (and shortly thereafter, Chief Justice) of the Massachusetts Supreme Judicial Court; Alexander White, a distinguished Virginia lawyer, delegate to his state's ratifying convention, and later a U.S. Senator. Interestingly, Tench Coxe, whom supporters of the Crosskey view frequently cite as using a broad meaning of commerce,[252] was the single most prolific public enumerator of

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Clause).

[246]*See* Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 30-38 (2003).

[247]Natelson, *Necessary and Proper*, *supra* note 2, at 292-96.

[248]*See, e.g.*, 3 ELLIOT'S DEBATES, *supra* note 2, at 51 (Patrick Henry, at the Virginia ratifying convention, criticizing U.S. CONST. art. I, §8, cl. 17, for creating a capital district under the full control of Congress).

[249]Natelson, *Enumerated*, *supra* note 2.

[250]*Id.* at 481-85.

[251]*See* Natelson, *Enumerated*, *supra* note 2, at 481-88. In addition, see Roger Sherman to Unknown Recipient, Dec. 8, 1787, in HUTSON, SUPPLEMENT, *supra* note 2, at 288 (stating that state courts will have exclusive jurisdiction over "all causes between citizens of the same State, except where they claim lands under grants of different states").

[252]Nelson and Pushaw, *Rethinking*, *supra* note 2, at 20 n.76; 1 CROSSKEY, *supra* note 2, at 109-10; W. HAMILTON, 169-73.

powers – economic and otherwise – that the federal government would *not* have.[253]

To my knowledge, no one has made any attempt to address why, if commerce means all economic activity, so many respected individuals – nearly all of them prominent lawyers of sterling reputation[254] – could place so many economic activities outside the federal sphere.

Land law was on everyone's list of reserved powers, even though, as Daniel Dulany had pointed out, land economics have a substantial effect on commerce; indeed, Dulany had justified Parliamentary regulation of real estate inheritance because of that effect.[255] In fact, the interdependence of commerce and real estate was well known and frequently attested.[256] Yet the federalists were absolutely clear that real estate law was a matter entirely outside federal authority. Such representations are as inconsistent with the Crosskey interpretation of "commerce" as they are with the modern "substantial effect" test.

VII. THE COASEAN CONSTITUTION

Given the state of the historical record, why have so many intelligent scholars been confused as to actual scope of the Commerce Clause? Part of the answer, of course, is emotional: Most of these scholars support, or at least accept, the modern regulatory state,[257] and would prefer to be free from the disquiet that arises from the conviction that it is, in large part, unconstitutional.

I believe, however, that another reason is a common pattern of modern thought. Modern writers tend to assume either one of two things about the founders:

(1) The Founders conceptually and legally divided commerce from manufacturing, agriculture, and other activities because those fields were not as interdependent as they are today. Therefore, modern conditions of interdependence require us to re-interpret their

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[253]*See* Natelson, *Enumerated*, *supra* note 2, at 479-89 (identifying the contributions of each of these individuals).

[254]Of those on the list, only Coxe was not a lawyer. He is described by Professors Nelson and Pushaw as "a distinguished economist." Nelson and Pushaw, *Rethinking*, *supra* note 2, at 20 n.76. He was, in fact, a Philadelphia businessman, and a friend of Hamilton. *See generally* JACOB COOKE, TENCH COXE AND THE EARLY REPUBLIC (1978).

[255]DULANY, *supra* note 2, 49-52 (defending British statutory alteration of colonial inheritance laws because colonial assemblies had altered those laws in a way to prevent the payment of commercial debt).

[256]8 DOCUMENTARY HISTORY, *supra* note 2, at 345, 349 ("State Soldier") (asserting, "Commerce then, freed from the oppressive hand of state jealousy and local interest, traversing the whole continent and seeking your commodities, would stamp a higher value on all your property."); *id*. (same author) (referencing, "that extensive commerce which alone can ensure a lasting value to our property"). *See also* THE FEDERALIST NO. 12, *supra* note 2, at 55 (Alexander Hamilton) (discussing how the circulation of commerce benefits the "laborious husbandman, the active mechanic, and the industrious manufacturer").

[257]*See, e.g.*, Pushaw, at 716-17 (criticizing the policy implications of returning to a narrow understanding of the Commerce Clause).

work.

(2) The founders did recognize that interdependence, so they must have intended to treat powers of economic governance as a unity.

In my experience, at least, the first assumption is the more common.[258] The second is the Crosskey view.[259] Both are incorrect.

They are incorrect because Anglo-American lawyers and lawgivers both (a) recognized the interdependence of commerce with other economic activities[260] *but (b) still severed it conceptually and legally from other economic activities.*[261] In other words, they consciously engaged in what Justice Souter has disparaged as "categorical formalism."[262]

One must not assume that this was the product of ignorance or because the Founders lived in a world in which discrete economies were bounded by jurisdictional lines. In fact, the participants in the

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[258]*See, e.g.*, Jefferson B. Fordham, *The States in the Federal System – Vital Role or Limbo?* 49 VA. L. REV. 666, 668 (1963) (stating, "Ours is now an interdependent national economy. Effective regulation must be country-wide in extent."); William P. Murphy, *State Sovereignty and the Constitution – A Summary View*, 33 MISS. L.J. 353, 358 (1962) (arguing, "In a complex and interdependent industrial society, . . . what was local yesterday today has assumed dimensions and effects which transcend state boundary lines. Much of the increased activity of the national government in this century has resulted from the fact that modern society generates problems which are beyond the capacity of individual states to control.") *See also* Karl A. Crowley, *States' Rights and Responsibilities and the Federal Constitution*, 54 TEX. L. REV. 76, 87 (1935) (expressing similar sentiments in address to state bar association).

See also United States v. Morrison, 529 U.S. 598, 644 (2000) (Souter, J., dissenting) ("If we now ask why the formalistic economic/noneconomic distinction might matter today, after its rejection in *Wickard*, the answer is not that the majority fails to see causal connections in an integrated economic world.").

See also United States v. Lopez, 514 U.S. 549 (1995) (Kennedy, J., concurring):

> That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy. . . Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.

Id. at 574.

[259]*See also* Nelson & Pushaw, *Critique, supra* note 2, at 707 (arguing that because the founding generation saw economic activity [commerce in the broad sense] as an "organic whole," they therefore provided for it to be regulated as an organic whole). *See also* W. HAMILTON, *supra* note 2, at 23-24 & 62 (discussing the interrelationship between commerce and other activities in the founders' times); AMAR, *supra* note 2, at 107-08 (arguing that commerce included all social intercourse and suggesting that the finished Constitution embodied the approach of the Virginia Plan).

[260]*See, e.g.*, *supra* notes 170-77 and accompanying text (discussing Thomas Whately's pamphlet and a passage in Blackstone's *Commentaries*).

[261]*Supra* Part V.

[262]United States v. Morrison, 529 U.S. 598, 644 (2000) (Souter, J., dissenting).

constitutional debates understood that foreign affairs, commerce, and the economy in general were intimately related as a matter of fact. The surviving records of the debates contain numerous statements acknowledging – trumpeting, really – the interdependence of commerce, manufactures, agriculture, land prices, foreign trade, and the like.[263]

Early in the federal convention, the delegates leaned toward creating a constitutional reality to match the economic reality – the scheme of "externality federalism" embodied in the Virginia Plan. The Virginia Plan would have granted Congress plenary power to regulate the economy, and all negative externalities spilling over state lines, that is: (1) all powers that Congress had enjoyed under the Confederation, plus (2) power over matters in which "the separate states are incompetent," plus (3) powers necessary to "the harmony of the United States," plus (4) a plenary veto over state legislation.[264]

Ultimately, however, the federal convention – and even more emphatically the ratifying public – rejected that approach.[265] They chose instead a division of sovereignty more familiar to them and one they could sell to the ratifying public. They chose the route suggested by the colonial lawyer-pamphleteers, who had proposed a constitutional division of authority between those who regulated "commerce" (meaning only economic trade and intercourse[266]) and those who governed the remainder of the economy,

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[263]The material that follows is drawn from Natelson, *Enumerated*, *supra* note 2. I have foresworn sentence-by-sentence citation, because that article is short, and the following summary draws from all parts of it. *See also* U.S. v. Lopez, 514 U.S. 549, 590 (Thomas, J., concurring) (providing other examples of the Founders' understanding of an interrelated economy).

[264]1 FARRAND, *supra* note 2, at 21.

[265]There have been occasional suggestions that the ultimate proposal for enumerated powers represented merely a translation of the Virginia Plan, see, *e.g.*, AMAR, *supra* note 2, at 108n, but they are not very convincing. First, if the goal was to adopt the power scheme in the Virginia Plan, then there would be no need to alter the wording so radically. Second, the federalists' subsequent public enumeration of state powers is utterly inconsistent with the Virginia Plan's scheme, and it is as morally certain as any historical speculation can be that nothing like the Virginia Plan ever would have been ratified. *See* Natelson, *Enumerated*, *supra* note 2, at 472-89 (detailing the nationalists' retreat from the "externality federalism" of the Virginia Plan).

[266]*See, e.g.* Dickinson, *supra* note 2, at 8-9 (Letter 2):

> *All before*, are calculated to regulate trade, and preserve or promote a mutually beneficial intercourse between the several constituent parts of the empire; and though many of them imposed duties on trade, yet those duties were always imposed *with design* to restrain the commerce of one part, that was injurious to another, and thus to promote the general welfare.

See also id. at 22 (Letter 4):

> Commerce was at a low ebb, and surprising instances might be produced how little it was attended to for a succession of ages. The terms that have been mentioned, and, among the rest, that of "tax," had obtained a national, parliamentary meaning, drawn from the principles of the constitution, long before any *Englishman* thought of *imposition of duties, for the regulation of trade*.

See also id. at 28 (Letter 5) ("But in more modern ages, the spirit of violence being, in some measure, if the expression may be allowed, sheathed in commerce, colonies have been settled by the nations of *Europe* for the purposes of trade.")

even while recognizing the profound impact each had on the other.[267] With the safeguard of the Bill of Rights promised, the ratifying public assented.

That there was a conscious decision to divide legally what was connected economically is difficult for some modern commentators to accept – particularly those who want government to swat at every buzzing externality. But through hard experience the founding generation had gained an insight rediscovered in modern times by Nobel Laureate Ronald Coase:[268] sometimes it is more trouble to swat an externality than to suffer it.

In the debate of 1787-91 the founding generation considered at length the benefits and costs of "externality federalism." They decided that the cost – the inefficiencies of centralized government and the risks posed to personal freedom – was too high to justify the benefits. Just as in your daily life, you avoid calling the cops merely because the neighbors' dog strays onto your land, so the founding generation accepted certain constitutional incongruities so as to retain the advantages of federalism.

VIII. CONCLUSION

In this article I have inquired into the meaning of the legal term "commerce" at the time the Constitution was written, debated, and ratified. I consulted all reported English court cases from the sixteenth, seventeenth, and eighteenth centuries; all of the leading abridgments and digests of English law; prominent legal treatises; popular legal dictionaries; and pamphlets written by prominent American and British attorneys on the dispute between the colonies and the mother country.

In these sources, the word "commerce" nearly always has an economic meaning. When used economically, the word was bound tightly with the *lex mercatoria* and the sort of activities engaged in by merchants: buying and selling products made by others (and sometimes land), associated finance and financial instruments, navigation and other carriage, and intercourse across jurisdictional lines. I

(All italics in original)

See also BLAND, *supra* note 2 (equating commerce with trade: "Why is the Trade of the Colonies more circumscribed than the Trade of Britain? . . . Their Commerce ought to be equally free with the Commerce of Britain").

Compare OTIS, *supra* note 2, at 85 (distinguishing traders from manufacturers); Dickinson, *supra* note 2, at 24 (distinguishing external taxes, for regulation of trade, from internal taxes on manufactures); 28 (referring to fact that commerce has grown "in more modern ages," although presumably earlier ages had economic activity); 31n (quoting a passage listing "trade and commerce, agriculture and manufactures").

See DULANY, *supra* note 2, at 36 (setting forth similar distinctions).

See also City of Boston, *Instructions for their Representatives,* in OTIS, *supra* note 2, at 104 (distinguishing, apparently, trade from manufacture).

[267]*E.g.*, Dickinson, *supra* note 2, at 8n (citing a statute regulating imports and exports , which statute "forms the foundation of the laws relating to *our* trade." The statute recited among its purposes the stimulation of manufacturing and employment in manufacturing).

On the wide American recognition of the interrelationship of commerce with the rest of the economy, see *supra* note 263 and accompanying text.

[268]RONALD H. COASE, THE FIRM, THE MARKET, AND THE LAW 20-30 (1988).

uncovered almost no evidence that there was a predominant legal meaning, or even a common legal meaning, that included all gainful economic activities. I also examined a few instances sometimes cited as illustrations of a broader definition, and found each ambiguous at best. Thus, when used in legal discourse, "commerce" did not include agriculture, manufacturing, mining, *malum in se* crime, or land use. Nor did it include activities that merely "substantially affected" commerce; on the contrary, the cases include wording explicitly distinguishing such activities from commerce.

Lawyers drew a conceptual and legal boundary between commerce and other economic activities in full recognition that in the real world these very much affected each other. This study has provided additional support for the conclusion that, for reasons of policy and politics, the founding generation inserted this conceptual and legal boundary into the Constitution. The clear inference from these findings collectively is that the Commerce Clause was designed to give Congress jurisdiction over the law merchant insofar as it pertained to inter-jurisdictional activities. This was the same jurisdiction that pre-Revolution American pamphleteers had conceded to Parliament.

I listed several reasons why these findings should come as no surprise. These include (1) the close connection, in the eighteenth century, between the English word "commerce" and its Latin analogue "*commercium,*" which is *always* used in the sense of "intercourse," (2) the text of the Constitution and the absurd textual results that follow when "commerce" is given a broad meaning, (3) the uncontroversial nature of the Commerce Clause during the ratification debates, and (4) the public representations as to the limits of federal power proffered by leading federalists, most of them distinguished lawyers, during those debates.

Some will object to these findings on practical grounds. In arguing against Professor Barnett's similar conclusions, Professor Pushaw has asked, "Does anyone seriously believe that Congress or the Court will, or should, dismantle the entire [post-New Deal] Commerce Clause framework?"[269] Presumably, this means the findings are practically irrelevant, and so should not be published. Professor Pushaw then quoted Robert Bork: "It appears that the American people would be overwhelmingly against such a change."[270] Presumably, this means the findings are unpopular, and so should not be published, and any court decisions that might be based on them would be unpopular and so should not be issued.

I believe it is a sufficient answer to such concerns that policy preferences should not affect the search for historical truth – or for any other kind of truth. My explorations frequently lead to constitutional results I find distasteful, but that is no reason to suppress the results. The reputation of legal history is already bad enough without my compromising it further.[271]

For those not satisfied with that answer – who think that such an attitude partakes too much of

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[269]Pushaw, *Methods*, *supra* note 2, at 1201.

[270]*Id.* at 1202. *Cf.* Nelson & Pushaw, *Critique*, *supra* note 2, at 699 (calling the Barnett conclusions, which are much like mine, "radically destabilizing").

[271]Among the many criticisms of "lawyer's legal history" – the distortion of historical methods and findings to serve advocacy purposes – one of the most colorful is that of Professor Morton Horwich: "The main thrust of lawyer's legal history, then, is to pervert the real function of history by reducing it to the pathetic role of justifying the world as it is." Morton J. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275, 281 (1973).

"*fiat justitia, ruat coelum*"[272] – let me suggest two other possible responses.

First, as to whether such findings make any difference: Rapid constitutional change does, in fact, happen from time to time, and may take unexpected directions. The New Deal revolution itself is an excellent example. Within the space of a decade, a federal government with clearly limited economic powers became a government of almost plenary economic powers – a development unthinkable a few years earlier. More recently, we have seen a worldwide mega-trend toward decentralization and economic freedom, resulting in previously unthinkable outcomes: the collapse of European Communism; sweeping Thatcher-style reforms in Britain, New Zealand, Ireland, Israel, and elsewhere; devolution of power from central to regional authorities in Britain and elsewhere; a rush toward capitalism in China; the division of Czechoslovakia into two nations, Yugoslavia into five, and the USSR into fifteen. Meanwhile, the principal efforts in the other direction, such as the drive for a European Constitution, have foundered. In this respect, one could argue that the United States is lagging behind the trend, and that it eventually will catch up, and when it does catch up, people will be looking for reasons – including constitutional reasons – to justify it.

Second, as to Judge Bork's comment about the presumed popularity of the post-New Deal regulatory state: If it really is true that the American people overwhelming favor the federal regulatory state *in toto* (as opposed to favoring particular programs), then findings like those in this article present no threat at all. Even if the Supreme Court were to adopt them, they would do no harm, because corrective constitutional amendments would sail through quickly. I have no doubt, for example, that if an originalist Supreme Court struck down the Civil Rights Act of 1964, a saving amendment would be adopted in a matter of weeks. As indeed it should be.

However, I do not think the most important concern among advocates of the regulatory state is that the American people would object to originalist court decisions. I think most of the concern is among those who like the regulatory state and who have a sneaking suspicion that the American people might readily accept, even appreciate or be relieved at, such decisions. Recent history has shown that even when individuals benefit from particular regulatory or welfare programs, they often perceive the collective contraption to be a negative sum game. Under such circumstances people can be induced to part with their favorite programs so long as others are induced to part with theirs.[273]

I emphasize again, that such considerations are not mine; they are offered for those for whom legal scholarship is principally a consequentialist endeavor. For my purposes, it is enough to say that, from an originalist point of view, one can argue that cases like *Carter Coal Co.*[274] and *Schechter Poultry*[275] were rightly decided after all.

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[272]"Let justice be done though the heavens fall."

[273]Roger Douglas, the finance minister who was the principal architect of New Zealand's reforms, notes that a hallmark of successful economic liberalization is rapid change, across the board, in which everyone participates. ROGER DOUGLAS, UNFINISHED BUSINESS 220-27 (1993) (describing lessons from economic liberalization in New Zealand).

[274]Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[275]A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).