

THE ORIGINAL (?) PUBLIC (?) MEANING OF “COMMERCE”

Mark R. Killenbeck*

The primary claim of the “new originalism” is incredibly seductive. As the always eloquent Randy Barnett explains, this technique simply “seeks the meaning actually communicated to the public by the words on the page.”¹ As a result, troubling questions that previously required subjective attempts to “channel” the Framers have now become “empirical” inquiries.² Rather than casting about for a favorite source and a copacetic quotation, individuals interested in what the Constitution actually, really, truly means can diligently pursue “the objective meaning of the text at a particular point in time, rather than a *counterfactual* reconstruction of the subjective intentions of an individual or group.”³ So, for example, “commerce”—for the purposes of understanding congressional power to “regulate” it “among the several states”—is “the trade, traffic, and transportation of things from one place to another.”⁴ Nothing less, and certainly nothing more.⁵

This has tremendous initial appeal for all sorts of reasons. It’s objective. It adheres to the text. It’s grounded in history. Above all else, it places key aspects of constitutional interpretation in the hands

* Wylie H. Davis Distinguished Professor, University of Arkansas School of Law. Kudos to the organizers and participants in this Symposium, all of whom made it an extraordinarily enriching experience. Special thanks to the editors and staff of the *Journal*, who have been a delight to work with. Special thanks to three individuals I have known for a long time who have been patient with and supportive of my efforts to puzzle through these questions: Jack Rakove, Joel Goldstein, and Randy Barnett. That said, this Article’s flaws (likely many) and virtues (hopefully a few) are mine alone.

1 Randy E. Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411, 413 (2013).

2 Compare Randy E. Barnett, *The Relevance of the Framers’ Intent*, 19 *HARV. J.L. & PUB. POL’Y* 403, 405 (1996) (“One may think of this as a type of constitutional ‘channeling’ in which originalist clairvoyants ask: ‘Oh Framers, tell us what would you think about the following law?’”), with Barnett, *Gravitational Force*, *supra* note 1, at 415 (“[T]he New Originalism . . . seeks to discover an empirical fact about the world.”).

3 Barnett, *supra* note 1, at 415.

4 Randy E. Barnett, *Jack Balkin’s Interaction Theory of “Commerce,”* 2012 *U. ILL. L. REV.* 623, 631–32 (2012).

5 Keith E. Whittington, *The New Originalism*, 2 *GEO. J.L. & PUB. POL’Y* 599, 609 (2004) (“The new originalism . . . requires judges to uphold the original Constitution—nothing more, but also nothing less.”).

of the individuals most concerned—“We the People”—rather than in the hands of “tyrants,” whatever their description.⁶ Indeed, it is tempting to call it the “by damn I can prove it” school of interpretation.

Unfortunately, my reading of the pertinent records tells me that there are serious problems with this approach. These are especially troubling given my historical bent, practiced without the formal training of a historian, but with an historian’s inclinations to adhere to “the cruel tyranny imposed by . . . respect for the authority of documents.”⁷

I am not at all convinced that the individuals whose words and actions matter the most for these purposes would accept either the new originalism’s premise or many of the conclusions that follow from its application. Like my friend, Jack Rakove, when I want to puzzle out what the Founding generation was about, I much prefer the company of the persons who actively wrote, debated, ratified, and implemented the Constitution, as opposed to the views and understandings of a counterfactual “Joe the Ploughman,”⁸ the new originalism’s “reasonable speaker of English . . . at the time.”⁹

I have spent a fair amount of time reading the words of the Framers and Founders and examining their actions. The individuals who wrote the text—many of whom played key roles in the subsequent ratification debates—did not believe that they were writing and recommending a document whose meaning became fixed at the point it was ratified. I am not suggesting that they did not have particular things and specific consequences in mind. They did, and many aspects of those expressed “meanings” command respect. But, these individuals also understood that framing and ratification were simply

6 Justice Antonin Scalia argues that these should be matters of “law,” rather than of an “unexpressed intent” that risks becoming “tyrannical.” A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW: AN ESSAY BY ANTONIN SCALIA 17 (Amy Gutmann ed., 1997). He and Bryan Garner, in turn, claim that “Originalism is the *only* approach to [the] text that is compatible with democracy” and “the only objective standard of interpretation even competing for acceptance.” ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 82, 89 (2012).

7 Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 586 (2011).

8 *See generally id.* (analyzing the use of an “imaginary originalist reader who never existed historically”). For a variation on this theme, see Larry Alexander, *Originalism, or Who Is Fred?*, 19 HARV. J.L. & PUB. POL’Y 321, 321–22 (1996) (“[O]ur constitutional presuppositions, which are just a set of norms we all share and are not themselves items to be interpreted, select Fred as the person whose recorded determinations shall be authoritative.”).

9 Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001).

necessary first steps in what many characterized as a continuing “great experiment” whose specific parameters and ultimate consequences were uncertain.¹⁰

More to the point, the available record simply does not support many of the conclusions that the new originalists reach about key constitutional provisions. So, for example, my reading of the record leads me to disagree, respectfully, but firmly, with the views on the Commerce Clause taken by new originalism’s major academic proponents and, for that matter, originalism’s adherents on the Supreme Court, be they “new,” “faint-hearted,” or otherwise.¹¹ These conflicts are not simply matters of perspective and do not depend on whether one adheres to a national or state-centric vision. Rather, these are matters of both actual record and interpretive technique, influenced by specific details and, in particular, how one views the timeframe within which the inquiry should be conducted.

Or, at least, so I believe and will now try to explain, with two important caveats. First, I do not for a moment pretend that I am doing justice to complexities and nuances in the extensive literature both embracing and responding to the new originalism.¹² More importantly, I neither discuss nor address the issues posed by the distinction many new originalists draw between constitutional interpretation and constitutional construction.¹³ Rather, my aims are more

¹⁰ For a discussion of the “experiment” metaphor and its implications, see Mark R. Killenbeck, *Pursuing the Great Experiment: Reserved Powers in a Post-Ratification, Compound Republic*, 1999 SUP. CT. REV. 81 (1999).

¹¹ Justice Scalia, for example, once described himself as a “faint-hearted originalist,” a characterization he now repudiates. Compare Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (“I hasten to confess that in a crunch I may prove a faint-hearted originalist.”), with MARCIA COYLE, *THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION* 165 (2013) (noting that in a 2011 interview, “Scalia . . . ‘recanted’ being a ‘faint-hearted originalist’”). The impetus for the original statement was the likelihood that strict adherence to originalism would produce harsh results, such as approval of flogging as a punishment for a crime. By “recanting,” Justice Scalia signaled his willingness to accept where originalism took him, stressing that a given practice (e.g., the “notching of ears”) may be “a stupid idea,” but “not unconstitutional.” COYLE, *supra* at 165.

¹² For a readable outline of the complexities and varieties of originalism today, see Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 12 (Grant Huscroft & Bradley W. Miller eds., 2011).

¹³ See, e.g., Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 100–03 (2010) (discussing how “the linguistic meaning of an authoritative legal text”—interpretation—is paired with the “legal effect” of “the semantic content of a legal text”—construction). My reading of the Founding suggests that the application of the text via the political process deserves independent consideration. Then again, I don’t do theory, and this may simply mean that I don’t understand what those who do are talk-

modest as I try to answer two questions. First, does the new originalism square with certain key assumptions that informed the drafting and ratification of the Constitution? Second, how do those assumptions impact application of new originalism insights on one of the most contentious and important current constitutional questions, what it means to “regulate” “commerce.”¹⁴

I

The new originalism’s primary claim is that we can and should recover “the objective meaning that would be understood by a reasonable person in the relevant community of discourse.”¹⁵ There is a great deal to be said for this. The “community of discourse” during ratification was indeed an assemblage that included Joe the Ploughman and his fellow citizens, individuals who both witnessed and participated in one of history’s most remarkable political transformations. Described by one contemporary observer as “a spectacle never before displayed among men, and even yet without a parallel on earth,”¹⁶ late eighteenth-century constitutional and political debates in this nation were the province

not of the learned and the wealthy only, but of the great body of the people; even a large portion of that class of the community which is destined to daily labour, having free and constant access to public prints, receiving regular information of every occurrence, attending to the course of political affairs, discussing public measures, and having thus presented to them constant excitements to the acquisition of knowledge, and continual means of obtaining it.¹⁷

ing about. Cf. Lawrence B. Solum, *We Are All Originalists Now*, in CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 3–4 (2011) (“[C]onstruction can also occur when Congress or the president acts in ways that require implementation of the Constitution.”).

14 Spoiler alert. I will discuss only in passing the Court’s most recent Commerce Clause extravaganza, *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), within which the conservative wing of the Court did violence to accepted understandings of the Clause in ways I hope will become the equivalent of prior “one off” rulings. See, e.g., *Bush v. Gore*, 531 U.S. 98, 109 (2000) (“Our consideration is limited to the present circumstances, for the problem of equal protection in election processes . . . presents many complexities.”).

15 Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 621 (1999).

16 2 SAMUEL MILLER, A BRIEF RETROSPECT OF THE EIGHTEENTH CENTURY: PART FIRST; IN TWO VOLUMES 253 (New York, T. and J. Swords 1803).

17 *Id.* Newspapers played a key role in the ratification debates and, as Robert Rutland notes in an insightful discussion, “many a foreign visitor was taken aback to find that chambermaids, blacksmiths, farmers, and shopkeepers were also readers of newspapers.” Robert Alen Rutland, *The First Great Newspaper Debate: The Constitutional Crisis of 1787–88*, 97 PROC. AM. ANTIQUARIAN SOC’Y 43, 44 (1988).

It is accordingly tempting to begin and end first-level constitutional inquiries with a quest for what Joe and his contemporaries read and understood. The Constitution ultimately belonged to "We the People," with the draft prepared and sent to them by the Constitutional Convention, "merely advisory and recommendatory . . . unless it be stamped with the approbation of those to whom it is addressed."¹⁸ That said, the individuals who wrote that document made it abundantly clear to our "reasonable" constitutional expositors that what they received in September 1787 was not intended to be definitive in any number of key respects. More to the point, as part of the ratification process, these same individuals made it equally obvious to "the People" that the text, as ratified, was a place to start, rather than an end in itself. Indeed, the very indeterminacy of the Constitution became a dominant theme in attacks by Anti-federalists who declared that they did "not believe there existed a social compact . . . so vague and so indefinite as the one now on the table."¹⁹

Three particular realities inform my assessment of the record and its implications.

The first was the difficulty involved in crafting a written constitution, much less one for a radically new "compound republic" within which there were multiple divisions of authority between and among multiple actors.²⁰ As George Washington stressed in the letter accompanying the text when it was forwarded to the Confederation Congress, "It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved . . ."²¹ That letter, with its acknowledgment of drafting

18 THE FEDERALIST NO. 37, at 264 (James Madison) (Jacob E. Cooke ed., 1961). Like virtually everyone else, I attach great significance to the insights offered in *The Federalist Papers* given the stature of their authors and the role these individuals played in framing and ratification. It is, nevertheless, important to acknowledge that these essays were, like virtually all of the published materials at the time, partisan attempts to steer the debate toward Jay's, Madison's, and Hamilton's preferred result. See Rutland, *supra* note 17, at 53 ("Surely *The Federalist Papers* have been read, and discussed in academic groves, more during the past generation than they were in 1787–88.").

19 William Grayson, *The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution*, in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 583 (Jonathan Elliot ed., Philadelphia, J. B. Lippincott Co. 2d ed. 1896).

20 See THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed. 1961) ("In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments.").

21 Letter from the President of the Convention (George Washington) to the President of Congress (Sept. 17, 1787), in 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE

imperfection, was part of the package sent to “the several legislatures in order to be submitted to a convention of delegates chosen in each state by the people thereof.”²² Not surprisingly, the Constitution’s indeterminacy became both a central contextual reality and a recurring complaint in the ratification process. As James Wilson stressed in his key December 1787 “Statehouse Address,” when he responded to concerns expressed about the potential scope of the powers conferred on the federal government,

They have asserted that these powers are unlimited and undefined. These words are as easily pronounced as limited and defined . . . [I]t is not pretended, that the line is drawn with mathematical precision; the inaccuracy of language must, to a certain degree, prevent the accomplishment of such a desire. Whoever views the matter in a true light will see that the powers are as minutely enumerated and defined as was possible.²³

The individuals who met in Philadelphia in the summer of 1787 recognized the importance of a written constitution, an incredible innovation at the time. As Michael Warner has noted, “the written constitution was a way of literalizing the doctrine of popular sovereignty.”²⁴ The Framers understood the need for a careful approach to their work and the obligation to produce a document grounded in first principles. They were also pragmatists who crafted a proposal that did not purport to create the “ultimate Union,” only “a more perfect” one, within which an occasional lack of precision was the necessary corollary of compromise and accommodation. Madison defended the proposed text as one that “promises stability to the public Councils & security to private rights.”²⁵ He conceded, nevertheless, that certain “line[s] of distinction” deemed essential were “found, on fair discussion, to be absolutely undefinable.”²⁶ So, for example, “[e]ven the boundaries between the Executive, Legislative &

CONSTITUTION: CONSTITUTIONAL DOCUMENTS AND RECORDS, 1776–1787, at 305, 305 (Merrill Jensen ed., 1976).

²² Journals of Congress, Friday, 28 September, in 1 DOCUMENTARY HISTORY, *supra* note 21, at 340, 340.

²³ James Wilson, Reasons for Adopting the Constitution, in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: PENNSYLVANIA, at 492, 496 (Merrill Jensen ed., 1976).

²⁴ Michael Warner, *Textuality and Legitimacy in the Printed Constitution*, 97 PROC. AM. ANTIQUARIAN SOC’Y 59, 59 (1988).

²⁵ Letter from James Madison to Thomas Jefferson (Sept. 6, 1787), in 10 THE PAPERS OF JAMES MADISON, at 163, 164 (Robert A. Rutland et al. eds, 1977).

²⁶ Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 THE PAPERS OF JAMES MADISON, *supra* note 25, at 206, 211.

Judiciary powers, though in general so strongly marked in themselves, consist in many instances of mere shades of difference."²⁷

Individuals like George Mason were troubled by this and "remark[ed] the different language held at different times."²⁸ That said, the goal was a written constitution, not a statute or common law legal opinion. Justice Felix Frankfurter emphasized this when he focused our attention on John Marshall's observation in *M'Culloch v. Maryland* that "we must never forget, that it is a *constitution* we are expounding."²⁹

Frankfurter believed that this was "the single most important utterance in the literature of constitutional law—most important because most comprehensive and comprehending."³⁰ That was certainly true for many of the reasons expressed in *M'Culloch*. Marshall understood that a written constitution could not "partake of the prolixity of a legal code," but rather, by its very nature "requires[] that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objectives be deduced from the nature of the objects themselves."³¹ He recognized that the Constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."³² Marshall also understood that his Court was giving active form to previously inchoate concepts. Like others of his generation, he knew that the individual words in the text would be "used in various senses" and that "in [their] construction, the subject, the context, the intention of the person using them, are all to be taken into view."³³ Any other approach, he warned, would "change, entirely, the character of the instrument."³⁴

All of this was front and center in ratification debates within which the proponents of indeterminacy prevailed.³⁵ This does not mean

27 *Id.*

28 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 31 (Max Farrand ed., rev. ed. 1966) [hereinafter FEDERAL CONVENTION]. See *id.* at 323 (showing Rufus King's complaint about the extent to which key terms had been used "inaccurately & delusively").

29 17 U.S. (4 Wheat.) 316, 407 (1819).

30 Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 219 (1955).

31 *M'Culloch*, 17 U.S. (4 Wheat.) at 407.

32 *Id.* at 415.

33 *Id.*

34 *Id.*

35 Madison believed that the frequency and intensity of Anti-federalist attacks on the text did not reflect actual levels of support for the Anti-federalist position. See Letter from James Madison to Edmund Randolph (Oct. 21, 1787), in 10 THE PAPERS OF JAMES MADISON, *supra* note 25, at 199, 199 ("Judging from the News papers one wd. suppose that the adversaries were the most numerous & the most in earnest. But there is no other

that the Anti-federalists and their views have no place in these inquiries. The Constitution's opponents played key roles in shaping the public dialogue and many of their insights about the nature and the scope of the document are valuable. That said, as we "expound" the Constitution, we must also never forget that choices about its meaning must, in many instances, be made in the light of the professed goals and understanding of those who championed it, rather than those of their opponents.³⁶

A second reality that is especially acute for the new originalists follows from James Wilson's allusion to the "inaccuracy of language." Words do have meanings, and those meanings may and do acquire common currency, such that I at least hope that no one engaged in serious constitutional discussion would ever treat with even a modicum of seriousness the suggestion that the "right to bear arms" is anything but a reference to the ability to acquire and own weapons.³⁷ The same words may nevertheless be more or less precise, depending on the complexity of the ideas they are being asked to convey. As Madison stressed in *Federalist 37*,

no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence, it must happen, that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful, by the cloudy medium through which it is communicated. Here then are three sources of vague and incorrect definitions; indistinctness of the object, imperfection of the organ of conception, [and] inadequateness of the vehicle of ideas.³⁸

evidence that it is the fact."). This assessment was subsequently belied by the closeness of the ratification vote in many states.

³⁶ Consider, for example, Justice Anthony Kennedy's clever but misleading embrace of the notion that the Founders "split the atom of sovereignty," a rhetorical device that is wrong, wrong, wrong as a matter of science, history, and constitutional policy, a point I make in Mark R. Killenbeck, *The Physics of Federalism*, 51 U. KAN. L. REV. 1 (2002).

³⁷ As opposed to being a reference "to . . . the limbs to which our arms are attached." Barnett, *supra* note 1, at 6. See *id.* (asking if the term "domestic violence" refers to "riots or spouse abuse"). I think I understand why Randy and others choose the examples that they do. I also believe that most of the ones they have selected are themselves counterfactual and undermine our appreciation of the truly serious problems posed when major interpretive issues arise involving genuinely contestable words or phrases. In the 1780s and 1790s, for example, no one with a modicum of intelligence or sense would have viewed the reference to domestic violence as anything other than an allusion to civil unrest.

³⁸ THE FEDERALIST NO. 37, at 236-37 (James Madison) (Jacob E. Cooke ed., 1961).

These interpretive problems are compounded by the reality of context. Many words are perfectly clear and perfectly defined at one point in time, for one particular purpose. However, those same words may not carry the same meaning or implications in altered circumstances. Thomas Jefferson, for example, recognized that in important respects, written constitutions were "wonderfully perfect for a first essay," but also that "every human essay must have defects" and it "remain[s] therefore to those now coming on the stage of public affairs to perfect what has been so well begun by those going off it."³⁹ He subsequently acknowledged that ratification marked the beginning of a new national journey, within which complex and evolving questions were to be "pursue[d] with temper and perseverance" as the people and their representatives struggled continuously to perfect "the great experiment which shall prove that man is capable of living in society, governing itself by laws self-imposed, and securing to its' members the enjoyment of life, liberty, property and peace."⁴⁰

The very nature of this radical enterprise meant that there would inevitably be interpretive difficulties, especially in the light of history and the changing roles of the states in our federal system.⁴¹ Madison was especially sensitive to this, stressing that the Constitution created a "novel and unique political system," within which "new ideas . . . must be expressed either by new words, or by old words with new definitions."⁴² Indeed, in an important letter written toward the end of his life, Madison criticized the assumptions following from what we might well characterize as an early-nineteenth-century exercise in new originalism.

The specific question was what had been meant by the terms "national" and "federal" as they were used during the ratification debates. John Taylor of Carolene had "assume[ed] for the term *national* a meaning co-extensive with a single consolidated Gov[t],"⁴³

³⁹ Letter from Thomas Jefferson to Thomas Mann Randolph (July 6, 1787), in 5 THE WORKS OF THOMAS JEFFERSON 298, 298 (Paul Leicester Ford ed., 1904).

⁴⁰ Thomas Jefferson, The Solemn Declaration and Protest of the Commonwealth of Virginia on the Principles of the Constitution of the U.S. of America and the Violations of Them, in 3 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776–1826, at 1944, 1946 (James Morton Smith ed., 1995).

⁴¹ See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 543–44 (1985) (stressing the need to "accommodat[e] changes in the historical functions of States" and that "[r]eliance on history as an organizing principle results in line-drawing of the most arbitrary sort").

⁴² Letter from James Madison to Edward Livingston (April 17, 1824), in 9 THE WRITINGS OF JAMES MADISON, 187, 189 (Gaillard Hunt ed., 1910) [hereinafter Madison, WRITINGS].

⁴³ Letter from James Madison to N. P. Trist (Dec. 1831), in Madison, WRITINGS, *supra* note 42, at 471, 473–75 [hereinafter Letter to Trist]. Taylor was a strong proponent of state

imputing a desire to do away with the states. Madison would have none of it. He stressed that any careful reading of the “whole course of [the] proceedings” would have told Taylor that “the term *National* as contradistinguished from *Federal*, was not meant to express more than that the powers to be vested in the new Gov[t] were to operate as in a Nat[al] Gov[t] directly on the people, and not as in the old Confed[cy] on the States only.”⁴⁴ Madison admitted that some aspects of what had been said had been expressed in “loose terms.”⁴⁵ He, nevertheless, admonished that it was imperative to keep in mind the nature of what was being undertaken and its impact on words: “It ought to have occurred that the Gov[t]. of the U.S. being a novelty & a compound, had no technical terms or phrases appropriate to it, and that old terms were to be used in new senses, explained by the context or by the facts of the case.”⁴⁶

The third and final problem is the most acute. My reading of the record leads me ineluctably to the conclusion that the proof lies not in what the Framers and Founders said, or what Joe the Ploughman understood them to have said, but in what followed. The critical question is not how the terms were understood in 1788. As Hamilton stressed in *Federalist 34*,

Constitutions of civil Government are not to be framed upon a calculation of existing exigencies; but upon a combination of these, with the probable exigencies of ages, according to the natural and tried course of human affairs. Nothing therefore can be more fallacious, than to infer the extent of any power, proper to be lodged in the National Government, from an estimate of its immediate necessities. There ought to be a CAPACITY to provide for future contingencies, as they may happen; and, as these are illimitable in their nature, it is impossible safely to limit that capacity.⁴⁷

Madison recognized this and its implications for the necessary next steps after ratification. As he stressed in *Federalist 37*,

All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.⁴⁸

rights and a prolific author. Madison was concerned with the statements made in and the implications of one of his works. JOHN TAYLOR, *NEW VIEWS OF THE CONSTITUTION OF THE UNITED STATES* (Washington City, Way & Gideon 1823).

44 Letter from James Madison to N.P. Trist (Dec. 1831) in Madison, *WRITINGS*, *supra* note 42, at 475.

45 *Id.*

46 *Id.*

47 THE FEDERALIST NO. 34, at 210–11 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

48 THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961).

One such "law" was the Constitution itself, a document that both required interpretation and was, by design, a general outline rather than a detailed blueprint. It was also crafted with continuing awareness of the fact that governance under its terms would be an evolving process. As Hamilton noted in *Federalist 36*, "[C]ertain emergencies of nations, in which expedients that in the ordinary state of things ought to be foreborn, become essential to the public weal. And the government from the possibility of such emergencies ought ever to have the option of making use of them."⁴⁹

This does not mean that we cannot find a particular, commonly accepted meaning for a specific word or phrase at the time of ratification. It does suggest strongly that we must be sensitive to both the initial context within which words were used and the subsequent circumstances within which they were applied. It also means that we must treat with appropriate caution a central tenet in some iterations of the new originalism:

[O]ne succinct way to define the New Originalism is . . . that the express and implied public meaning of the words on the page *should remain the same until properly changed*. And the proper way to change "this Constitution" is provided in Article V. Judges are not allowed to update the text of the Constitution by changing the meaning it had at the time of enactment.⁵⁰

I agree completely that commonly accepted understandings of key constitutional terms should be taken into account as part of the interpretive process. So, for example, if Joe the Ploughman and his fellow constitutional savants did in fact have an objective, public sense of what the word commerce meant in 1788, then that certainly provides an appropriate starting point for our inquiries. That does not mean, however, that a constitutional amendment is required before we can agree that the federal power to regulate commerce can be read to encompass something more than "trade, traffic, and transportation of things from one place to another."⁵¹

That is not how Madison and his contemporaries thought of these matters. More tellingly, it is certainly not how events unfolded in the wake of ratification. Perhaps the best example of this was the sequence and content of the debates about the constitutionality of the

49 THE FEDERALIST NO. 36, at 229 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

50 Barnett, *supra* note 1, at 9. See Barnett, *Originalism*, *supra* note 15, at 654 (arguing that the Constitution works "only if its original meaning is not contradicted or altered without adhering to formal amendment procedures").

51 Barnett, *Balkin's Interaction Theory*, *supra* note 4, at 631.

First and Second Banks of the United States.⁵² Representative James Madison led the opposition to Hamilton's proposal to create the First Bank, speaking against it eloquently and at length during its consideration by the House. In particular, he questioned the propriety of reading the Necessary and Proper Clause as Hamilton and his allies would, stressing that "[i]f implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy."⁵³ Nevertheless, President James Madison, with the benefit of subsequent and different service—in particular, with the insights gained during the War of 1812—concluded, as a matter of both “public meaning” and national need, that a bank was both necessary and proper. So, he declared in 1815, he had no constitutional objections to chartering the Second Bank. Rather, he

[w]aiv[ed] the question of the constitutional authority of the Legislature to establish an incorporated bank as being precluded in my judgment by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation.⁵⁴

This is not a Madison whose “political career” should be “stamp[ed] . . . with discrediting inconsistencies.”⁵⁵ The “mutability,” he insisted, was “apparent, not real,” with his change in position a response to “a course of authoritative, deliberate, and continued decisions” that were “an evidence of the Public Judgment, necessarily superseding individual opinions.”⁵⁶ These “precedents,” he stressed, did not “alter” the Constitution. Rather, they simply “expound[ed]” it, “fix[ing its] interpretation.”⁵⁷

Simply put, the Madison of 1815 and 1831 recognized that the beliefs, perspectives, and meanings that prevailed in 1791 were not definitive but were rather subject to a process of “liquidation and ascer-

52 I discuss the constitutional debates about, and history of, the First and Second Banks in suitable detail, albeit not excessive length, in MARK R. KILLENBECK, *M'CULLOCH V. MARYLAND: SECURING A NATION* (2006). One interesting facet of the record is that the concerns about constitutionality that were so prominent when the First Bank was proposed and during the failed attempt to renew its charter in 1811 largely disappeared after that, with constitutionality at best an afterthought in the lead up to the Second Bank. See *id.* at 53–63.

53 2 ANNALS OF CONG. 1899 (Joseph Gales ed., 1834).

54 James Madison, Veto Message, Jan. 30, 1815, in 8 THE WRITINGS OF JAMES MADISON 327, at 327 (Gaillard Hunt, ed., 1908).

55 Letter to Trist, *supra* note 42, at 471.

56 *Id.* at 476–77.

57 *Id.*

tainment” as a necessarily and inherently equivocal text was given actual meaning over time.

II

One recurring trope in constitutional discourse is the tendency to cite certain decisions as stalking horses for a world view with which an individual disagrees. These are the doctrinal equivalents of George Carlin’s “Filthy Words,” cases that become “curse words and . . . swear words, the cuss words and the words that you can’t say, that you’re not supposed to say.”⁵⁸ Perhaps the best illustration of this is that in many, if not most, minds, “*Lochner*” is not simply a reference to *Lochner v. New York*,⁵⁹ within which the Court held that states could not limit the number of hours a baker could work in a given week. Rather, it stands for the proposition that federal courts should not “legislate from the bench,” a somewhat subjective recharacterization of the arguably unremarkable proposition that the Supreme Court should not “sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.”⁶⁰

In a similar vein, key cases decided by the New Deal Court are viewed as constitutional “wrong turn[s],” a body of work that marks a “dramatic departure in the 1930’s from a century and a half of precedent.”⁶¹ One such filthy case is *Wickard v. Filburn*,⁶² in which the Court held that Congress could use the commerce power to restrict the amount of grain a farmer grew, even where there was no intent to sell that grain on the open market. *Wickard* has been repeatedly criticized in originalist quarters as “fanciful,”⁶³ a decision that is “far removed from the core of interstate commerce—the exchange of

58 FCC v. Pacifica Found., 438 U.S. 726, 751 (1978) (quoting an FCC prepared transcript of the comedian George Carlin’s “Filthy Words” monologue broadcast over the radio).

59 198 U.S. 45 (1905).

60 *Griswold v. Connecticut*, 381 U.S. 479, 481–82 (1965) (declining the “invitation” to use *Lochner v. New York*, 198 U.S. 45 (1905) as “our guide”); see *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 690 (1999) (noting “the discredited substantive-due-process case of *Lochner*”).

61 *United States v. Lopez*, 514 U.S. 549, 599 (1995) (Thomas, J., concurring) (internal quotation marks omitted).

62 317 U.S. 111 (1942); see, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2643 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ. dissenting) (characterizing *Wickard* as “the *ne plus ultra* of expansive Commerce Clause jurisprudence”).

63 Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1451 (1987).

goods.”⁶⁴ That was, of course, not how the opinion’s author saw it. Rather, Justice Robert Jackson viewed *Wickard* as part of a continuum, a line of cases designed “to bring about a return to the principles first enunciated by Chief Justice Marshall,”⁶⁵ understandings expressed in the first case within which the Court parsed the Commerce Clause, *Gibbons v. Ogden*.⁶⁶

Justice Thomas disagrees with this characterization, arguing in *Lopez* that these and similar statements “misconstrue *Gibbons*.”⁶⁷ As part of this, he emphasizes, as have many other originalists, Marshall’s discussion of “completely internal” commerce and his supposed exclusion of certain types of activities from the clause’s reach.⁶⁸ In a similar vein, Randy Barnett offers us a choice between James Madison and Franklin D. Roosevelt, within which the appropriate “means-ends fit” is either policed by the Court (Madison) or left wholly in the discretion of Congress (Roosevelt).⁶⁹ As the first part of this Article suggests, I am inclined to opt for Madison, albeit, as I will now argue, not for the reasons the new originalists do and certainly not to the same purpose and effect.

A. *Commerce in Congress*

As a threshold matter, let’s assume, for the sake of argument, that on June 21, 1788—the date New Hampshire’s assent made the Constitution binding—that there was widespread, perhaps even universal acceptance that the “objective” meaning of the word “commerce” was “trade, traffic, and transportation of things from one place to another.”⁷⁰ The important question, at least as I read the record, is what the applied meaning of that term became as the Commerce Clause was “liquidated and ascertained” by the individuals in a position to actually act on its meaning, the members of the First Federal Congress.

⁶⁴ Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 708 (1996).

⁶⁵ *Wickard*, 317 U.S. at 122.

⁶⁶ 22 U.S. (9 Wheat.) 1 (1824). The classic study of *Gibbons* had been MAURICE G. BAXTER, *THE STEAMBOAT MONOPOLY: GIBBONS V. OGDEN, 1824* (1972). As good as it is, this volume has now been superseded by HERBERT A. JOHNSON, *GIBBONS V. OGDEN: JOHN MARSHALL, STEAMBOATS, AND THE COMMERCE CLAUSE* (2010).

⁶⁷ *United States v. Lopez*, 514 U.S. 549, 594 (1995) (Thomas, J., concurring).

⁶⁸ *Id.*

⁶⁹ See Randy Barnett, *The Choice Between Madison and FDR*, 31 HARV. J.L. & PUB. POL’Y 1005, 1014 (2008).

⁷⁰ Barnett, *supra* note 4, at 630. Or, as Justice Thomas argues, “selling, buying, and bartering, as well as transporting for these purposes.” *Lopez*, 514 U.S. at 585. Additional support for these narrow readings may be found in Robert G. Natelson, *The Legal Meaning of “Commerce” in the Commerce Clause*, 80 ST. JOHN’S L. REV. 789 (2006).

In June 1789, James Madison, Framers, became James Madison, Representative from Virginia, a career trajectory that he and nineteen others followed as they moved from the Convention in Philadelphia to the First Congress in New York.⁷¹ Aptly described at the time as “a second convention,”⁷² that gathering faced the daunting prospect of fashioning a working government within the framework provided by the text. Everyone understood the importance of the task. Future Justice James Iredell observed, during the ratification debates in North Carolina, that “[t]he first session of Congress will probably be the most important of any for many years. A general code of laws will then be established in execution of every power contained in the Constitution.”⁷³ The French ambassador to the United States noted—in language that aptly captured the significance of the transformation from confederation to nation—that “[t]he ground Congress is operating on now is, in some sense, totally new to it, it makes laws that it has the power to enact, instead of *resolutions*, as before, that ended up being generally disregarded.”⁷⁴ This made for exciting, albeit time consuming, work. As one member noted apologetically, “the business of Congress goes on very slow [and] we find almost every Act involves great Constitutional principles which require time and much disquisition to establish.”⁷⁵

Madison, in particular, spoke of the “intricacy” and the “novelty” of what was being undertaken, emphasizing that “[a]mong other difficulties, the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents.”⁷⁶ He also rejected the claim

71 See CHARLENE BANGS BICKFORD & KENNETH R. BOWLING, *BIRTH OF THE NATION: THE FIRST FEDERAL CONGRESS 1789–1791*, at 12 (1989) (describing the composition and demographics of the First Federal Congress).

72 Letter from Samuel Osgood to Elbridge Gerry (Feb. 19, 1789), *in* 1 *THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788–1790*, at 656, 657 (1976).

73 Debates in the Convention of the State of North Carolina on the Adoption of the Federal Constitution, *in* 4 *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION IN 1787*, at 1, 222 (Jonathan Elliot ed., at Philadelphia, J. B. Lippincott Co. 1891).

74 Letter from Comte de Moustier to Comte de Montmorin (June 9, 1789), *in* 16 *CORRESPONDENCE: FIRST SESSION: JUNE–AUGUST 1789*, at 729, 732 (Charlene Bangs Bickford et al. eds., 2004).

75 Letter from William Few to Governor Edward Telfair (June 20, 1789), *in* 16 *CORRESPONDENCE: FIRST SESSION: JUNE–AUGUST 1789*, at 818, 819 (Charlene Bangs Bickford et al. eds., 2004).

76 Letter from James Madison to Samuel Johnston (June 21, 1789), *in* 12 *THE PAPERS OF JAMES MADISON, PAPERS*, at 249, 250 (Robert A. Rutland et al. eds., 1976).

that “the legislature itself has no right to expound the constitution.”⁷⁷ Conceding that “in the ordinary course of government . . . the exposition of the laws and constitution devolves upon the judicial.”⁷⁸ Madison, nevertheless, refused to accept that Congress had no role to play:

The constitution is the charter of the people to the government; it specifies certain great powers as absolutely granted, and marks out the departments to exercise them. If the constitutional boundaries of either be brought into question, I do not see that any one of the independent departments has more right than another to declare their sentiments on that point.⁷⁹

That was, of necessity, a qualified endorsement. Madison recognized that the ultimate responsibility for resolving contested meanings lay with the Court. Indeed, his criticisms of Marshall’s opinion in *M’Culloch* focused, in important respects, on the extent to which “the Court relinquish by their doctrine, all controul on the Legislative exercise of unconstitutional powers.”⁸⁰ In the wake of ratification, however, the deliberations and actions of the House and Senate were part of a process by which “the meaning of the constitution [was] established by fair construction.”⁸¹ In particular, the new Congress needed to chart a path that would avoid the central defect in the confederation government, the “want of concert in matters where the common interest requires it,” a flaw “strongly illustrated in the state of our commercial affairs,” to the point that “the national dignity, interest, and revenue [have] suffered from this cause.”⁸² As Jack Rakove has observed,

[The] Federalists . . . understood that removing trade barriers among the states could create a great domestic market that would become an engine of economic growth. States would still compete for economic advantage,

77 James Madison, *Removal Power of the President* (June 17, 1789), in 12 THE PAPERS OF JAMES MADISON, *supra* note 76, at 232, 238.

78 *Id.*

79 *Id.*

80 Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 THE WRITINGS OF JAMES MADISON 447, 449 (Gaillard Hunt ed., 1908). For a discussion of this letter and Madison’s views, see Mark R. Killenbeck, *Madison, M’Culloch, and Matters of Judicial Cognizance: Some Thoughts on the Nature and Scope of Judicial Review*, 55 ARK. L. REV. 901, 920 (2003).

81 James Madison, *Removal Power of the President* (June 17, 1789), in 12 THE PAPERS OF JAMES MADISON, *supra* note 76, at 232, 239.

82 James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9 THE PAPERS OF JAMES MADISON (Robert A. Rutland et al. eds., 1975), at 348, 350. I discuss the significance of Madison’s Vices paper in Mark R. Killenbeck, *A Prudent Regard to Our Own Good? The Commerce Clause, in Nation and States*, 38 J. S. CT. HIST. 281, 282–85 (2013) (forthcoming 2013).

but they would do so under the authority of a national government that could promote the free movement of goods, capital, and labor across state lines, and prevent states from erecting barriers to free trade.⁸³

This required legislation, and Congress acted quickly to fill the void. Many of these initial measures arguably reflected an originalist vision of the commerce power, focusing narrowly on external matters of “deep-water shipping and foreign trade.”⁸⁴ So, for example, one of the very first statutes passed was An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes.⁸⁵ That measure did not require that ships be registered but granted certain privileges to those that were. Indeed, this statute, albeit in an amended form,⁸⁶ eventually became the basis for the actual holding in *Gibbons*, that the state-conferred monopoly on steamboat navigation between New York and New Jersey was trumped by an applicable federal statute within which “commerce” and “navigation” were the same thing. It is accordingly worth noting that the Coasting Act apparently passed with little or no debate about its constitutionality, a reality that verifies John Marshall’s subsequent take on a “power [that] has been exercised from the commencement of the government.”⁸⁷

One way to view the 1789 Act is as a regulatory scheme governing any ship “destined from district to district, or to the bank or whale fisheries.”⁸⁸ That formulation appears consistent with a definition of commerce confined to “buying and selling products” and “navigation and other carriage, and intercourse across jurisdictional lines.”⁸⁹ It

83 THE ANNOTATED U.S. CONSTITUTION AND DECLARATION OF INDEPENDENCE 134 (Jack N. Rakove ed., 2009).

84 Calvin H. Johnson, *The Panda’s Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause*, 13 WM. & MARY BILL RTS. J. 1, 1 (2004).

85 Act of Sept. 1, 1789, ch. 11, 1 Stat. 55. I began writing about this and other such measures long before it became popular as part of the debate about the Patient Protection and Affordable Care Act. See, e.g., Killenbeck, *supra* note 10, at 92–95 (identifying the Act of July 20, 1790 as an example of the first Congress using its Commerce Clause power to regulate in ways that are at odds with a narrow, originalist view of commerce); Mark R. Killenbeck, *The Qualities of Completeness: More? Or Less?*, 97 MICH. L. REV. 1629, 1649–51 (1999) (stating the same proposition).

86 See Act of Feb. 18, 1793, ch. 8, 2 Stat. 305 (amending An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes).

87 *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824). The scant legislative history may be found in 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, MARCH 4, 1791–MARCH 3, 1791, at 220–80 (Linda Grant De Pauw ed., 1972).

88 Act of Sept. 1, 1789, ch. 11, § 22, 1 Stat. 55.

89 Natelson, *supra* note 70, at 845. Natelson’s ultimate argument is that the meaning of “commerce” in the late 1700s was an economic one that did not extend to “all gainful

certainly included such matters and, in that respect, reflected what one might expect in a political climate within which commerce did not include other “gainful activities.” That said, the “districts” in question included many located within a single state. Nor does it follow from the simple act of fishing on the high seas that the resulting catch, in any way, will move in interstate or foreign commerce. More tellingly, most of the provisions of the statute did not focus on the movement of a given ship, but were rather triggered by the mere fact that it “belong[ed] wholly to a citizen or citizens” of the United States.⁹⁰ As such, the 1789 measure becomes suspect if we credit subsequent decisions of the Court, celebrated by many originalists: opinions that condemn measures regulating “commerce completely internal to a [s]tate,”⁹¹ such as agriculture or manufacturing⁹² or, more tellingly, that do “not confine [themselves] to the interstate commerce business which may be done by such persons.”⁹³

Deviations from the originalist norm are even more pronounced in a second important measure approved the following year, An Act for the Government and Regulation of Seamen in the Merchants Service.⁹⁴ This statute structured the day-to-day working lives of necessary participants in a continuum that was clearly a part of “mere ‘trade and exchange.’”⁹⁵ Nevertheless, both the spirit and letter of the law did violence to the narrow reading of commerce, much less the power to regulate it. The act required, for example, “an agreement in writing or in print, with every seaman or mariner on board” a ship “bound from a port in one state to a port in any other than an adjoining state.”⁹⁶ It also stated that ships bound overseas must carry “a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same.”⁹⁷

economic activities,” in particular, those that “merely ‘substantially affected’ commerce.”
Id. I obviously read the record differently.

90 Act of Sept. 1, 1789, ch. 11, § 1, 1 Stat. 55.

91 *Adair v. United States*, 208 U.S. 161, 178 (1908) (holding an act of Congress that criminalized discrimination against employees associated with labor organizations unconstitutional because it was not related to interstate commerce).

92 *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 301 (1936) (“That commodities produced or manufactured within a state are intended to be sold or transported outside the state does not render their production or manufacture subject to federal regulation under the commerce clause.”).

93 *The Emp.s’ Liab. Cases*, 207 U.S. 463, 497 (1908).

94 Act of July 20, 1790, ch. 29, 2 Stat. 131.

95 Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 865 (2003).

96 Act of July 20, 1790, ch. 29, § 1, 2 Stat. 131.

97 *Id.* § 8.

And, it mandated that for each person aboard, there be "well secured under deck, at least sixty gallons of water, one hundred pounds of salted flesh meat, and one hundred pounds of wholesome ship-bread."⁹⁸

One possibility is to view these strictures as ones embracing "activities closely incident" to "interstate transportation, navigation, and sales."⁹⁹ That characterization is, however, at irreconcilable odds with decisions of the Court rendered during what originalists would have us believe are the "golden" years of Commerce Clause exposition, the period during which judicial understandings "still left an extensive area of economic life outside the power of Congress."¹⁰⁰ Those decisions did give Congress a certain degree of latitude. So, for example, as the Court stressed in *Adair*, a federal act was constitutional when there was "some real or substantial relation to or connection with the commerce regulated."¹⁰¹ But that same year, in *The Employer's Liability Cases*, the Court stated, in no uncertain terms, that this connection was not present where the measure in question "is not confined solely to regulating the interstate commerce business which [employees] may do," but instead, "regulates the persons because they engage in interstate commerce and does not alone regulate the business of interstate commerce."¹⁰²

If the new originalists are right about the "original" "public" meaning of commerce, then The Merchant Seaman Act clearly exceeded the scope of the commerce power in two important respects. As was the case with the Coasting Act, many of its provisions by their express terms were not limited to seamen or vessels engaging in interstate or foreign commerce.¹⁰³ More tellingly, by purpose and de-

98 *Id.* § 9. These "mandates" follow from voluntarily undertaking a positive commercial act and engaging in commerce (navigation, actually). As such, they are not the constitutional equivalent of the "missing link" required to sustain the so-called individual mandate as a Commerce Clause matter. Compare *Nat'l Fed'n on Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586 (2012) ("Congress has never attempted to rely on [the commerce] power to compel individuals not engaged in commerce to purchase an unwanted product."), with JOHN READER, *MISSING LINKS: IN SEARCH OF HUMAN ORIGINS* (2011) (describing the quest for evidence of fossil proof that human beings and primates, especially chimpanzees, share a common ancestor).

99 Epstein, *supra* note 63, at 1454.

100 *Id.* at 1410.

101 *Adair v. United States*, 208 U.S. 161, 178 (1908). The Court held that, because "interstate commerce" does not cover labor organizations, Congress had no power to prohibit the discharge of employees based on union membership.

102 *The Emp.'s Liab. Cases*, 207 U.S. 463, 497 (1908).

103 *See, e.g.*, Act of July 20, 1790, ch. 29, § 4, 2 Stat. 131 ("[I]f any person shall harbor or secrete any seaman or mariner belonging to any ship or vessel."); *id.* at § 6 ("[E]very seaman or mariner shall be entitled to demand and receive."); *id.* at § 7 ("[A]ny seaman or

sign, the measure focused on labor relations, rather than the actual “activity of interstate [or foreign] transportation.”¹⁰⁴

The First Congress clearly believed that its power to regulate commerce extended far beyond the limits imposed by an “objective meaning of the text” at the time of ratification that limited the commerce power to the actual act of “trade or transportation.”¹⁰⁵ That assemblage was populated with individuals who both wrote and ratified, on both sides of the debate.¹⁰⁶ Tellingly, they did not legislate on the basis of the narrow, originalist definition. More to the point, contemporary commentators did not characterize these measures as ones that required the Necessary and Proper Clause to justify them.¹⁰⁷ In his edition of *Blackstone’s Commentaries*, for example, St. George Tucker described the 1790 Act as a pure exercise of the commerce power:

The right of regulating foreign commerce, draws after it also, the right of regulating the conduct of seamen, employed in the merchant service; and by a continued chain, that of punishing other persons harbouring or secreting them, as well on land, as elsewhere; and the [Merchant Seamen Act] accordingly makes it penal in any person to harbour or secret any seaman regularly engaged in the service of any ship.¹⁰⁸

The same can be said of other early federal statutes that cannot be squared with an originalist reading of the commerce power that de-

mariner, who shall have signed a contract [who has] desert[ed], or . . . absent[ed] himself . . . [is subject to] warrant to apprehend.”). *Cf. Emp.s’ Liab. Cases*, 207 U.S. at 498 (stressing that a measure that regulates “without qualification or restriction as to the business . . . engaged . . . of necessity includes subjects wholly outside of the power of Congress to regulate commerce.”).

104 *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 374 (1935). The specific issue here was the mandate for a pension plan, defended as a means of promoting “efficiency” and “morale” by providing a form of “security,” in much the same way that the 1790 measure operated. *Id.* at 367.

105 Barnett, *supra* note 1, at 415, 420.

106 A fact that Madison stressed was on the subject of using tariffs to “encourage[] . . . Manufactures.” See Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 42, at 316, 332 (stating that in “the first Congress under the Constitution . . . the members present were so many” from both the federal and state conventions, “each of these classes consisting also of members who had opposed & who had espoused, the Constitution in its actual form”).

107 See, e.g., Barnett, *supra* note 9, at 127 (“[T]he admitted power to pass navigation laws is most accurately conceived as an implied power that was embraced by the Necessary and Proper Clause.”); Robert G. Natelson, *Tempering the Commerce Power*, 68 MONT. L. REV. 95, 115–17 (2007) (characterizing key aspects of current Commerce Clause doctrine as “memorialized textually in the Necessary and Proper Clause”).

108 St. George Tucker, Appendix, in 1 WILLIAM BLACKSTONE, COMMENTARIES 252 (Philadelphia, William Young Birch & Abraham Small, 1803). While couched in terms of “foreign commerce,” Tucker is here discussing an act that was not so limited.

nies that Congress has the power to reach criminal acts,¹⁰⁹ much less those committed within the confines of a state.¹¹⁰ The Merchant Seamen Act, for example, made it a crime to "harbor or secrete any seaman or mariner" who failed to fulfill his contractual obligations.¹¹¹ It also authorized remedies that posed fundamental concerns about the sanctity of state sovereignty. The first made penalties paid by delinquent seamen to ship owners "recoverable in any court, or before any justice of [sic] justices of any state, city, town or county within the United States" that had "cognizance of debts of equal value."¹¹² The second "required" local justices of the peace to resolve controversies between owners and seamen over the seaworthiness of a vessel.¹¹³

Several years later, Congress made it a felony to steal goods from a shipwreck.¹¹⁴ The Court sustained that statute in *United States v. Coombs*, a case involving goods cast adrift by a ship in distress that had come to rest "above high water mark."¹¹⁵ Citing *Gibbons*, Justice Joseph Story stressed that "[t]he power to regulate commerce, includes the power to regulate navigation, as connected with the commerce of foreign nations, and among the states."¹¹⁶ He rejected the suggestion, however, that the separation of the goods from the ship itself limited congressional authority to punish their subsequent theft. The commerce power was not "confined to acts done on the water, or in the necessary course of the navigation thereof," but rather, extended to "[a]ny offense which thus interferes with, obstructs, or prevents such commerce and navigation."¹¹⁷ Indeed, Story stressed that "Congress have, in a great variety of cases, acted upon this interpretation of the constitution, from the earliest period after the constitution."¹¹⁸

Three federal statutes among the many enacted in the early years of the nation are not definitive proof that I am right and that the originalists are wrong. These measures do tell us quite clearly that a body acting for the people—one that included a substantial number

109 See, e.g., Natelson, *supra* note 70, at 845 ("When used in legal discourse, 'commerce' did not include . . . *malum in se* crime.").

110 See, e.g., Epstein, *supra* note 63, at 1429 (arguing that the result in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), was proper "because Congress had used its admitted powers over interstate commerce to eliminate a state's 'internal affairs' completely").

111 Act of July 20, 1790, ch. 29, § 4, 2 Stat. 131.

112 *Id.* § 2.

113 *Id.* § 3.

114 See Act of Mar. 3, 1825, ch. 65, § 9, 4 Stat. 115, 116.

115 37 U.S. (12 Pet.) 72, 75 (1838). The fact that the goods were above the high-water mark removed the case from any application of admiralty.

116 *Id.* at 78.

117 *Id.*

118 *Id.*

of individuals who participated in both the drafting and ratification debate—held a different view of the commerce power than the one supposedly embraced by a “reasonable” late-eighteenth-century reader of the text. It is, of course, always possible that Congress was just wrong and that mere politicians could not be trusted to properly parse and implement the text. Gouverneur Morris, for example, railed against “legislative lion[s]” prone to parse the “true intent and meaning” as “that which suits their purpose.”¹¹⁹ Viewed in that manner, constitutional values and textual fidelity are protected when “the judiciary is called upon to declare its meaning.”¹²⁰

Which brings me to a second major consideration that argues against the narrow originalist reading: the manner in which the commerce power was viewed by the courts in the nation’s formative years. Our focus here will eventually be, as it should be, on *Gibbons*, which provided the first occasion for the Supreme Court to discuss the meaning and implications of the Commerce Clause. It would, nevertheless, be a mistake to begin there.

B. Commerce in the Courts

The word “commerce” appeared with some frequency in the official reports of the Supreme Court in the years between ratification and *Gibbons*.¹²¹ Commerce, that is, but not the Commerce Clause, which did not come before the Court for twenty-five years, an arguably surprising development given the central role that concerns about the regulation of commerce played in the lead up to the Convention.¹²² There are, however, a number of cases within which the meaning and implications of the clause were discussed, many of which shed interesting light on these matters.

In 1808, for example, in *United States v. The William*, United States District Judge John Davis was asked to determine whether the “[p]ower to regulate” should “be understood to give a power to anni-

119 Letter from Gouverneur Morris to Timothy Pickering (Dec. 23, 1814), in 3 JARED SPARKS, *THE LIFE OF GOUVERNEUR MORRIS, WITH SELECTIONS FROM HIS CORRESPONDENCE AND MISCELLANEOUS PAPERS*, at 323 (Boston, Gray & Bowen, 1832).

120 James Madison, *Removal Power of the President* (June 17, 1789) in 12 *THE PAPERS OF JAMES MADISON*, *supra* note 76, at 232, 238.

121 The first reported mention was in Justice Samuel Chase’s opinion in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 222 (1796). It was merely descriptive, as was each use of the term in the eighty-seven cases within which it appeared leading up to *Gibbons*. A diligent author would list and parse each to see what they might presage about commonly accepted meaning. Perhaps, another time.

122 See Killenbeck, *supra* note 82, at 10–12 (describing the regulation of commerce as a strong factor in initiating constitutional reform).

hilate.”¹²³ The issue arose in a challenge to the embargo that cut off all trade with England. Davis had been a delegate to the Massachusetts ratification convention, had served briefly as Comptroller of the Treasury for President George Washington, and was one of the “midnight judges” John Adams nominated in February 1801.¹²⁴ He was, obviously, a Federalist, and his support for an expansive reading of federal power would not have been a surprise. His opinion is, nevertheless, notable for the manner in which he treated Commerce Clause issues at a point in time during which its “public meaning” was supposedly limited.

Davis began his analysis with a discussion of the need for and significance of the clause. A federal power was essential, he noted, given “the depressed state of American commerce, and complete experience of the inefficacy of state regulations, to apply a remedy, were among the great, procuring causes of the federal constitution.”¹²⁵ The authority conferred was that of a “national sovereignty,” one that was not “unlimited,” but “as to the objects surrendered” by the states and “specified, limited only by the qualifications and restrictions, expressed in the constitution.”¹²⁶ He concluded, accordingly, that

[t]he care, protection, management and controul, of this great national concern, is, in my opinion, vested by the constitution, in the congress of the United States; and their power is sovereign, relative to commercial intercourse, qualified by the limitations and restrictions, expressed in that instrument, and by the treaty making power of the president and senate.¹²⁷

Davis stressed that the statutes authorizing the embargo “do not operate as a prohibition of all foreign commerce.”¹²⁸ In particular, voicing a theme that would be repeated in *M’Culloch* and *Gibbons*, he posited a rule of deference in such matters: “the degree, or extent, of the prohibition” was properly determined by “the national government,” to which the power to regulate commerce had been “committed.”¹²⁹ He also appeared to embrace a narrow definition of the term

123 28 F. Cas. 614, 621 (D. Mass. 1808) (No. 16,700).

124 BIOGRAPHICAL DIRECTORY OF THE FEDERAL JUDICIARY 1789–2000, at 459 (2001).

125 *The William*, 28 F. Cas. at 620.

126 *Id.*

127 *Id.* at 620–21.

128 *Id.* at 621.

129 *Id.*; see also *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (“[T]he sound construction of the constitution must allow to the national legislature [significant] discretion, . . . enabl[ing] that body to perform the high duties assigned to it”); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824) (stressing that a “narrow construction” of the Commerce Clause “would cripple the government, and render it unequal to the object for which it is declared to be instituted”).

commerce, even as he refused to exclude matters beyond its reach from the federal power to regulate them: “The term does not necessarily include shipping or navigation; much less does it include the fisheries. Yet it never has been contended, that they are not the proper objects of national regulation; and several acts of congress have been made respecting them.”¹³⁰

Davis rejected the suggestion that “these are incidents to commerce, and intimately connected with it; and that congress, in legislating respecting them, act under the authority, given them by the constitution, to make all laws necessary and proper.”¹³¹ The proper focus was not on what was “expedient,” but instead on the “abstract question of [actual] constitutional power.”¹³² Viewed in that light, “I see nothing to prohibit or restrain the measure[s],” given that

the power to regulate commerce is not to be confined to the adoption of measures, exclusively beneficial to commerce itself, or tending to its advancement; but, in our national system, as in all modern sovereignties, it is also to be considered as an instrument for other purposes of general policy and interest. The mode of its management is a consideration of great delicacy and importance; but, the national right, or power, under the constitution, to adapt regulations of commerce to other purposes, than the mere advancement of commerce, appears to me unquestionable.¹³³

A less expansive, but no less suggestive, view was taken by Chancellor James Kent in *Livingston v. Van Ingen*,¹³⁴ one of the lower court opinions leading to *Gibbons*. Kent anticipated a debate that between Chief Justice Marshall and Associate Justice William Johnson in *Gibbons* when he stressed that the federal power was “not, in express terms, exclusive.”¹³⁵ His discussion of the nature of the power was nevertheless narrow: “[t]he congressional power relates to external not to internal commerce, and it is confined to the *regulation* of that commerce.”¹³⁶ This meant, in those areas and others, that “the states

¹³⁰ *The William*, 28 F. Cas. at 621.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*; see *id.* at 622 (“[N]ational regulations relative to commerce . . . are not necessarily confined to its direct aid and advancement.”).

¹³⁴ 9 Johns. Cas. 507 (N.Y. Sup. Ct. 1812).

¹³⁵ *Id.* at 577. Marshall suggested, without actually saying so, that the power was concurrent, with Johnson arguing in his concurring opinion that federal authority was exclusive. Compare *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824) (“The completely internal commerce of a State . . . may be considered as reserved for the State itself.”), with *id.* at 236 (Johnson, J., concurring) (stating that the Constitution gave Congress “exclusive grants . . . of power over commerce”). The Court eventually opted for concurrent powers in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 308 (1851).

¹³⁶ *Livingston*, 9 Johns. Cas. at 578.

are at liberty to make their own commercial regulations,"¹³⁷ albeit only unless and until the federal government acted.

This ended the matter for the purposes of the case at hand, given Kent's subsequent judgment that a license granted under the Coasting Act "only gives to the vessel an *American* character" and, as such, conferred no positive rights.¹³⁸ That said, Kent did not embrace the sharp delineations adhered to in the originalist account, conceding three things that are entirely consistent with a more expansive reading. The first was that "[t]he capacity to grant separate and exclusive privileges appertains to every sovereign authority."¹³⁹ The second, consistent with the assumption that a coasting license did not regulate commerce, was that any navigation rights conferred by New York should "be considered as taken subject to such future commercial regulations as congress may lawfully prescribe."¹⁴⁰

Third, and most important, Kent acknowledged that there was room for disagreement. Congress did not have "any *direct* jurisdiction over our interior commerce or waters."¹⁴¹ Nevertheless, drawing the line between federal and state authority was not an easy task, given the intimate connection between internal and external matters. "The limits" of the federal power, he observed, "seem not to be susceptible of precise definition. It may be difficult to draw an exact line between those regulations which relate to external and those which relate to internal commerce, for every regulation of the one will, directly or indirectly, affect the other."¹⁴²

These two decisions provide an interesting backdrop to *Gibbons*, within which Marshall largely repeated views previously expressed about the scope of the term commerce and the extent of the commerce power. Sitting as a Circuit Justice in May 1820, Marshall considered the appeal of a ship owner whose vessel had been confiscated for bringing into the port at Norfolk, Virginia "three persons of colour, not being native citizens or registered seamen."¹⁴³ The specific

137 *Id.*

138 *Ogden v. Gibbons*, 4 Johns. Ch. 150, 157 (N.Y. Ch. 1819).

139 *Livingston*, 9 Johns. Cas. at 573.

140 *Id.* at 579.

141 *Id.* (emphasis added).

142 *Id.* at 578. Kent subsequently stated, in the wake of Marshall's opinion in *Gibbons*, that "[t]he only great point on which the Supreme Court of the United States, and the courts of this state, have differed, is in the construction and effect given to a coasting license." 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 411 (New York, O. Halsted 1826). That conclusion was, however, based on a reading of *Gibbons* that glossed over the careful qualifications Marshall made as he discussed the internal/external commerce distinction.

143 *The Wilson v. United States*, 30 F. Cas. 239, 240 (C.C.D. Va. 1820).

question before him was whether Congress had the authority to pass the measure prohibiting these acts.¹⁴⁴ Marshall began this discussion by asking, “What is the extent of this power to regulate commerce? Does it not comprehend the navigation of the country? May not the vessels, as well as the articles they bring, be regulated?”¹⁴⁵ He stressed that “[t]he authority to make such laws has never been questioned; and yet, it can be sustained by no other clause in the constitution, than that which enables congress to regulate commerce.”¹⁴⁶ Indeed, he argued that “[f]rom the adoption of the constitution, till this time, the universal sense of America has been, that the word ‘commerce,’ as used in that instrument, is to be considered a generic term, comprehending navigation, or, that a control over navigation is necessarily incidental to the power to regulate commerce.”¹⁴⁷

Marshall did not, obviously, tell us whether this “universal sense of America” was that of Joe the Ploughman or an educated, Federalist elite. His language, nevertheless, implied that this understanding was the one embraced consistently by anyone familiar with the meaning and use of the term. In other words, just as I have argued, Marshall was here appealing to an original and consistent public embrace of commerce and the commerce power that was not as narrow as the one championed by the new originalists.

Marshall’s subsequent gloss in *Gibbons* has become a central part of every law student’s education. Rejecting an attempt to “limit [commerce] to traffic, to buying and selling, or the interchange of commodities,”¹⁴⁸ he declared,

This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.¹⁴⁹

Generations of law students have snickered at Marshall’s use of the term “intercourse,” envisioning exactly what one account sug-

144 See Act of Feb. 28, 1803, ch. 10, 2 Stat. 205 (prohibiting the importation of persons of color who were not registered seamen or native citizens).

145 *The Wilson*, 30 F. Cas. at 242.

146 *Id.*

147 *Id.* at 243.

148 *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824).

149 *Id.* at 189–90.

gests, “Sexual Intercourse Among the . . . States.”¹⁵⁰ This was not, however, simply a “rhetorical device.”¹⁵¹ Rather, Marshall was using the first listed definition in Samuel Johnson’s *Dictionary* that commerce is “[i]ntercourse; exchange of one thing for another; interchange of any thing; trade; traffick.”¹⁵² There was, at the time, an arguably close association between the two terms. So, according to Johnson, the definition of “intercourse” was “commerce, exchange.” I cannot say what Joe would have thought if he came upon the term “intercourse” alone, on a page. I do suspect that in the context of a discussion of the Constitution, he would almost certainly have associated intercourse with commerce.

Marshall’s definition allowed him to do what was necessary to resolve the claim before him. The federal coasting license held by Thomas Gibbons was a constitutionally sound regulation of commerce, properly defined. As such, it preempted New York’s attempt to confer a monopoly via the license issued to Aaron Ogden. Some scholars have taken issue with this approach, agreeing with the New York courts that a federal coasting license simply designated a vessel as American and did not confer any independent authority to engage in trade or commerce.¹⁵³ That is certainly a viable conclusion. Many sections of the act were simply descriptive. Key provisions, however, were consistent with Marshall’s reading, referring, for example, to vessels “destined from district to district, or to the bank or whale fisheries,” and to those “employed in . . . trade.”¹⁵⁴

Does this matter? It’s certainly an interesting question as a matter of statutory interpretation. Our focus, however, is on what Marshall had to say about the nature and scope of the federal power to regulate commerce. Given what followed in the wake of *Gibbons*, two elements of the Marshall opinion must be examined with care: his discussion of the distinction between interstate and intrastate commerce

150 Natelson, *supra* note 79, at 835.

151 *Id.* at 835 n.226.

152 SAMUEL JOHNSON, 1 A DICTIONARY OF THE ENGLISH LANGUAGE (London: W. Strahan, 1755).

153 Professor White, for example, characterizes Marshall’s conclusion that the coasting licenses conferred a “right to trade” as “dubious,” stating that the statute “was designed to identify American ships operating in coastal waters so that they could be free from duties and other requirements imposed on foreign vessels.” 1 G. EDWARD WHITE, LAW IN AMERICAN HISTORY: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR 240 (2012). That position tracks the one taken in one of the New York decisions. *See* *N. River Steam Boat Co. v. Livingston*, 3 Cow. 713, 742 (N.Y. 1825) (“[T]he effect of a coasting license was considered . . . and . . . adjudged to give no right whatever.”).

154 *See* Act of Sept. 1, 1789, ch. 11, § 22–23, 2 Stat. 305 (amending An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes).

and his thoughts on commerce, narrowly understood, as distinct from other productive activities, most notably agriculture and manufacturing.

Marshall clearly stressed the centrality of the intra/interstate distinction:

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.¹⁵⁵

Marshall also discussed the nature of certain activities whose

object . . . is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose.¹⁵⁶

Speaking specifically of state inspection laws, he states,

They form a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.¹⁵⁷

Both of these elements of *Gibbons* became central factors in subsequent decisions, within which the Court used that case as the justification for sharply limiting the scope of the federal commerce power. The inter/intrastate distinction, for example, was a central element in *Paul v. Virginia*, in which the Court held that insurance policies issued in one state and in force in another “are not articles of commerce in any proper meaning of the word,” but are rather “local transactions, and are governed by the local law.”¹⁵⁸ In a similar vein, in one of its most famous—or infamous, depending on one’s world view—pronouncements, *A. L. A. Schechter Poultry Corp. v. United States*, a majority of the Court held that the Live Poultry Code was “not in terms limited to interstate and foreign commerce.”¹⁵⁹ The poultry in question “had come to a permanent rest within the State,” with

155 *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824). *Cf. id.* (“Comprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which concerns more States than one.”).

156 *Id.* at 203.

157 *Id.*

158 *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1868).

159 295 U.S. 495, 542 (1935).

“[n]either [its subsequent] slaughtering nor . . . [its] sale . . . [constituting] transactions in interstate commerce.”¹⁶⁰

An insistence that there was a difference between commerce and other productive activities in turn surfaced repeatedly in the late-nineteenth and early-twentieth centuries. In *Kidd v. Pearson*, for example, the Court held that Iowa could bar the production of “intoxicating liquors,” even though they were produced solely for distribution and consumption outside the state.¹⁶¹ Quoting *Gibbons*, Justice Lucius Quintus C. Lamar stressed that the founding generation “must be understood to have employed words in their natural sense and to have intended what they have said.”¹⁶² He then stated, in no uncertain terms,

No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce.¹⁶³

In a similar vein, in *United States v. E. C. Knight Co.*,¹⁶⁴ the Court ruled that Congress could not bar a monopoly in the manufacture of refined sugar. Citing *Gibbons*, the majority stressed that “[t]hat which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State.”¹⁶⁵ And, in *Hammer v. Dagenhart*, Justice William Rufus Day wrote for a Court that struck down a federal child labor act, stressing that “[t]he goods shipped are of themselves harmless” and “the production of articles, intended for interstate commerce, is a matter of local regulation.”¹⁶⁶

These are certainly colorable interpretations of what Marshall said in *Gibbons*. However, they also require that we filter what was said there through a particular lens. More tellingly, they ignore certain key passages in Marshall’s opinion.

¹⁶⁰ *Id.* at 543.

¹⁶¹ 128 U.S. 1, 22–23 (1888).

¹⁶² *Id.* at 20 (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 188)).

¹⁶³ *Id.*

¹⁶⁴ 156 U.S. 1 (1895).

¹⁶⁵ *Id.* at 12.

¹⁶⁶ 247 U.S. 251, 272 (1918). See *Carter v. Carter Coal Co.*, 298 U.S. 238, 298–99 (1936) (positing that commerce does not include the act of mining or manufacturing itself). Rob Natelson, to his credit, sticks to his narrow-meaning guns and declares “[f]or my purposes, it is enough to say that, from a purely originalist point of view, cases like *Carter Coal Co.* and *Schechter Poultry* were rightly decided after all.” Natelson, *supra* note 70, at 848.

Marshall certainly did state that “[t]he completely internal commerce of a State, then, may be considered as reserved for the State itself.”¹⁶⁷ But, how should we read the key phrase, “completely internal?” The full sense of what Marshall meant and said emerges only if we consider this sentence and phrase in the light of what preceded them:

The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purposes of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.¹⁶⁸

Marshall is here stating quite clearly that Congress exceeds its authority only when it tries to reach those aspects of commerce “completely within a particular state” that, tellingly, “do not affect other States.” This is a far cry from a declaration that “the commerce power did not extend to wholly intrastate commerce.”¹⁶⁹

Marshall believed that the exercise of federal power would be proper when it focused on “those internal concerns which affect the States generally.”¹⁷⁰ As a result, he speaks of the need to avoid “interfer[ing]” with internal state matters only as a general proposition, unless such actions are undertaken for “the purpose of executing some of the general powers of the government.”¹⁷¹ Madison agreed, noting in 1827 that “[t]hroughout the succeeding Congresses, till a very late date, the power over commerce has been exercised or admitted, so as to bear on internal objects of utility or policy, without a reference to revenue.”¹⁷²

What about the distinction between commerce and other matters? Justice William Rufus Day argued for the majority in *Hammer* that Marshall’s discussion of inspection laws in *Gibbons* should be read to draw a sharp contrast between commerce and, in particular, agricul-

167 *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

168 *Id.*

169 *United States v. Lopez*, 514 U.S. 549, 595 (1995) (Thomas, J., concurring). Justice Thomas is here relying on what “the Court had earlier noted,” *id.*, i.e., on the line of cases within which the Court, to my mind, departed from what Marshall actually said in *Gibbons*.

170 *Gibbons*, 22 U.S. (9 Wheat.) at 195.

171 *Id.*

172 Letter from James Madison to Joseph C. Cabell (Mar. 22, 1827), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 42, at 284, 286. The focus here was on tariffs, but the general proposition is consistent with the record.

ture or manufacturing.¹⁷³ But, his account of what Marshall had to say is incomplete, and he does not consider the implications of what Marshall says next:

No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious, that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the States, may use means that may also be employed by a State, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State.¹⁷⁴

This may, or may not, require invocation of the Necessary and Proper Clause. Marshall does speak of “direct,” “express,” and “incidental” powers. Nevertheless, he quite clearly declares that the federal government—as part of the power to “regulate commerce among the States”—may use the very same means that the states employ when they “regulate commerce within the State.” This is a far more robust vision of the commerce power than the one championed under the banner of “original” “public” meaning. It is also, notably, the one that New York’s Court for Correction of Errors—its highest court at the time—accepted in the wake of *Gibbons*.

The issue was whether the state of New York could bar a steamboat, the *Olive Branch*, from plying the Hudson River between New York City and Albany. The ship’s owners initially used the artifice of a brief stop in Jersey City, New Jersey as a way to establish the “interstate” character of the journey within the meaning of *Gibbons*.¹⁷⁵ They then abandoned that pretext, with multiple subsequent voyages going directly from New York to Albany and back.

Chancellor Nathan Sanford agreed that “circuitous navigation” via Jersey City was permissible, but granted the Livingston-Fulton syndicate’s request for an injunction barring the purely intrastate trips.¹⁷⁶ On appeal, a substantial majority of the court agreed with Chief Justice Nathan Savage that the direct trips were also permissible. Quot-

173 See *Hammer v. Dagenhart*, 247 U.S. 251, 274 (1918) at 203 (“They [inspection laws] act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose.” (quoting *Gibbons*, 22 U.S. (9 Wheat.)) (alteration in the original).

174 *Gibbons*, 22 U.S. (9 Wheat.) at 203–04.

175 While most of the facts can be mined from the reported opinion in the case, those wishing to read a clear and succinct account should see JOHNSON, *GIBBONS*, *supra* note 64, at 138–45.

176 *N. River Steam Boat Co. v. Livingston*, 3 Cow. 713, 716, 719–20 (N.Y. 1825).

ing the same passages from *Gibbons* we have looked at, Savage agreed that the “completely internal commerce of a state, then, may be considered as reserved for the state itself.”¹⁷⁷ However, he read Marshall’s opinion as establishing clearly “that over a part of the internal commerce of the states, congress has power.”¹⁷⁸ Stressing that the *Gibbons* Court had no reason to determine “how far that power extends,” Savage declared that “it is clearly inferrible, that all that part of the internal commerce of a state which is not *exclusively internal*, is subject to the regulation of congress.”¹⁷⁹ This, he stressed, was consistent with Marshall’s observations about the power of Congress to legislate “for national purposes.”¹⁸⁰

Facilitating the coasting trade was one such purpose, a form of “commercial intercourse carried on between different districts in different states, *between different districts in the same state, and between different places in the same district, on the sea coast or on a navigable river.*”¹⁸¹ One notable aspect of this was the extent to which Savage characterized his opinion as an exercise in applied original public meaning. He emphasized that “[t]o show the understanding of those who framed and adopted the constitution, we have only to look at the acts of congress immediately consequent upon its adoption.”¹⁸² Congress, acting in the immediate wake of ratification, had passed the Coasting Act, “a contemporaneous exposition of the constitution with which all were satisfied; and it was not then thought that state boundaries had any effect or influence upon this kind of navigation.”¹⁸³

It is always possible that the majority was simply doing what it felt the Marshall opinion compelled and that its broad reading did not reflect any sort of independent judgment. The earlier parallel conclusions by Davis and Kent suggest otherwise, providing support for a “public” “meaning” of commerce in the wake of ratification that is broader than the new originalists suggest. Regardless, it seems quite clear that a full and careful reading of Marshall’s opinion in *Gibbons* supports what Justice Jackson said in *Wickard*: that it was well past time to return to Marshall’s original, public meaning.

177 *Id.* at 749 (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 195).

178 *Id.* at 745.

179 *Id.*

180 *Id.* at 734 (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 203).

181 *Id.* at 747.

182 *Id.* at 752.

183 *Id.*

C. *Necessary, or Proper?*

One final aspect of the debate about these matters needs to be addressed: are the answers found in the Commerce Clause alone or via a combination of it and the Necessary and Proper Clause? This is, in certain important respects, largely beside the point. All parties to the debate about the commerce power agree that the "sweeping clause" is a proper part of the equation. There is, nevertheless, considerable room to worry about these matters if, for example, the question is whether a given federal measure is "proper" precisely because it regulates something other than commerce, narrowly defined. That, I take it, is the real objection in a dialogue within which various individuals argue that the narrow definition of commerce that prevailed before the New Deal "wrong turn" has never actually been repudiated, with the Court relying instead on "the Necessary and Proper Clause to allow Congress to regulate economic activities that were neither interstate nor commerce because such activities had a substantial effect on interstate commerce."¹⁸⁴

As a threshold matter, the assumption that the proper pre-New Deal definition was actually as narrow as the new originalists claim is simply wrong, at least if we credit what Congress did in the wake of ratification and what Marshall actually said in *Gibbons*. Let's assume, nevertheless, that there is something to worry about if and when the Necessary and Proper Clause enters the picture. It is quite clear that Marshall's opinion in *Gibbons* contemplated that the sweeping clause could become part of the inquiry. His discussion of the internal/external question and of the ability of Congress to reach "other productive activities" includes language that makes this obvious.¹⁸⁵ The argument is, accordingly, about whether Marshall's approach to these matters is doctrinally lax, conflating "necessity" and "convenience" in ways that do violence to the proper understanding and application of the clause.

My take on these matters is simple, perhaps deceptively (or delusively?) so. The classic formulation of the necessary and proper inquiry is the one Marshall stated in *M'Culloch*: "Let the end be legiti-

¹⁸⁴ Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 584 (2010). He is not the only one to make this claim. See, e.g., Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 807–11 (1996) (discussing the New Deal Court's use of the Necessary and Proper Clause to "enlarge the scope of the Commerce Clause"); Natelson, *supra* note 70, at 795 (discussing the Supreme Court's use of the Necessary and Proper Clause to allow Congress to regulate non-commercial activities "substantially affecting" commerce).

¹⁸⁵ *Gibbons*, 22 U.S. (9 Wheat.) at 195, 203–04.

mate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”¹⁸⁶ Marshall did, as part of the lead-up to this rule, state that “[t]o employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.”¹⁸⁷ He also argued that the clause should not be read to deny “the power of Congress to adopt any which might be appropriate, and which were conducive to the end.”¹⁸⁸

Critics focus on these initial passages and characterize Marshall’s approach as one that “dismiss[es], almost casually, concerns about how such an open-ended grant of discretionary power square[s] with the theory of limited and enumerated powers.”¹⁸⁹ I might well share these concerns, but for the fact that the actual operative test is much narrower. At the risk of repetition, Marshall’s did not condone “any means” and, while he speaks of those that are “appropriate,” his explanation of that term stresses that they must be “plainly adapted to that end,” must not be “prohibited,” and must comport with both “the letter” and the “spirit of the constitution.”¹⁹⁰ That was the standard invoked by Justice Breyer for the Court in a recent, focused discussion of these matters, *United States v. Comstock*, within which he quoted Marshall’s test and declared that “[w]e have since made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”¹⁹¹

Justice Thomas correctly emphasized in his *Comstock* dissent that there is ample room to argue about whether “the end is in fact legitimate,” that is, whether it is “one of the Federal Government’s enu-

186 *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

187 *Id.* at 413–14.

188 *Id.* at 415.

189 Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 200 (2003).

190 *M’Culloch*, 17 U.S. (4 Wheat.) at 421. For whatever reason, Professor Barnett does not quote this passage in his second article on this subject, the one written after he had adopted an originalist methodology. See Barnett, *supra* note 189, at 184 n.12 (speaking of a change in position since the publication of Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745 (1997)).

191 130 S. Ct. 1949, 1956 (2010).

merated powers."¹⁹² A narrow vision of "commerce" might provide a basis for maintaining that any use of the term other than "sale or trade" is not "legitimate," that it is inconsistent with both the "letter" and the "spirit" of a clause whose meaning was fixed at the time of ratification. As I have argued, however, key members of the Founding cadre made it quite clear that the Constitution's meaning was not fixed in that manner, and initial implementation of the commerce power verifies a broader reading.

What about the argument that Marshall's gloss of the sweeping clause deprives the Court of its essential role as definitive expositor of the Constitution? Randy Barnett stresses the long-running debate about the constitutionality of the Bank of the United States as part of his discussion of these matters, recounting in some detail, in particular, Madison's opposition to the First Bank and his "immediate" negative reaction to Marshall's opinion in *M'Culloch*.¹⁹³

He is absolutely correct in one important respect: Madison did express deep concerns about the extent to which Marshall's approach signaled "a latitude in expounding the Constitution which seems to break down the landmarks intended by a specification of the Powers of Congress, and to substitute for a definite connection between means and ends, a Legislative discretion as to the former to which no practical limit can be assigned."¹⁹⁴ It is, nevertheless, important to recognize that the focus here was on whether the Supreme Court would continue to be an effective check on Congress, as opposed to posing fundamental questions about implied powers or state rights.

As a general matter, Madison had no problem with deference to the considered judgments of Congress. As he stressed in *Vices*, "the fundamental principle of republican Government [is] that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights."¹⁹⁵ Indeed and, ironically, one of the major focuses in that document was the absence of any meaningful federal power to regulate commerce.¹⁹⁶ In this respect, he tracked an observation that Hamilton made in *Federalist* 36, when he observed that "[t]he real scarcity of objects in this country, which may be considered as productive sources of revenue, is a reason peculiar to itself,

192 *Id.* at 1975 (Thomas, J., dissenting).

193 See Barnett, *supra* note 189, at 188–94, 201–02 (discussing the constitutionality of the national bank and the ambiguity inherent in the term "necessary").

194 Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 THE WRITINGS OF JAMES MADISON, *supra* note 80, at 447, 448.

195 James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 82, at 348, 354.

196 *Id.* at 350 ("This defect is strongly illustrated in the state of our commercial affairs.").

for not abridging the discretion of the national councils in this respect."¹⁹⁷ This was entirely consistent with the position Marshall took in *Gibbons*, in which he emphasized that

[t]he wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse.¹⁹⁸

Madison's critique of *M'Culloch* was, then, not about the nature of the congressional powers recognized. Rather, it focused on the possibility that the Court would not serve as an effective check if and when an abuse occurred. This was not, then, the Madison who had rejected the notion of a national bank based on his belief that there was no express power given to Congress that comported with a Necessary and Proper Clause whose "meaning must, according to the natural and obvious force of the terms and the context, be limited to means *necessary* to the *end*, and *incident* to the *nature* of the specified powers."¹⁹⁹ It was, rather, a Madison who—based on experience—believed it essential that Congress act on the basis of "an obvious and precise affinity" between "means" and "ends."²⁰⁰ And, that it was incumbent on the Court to see to it that this was what actually happened.

The problem here is, of course, that one person's deference is another's abdication, with a substantial number of these judgments colored by perspective. For example, I am perfectly willing to accept the argument many have made that we need to ignore Gunning Bedford Jr.'s proposal that Congress be given the ability "to legislate in all Cases for the general Interests of the Union . . . and . . . in those Cases to which the States are separately incompetent."²⁰¹ That "almost completely open-ended grant of power to Congress" was indeed rejected "in favor of the enumeration of particular powers and the ancillary Necessary and Proper Clause."²⁰²

197 THE FEDERALIST NO. 36, at 229 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

198 *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824). A similar position was taken in *Champion v. Ames (Lottery Case)*, in which the Court stated "if Congress is of opinion . . . we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large." 188 U.S. 321, 358 (1903).

199 James Madison, The Bank Bill (Feb. 2, 1791), in 13 THE PAPERS OF JAMES MADISON 372, 376 (Robert A. Rutland et al., eds. 1981).

200 *Id.*

201 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 131.

202 Barnett, *Necessary and Proper*, *supra* note 189, at 185.

What, then, are we to make of Madison’s statement that the Constitution sought a “national Government . . . armed with a positive & compleat authority in all cases where uniform measures are necessary[?]”²⁰³ Madison argued for the creation of an effective national government. Its powers would, he stressed, be limited. Nevertheless, these powers needed to be real, especially in the face of state intransigence: “If Congress have not the power it is annihilated for the nation.”²⁰⁴ Madison believed, accordingly, that one of the primary virtues of the new system would be that any truly ““necessary & proper”” congressional action would have the purpose and effect of fashioning a “uniform & practical sanction” in the face of dangers posed by competing or contradictory state regimes.²⁰⁵

In other words, we do not need Gunning Bedford and/or Resolution VI to get where we need to go.²⁰⁶ Madison and his colleagues provide more than enough support for a “middle ground, which may at once support a due supremacy of the national authority, and not exclude the local authorities wherever they can be subordinately useful.”²⁰⁷ Indeed, in one of the most telling passages of his opinion in *North River Steam Boat Company*, Chief Justice Savage asked “why should we more apprehend an abuse of power, or an act of usurpation, by the general than by the state governments?”²⁰⁸ He then stressed, in language that accounts for current federalism concerns, but also places them in appropriate perspective, that “I am fully sensible of the propriety of preserving the state governments, with all their rights and powers: but this is by no means inconsistent with conceding to the general government its appropriate powers.”²⁰⁹

CONCLUSION

Madison repeatedly invoked a portion of the new originalist mantra, stating, for example, that “I entirely concur in the propriety of re-

203 Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 82, at 368, 370.

204 Letter from James Madison to Joseph C. Cabell (Mar. 22, 1827), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 42, at 284, 330.

205 *Id.* at 332–33.

206 For the pros and cons of these matters, compare Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory or Article I, Section 8*, 63 STAN. L. REV. 115, 115–16 (2010), with Kurt T. Lash, “Resolution VI”: *The Virginia Plan and Authority to Resolve Collective Action Problems Under Article I, Section 8*, 87 NOTRE DAME L. REV. 2123, 2123–24 (2012).

207 Letter from James Madison to George Washington (Apr. 16, 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 82, at 382, 383.

208 *N. River Steam Boat Co. v. Livingston*, 3 Cow. 713, 754 (1825).

209 *Id.*

sorting to the sense in which the Constitution was accepted and ratified by the nation.”²¹⁰ He also argued that “the very best keys to the true object & meaning of all laws and constitutions” are “the original evils & inconveniences, for which remedies were needed.”²¹¹ So, in the lead up to the Constitutional Convention, he counseled that the participants should focus on “the mortal diseases of the existing constitution,”²¹² problems caused by a system of governance that was “in fact nothing more than a treaty of amity of commerce and of alliance, between so many independent and Sovereign States.”²¹³ In particular, he argued that there was a need to address “the present anarchy of our commerce,”²¹⁴ a state of affairs that argued for a strong, positive commerce power at the federal level and protections against the extent to which “repetitions” of current problems “may be foreseen in almost every case where any favorite object of a State shall present a temptation.”²¹⁵

These are important perspectives, ones that must play a central role in any discussion of both the case for the new originalism and originalist discussions of the commerce power. As is the reality for Madison and others, as opposed to Joe the Ploughman, ratification marked a beginning, rather than an end.

Where does all of this leave us? I don’t for a moment believe that what I have said will lead to a “Eureka!” moment, with the new originalists declaring “if only we knew!” I also do not in any way claim that my account is the only possible one, given the breadth and complexity of the record. I do know that there is ample reason to believe that the meaning of a constitution was not fixed at the moment of ratification. Rather, its terms were to be “liquidated and ascertained” over time, in the light of experience. I also know that standard originalist accounts of what John Marshall actually said in *Gibbons*

210 Letter from James Madison to Henry Lee (June 25, 1824), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 42, at 190, 191. See Letter from James Madison to John G. Jackson (Dec. 27, 1821), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 42, at 70, 74 (“[I]t was the duty of all to support [the Constitution] in its true meaning as understood by the nation at the time of its ratification.”).

211 Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 42, at 284, 334.

212 Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 82, at 317, 318.

213 James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 82, at 348, 351.

214 Letter from James Madison to Thomas Jefferson (Mar. 18, 1786), in 8 THE PAPERS OF JAMES MADISON 500, 502 (Robert A. Rutland et al. eds., 1973).

215 James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 82, at 348, 348.

either ignore or treat as "mere dicta" passages in that opinion that cast the "original" "public" meaning of the Commerce Clause in a new light.

Does that make me an originalist? Indeed, does that matter? I really don't know.