

## COMMERCE IN THE COMMERCE CLAUSE: A RESPONSE TO JACK BALKIN

*Robert G. Natelson\* and David Kopel\*\*†*

Guest (tied and trussed): You said you were having me over for dinner. You didn't say that *I* was the dinner.

Host: Right. I said I was having you over for dinner. Obviously, you didn't consider all the possible meanings of my words.

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No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction.

—James Madison, reacting to claims of congressional omnipotence.<sup>1</sup>

The Constitution's original meaning is its meaning to those ratifying the document during a discrete time period: from its adoption by the Constitutional Convention in late 1787 until Rhode Island's ratification on May 29, 1790.<sup>2</sup> Reconstructing it requires historical skills, including a comprehensive approach to sources. Jack Balkin's article *Commerce*<sup>3</sup> fails to consider the full range of evidence and thereby attributes to the Constitution's Commerce Clause a scope that virtually no one in the Founding Era believed it had.

In his first sentence, Balkin reveals the principal reason for his error: "A good test for the plausibility of any theory of constitutional interpretation," he writes, "is how well it handles the doctrinal transformations of the New Deal period."<sup>4</sup> Otherwise, "we could not have a federal government that provides all of the social services and statutory rights guarantees that Amer-

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\* Senior Fellow in Constitutional Jurisprudence, Independence Institute; Professor of Law (ret.), University of Montana.

\*\* Research Director, Independence Institute; Adjunct Professor of Advanced Constitutional Law, Denver University, Sturm College of Law.

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1. THE FEDERALIST No. 41 (James Madison).

2. Evidence from shortly after ratification may be useful for shining a light back to the period before May 29, 1790. Such evidence must be used with great caution, however, because once the Constitution was ratified by the requisite number of states, advocates of vast federal power had much less incentive against making the kind of broad claims that might have led to the Constitution's rejection during the ratification debate.

3. Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010).

4. *Id.* at 2.

icans have come to expect. The government could neither act to protect the environment nor rescue the national economy in times of crisis.”

No. The original meaning of the Constitution does not depend on whether it comports with Jack Balkin’s policy preferences on the welfare state any more than whether it comports with John Yoo’s policy preferences on habeas corpus or John McCain’s policy preferences on campaign speech. Balkin’s piece suffers from the vice he attributes to others: “view[ing] the commerce power through modern eyes.”

The foundation of Balkin’s thesis is that during the Founding Era, the word “commerce” sometimes included not only mercantile trade and certain incidents, but other social relationships as well. We agree. However, we dispute Balkin’s claim that “commerce” in the *Commerce Clause* also includes those other relationships.

During the Founding Era, the meaning of a word in a legal document was presumed to be its ordinary, common meaning.<sup>5</sup> There is little question that the ordinary and common meaning of “commerce,” both in common discourse and in legal language, was mercantile trade and traditionally associated activities. The social, religious, and sexual meanings of “commerce,” while sometimes employed, were figurative or metaphorical, derived from the mercantile meaning.

This is clear from a more complete survey of the contemporaneous dictionaries than Balkin produces. He goes no further than an entry for “commerce” in a 1785 edition of Samuel Johnson’s *Dictionary*. That entry begins with the word “intercourse” and references religious and social denotations. Balkin seems unaware that relying exclusively on Johnson’s *Dictionary* can be risky: while deservedly celebrated, Johnson’s work is sometimes idiosyncratic, and its compiler’s zest for comprehensiveness can mislead. Many of Johnson’s examples were seldom-used archaisms from long-dead writers like Richard Hooker and William Shakespeare. Indeed, the mere fact that this edition’s first example of “commerce” was the interaction between God and humans (from Hooker) should raise doubts, since during the ratification debates the Federalists specifically denied that Congress would have power to regulate religious relationships.

In fact, there were many editions of Johnson’s *Dictionary*, and not all included the subsidiary definitions Balkin relies on. The first edition, in 1756, and the eighth, published in 1786 (the year before the ratification process began), included only a mercantile definition of the noun “commerce”: “Exchange of one thing for another; trade; traffick.” Nor was Johnson’s the only Founding Era dictionary. The dictionaries by Sheridan and Donaldson limited their definitions to the mercantile meaning.<sup>6</sup> Those

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5. TIMOTHY BRANCH, *PRINCIPIA LEGIS ET AEQUITATIS* 73 (1753) (reporting the maxim *Nunquam decurritur ad extraordinarium sed ubi deficit ordinarium*, or “Resort is never made to the extraordinary but when the ordinary fails”).

6. THOMAS SHERIDAN, *A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* (1789) (unpaginated) (defining “commerce” as “Exchange of one thing for another, trade, traffick”); ALEXANDER DONALDSON, *A UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE* (1763) (unpaginated) (same definition).

of Allen, Ash, and Bailey included the social definition, but relegated it to secondary importance.<sup>7</sup> Barlow's dictionary acknowledged the social meaning at the end of this entry on the subject, but described it as figurative.<sup>8</sup> Thus, a more complete survey of the dictionaries in use at the time of the Founding Era strongly suggests that the mercantile meaning of commerce was the most natural meaning in ordinary discourse, with the social and sexual denotations much less common.

Another way to determine how the Constitution uses a word is to sample contemporaneous use directly. Professor Randy Barnett did so in two empirical studies, one compiling dozens of references to "commerce" in the constitutional debates<sup>9</sup> and the other cataloguing 1,594 appearances of the word in newspaper usage.<sup>10</sup> He found the mercantile meaning of commerce to be overwhelmingly dominant. Balkin regrettably does not consider those studies worth citation or rebuttal, although he does discuss another of Barnett's works.

Balkin also overlooks yet another potential source of meaning: the pre-Revolutionary debate over the proper allocation of power between London and the colonies within the British Empire. The British government argued for unlimited parliamentary supremacy over the colonies. Most Americans conceded to London the regulation of commercial trade among units of the empire, but contended that other activities in America should be regulated only by colonial assemblies. The balance of power between the states and the federal government in the Constitution largely tracked the balance the Americans had sought within the British Empire.<sup>11</sup>

Just as telling as the dominant use of "commerce" in common speech is its dominant use in legal discourse. The Constitution was, after all, a legal document. It was drafted by a convention consisting primarily of lawyers and others knowledgeable in law, and was explained primarily by lawyers to

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7. FRANCES ALLEN, *A COMPLETE ENGLISH DICTIONARY* (1765) (unpaginated) ("[T]he exchange of commodities, or the buying and selling merchandize both at home and abroad; intercourse of any kind."); 1 JOHN ASH, *THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* (1775) (unpaginated) (defining commerce as "the exchange of commodities, or the buying and selling merchandize both at home and abroad," and adding as a second definition, "intercourse of any kind"); NATHANIEL BAILEY, *AN UNIVERSITY ETYMOLOGICAL DICTIONARY* (1783) (unpaginated) ("[T]rade or traffick; also converse, correspondence.").

8. 1 FREDERICK BARLOW, *THE COMPLETE ENGLISH DICTIONARY, OR GENERAL REPOSITORY OF THE ENGLISH LANGUAGE* (1772–73) (adding, "[c]ommerce is used figuratively for intercourse, or connection of any kind" after giving a purely mercantile definition).

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

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

11. Robert G. Natelson, *The Legal Meaning of "Commerce" In the Commerce Clause*, 80 ST. JOHN'S L. REV. 789, 836–39 (2006).

a public audience that, by comparison with today's public, was superbly literate in legal matters.<sup>12</sup>

In 2006, one of us published a survey of the word “commerce” in Anglo-American legal sources commonly consulted during the Founding Era.<sup>13</sup> Included in the sample were popular Founding Era treatises, digests, law dictionaries, and other legal materials. Also included were all English cases reported between about 1550 and 1799 and all American cases reported until 1790. The cases alone provided over 470 references to “commerce” and its Latin analogue, *commercium*. The key finding was that lawyers used “commerce” almost exclusively in a mercantile sense—as the exchange of commodities, and certain closely connected activities, such as navigation and commercial paper. Two definitions in the 1762 edition of Giles Jacob’s popular law dictionary (a frequent holding in American libraries) exemplify the legal usage:

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

Merchant, (*Mercator*) is one that buys and trades in any Thing . . . But every one that buys and sells is not . . . a *Merchant*; only those who traffick in the Way of Commerce . . . Those that buy Goods, to reduce them by their own Art or Industry . . . are Artificers and not *Merchants* . . .<sup>14</sup>

Balkin does acknowledge this study in a footnote, but dismisses it by saying that the author “does not recognize that all of his examples are united by the general concept of ‘intercourse.’ ” Unfortunately, this response is simply inaccurate: the author does provide examples inconsistent with wider meaning, and indeed, offers them specifically to show their inconsistency.<sup>15</sup>

Because of the legal nature of the Constitution, contemporaneous legal definitions, concepts, and doctrines can be key to understanding the original meaning. What the legal sources tell us about “regulating commerce” is that it was well understood as a bounded concept. It encompassed governmental trade restrictions, the law merchant, and certain closely related areas, such as navigation and commercial paper. Areas of law outside that realm were not part of “regulating commerce,” even if closely connected to commerce. One example was governance over the immigration and emigration of free persons, which Balkin several times erroneously attributes exclusively to the commerce power, but which the Constitution granted to Congress as part of

12. Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239, 247–48 (2007) (explaining the high level of legal knowledge among the ratifying public).

13. Natelson, *Commerce*, *supra* note 11.

14. GILES JACOB, A NEW LAW-DICTIONARY (1762) (unpaginated).

15. Natelson, *Commerce*, *supra* note 11, at 811–12. The study was directed at either validating or disproving a hypothesis that “commerce” included all gainful economic activity. In excluding that hypothesis, it necessarily excluded the even broader definition Balkin advocates.

its authority to “define and punish . . . Offenses against the Law of Nations.”<sup>16</sup>

Balkin entirely fails to address a decisive historical fact: during the ratification debates, the Constitution’s advocates repeatedly and clearly represented to the general public many areas over which the new government would have no power at all, at least within state boundaries. Their lists included education, social services, real estate transactions, inheritance, religion, manufacturing, agriculture and other land use, business licensing, most road building, civil justice within states, local government, and control of personal property outside mercantile commerce. All of these are within Balkin’s broad definition of “commerce,” but control over all, the Federalists informed the public, were outside federal authority. Those enumerations have been in the modern legal literature since one of us republished them in 2003;<sup>17</sup> more have been added since.<sup>18</sup>

Balkin points out that “fidelity to original meaning does not require fidelity to the original expected applications of text and principle.” However, most of the Federalist representations about the limited scope of federal power were not merely statements of expectation. They were specific representations of constitutional meaning. Moreover, although fidelity to original meaning does not always and invariably require honoring every expectation about how a power would be applied, expectations can be valuable evidence of underlying meaning.

We have space only to address briefly a few of Balkin’s other points:

*The Indian Intercourse Act.* Plentiful Founding-Era evidence, including enactments of the Confederation Congress and state legislatures, show that “Commerce with the Indian tribes” referred to mercantile trade with the Indians and certain tightly related activities, such as the licensing of and control over the behavior of merchants.<sup>19</sup>

Balkin enlists the Indian Intercourse Act of 1790 as exemplifying a broad meaning of the Indian Commerce Clause. Because the 1790 act included some criminal provisions (as trade regulations often did), Balkin argues that the meaning of “commerce” extended far beyond trade.

The Indian Intercourse Act was adopted *after* the Constitution had been ratified, and, like the Sedition Act a few years later, is not necessarily a correct guide to public understanding of the Constitution at the time of ratification. However, if the act had been adopted pursuant to the commerce power, and before the holdouts of North Carolina and Rhode Island had ratified the Constitution, the act would help the Balkin thesis very little, for the law’s criminal provisions were typical of contemporaneous trade regula-

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16. See EMER DE VATTEL, *THE LAW OF NATIONS* 220–27 (Knud Haakonssen, ed. 2008) (originally published 1758) (discussing emigration and immigration as a division of international law). Vattel’s work was the most important book on international law during the Founding Era.

17. Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L. J. 469 (2003).

18. E.g., Natelson, *supra* note 11, at 840 n.252.

19. See generally, Robert G. Natelson, *The Original Meaning of the Indian Commerce Clause*, 85 DENVER U.L. REV. 201 (2007).

tion—designed to protect trade by punishing merchants who entered Indian territory without authorization.<sup>20</sup>

In fact, however, the law was an exertion of the treaty power, not the commerce power. It was adopted on the recommendation of President Washington “for extending a trade to [the Indians] agreeably to the treaties of Hopewell.”<sup>21</sup> Several years ago, one of us discussed this background, including an explanation for why the law extended beyond the signatory tribes.<sup>22</sup>

*James Wilson’s Statement.* Balkin quotes James Wilson’s comment during the ratification debates to the effect that the federal government would have power over matters that affected more than one state. In isolation, the statement appears more persuasive than it does in context. Not only were comments of that sort relatively rare, but they were contradicted by other Federalist representations—including representations from Wilson himself. Despite the statement Balkin cites, Wilson went out of his way to identify particular activities outside congressional control, even though they had interstate implications. Among those activities was the newspaper industry.<sup>23</sup> Wilson surely knew that newspapers exercised interstate influence and that papers in one state often printed stories from papers in other states. The interstate exchange of ideas via the press is certainly a form of intercourse. Yet Wilson argued strongly that the federal government would have no power over the subject, even though the First Amendment did not yet exist.

*Earlier Drafts of the Constitution.* Although Balkin tries to attribute the broad power grants in an early draft of the Constitution to the enumeration in the final draft, the wording and approaches of the two drafts are very different. The change was made by the convention’s Committee of Detail, perhaps amid a general recognition that the ratifying public would never accept a national government with plenary powers—a recognition that proved prescient during the ratification process.

It is not quite true, as Balkin argues, that no one objected to the change, for later in the convention several delegates assayed to strengthen congressional power.<sup>24</sup>

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20. *Id.* at 253–54.

21. 1 ANNALS OF CONG. 68 (Joseph Gales ed., 1834).

22. On the latter point, see Natelson, *supra* note 19, at 255–56 (explaining that the Hopewell treaties were the first in a series of treaties which were being negotiated with a variety of tribes).

23. *E.g.*, 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 449 (2d ed. 1836). Elliot quoted Wilson as stating, at the Pennsylvania ratifying convention, “on the subject of the press . . . this Constitution says nothing with regard to that subject, nor was it necessary; because it will be found that there is given to the general government no power whatsoever concerning it; and no law, in pursuance of the Constitution, can possibly be enacted to destroy that liberty” Wilson’s comment came, of course, prior to adoption of the First Amendment.

24. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 324–33 (Max Farrand ed., 1937) (recording debate at the constitutional convention over adding further powers for Congress). Balkin’s argument that the final draft should be presumed to mean the same as the earlier drafts runs contrary to a rule of statutory construction that is also sensible in constitutional construction: “[f]ew principles of statutory construction are more compelling than the proposition that Congress does not

*Interdependence or Lack Thereof.* Finally, one should not assume that the founders limited federal power because they believed activities reserved for state regulation did not affect other states. They well understood that such activities could affect other states; this is one reason they permitted states to compact with each other with congressional consent.<sup>25</sup> But as the ratification record makes abundantly clear, the founders ultimately decided to sacrifice comprehensiveness for freedom: for them, a purpose more important than maximizing the efficiency of a central government was minimizing the risk of tyranny.<sup>26</sup>

Many today would not make the same choice regarding the scope of the federal government's power. But the constitution they might write for us is not the same as the Constitution bequeathed by the founders.

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intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442 (1987).

25. U.S. CONST., art. I, §10, cl. 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . .").

Another illustration of both the Founders' relatively narrower interpretation of "commerce" and their understanding of how it affected other activities is this passage from a 1784 congressional committee report: "The fortune of every Citizen is interested in the fate of commerce: for it is the constant source of industry and wealth; and the value of our produce and our land must ever rise or fall in proportion to the prosperous or adverse state of trade." 26 J. CONT. CONG. 269 (April 22, 1784). Note the identification of "commerce" with "trade" and how other activities affected by it are identified separately. The committee members were Elbridge Gerry, Jacob Read, Hugh Williamson, Jeremiah Townley Chase, and Thomas Jefferson.

26. Cf. Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 565 (1998) ("The accountability provisions do not establish a preference-maximizing constitution. They create a tyranny-minimizing constitution.").