

HOW “COMMERCE AMONG THE SEVERAL STATES” BECAME “INTERSTATE COMMERCE,” AND WHY IT MATTERS

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INTRODUCTION

A. OUTLINE

This Introduction briefly discusses the significance of the Constitutional “[p]ower . . . [t]o regulate [c]ommerce . . . among the several states” and argues that this, the actual language of the Constitution, was understood to have and has a broader meaning than the nearly universally accepted but quite unoriginal substitute language, “interstate commerce.” Part I considers the first major interpretation of the actual words of the Constitution, in *Gibbons v. Ogden*,¹ and then discusses the origins and meanings of the later invented and adopted terms “interstate” and “intrastate.” Part II presents data on the frequency of usage of all these terms in all Court majority opinions since 1789, and shows how “interstate commerce” has overwhelmingly been the term used by the Supreme Court since shortly after its introduction in 1869, being used about ten times more in majority opinions concerning the power to regulate commerce among the several states since roughly 1910 than the actual constitutional language.

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1. 22 U.S. 1 (1824).

Part III presents the research methodology. Part IV first analyses key Court opinions over the last century, including modern originalist analyses, to show how the use of “interstate commerce” has led or allowed the Court to take what is arguably a narrower view of the power than is warranted by the actual language of the Constitution, in turn necessitating greater than necessary resort to commerce power-extending doctrines such as the affecting commerce test and the necessary and proper clause. Then it considers past and modern academic analyses of the power over commerce based on the “interstate commerce” gloss, including several contemporary analyses that present themselves as originalist. Part VI discusses the dangers of reliance on commerce power-extending doctrines resulting from dependence on the “interstate commerce” power. Part VII is a brief conclusion.

B. THE IMPORTANCE OF THE POWER TO REGULATE
COMMERCE AMONG THE SEVERAL STATES AND ITS
DEFINITION

The potential significance of this study stems first from the fact that giving the national government a power to regulate commerce was among the most important reasons for creating the Constitution in the first place, and has remained among its most important powers. Second, beginning with the so-called Interstate Commerce Act of 1887,² and especially since the New Deal, the power to regulate commerce among the several states has become the main source of numerous federal regulations governing wide aspects of American life, from regulating civil rights in the private sector for minorities, women, the disabled, the elderly and other groups in employment, housing, protecting the environment, including air, soil, wetlands, water and endangered species, as well as workplace safety, financial regulation, regulating much of health care, fighting organized crime, regulating harmful as well as helpful drugs, and protecting food, product and consumer safety, among others. Third, conservatives and some originalists have argued that the “interstate commerce” power is not strong enough to support this legislation and is too broadly construed. Thus, because of the importance of the power to regulate commerce among the states for American domestic policy, the

2. This is the popular name of the act, not the official title, which to some extent demonstrates our point. See *infra* pp. 441, 453–55, 457–58, 486, and accompanying notes, and notes 44 and 64.

interpretation of the meaning of each of the words of the power—and especially of a gloss like “interstate commerce” is very important to constitutional law and to society generally.

Over the years, the Court has developed three main approaches to the power over commerce among the states, one dealing with instrumentalities and channels of commerce, another dealing with persons and things in commerce, and a third dealing with activities affecting commerce.³ Within those categories this article focuses only on the question of whether and to what extent the use of the actual language of the Constitution—“among the several states” versus the neologisms “interstate” and “intrastate”—affects the perception or definition of the actual extent of the power within the last category, things affecting commerce.

On the one hand, this article argues that generally the “interstate commerce power” is itself seen narrowly as limited to regulation of commerce—however defined⁴—that is in the process of crossing state boundaries only, and thus the power often needs considerable assistance from various commerce-extending doctrines if it is going to reach activity inside states. This extension of the Constitutional gloss has long been criticized, especially by modern conservative originalists. On the other hand, I argue that the power actually in the Constitution, to regulate commerce *among* the several states, by definition can regulate certain activity *inside* states, particularly activity that is not directly in the process of crossing state lines, as long as it affects more states than one, thus reaching a potentially wider range of activities without need or as much need of the assistance of extending doctrines and reaching even further with the aid of such doctrines. While the latter is a highly disputed issue which for space reasons we cannot deal with fully, this article argues that the

3. Chief Justice Rehnquist well summarized most of this doctrine in *United States v. Lopez*, 514 U.S. 549, 552–60 (1995), though he did so entirely within the linguistic framework of “interstate commerce.” *See infra*, pp. 461–63.

4. Though the meaning of individual words of the power are contested, they could be somewhat interdependent in their effects. A broad interpretation of the terms “regulate” or “commerce,” for example, could counter to some extent the effect of a narrow interpretation of “among the several states,” and vice versa. Along these lines Balkin argues that restrictions on the meaning of “commerce” are sometimes actually restrictions on “among.” JACK M. BALKIN, *LIVING ORIGINALISM*, 181–82 (2011). For limited discussion of the definition of “commerce” *see infra* pp. 433, 456–57, 459–461, 464–65, 468–71, and 482–85, and notes 13, 17, 95.

dominance of “interstate commerce” over the actual constitutional language has supported a narrower than justified meaning of the power over commerce among the several states, including supporting the narrow meaning argued by some conservative and originalist Justices and academicians.

I. THE ORIGINS OF THE WORDS OF THE CONSTITUTION AND THEIR SUBSTITUTES

A. INTRODUCTION

As the data in Part III demonstrate, the actual constitutional language “commerce . . . among the several states” has long been largely supplanted on the Court by the phrase “interstate commerce,” and the latter has long been normally used generally in law and society to refer to the power over commerce among the several states on the largely unexamined assumption that the two are the same. In this section we explore the origins and meanings of the original language of the Constitution and of the term “interstate commerce,” as well as its reinforcing complement “intrastate.” Because of space considerations, we cannot fully examine the debate over the origins or meaning of “among the several states,” but merely sketch out two basic contrasting contentions as to the meaning, and then examine these contentions in light of our data.

B. “AMONG THE SEVERAL STATES”

Gaining a power to regulate foreign commerce was one of the chief motives for the calling of the Constitutional Convention, as its absence from the Articles of Confederation proved to be a major weakness for the new nation. This power was granted in Convention with little or no controversy over the power itself, but extensive controversy prevailed over whether it would be exercised by a two-thirds or a simple majority. The chief opposition to a simple majority was from Southern delegates who feared that it would allow a Northern majority to burden their slave-labor-based exports as well as perhaps squeeze out slavery itself. The issue was resolved when concessions were made to the South over slavery, though some continued to advocate for the supermajority requirement both in Convention and then later in some Southern ratifying conventions. The power over commerce among the several states was recognized as necessary in itself as

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well as to complement the power over foreign commerce and thus was added, again with little controversy over the power itself, but with considerable controversy over the size of the majority to exercise it. A power over Indian commerce was already in the Articles of Confederation and was brought forward into the Constitution with no debate, but with simplified language.⁵

As noted above, the power over commerce among the several states is among the most important as well as contested powers in the Constitution. Briefly, the key debates are over whether the power to regulate includes the power to prohibit, whether commerce is only buying and selling or something broader, perhaps as broad as all productive or gainful activity, whether the three parts of the power have the same extent, and regarding the part we are concerned with here, “among the several states,” the debate, in sum, concerns whether this phrase purports to extend federal power to some activities *inside* states or is more narrowly limited only to activities which *cross state boundaries*.

This latter debate originated in differing political views of the appropriate scope of the power over commerce among the states, but also in occasional usage of the term “between the states” in the Framing era, a term which actually conveys the narrower meaning of only covering activities crossing state boundaries. In the early Republic, the narrow “between” meaning of “among” was often advocated by those in favor of states’ rights and a weaker federal power, often in the defense of state control over slavery as an internal matter, since the national power over commerce was recognized as perhaps the chief danger to the peculiar institution.⁶ However, the meaning of “among the several states” was not considered in detail by the Supreme Court until the foundational 1824 case, *Gibbons v. Ogden*, which ironically had nothing to do with slavery.

C. GIBBONS V. OGDEN

Gibbons v. Ogden concerned a long-disputed New York state monopoly of the business of ferrying passengers by steamboat across the Hudson River between Manhattan and northern New

5. ARTICLES OF CONFEDERATION of 1781, art. IX, § 4.

6. DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC*, 43 (2001) and 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION* 47, 281 (1953), among others.

Jersey granted to Ogden.⁷ Gibbons, on the other hand, had a federal coasting license under the federal Coasting Act of 1793, and claimed that this gave him the right to also operate a ferry between Manhattan and New Jersey regardless of the New York monopoly. Among other arguments, Ogden's counsel asserted that the power over commerce among the several states extended to commerce *only when it crossed a state line*, while activity inside a state was left to the state to regulate, and he often characterized the power as "between" the states.⁸ This "between" interpretation was an early version of the "interstate" theory that is our central concern.

In striking down the New York monopoly because it conflicted with the federal coasting license, Marshall directly addressed the meaning of "among" in the phrase, "commerce among the several states." Marshall made quite clear that the word "among" meant to go *inside* states: "The word "among" means *intermingled* with. A thing which is among others, is *intermingled* with them. Commerce among the States, *cannot stop at the external boundary line of each State, but may be introduced into the interior.*"⁹

In direct rebuttal to Ogden's "between" meaning of "among," Marshall made clear that the state line was *not* the limit of the power of Congress:

But, in regulating commerce with foreign nations, the power of Congress *does not stop at the jurisdictional lines of the several States*. . . . This principle is, if possible, still more clear, when applied to commerce "among the several States." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in

7. 22 U.S. 1 (1824). For historical background see HERBERT A. JOHNSON, *GIBBONS v. OGDEN: JOHN MARSHALL, STEAMBOATS, AND THE COMMERCE CLAUSE* (2010) [hereinafter JOHNSON, GIBBONS], and THOMAS H. COX, *GIBBONS v. OGDEN, LAW AND SOCIETY IN THE EARLY REPUBLIC* (2009). Ironically, the preface to each book anachronistically describes the case as dealing with "interstate commerce," which demonstrates our thesis by linguistically assuming away much of the point of Marshall's opinion. COX, *supra*, at ix; JOHNSON, GIBBONS, *supra*, at xiii and *infra* note 13.

8. *Gibbons*, 22 U.S. at 64–65.

9. Marshall both went beyond and largely ignored much of what the parties argued. Marshall gave no attention to the extensive discussion by the parties of the intellectual property clause, and bypassed whether the federal power was exclusive or concurrent, though Justice Johnson's concurrence did address the latter. Nor did the parties spend much time addressing the meaning of "among" or "several states," which Marshall obviously did. *Gibbons*, 22 U.S. at 194–96 (emphasis added). Concerning "mingle," see *infra*, pp. 434–36, 459, 461, 462, 464, 468–69, 470, 473, 480, 490, 492, and note 13.

which case other States lie between them. What is commerce “among” them; and how is it to be conducted? Can a trading expedition between two adjoining States, commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably *pass through* a third? Commerce among the States must, of necessity, be commerce with the States.¹⁰

To be sure, as Marshall continued, the power to go inside a state would not grant federal power over “the purely internal commerce of a state,” but it would extend to “that commerce which *affects more states than one*,” i.e., “several.” (emphasis added).¹¹

Neither of the parties nor Marshall cited any dictionaries in the case. However, Marshall’s definition of “among” and his contrast of its meaning with that argued by Ogden corresponds very closely to definitions in Dr. Samuel Johnson’s *Dictionary of the English Language*.¹² Johnson first defined “between” as “[i]n the intermediate space,” or “[f]rom one to another; noting intercourse.” He listed several other definitions and then at the end importantly said “[*b*]etween is properly used of two and *among* of more; but perhaps this accuracy is not always observed.” For “among” Johnson’s first definition was: “[m]ingled with; placed with other persons or things; on every side.” “Mingle” (from which “mingled” derives), he first defined as: “[t]o mix; to join; to compound; to unite with something so as to make one

10. *Gibbons*, 22 U.S. at 193–94 (emphasis added). See *infra* note 13 on Marshall’s use of the term “intercourse” and *supra* note 4.

11. By referring to “commerce which affects more states than one” Marshall arguably was not introducing the “affecting commerce” test *per se*, but referring to the “several states” part of the power, the term “several” requiring by definition that the commerce in question be among or inside more states than one. The “inside” meaning of “among” necessitates the term “several” to avoid regulating commerce inside only one state. In contrast, if the Constitution meant or said “between the several states,” as many have argued, (see *infra*, pp. 466–68 and 482–485) by definition “between” requires at least two states, making “several” redundant.

12. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) [hereinafter JOHNSON, DICTIONARY]. Here we partially follow the practice of originalists on and off the Court who increasingly (though sometimes unsystematically) have cited early dictionaries for constitutional meaning, preeminently Dr. Johnson’s Dictionary. See James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Court’s Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483 (2013), and Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court’s Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77 (2010).

mass,” and the second definition was “[c]onjoined with others, so as to make part of the number,” all of which seem to mean being inside of or a part of something. But regarding Johnson’s point at the end of his definition of “between,” that the “accuracy” between the two definitions was not always observed, his own definitions of “between” and “among” themselves do differ meaningfully. His definition of “between,” “[i]n the intermediate space” clearly denotes being *outside of* whatever occupies the spaces or entities that one is between, such as on a state boundary, and “from one to another” similarly conveys the meaning of crossing from one clearly defined unit to another across a boundary. On the other hand, his definitions of “among,” i.e., “mingled with,” and especially “conjoined with others so as to make part of the number,” or “one mass” clearly emphasize a very different meaning of being *inside of* or *part of* a larger number or whole.¹³

We recognize that our interpretation of *Gibbons* is disputed, and we readily concede as noted below in Table 3 that the Framers and the early Court often used the term “between” in connection with “commerce among the several states,” which has supported arguments that the Framers understood “among” to actually mean only “between.”¹⁴ But, without fully exploring the debate, it must be noted that “between” can very comfortably be a lesser included meaning *within* the broad meaning of “among.” If one is going inside more states than one to regulate commerce, one usually also crosses state borders and thus goes “between” states in order to go “among” them. Moreover, much federal regulation of commerce *does* only concern commerce at the point of crossing a state boundary. So the term “between” in itself could well be or have been the precise term appropriate to describe the actual activity or regulation in question in any given situation of

13. JOHNSON, DICTIONARY, *supra* note 12, (emphasis added), “between,” “mingle,” and “among.” Note that Marshall’s use of “intercourse” in the passage quoted above is also Dr. Johnson’s *first* definition of “commerce:” “[i]ntercourse; exchange of one thing for another; interchange of any thing; trade; traffick.” Some modern conservative originalists skip over “intercourse.” *See infra* notes 113 and 114.

14. *See, e.g.,* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 CHI. L. REV., 101, 132–39 (2001) [hereinafter *Original Meaning*]; RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 301–02 (2004) [hereinafter RESTORING], among others. While Barnett consulted Dr. Johnson’s Dictionary regarding “commerce,” he did not for “among,” concluding on other grounds that “among” must mean “between.” *Original Meaning*, 132–36. *See, infra* notes 144, 145, and 168.

being “in the intermediate space,” i.e., crossing a state boundary, though crucially *not* defining the full reach of “among” in terms of commerce inside of and affecting more states than one. In other words, “between” is arguably a conception, or specific expected application, but not the concept or full meaning of “among.”¹⁵ In any event, though a full discussion is beyond the scope of this article, we believe that there is ample additional originalist evidence¹⁶ as well as Marshall’s opinion in *Gibbons* to support the “inside” meaning of “among,” in contrast to the “crossing a state line” or “between” meaning, and in contrast to the meaning of the yet-to-be invented term that would eventually dominate the entire topic, “interstate.”¹⁷

Within a few years of *Gibbons*, under new Chief Justice Taney the Court began embracing views that, while not directly repudiating the “inside” meaning of “among,” greatly limited the ability of the Federal government to reach insides states under the power over commerce. In three cases, *Mayor of New York v. Miln*,¹⁸ the *License Cases*,¹⁹ and the *Passenger Cases*,²⁰ the Court found that transportation of persons *into* a state was not commerce and was instead completely subject to the internal police powers of the states over public health and welfare. (To be sure, the Court recognized that the navigable waterways of the United States themselves were partial exceptions to the “between” limitation, so that commerce could be regulated inside a state to the extent it was “navigation” to the port). Besides excluding persons (once on land) from the federal regulation of commerce, for presumably pro-slavery reasons, these opinions took a very strong stand to try to exclude any conflict between state police laws and federal commerce regulation, distinguishing between what went between states and what went inside, so that it seemed that there was a sharp and clear demarcation between the two. In what has come to be called a “dual federalism”

15. Ronald Dworkin, *Comment, in A MATTER of INTERPRETATION: FEDERAL COURTS AND THE LAW* 119 (Antonin Scalia ed., 1997).

16. See *infra* pp. 476–79 and 482–83 for limited discussion.

17. As mentioned *supra* note 4, giving a broad meaning to one part of the power could compensate for a narrow reading of another, and vice versa; consequently Marshall’s broad definition of commerce as “intercourse” in *Gibbons* would also likely extend the power inside states, though here our focus is upon “among” versus “interstate.” See *supra* note 15.

18. 36 U.S. 102 (1837).

19. 46 U.S. 504 (1847).

20. 48 U.S. 283 (1849).

interpretation,²¹ the Taney Court seemed to say that if a state were exerting its police powers inside itself, regardless of effects on commerce among the states, i.e., on that commerce which the federal government could otherwise regulate, there could be no federal regulation. Thus under Taney the reach of the federal power over commerce among the states was largely limited to that which was “between” or was crossing state boundaries,²² and while the Taney Court did not explicitly repudiate the “inside” or “intermingled” meaning of “among” or explicitly adopt the “between” meaning, it adopted doctrines that largely accomplished this result.

After the Civil War, these narrow commerce doctrines survived, though obviously no longer in the service of slavery,²³ but instead in the service of an emerging “laissez-faire” outlook on the Court, where they soon found perfect expression in two recently invented terms: “interstate commerce” and “intrastate commerce.”

D. INTERSTATE AND INTRASTATE COMMERCE

1. Original Meaning and Use of “Interstate” Commerce

The neologism “interstate” was apparently invented in the 1840’s, but first appeared in a Supreme Court majority opinion paired with the word “commerce” in 1869. According to the *Oxford English Dictionary (OED)*, the first meaning of “interstate” is: “(l)ying, extending, or carried on *between* independent states, or *between* states belonging to a Union, Federation, etc. Also as *n.*, a road *between* states.”²⁴ The *OED*’s first source is none other than the eminent Justice Joseph Story, who supposedly first used the term in his posthumous 1846

21. EDWARD S. CORWIN, *THE COMMERCE POWER VERSUS THE STATES: “BACK TO THE CONSTITUTION”* 141, 257 (Peter Smith, 1962) (1936). JOSEPH F. ZIMMERMAN, *CONTEMPORARY AMERICAN FEDERALISM: THE GROWTH OF NATIONAL POWER*, 70, 90–93 (1992). To be clear, Taney did not himself use the later invented term “dual federalism.”

22. Of course, political divisions in the country also limited attempts of Congress to extend federal power.

23. Though they quite importantly did continue to support Jim Crow laws. *See infra* p. 135.

24. *Interstate*, *OXFORD ENGLISH DICTIONARY* (2d ed. 1989) (emphasis added).

Miscellaneous Writings.²⁵ The *OED*'s source for Story as the first user is Joseph E. Worcester's 1860 *Dictionary of the English Language*.²⁶ However, Worcester simply says the source is Story without providing what Story actually said, that the word is composed of “inter” and “state,” derives from the field of law, and means “existing *between* different states.”²⁷ Without the actual quotation from Story it is difficult to know precisely what he meant by “interstate,” especially in the context of the power to regulate commerce among the states. The *OED*'s second source is J. M. Ludlow's *A Sketch of the History of the United States*, where he is quoted as saying “[t]he Supreme Court has exclusive jurisdiction in all questions of constitutional, international, and (if I may venture the term) interstate law.”²⁸ This does not give much sense of how he understood the term relative to the between versus among debate. The *OED*'s third source is George Bancroft's 1876 *History of the United States of America*.²⁹ Bancroft's use was not clearly in the narrow sense of relating only to objects as they pass over a boundary between states: he referred to the privileges and immunities clause of the Articles of Confederation as granting “inter-state rights.”³⁰ Clearly, the rights in question were based on the idea that citizens could move from state to state, but the rights obviously would also apply to a citizen inside a state, and were thus not limited only to the instant when citizens crossed state boundaries.

We have, however, found a use of the term “inter-state” as early as 1841, in the arguments of counsel³¹ in the important slavery case *Groves v. Slaughter*,³² which concerned primarily whether Mississippi could ban the importation and sale of slaves

25. Despite diligent searching, however, the author has been unable to find the actual use of this term in this volume, so it is not clear how Story might have used the term.

26. JOSEPH E. WORCESTER, *DICTIONARY OF THE ENGLISH LANGUAGE* (1860).

27. *Id.* at 771 (emphasis added).

28. OXFORD, *supra* note 24; J. M. LUDLOW, *A SKETCH OF THE HISTORY OF THE UNITED STATES* 36 (1862).

29. OXFORD, *supra* note 24; GEORGE BANCROFT, *6 HISTORY OF THE UNITED STATES* 34 (1876).

30. ARTICLES OF CONFEDERATION of 1781, Art. IV, § 1; OXFORD, *supra* note 24, at 34–35. The hyphenated version of “interstate” seems to have disappeared from use in the 1890's and generally we use the modern version. Lexis generally retrieves both versions. However, searching in Word requires searching for each version separately. *See infra* pp. 439–41, 457, and notes 36 and 64.

31. As discussed *infra* p. 451, Lexis search results before the 1950's often include arguments of counsel.

32. 40 U.S. 449 (1841).

from other states. The term “inter-state” was used five times by Counsel Walker to refer to actual commerce in slaves *between* Mississippi and other states, though importantly not as a synonym for the federal power over commerce among the several states. In addition, the phrase “commerce between the states” was used throughout as a synonym for “inter-state,” reinforcing the interchangeability of both terms. Use of both terms was appropriate to the facts of the case since the issue was a state’s ability to prevent movement of slaves *across its border* from a neighboring state. This case is thus perhaps the earliest recorded instance of the use of the term “interstate” as well as to use it in the narrow “crossing a state border” meaning, though obviously the term did not catch on right away. Justice Story was on the Court and participated in *Groves v. Slaughter*, so perhaps that is where he first heard the term, then used it in his book in 1846, where it was noticed by Worcester.

An 1869 case, *Hinson v. Lott*,³³ used “inter-state” once in the published argument of counsel John A. Campbell.³⁴ *Hinson* concerned whether the City of Mobile, Alabama, in taxing sales, auctions and other activities, violated the no state import or export tax clause,³⁵ because some of the goods the city taxed came from other states. The case concerned relations between two states, so that use of “inter-state” was again quite appropriate.³⁶

The first actual use of the term “inter-state” in a majority Supreme Court opinion was in *Woodruff v. Parham*, decided November 8, 1869, the same day as *Hinson*. Justice Miller for the majority argued that the no import or export duty clause only applied to “foreign” imports and exports. He distinguished the earlier case of *Almy v. California*, saying in that case

[t]he master of the ship *Rattler* was fined for violating this law, by refusing to affix a stamp to a bill of lading for gold shipped on board his vessel from San Francisco to New York. It seems to have escaped the attention of counsel on both sides, and of

33. 75 U.S. 148 (1869).

34. Appointed to the Court in 1853, Campbell resigned in 1861 to join the Confederacy, resuming the practice of law after the War. OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES (KERMIT L. HALL ed., 1992), 116–17.

35. U.S. CONST. art. I, § 10, cl. 2.

36. Campbell is quoted as saying “the State act regulated inter-state commerce.” *Hinson*, 75 U.S. at 150.

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the Chief Justice who delivered the opinion, that the case was one of inter-state commerce.³⁷

In this usage Miller seemed to apply “inter-state” to commerce involving a ship that was clearly sailing from one state to another, rather than from abroad, so that in this case the “between” meaning of “inter-state” was quite appropriate, and Miller’s use of “interstate” was not purporting to describe the whole extent of the federal power. Campbell was a counsel in both *Hinson* and *Woodruff*, so Campbell’s use of “inter-state” in *Hinson* may have inspired the Court to use it in *Woodruff*. Miller used the term only once, though the dissent used it six times.

After this first appearance in a majority opinion, the next two majority opinions to use “interstate commerce” similarly used it appropriately in the “between” sense corresponding to the actual facts of the case, which involved actual navigation across state lines,³⁸ or in-state water transport of goods intended for or from market out of state.³⁹ The latter case was a little less clear, since the Court was actually describing “intercourse,” and found that internal navigation that was part of a larger movement of the goods across state lines was regulable, but called it “between.” Thus the first few opinions did not use “interstate” in an all-encompassing sense but seemingly as a lesser included term within the broader meaning of “commerce among the several states.”

After its introduction by the Court in 1869, the term “interstate commerce” rapidly became a Court and general public favorite, its initial use by the Court soon reinforced by the 1887 passage of the correspondingly called Interstate Commerce Act.⁴⁰ Since then, as shown more fully below,⁴¹ “interstate” has displaced by far the Framers’ phrase “among the states” in Supreme Court usage, and in the legal academy as well, including, ironically, even in discussions of the “original meaning” or “original understanding” of the power to regulate commerce.

37. *Woodruff v. Parham*, 75 U.S. 123, 137 (1869).

38. *St. Louis v. Wiggins Ferry Co.*, 78 U.S. 423, 431–32 (1870).

39. *The Daniel Ball*, 77 U.S. 557, 564–66 (1870).

40. *See supra* p. 430 and note 2.

41. *See infra* Part II.

2. “Intrastate”

A few decades after the Court adopted “interstate commerce” it adopted another neologism, “intrastate.” “Intrastate” was often followed by “commerce” and paired with but sharply contrasted with “interstate commerce” to emphasize commerce or activity not normally subject to regulation under the “interstate commerce” power but instead left with the state.⁴² The *OED*’s definition of “intrastate” is “occurring within a class, political party, state,”⁴³ and first quotes Emory Johnson as using the term in 1903 to refer to the Supreme Court’s important 1886 *Wabash* decision, where the Court urged Congress to regulate the railroads.⁴⁴ However, a search of the *Wabash* case did not find the term, though the use of “intrastate” would have been highly appropriate, so Johnson was likely characterizing the Court’s words as in some fashion embodying the concept of “intrastate.” The first actual usage of “intrastate” that we found by the Court was in 1890 in another of the by then very numerous railroad cases, *Texas & Pacific Railway Company v. Southern Pacific Company*.⁴⁵ In a case involving whether the Louisiana Supreme Court improperly overturned a contract dealing with interstate railroad traffic, Chief Justice Fuller significantly characterized the plaintiff’s argument by contrasting “interstate” with “intrastate”: “that as the agreement related to earnings from *interstate* as well as from *intrastate* traffic, such decision was an interference with the freedom of *interstate commerce*”⁴⁶ Clearly the two terms were seen here as an all-inclusive set, “interstate” expressing on the one hand that commerce which could be federally regulated, and “intrastate” on the other that which could not be, at least by itself, and generally that is how they have been used since.

Thus, this use of “intrastate” excludes the considerable amount of activity inside a state that Marshall said could be included within the meaning of “among the several states,” i.e.,

42. The “interstate-intrastate” distinction seems to be conceptually the same as the “dual federalism” concept attributed to Taney, *supra* pp. 109–10, DAVID M. O’BRIEN, 1 *CONSTITUTIONAL LAW* 568–74, 694 (9th ed. 2014), though to be clear, Taney did not actually use these terms.

43. *Intrastate*, OXFORD, *supra* note 24.

44. *Wabash, St. Louis, & Pac. Ry. Co. v. Illinois*, 118 U.S. 557 (1886). Apparently, this decision spurred Congress to pass what became known as the Interstate Commerce Act the next year. *See infra* pp. 430, 453, and note 54; *see supra* note 2.

45. *Tex. & Pac. Ry. Co. v. S. Pac. Co.*, 137 U.S. 48, 53 (1890).

46. *Id.* at 53 (emphasis added).

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internal activity that “affects more states than one,” and arguably and crucially is not the distinction the Framers understood. To be sure, the Framers unquestionably recognized that much would be left to the states to regulate under the power to regulate commerce among the several states, but they did not say that “the much to be left to the states to regulate” would be “any and all commerce inside a state,” and they arguably anticipated federal regulation of commerce inside any number of states more than one by clearly choosing to use “among the several” instead of “between.”⁴⁷

To be sure, the Court does not always pair “intrastate” with “interstate commerce”, but “intrastate” has been used in most of the major commerce cases since its introduction, and Table 2 shows that the two actually appear as a pair in majority opinions *more often than the original words of the Constitution*. While “interstate” by itself conveys the narrow “between” sense, joining it frequently with “intrastate” solidifies the idea that “interstate commerce” is limited to that which crosses a state line and probably only at the moment of crossing, before becoming “intrastate,” which is inside a state and therefore left to the states to regulate. Thus the two terms together reinforce the dual federalism approach from Taney onward, and imply that exercise of the “interstate commerce power” inside a state can only be done with the help of some kind of extending doctrines. The problem is that arguably neither these terms nor the concepts they embody reflect the original understanding or the actual meaning of the language of the Constitution.

II. THE DATA

A. EXPLANATION OF TABLE 1

Table 1 presents our most important findings. Starting from the left, Column 1 shows our various time periods. Moving rightward are three columns all under the broader overall heading of “2. ‘commerce among the several states.’” First, Column 2A shows the total *number* of majority opinions for each time period citing “commerce among the several states.” Then Column 2B shows the total number of *uses* of that phrase within the majority

47. See *supra* pp. 434–37 and note 13; see *infra* pp. 443–45, 449, 451–52, 473–75, 477–85, 489–491, 492–93, 497–98 and accompanying notes, and note 176.

opinions counted in Column 2A. Finally, Column 2C shows the ratio of uses of the search language per opinion-how many times “commerce among the several states” was used on average per majority opinion for that time period.

Further to the right, the pattern repeats for the overall category “3. Interstate Commerce.” Under this in Column 3A, paralleling Column 2A, are the *number* of majority opinions per time period citing “interstate commerce” at least once. In Column 3B are the total number of *uses* of that phrase in the opinions that used the phrase at least once, and in Column 3C is the ratio of uses per opinion, paralleling Columns 2B and 2C.

At the far right, Column 4 is a ratio showing how many majority opinions per time period used “interstate commerce” divided by the number of opinions citing “commerce among the several states,” which is Column 3A divided by Column 2A. In other words, Column 4 shows how many majority opinions cited “interstate commerce” compared to opinions citing “commerce among the several states.” (There is some overlap because opinions often quoted both). Column 5 does the same thing for Columns 2B and 3B, comparing how many times “interstate commerce” was *used* in majority opinions versus “commerce among the several states.” At the bottom is a Totals row.

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Table 1. Total Number of Opinions and Uses of Commerce-Related Terms⁴⁸

1. Time Period	2. Commerce Among States			3. Interstate Commerce			4. Ratio	5. Ratio
	2A	2B	2C	3A	3B	3C	of Cases	of Uses
	Cases	Uses	Uses/Case	Cases	Uses	Uses/Case	3a/2a	3b/2b
1789-1869	21	94	4.48	1	1	1.0	0.05:1	0.01:1
1870-1879	31	61	1.97	27	58	2.15	0.87:1	0.95:1
1880-1889	47	160	3.40	44	166	3.77	0.94:1	1.04:1
1890-1899	57	198	3.47	115	683	5.94	2.20:1	3.45:1
1900-1910	59	201	3.41	143	809	5.66	2.42:1	4.02:1
1910-1919	98	190	3.41	412	1996	4.84	4.20:1	10.51:1
1920-1929	45	74	1.64	270	1336	4.95	6:1	18.05:1
1930-1939	22	34	1.55	256	1527	5.96	11.64:1	44.91:1
1940-1949	55	100	1.82	258	1583	6.14	4.69:1	15.83:1
1950-1959	39	66	1.69	155	640	4.13	3.97:1	9.70:1
1960-1969	32	49	1.53	126	702	5.57	3.94:1	14.33:1
1970-1979	30	46	1.53	129	741	5.74	4.30:1	16.11:1
1980-1989	47	74	1.57	146	837	5.73	3.11:1	11.31:1
1990-1999	30	39	1.30	84	518	6.17	2.80:1	13.28:1
2000-2009	15	19	1.27	48	246	5.13	3.20:1	12.95:1
Totals	628	1405	2.21	2211	11,843	5.36	3.56:1	8.64:1

B. EXPLANATION AND DISCUSSION OF TABLE 1

Table 1 shows the rapid rise and dominance of “interstate commerce” over “commerce among the several states” after the first use of the former term in 1869 by a Court majority. This rise can be quickly seen from the Totals row at the bottom, showing that overall, in the 141 years from 1869 till the end of 2009, majority *opinions* citing “interstate commerce” have exceeded the number of those citing “commerce among the several states” by over three and a half to one. The difference in the *actual number of mentions of the terms* in the majority opinions that used

48. Some data before 1890 include “inter-state.” See *supra* note 30.

either of these terms at least once was even more lopsided, over eight and a half to one. In other words, since its introduction in 1869 the Court not only used “interstate commerce” in *many more majority opinions* than it used “commerce among the several states,” but it also used it *much more often* than the language of the Constitution *within* those opinions.

In examining Table 1 more closely, we see first, that, as to “commerce among the several states,” in Columns 2A, B and C, this or some close variant was the only term used by the Court majority before 1869, with the limited exception, discussed below, of “between the several states.” After the introduction of “interstate commerce” in 1869, the number of opinions citing “commerce among the several states” gradually increased, but never increased greatly, always remaining below 100 cases per decade, and for all decades except the 1920s less than fifty opinions per decade. The average number of uses of “commerce among the states” per Court opinion was actually higher *before* the introduction of “interstate commerce,” about 4.48 uses per opinion up to 1869, with the bulk of these uses being in *Gibbons* and a few other cases. After that, the rate of use decreased slightly for a few decades, and after the 1910s began to decrease much more to less than two uses per case, and since the 1990’s, to little more than one use per case on average.

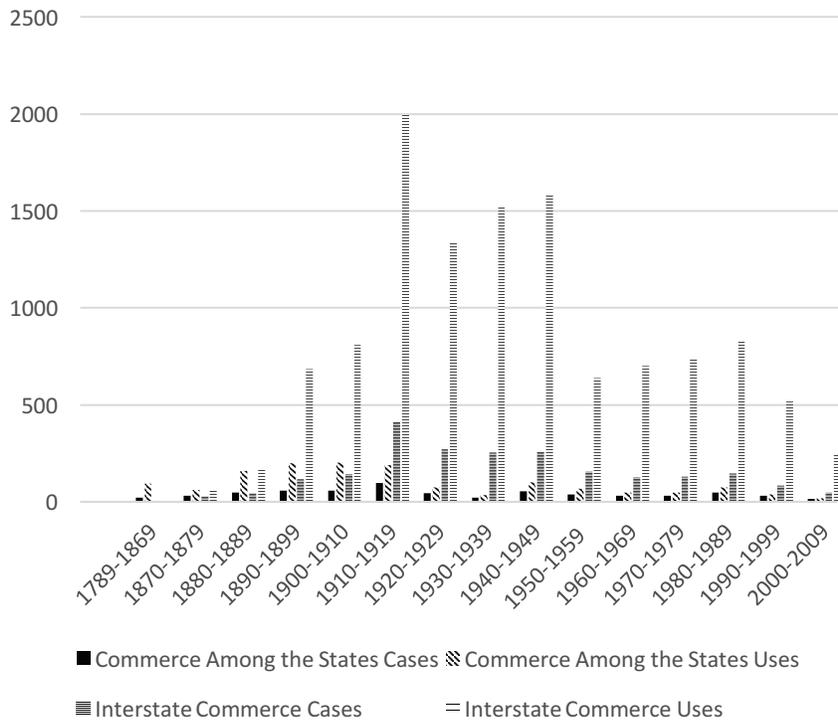
In contrast, by 1890 “interstate commerce,” far and away dominated the Court’s discussion of the power over commerce. This is shown several ways: first, Columns 3A, B and C show that after 1869 “interstate commerce” rapidly rose in use, with the highest number of opinions citing the term in the 1910s, and then the number gradually tapering off thereafter. But in every decade since the 1890’s, the number of opinions mentioning “interstate commerce” exceeded those mentioning “commerce among the several states,” and after the 1890’s they always exceeded the latter by twice, and often more. In the crucial decade of the 1930s, majority opinions citing “interstate commerce” exceeded those citing the language of the Constitution by over eleven to one. Even in the 2000s, “interstate commerce” cases exceeded “commerce among the states” cases by over three to one.

If we count the total number of uses of “interstate commerce” in opinions citing it compared to the total number of uses of “commerce among the states,” the dominance of the former is even more pronounced. Since the 1910s, the ratio of

dominance has always been at least just under ten to one, ironically peaking in the crucial decade of the 1930s, as shown in the far right column, when the number of uses of the term “interstate commerce” was almost *forty-five times* the number of uses citing the actual language of the Constitution. Since then the difference has decreased, but always remained at nearly ten-to-one or more. These data show that, to the extent that it is invoked at all, the actual language of the Constitution is in a long decline if not actually on a path to extinction, invoked probably largely for symbolism, and long ago ceasing to be the working language of the Court.

Some of the data from Table 1 are represented graphically in Chart 1 below.

Chart 1. Commerce Among the States v. Interstate Commerce: Cases Mentioning Terms and Number of Mentions of Terms by Time Periods



C. EXPLANATION AND DISCUSSION OF TABLE 2

Table 2. Majority Opinions Joining “Interstate Commerce” and “Intrastate”

<u>Period</u>	<u>Term</u>		<u>Ratios</u>	
	A. Commerce Among The States	B. Interstate Commerce	C. Col. B. and Intrastate	4. Column B as % of Column A
1789-1869	21	1	0	5
1870-1879	31	27	0	87
1880-1889	47	44	0	94
1890-1899	57	115	6	202
1900-1909	59	143	26	242
1910-1919	98	412	152	419
1920-1929	45	270	119	600
1930-1939	22	256	127	1164
1940-1949	55	258	104	469
1950-1959	39	155	49	397
1960-1969	32	126	43	394
1970-1979	30	129	41	430
1980-1989	47	146	41	311
1990-1999	30	84	21	280
2000-2009	15	48	19	320
Totals	628	2211	748	119

Table 2 lists the same time periods as in Table 1 above, and Column A repeats the same data as Table 1 regarding the occurrence of the actual language of the Constitution in majority opinions. Column B shows the number of opinions per decade quoting “interstate commerce” and “intrastate” at least once in the same opinion. Column C shows Column B as a percentage of Column A, or the frequency in which the Court used “interstate commerce” in the same opinion along with “intrastate,” compared to the frequency that it used the actual constitutional language.

As Column C shows, since its first use combined with “interstate commerce” in a Supreme Court majority opinion in 1890,⁴⁹ “intrastate” has often been used by the Court to complement “interstate commerce,” and like “interstate commerce” its use also rose dramatically after introduction,

49. See *supra* p. 442 and note 46.

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though not to the same level. From 1910 to 1979, however, “intrastate” was used with “interstate commerce” in more opinions than the actual words of the Constitution in Column A, and again in the most recent decade.

D. “BETWEEN THE STATES”

The expressions “between the states” or “between the several states” were also used by the Court from the beginning, before and after the introduction of “interstate commerce,” but not nearly as often as “among the several states.” The importance of “between the states” is that it was and still is for some an expression of an early narrow meaning of the constitutional language, essentially having the same meaning as the later “interstate,” in contrast to the broader “among” meaning discussed above.⁵⁰ Recognizing this, Table 3 shows search results for “commerce between the several states,” or close variations, in majority opinions. Because there were relatively few instances of the Court using “commerce between the states” we put the data into only three time periods.

Table 3. Court Opinions Using “Commerce Between the States”

<u>Period</u>	<u>“Commerce Between the States”</u>
1789-1869	16
1870-1929	167
<u>1930-2009</u>	<u>48</u>
Total	231

III. RESEARCH METHODOLOGY

The data in this study resulted from an analysis of how frequently certain terms appeared in majority opinions of the United States Supreme Court when searched in LexisNexis

50. See *supra* note 47.

(hereinafter Lexis).⁵¹ In the interest of space, I will only summarize key methodological steps, but further information is available from the author. The main methodological issues were what search terms to use, what data sets to search, and how to classify the data chronologically. The actual process of deciding on each of the methodological steps was very pragmatic and interactive, with many different combinations being laboriously tried before deciding on a particular method.

A. SEARCH TERMS

1. “commerce among the several states”

The most difficult part of defining the research methodology was selecting the appropriate search terms and ensuring their validity. The commerce clause is written in the Constitution by first granting Congress a power to regulate commerce, then directing it toward foreign nations, then to “commerce . . . among the several states,” and finally to the Indian tribes. In order to ensure that these searches were finding “among the several states” in the context of commerce and not something possibly unrelated, we had to find a way to allow for the Court possibly quoting the power over foreign or Indian commerce as well as the commerce we were looking for. After considerable experimentation I found that over the centuries the Court has employed a variety of phrasings closely related to the actual language of the Constitution when discussing the power over commerce among the several states. Sometimes the Court literally quoted the entire commerce power of Article I, § 8, but more often the court left out “with foreign nations” or “and with the Indian tribes.” Sometimes the Court said something like “the power to regulate that commerce which is among the several states.” Perhaps most frequently the Court paraphrased or quoted the constitutional language closely except for omitting the “several” from “among the several states.” All of these expressions, it seemed, were very close to the original language.

To accommodate these various phrasings, I decided to use the search terms “commerce (with up to five words intervening)

51. BARBARA LEIGH SMITH ET AL, *POLITICAL RESEARCH METHODS* 204–25 (1976); JOSEPH A. MAXWELL, *Designing a Qualitative Study*, in *HANDBOOK OF APPLIED SOCIAL RESEARCH METHODS* 69–100 (LEONARD BICKMAN AND DEBRA ROG, eds., 1998).

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among (up to three words intervening) states,” which accommodated all the above variations. I eliminated attempts to capture “to regulate” or variants because their presence or absence did not affect our purpose. Searching with five words intervening between “commerce” and “among” allowed for the inclusion of the three word phrase “with foreign nations” following “commerce,” or the four word phrase “with foreign nations and” which sometimes was used after “commerce” and before “among,” and did not seem to include any undesirable phrases. Searching with three words between “among” and “states” allowed for the phrase “the several” to be included, when the Court was quoting the actual language of the Constitution, and did not seem to include any inappropriate results. The actual Lexis search term was (“commerce w/5 among w/3 states”).

2. “Interstate Commerce”

“Interstate commerce,” was very easy to search for, because it had no variations within the phrase, so our search phrase was (interstate commerce).

3. “Intrastate”

The search for “intrastate” when combined with “interstate” was also straightforward. The search term was (“interstate” AND “intrastate”).

4. “Commerce Between the Several States”

The problems searching for this phrase were the same as those for “commerce among the several states” so we used essentially the same search term: (commerce w/5 between w/3 states).

B. THE SEARCH UNIVERSE: SUPREME COURT MAJORITY OPINIONS

The goal of this study was always to focus on the Court’s actual words, but surprisingly it took a fair amount of experimentation to decide how best to do that. Unless they are limited, Lexis searches return such things as headnotes, syllabus, summaries, and often, until around the 1950’s, very lengthy arguments of counsel, in addition to majority, concurring, and dissenting opinions. In addition to greatly increasing the number

of search results, surprisingly headnotes, syllabi, and summaries often retroactively inserted “interstate commerce” or “intrastate,” even where the Court itself may not have used those terms, and sometimes did not use the actual language of the Constitution even where the Court did. Searching full or partial arguments of counsel would also have added greatly to the number of results and the potential complexity of analysis. I considered including concurring and dissenting opinions, but decided to exclude these also, since, while often quite important, they were technically not the binding opinion of the Court, and would add significantly to the complexity and amount of the data analysis, especially after it became apparent that just selecting majority opinions would itself produce a large amount of data. So I did advanced searches for all cases since 1789, but in majority opinions only.

Thus, the universe and the sample for this study are the same—all Supreme Court majority opinions since 1789, so there is no sampling problem.

C. TIME PERIODS

Experimentation also led to deciding to arrange our main results by decade, except for an initial period from 1789 to 1869. This lengthy initial period was picked both because there were relatively few regulation of commerce among the several states cases before the Civil War, as well as because the term “interstate commerce” was not used by the Supreme Court majority before 1869. Shortly after this period, however, the pace of Commerce Clause cases picked up dramatically, and at the same time the Court began to heavily favor the term “interstate,” so from 1870 on we decided to present data in Tables 1 and 2 by decades.⁵² This use of decades also gave a rough match over time to changing public events and changing Court doctrines, although more refined analysis would obviously be appropriate in a future study, such as of “natural courts,”⁵³ or individual justices. However, using natural courts would produce several dozens of time periods, all of unequal length, sometimes covering only a few months. Analyzing by individual Chief Justices, or even by individual Justices would doubtless also be useful, but given that

52. Table 3 has longer time periods as explained *supra* p. 449.

53. “Natural courts” are periods in which the same justices are on the Court.

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the purposes of this study were to simply point out that “interstate commerce” has largely replaced “commerce . . . among the states” on the Court, and to inquire into the possible significance of this development, it seemed sufficient to categorize by decades, which gives a rough measure of the relative use of the main search terms on a consistent and comparable chronological basis. Other possible bases of classification would be the amount of legislation passed by Congress under the power over commerce, the kind of commerce issue involved,⁵⁴ or eras in the Court’s doctrines regarding the power to regulate commerce. However, analysis of factors such as these would greatly complicate analysis and comparability well beyond our purposes and resources in this initial study. Finally, as a practical matter, Lexis searches are limited to 1000 results, and by trial and error it appeared that breaking the analysis down by decades for majority opinions only would keep from having over 1000 cases in any decade, while still not having a large number of time periods to compare.

D. VALIDITY OF SEARCH TERMS

The biggest validity problems-making sure the results reflected what I really was looking for-arose from search results where the Court might have been necessarily quoting party names, statutory language, or perhaps its own earlier language, though in quoting itself there was arguably more of an element of the Court’s own choice. There was no way to simply eliminate this problem, with one huge exception. By far the biggest problem of invalid results arose with “interstate commerce” searches, stemming from the fact that the term “Interstate Commerce Commission” (ICC) and related terms such as “the interstate commerce law,” “the interstate commerce act,” “the committee on interstate commerce,” or “interstate commerce committee” began to occur with great frequency within a few years after the ICC was established in 1887,⁵⁵ because the Commission itself was frequently a party before the Court for decades in hundreds of cases. Since none of these mentions of “interstate commerce” where the ICC was a party, or references to the law that created it could be considered voluntary expressions by the Court of its language preferences, I decided to exclude them by searching within the overall results and subtracting these terms from our

54. See *supra* p. 431 and note 4.

55. See, e.g., *infra* p. 457 and note 65.

totals. This additional and laborious effort significantly reduced the number of cases as well as uses within cases mentioning “interstate commerce,” but obviously a great many still remained.

For all search terms, our results include a number of instances of the Court quoting its own earlier opinions or statutes other than the ICC where it might be argued the Court had no choice in the use of one search term or the other. From much examination of the search results, it appears that these instances are relatively proportional between the two search terms, and are nowhere near a majority of the results. The data, combined with a detailed examination of numerous opinions, show beyond any doubt that the Court has long used “interstate commerce” as its term of choice for applying what the Constitution states as the power to “regulate commerce among the several states,” even though I did not separate out instances of the Court citing the search terms in non-ICC related statutory language or its own opinions.

Searches for either “commerce among the several states” or the “between” variant could possibly have produced some cases that were actually about foreign commerce if the Court had cited or paraphrased the full commerce power, but inspection of the results showed that this was highly unlikely, largely because there were relatively few such cases, and also because the court usually limited itself to only mentioning the power over foreign commerce when that was the power in question. Regarding “commerce between the several states,” there were a few validity problems where a treaty of amity and commerce was involved, and the Court was referring to commerce between the states and foreign countries, or sometimes even when the Court was referring to actual relations between two states, and not as a synonym for “commerce among the several states,” so I individually excluded these instances.

Regarding “intrastate,” when used by itself it could be completely unrelated to our concern with the commerce power, so I was careful to search for it only in combination with “interstate commerce.” Also, unlike the data in Table 1, I did not eliminate instances in Table 2 where the sole mention of “interstate” resulted from a reference to the ICC. Thus, the number of opinions cited in Table 2 includes a few cases that would not have been included in Table 1 because their only reference to “interstate commerce” appearing jointly with

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“intrastate” was where the former referred to the ICC. However, the additional number of such cases appears to be relatively small, and in any case, “intrastate” did not appear in the legislation creating the ICC, so its use was still voluntary by the Court even in such cases, and obviously the term was utilized and understood as complementary to and exclusive of “interstate commerce” whether or not the latter term was required by legislation. Finally, despite care in searching, there is a very small chance that even when used in the same opinion with “interstate commerce,” occurrences of “intrastate” might not refer to activities relevant to our purposes.

IV. ANALYSIS AND DISCUSSION

A. “INTERSTATE COMMERCE” BECOMES THE WHOLE MEANING OF “COMMERCE AMONG THE SEVERAL STATES.”

After the Civil War the commerce-narrowing doctrines established by Taney were obviously no longer needed to protect slavery. However, for the most part they did not disappear but were refashioned during the so-called “laissez-faire” or *Lochner* era, where a goal of the Court was to keep most federal and state regulation of the now rapidly growing national and international economy within fairly strict limits, and particularly to keep regulation of “production”—especially regulations of labor and manufacturing-out of federal and sometimes even state control.

A key part of the effort to keep the federal power over commerce among the states narrow seems to have been changing the name of the power. Once adopted by the Court, and especially when contrasted with “intrastate,” the term “interstate commerce” seemed to exactly express the Court’s thinking and rapidly became the primary language for the Court to express and limit the power to regulate commerce among the states as the cases involving that power multiplied in response to the growing economy. Above it was shown how at first the Court seemed to actually apply “interstate commerce” to what was truly only “between” states. Quite rapidly, however, a synecdoche was created, and the part became the whole: “interstate commerce” became not just a gloss but the power to regulate commerce among the several states itself. For example, Justice Swayne writing in 1876 said “[t]he *commerce clauses of the Constitution* had their origin in a wise and salutary policy. They give to

Congress the entire control of the foreign and *inter-state commerce* of the country.”⁵⁶

Clearly, “interstate commerce” had become “the commerce clause” for Justice Swayne as early as 1876. Similarly, in the otherwise thoroughly obscure 1898 case of *Vance v. Vandercook* Justice White noted-without examining its significance-the already achieved dominance of the term “interstate commerce”: “the statute was repugnant to the third clause of section 8 of the first article of the [C]onstitution of the United States, *commonly spoken of as the ‘[I]nterstate [C]ommer*ce clause’ of the [C]onstitution.”⁵⁷ An equivalence between “between” and “interstate” and a reading of “between” and “interstate” into the Framers’ purposes in drafting the Constitution was also expressed in 1893 by Justice Brewer:

Commerce between the States is a matter of national regulation, and to establish it as such was one of the principal causes which led to the adoption of our [C]onstitution. To-day, the volume of interstate commerce far exceeds the anticipation of those who framed this [C]onstitution, and the main channels through which this interstate commerce passes are the railroads of the country.⁵⁸

Thus, in addition to its quantitative dominance shown above, more importantly, the term “interstate commerce” seems certainly by the end of the 19th century to have become accepted qualitatively as equivalent to the “between” meaning of “among the several states,” in contrast to the “inside” meaning, and to express the Court’s conception of the power granted by the Framers as not normally reaching inside states. Unlike most doctrine, if such it was, however, the transition in terminology and whatever it was intended to mean was not announced nor even examined but instead simply occurred, apparently without anyone objecting or even noticing.

A further elaboration on the “interstate-intrastate” dichotomy came in 1895 in the important case *United States v. E. C. Knight Co.*,⁵⁹ which dealt with whether the newly passed Sherman Antitrust Act⁶⁰ would apply to a monopoly of the

56. *Inman Steamship Co. v. Tinker*, 94 U.S. 238, 245 (1876) (emphasis added).

57. *Vance v. W.A. Vandercook Company*, 170 US 438, 442 (1898) (emphasis added).

58. *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 378 (1893) (emphasis added).

59. 156 U.S. 1 (1895).

60. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as 15 U.S.C. § 1).

production of refined sugar. Even though the Act itself utilized only the language “commerce among the several states” in defining the basis for banning formation of monopolies, and never used “interstate commerce,” Chief Justice Fuller repeatedly translated the former into the latter.⁶¹ Though the Court did not actually pair “interstate commerce” with “intrastate,” it ruled that the power over “interstate commerce” could not reach production, because production was by definition “local,” and not commerce, and thereby left entirely to the states to regulate in order to preserve our “dual form of government.”⁶² Furthermore, the Court ruled that even if production, in this case refining of sugar, was clearly done for the purpose of out-of-state sale, and clearly affected “interstate commerce,” nonetheless production only “indirectly” affected interstate commerce, not “directly,” and thus could not be federally regulated, presumably even with the “affecting commerce” doctrine. To be sure, here the Court was primarily focusing on defining the term “commerce” so as to exclude “production,” but there is a strong overlap between “intrastate” activity being outside federal control and production being considered as “local” or “intrastate” by definition.⁶³

The narrow meaning of the regulation of commerce as limited to regulation of movement across state lines was also the meaning conveyed in the landmark act of 1887 creating the Interstate Commerce Commission. The actual title of the act was “An Act to Regulate Commerce,” and the only reference in the Act to “inter-state” was in the section creating the Interstate Commerce Commission, but the Act immediately became universally known as the “Interstate Commerce Act,” its title a tribute to the rising popularity of “interstate commerce.”⁶⁴ As noted by an early railroad law expert, this Act was perceived to

61. The relevant language of § 1 of the Act was: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.” § 2 of the act repeated the “among the several states” language. The act was entitled “An act to protect trade and commerce” However, the statute somewhat ambiguously referred to goods moving from one state to another, as if that were the meaning of the constitutional language. *Id.* The Court’s opinion used “among the several states” five times, and “interstate commerce,” “trade,” or “market” 13 times. *Knight*, 156 U.S. at 9–17.

62. *Knight*, 156 U.S. at 15.

63. *Infra* pp. 458, 463, 473, 484–85, and notes 176 and 178.

64. The term “interstate commerce” appeared in the act itself exactly *once*, in § 11, creating the “Inter-State Commerce Commission.” Interstate Commerce Act, ch. 104, PUB. L. 49-41 (1887), abolished 109 Stat. 803, PUB. L. 104-88 (1995).

express the “interstate-intrastate” distinction, clearly distinguishing between permissible federal control over railroad traffic crossing state lines and intrastate traffic beyond federal control.⁶⁵ But while the “interstate-intrastate” distinction may have been conceptually appealing, as a practical matter the difficulty of separating “interstate” from “intrastate” railway traffic in many situations led to a series of arcane and tortured decisions over the next several decades in which the Court repeatedly tried to decide under what circumstances many highly specific aspects of integrated railroad operations, such as passengers, freight, railway cars and engines, railway workers, and particular operations of the railroads were to be legally classed either as “interstate” or as “intrastate,” while still allowing some degree of effective overall regulation.⁶⁶ Eventually the impracticality of the linguistic straitjacket of the interstate-intrastate distinction that both the Court and Congress had created for themselves regarding railroad regulation and other matters led, as discussed next, to the Court finding a variety of ways to extend the reach of “the interstate commerce power” inside states. Arguably they could have done the same thing simply by construing “among the several states” to reach inside more than one state by definition.

B. INTERSTATE COMMERCE REACHES INTRASTATE

One of the first decisions to breach the linguistic confines of the “interstate-intrastate commerce” dichotomy came in 1911 when the Court upheld seizing impure eggs inside a state under the Pure Food and Drug Act of 1906 as an exercise of the “interstate commerce power” and the necessary and proper clause. As Justice McKenna stated, “[t]he question in the case, therefore is, What power has Congress over such articles? Can they escape the consequences of their illegal transportation by

65. EMORY R. JOHNSON, *AMERICAN RAILWAY TRANSPORTATION*, 361 (1903).

66. Congress also eventually modified the law to fit reality. James W. Ely, Jr., “*The railroad system has burst through State limits*”: *Railroads and Interstate Commerce, 1830-1920*, 55 *ARK. L. REV.* 933, 968–69 (2003). Ironically, the title of this article itself expressed the problem of the need to “burst through” and reach inside states despite characterizing federal power as limited to “interstate commerce.” The author recognized this problem when he concluded that “the railroad experience . . . suggests that there is an air of unreality about drawing precise lines between interstate and intrastate commerce.” *Id.* at 979. We agree entirely but argue that the “unreality” stems from the ersatz language on which the Court relied instead of the actual constitutional language.

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being *mingled* at the place of destination with other property?”⁶⁷ The defendant had argued that after crossing the state line “the eggs had passed into the general mass of property in the State and *out of the field covered by interstate commerce*” and were hence beyond the reach of “the interstate commerce power.”⁶⁸ Thus, the argument seemed clearly cast in terms of whether the eggs were in the process of crossing a state boundary (i.e., “interstate”), and were thus within “the rule which marks the line between the exercise of Federal power and state power over articles of legitimate commerce,” (i.e., intrastate,) or could somehow still be reached even though clearly inside a state. In upholding the federal law, the Court remained entirely within the “interstate” framework, but accepted the need to regulate the adulterated eggs that had passed out of “interstate commerce” and gone inside the state by using the necessary and proper clause in order to uphold the “goal” of the statute.⁶⁹ But in referring to eggs that had “mingled with” other property, Justice McKenna seemed unaware of the fact discussed above⁷⁰ that the actual power in the Constitution, “among the several states” arguably *already meant* “mingled with,” and thus whether they had previously crossed a state line or not, in-state eggs mingled with “interstate eggs” could arguably be regulated by definition as a “legitimate goal” in themselves under the power to regulate commerce among the several states without need of assistance from the necessary and proper clause at all.

Another important early workaround on the limits of the interstate-intrastate commerce dichotomy came in the 1905 case *Swift & Company v. United States*.⁷¹ *Swift* concerned the application of the 1890 Sherman Antitrust Act to Swift and other Midwest meatpackers controlling about 60% of the national market and accused of conspiring to fix prices, manipulate the market for cattle, arrange artificially low railroad rates, and other monopolistic actions. Counsel for Swift and the others argued that what they were doing was not “interstate trade or commerce” because the sales of fresh meat “were made at the places where the meats [were] prepared” by the buyers’ agents at the

67. *Hipolite Egg Co. v. United States*, 220 U.S. 45, 58 (1911) (emphasis added).

68. *Id.* at 55 (emphasis added).

69. *Id.*

70. *Supra* pp. 435–36.

71. 196 U.S. 375 (1905).

slaughterhouses and were therefore “domestic sales,” that the delivery of the meat to the railroads was itself not any part of “interstate transportation,” and that the sales to agents of buyers from other states were also “not incidents of interstate commerce,” presumably because the actual act of sale occurred inside a state. Thus, Swift’s counsel were implicitly invoking the “interstate-intrastate” dichotomy and arguing for a very narrow, border-crossing definition of “commerce among the several states” with no look to the broader context and movement of the activities and goods in question. Swift also argued that any effect, if any, of their meat-packing on interstate commerce, was only indirect, invoking the *Knight* doctrine that production only indirectly affected commerce,⁷² and that any ultimate purpose or fact of the sales of the cattle or meat to go into broader commerce in other states did not matter despite their 60% control. The government countered that there was a broader effect on commerce deriving from the companies’ overall pattern of activity, and though the government’s attorneys argued exclusively within the language of “interstate commerce,” they tied it to a broad Marshallian meaning taken literally from *Gibbons*, defining it repeatedly and literally to mean “that commerce which affects more states than one.”⁷³

Holmes’ unanimous opinion in *Swift* upheld federal regulation of sales of cattle in stockyards even though the activity might not be in the “original package,” i.e., the cow had been cut up into packages of meat, and even though the individual sales in question might not be made while directly crossing a state boundary, because all the transactions formed “a current of commerce” Holmes generally agreed with the government and while he did not refer directly to *Gibbons*, he did follow the broad interpretation of *Gibbons*, and his “current of commerce” image corresponded closely to Marshall’s (and Dr. Johnson’s) primary

72. *Supra* pp. 456–57.

73. For Swift’s argument, see *Swift & Co. v. United States*, 1905 LEXIS U.S. 908, 2–17. The government anachronistically argued, for example “[a]s to what is *interstate* commerce, see *Gibbons v. Ogden*” But it broadly interpreted “interstate commerce” by drawing on *Gibbons*: “[i]f *interstate* commerce is *commerce which concerns more States than one*, and if a combination of independent producers to suppress competition between its members is a restraint upon commerce, it must follow that a combination of independent producers to fix and control prices and suppress competition between each other in an area covering more States than one is in restraint of *interstate* commerce”” *Id.* at 19–20 (emphasis added). As noted above, the act itself did not contain the language “interstate commerce.” See *supra* p. 457 and note 61.

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definition of commerce as “intercourse,”⁷⁴ as well as to Marshall’s definition of commerce among the states as that commerce which “concerns more states than one.” Though perfunctorily citing *Knight*, Holmes completely bypassed *Knight*’s direct-indirect distinction, saying commerce is a “practical” matter, and any artificial or formalistic approach in this area (presumably as in *Knight*) was especially likely to be inadequate. Holmes also referred to *Swift*’s “current of commerce” as having a “unity,” evoking Marshall’s comment in *Gibbons*, that “commerce is a unit.”⁷⁵

Holmes’ opinion interestingly never used the term “interstate commerce,” and instead employed the original constitutional language.⁷⁶ However, despite the fact that the Sherman Act *also* did not use “interstate commerce,” everyone else involved in the case heavily utilized “interstate commerce,” including both counsel, as already mentioned, and also the headnote and syllabus writers, who helpfully and anachronistically modernized Holmes’ careful use of the actual constitutional language into “interstate commerce.” This contrast between Holmes’ adherence to the actual language of the Constitution⁷⁷ and everyone else’s use of neologisms not only is a tribute to the latter’s dominance, but also strengthens the idea that the Court and other actors in the constitutional interpretation process were not forced to employ “interstate commerce” by the language of legislation, or anything else, but instead chose on their own to use the recently invented term.

A third early and important tear in the Court’s self-created linguistic straitjacket of the interstate-intrastate distinction came

74. *Supra* note 13.

75. *Swift*, 196 U.S. at 194. Holmes also did not seem to rely on the necessary and proper clause.

76. *See supra* pp. 455–56 and note 61.

77. Holmes’ dissent in the earlier *N. Sec. Co. v. United States*, 193 U.S. 197 (1904), which also tested the Sherman Act, similarly used only the actual language of the Constitution, or the “between” variant, while everyone else heavily used “interstate commerce.” However, most commentators assume Holmes in both cases and the Sherman Act said or should be understood to have meant “interstate commerce:” for example, regarding Holmes’ opinion in *Swift*, Richard A. Epstein wrote: “Justice Holmes came out of his dissent in *Northern Securities* and wrote for a unanimous Court condemning this cartel for its effect on *interstate commerce*”[.]” Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1439 (1987) (emphasis added). So if Holmes avoided using the term “interstate commerce,” did he nonetheless mean it? Or was his careful use of language sending some other message? *See also supra* pp. 455–56 and *infra* note 149.

in *The Shreveport Rate Cases* in 1914. Similarly to what it had done in *Hipolite Egg* and *Swift*, here the Court announced another doctrine whereby federal control could reach inside states to regulate railroads. In his majority opinion Justice Hughes applied the “interstate-intrastate” distinction, writing that congressional authority over interstate carriers “necessarily embraces the right to control their operations in all such matters having such a close and substantial relation to *interstate* traffic that the control is essential or appropriate,” and

[t]he fact that carriers are instruments of *intrastate commerce*, as well as of *interstate commerce*, does not derogate from the complete and paramount *authority of Congress over the latter*, or preclude the Federal power from being exerted to prevent the *intrastate* operations of such carriers from being made a means of injury to that which has been confided to Federal care.⁷⁸

So, while intrastate railroad operations were off-limits to federal regulation in principle, they could be regulated if they had “a close and substantial relation to” interstate operations.

Ironically, in the process of making another exception to the Court’s self-created interstate-intrastate dichotomy in *Shreveport*, the Court again used a form of “mingle”: “[a]s Congress could limit the hours of labor of those engaged in *interstate* transportation, it necessarily followed that its will could not be frustrated by . . . the *commingling* of duties relating to *interstate* and *intrastate* operations.”⁷⁹ In other words, the fact that railroad activity might be “intrastate” would not bar federal regulation (as it had arguably in *Knight* and other cases) if that activity was commingled with “interstate” activity. But “mingled with” was Dr. Johnson’s definition of “among,” and essentially Marshall’s definition of “among” in *Gibbons*,⁸⁰ so, like the *Hipolite Egg* Court, the *Shreveport* Court could arguably just as easily have used the original constitutional language without having to invent the “close and substantial relation” test at all to overcome the artificially narrow limits of the Court’s own interstate-intrastate dichotomy.

78. *Hous., E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342, 351 (1914) (emphasis added).

79. *Id.* at 352 (emphasis added).

80. *See supra* pp. 435–46.

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But while the ICC may have broken through the interstate-intrastate barrier regarding most aspects of regulation of the railroads following *Shreveport*, it long allowed racial segregation of “interstate” passengers in transportation until finally banning it in 1955. However, in many Southern states, the main and easily foreseeable effect of this ban on “interstate” transportation was to activate the trusty interstate-intrastate distinction, so that suddenly signs appeared literally designating separate waiting rooms for white or colored “intrastate passengers,” often adjoining theoretically integrated “interstate passenger” waiting rooms, causing great confusion and largely undermining the ICC decision. This application of the interstate-intrastate distinction not only resonated directly with Taney’s earlier dual federalism pro-slavery decisions, but exemplified again the real bite as well as the unworkability of that distinction, demonstrating why, to be effective, federal power over commerce must often reach inside states according to its “among” meaning without reliance on commerce extending doctrines. Racial integration of intrastate bus waiting rooms as well as of many informally segregated interstate ones only came about officially in 1961 with another ICC decision, in large part as a result of pressure from the Freedom Rides.⁸¹

C. THE NEW DEAL ERA

Hipolite Egg, Swift and *Shreveport* showed that extending the reach of the “interstate commerce power” inside states to uphold national legislation in the Progressive Era could be done by applying various extending doctrines, but these doctrines were narrow in application. A generation later, in 1937, after initial resistance by the Court to New Deal programs, the Court eventually extended these corollary doctrines quite broadly. But in so doing, despite what is often called a “constitutional revolution,” the Court still remained within the language of “interstate commerce” and still relied on the necessary and proper clause.

In the landmark 1937 *Jones & Laughlin v. NLRB* case, the Court ended years of conflict with the New Deal, greatly widening

81. CATHERINE A. BARNES, *JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT*, 99–107, 157–79 (1983).

the breach in the barrier between inter- and intrastate activities it had already made in the earlier cases above. The Court held that

[a]lthough activities may be *intrastate* in character when separately considered, if they have such a *close and substantial relation to interstate commerce* that their control is essential or *appropriate to protect that commerce from burdens and obstructions*, Congress cannot be denied the power to exercise that control.⁸²

Significantly, at the outset of his *Jones & Laughlin* opinion, Chief Justice Hughes described in great detail the flow of activity from mining iron ore to shipping it across the Great Lakes to refining it into steel and fabricating it into finished goods and further transporting it for sale in retail stores in other states. This description not only evoked Holmes' "current of commerce" metaphor from *Swift*, but also exemplified "intercourse," Dr. Johnson's and Marshall's definition of "commerce," as well as Marshall's characterization of commerce as a "unit"—a continual set of interactions comprising an identifiable whole that has commercial sense and coherence, indifferent to state boundaries, if affecting more states than one.⁸³ The fact of a large and vertically integrated enterprise crossing state and national borders also evoked the "mingled with" or "concerns more states than one" meaning of "among the several states."⁸⁴ Yet despite all these implicit references to the arguably broad original meaning of the power to regulate commerce among the several states as expressed in *Gibbons*, the Court performed even this historic turn while remaining within the linguistic constraints of "interstate" and "intrastate commerce," extending the reach of the former into the latter through the necessary and proper clause.⁸⁵

To be sure, if Congress really only had power over "interstate commerce," it was (and is) probably correct that most intrastate activities can only be regulated by the necessary and proper clause extending inside states from state borders. But, again, the question we pose is not how far can the "interstate commerce power" reach inside states assisted by the necessary and proper

82. *NLRB v. Jones & Laughlin Steel Corp.* 301 U.S. 1, 37 (1937) (emphasis added).

83. *Gibbons v. Ogden*, 22 U.S. 1, 194 (1824).

84. *Id.* at 194.

85. Hughes suggested that the "close and substantial effects" test relied on this clause of Art. I, § 8, cl. 18 by using "necessary," as well as "appropriate" from *McCulloch v. Maryland*, 17 U.S. 316, 420–21 (1819). *Jones & Laughlin*, 301 U.S. at 37.

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clause, but how far the can the power “To regulate Commerce . . . among the several States” reach inside states of its own force *unassisted* by the necessary and proper clause. So, from our point of view, all the *Jones & Laughlin* Court did was to take the power over commerce back to its original meaning through an artificial, circuitous, and unnecessarily complex linguistic and constitutional path.

In any event, the real breakthrough of *Jones & Laughlin* was in concluding broadly that separate, individual and “local” instances of *intrastate productive* activities *could* be regulated if they created a burden or substantial effect on *interstate* commerce. Not only did this formulation effectively overturn the direct-indirect distinction of *Knight* and its ban on regulating production generally, but it also laid the groundwork for the *Wickard* “aggregation” test of 1942, discussed more fully below.

After *Jones & Laughlin* the Court continued to expand the reach of the “interstate commerce” power by using doctrines which still ultimately relied on the necessary and proper clause, but were also often linguistically confused. The next year, in upholding the Wagner Act against a strike-breaking company, Chief Justice Hughes explained how that which could or could not be regulated under the power to regulate “interstate commerce” could not be precisely calculated like a “mathematical formula,” implicitly referring to *Knight*’s direct-indirect test. Hughes confusingly said,

where federal control is sought to be exercised over activities which separately considered are *intrastate*, it must appear that there is a close and substantial relation to *interstate commerce* in order to justify the federal intervention for its protection.

. . .

But such [mathematical] formulas are not provided by *the great concepts of the Constitution such as “interstate commerce,” “due process,” “equal protection.”*⁸⁶

Clearly Hughes felt that a term—“interstate commerce”—neither in the Constitution nor invented till decades after its ratification, was not only a “great concept” of the Constitution, embodying the meaning of “commerce among the several states,”

86. *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453, 466–68 (1938) (emphasis added).

but was also on the same level as the actual language of the Constitution's Fifth and Fourteenth Amendments. True, by saying the "great concepts" of the Constitution such as "interstate commerce" do not provide "mathematical formulas" like the "direct-indirect" dichotomy, he was apparently agreeing with Marshall that the power over commerce among the several states should not be defined by a "mathematical line."⁸⁷ But he totally overlooked the fact that the "interstate-intrastate" dichotomy is fully as or more mathematically precise as, if not also substantially identical to, the "direct-indirect" dichotomy he had just rejected,⁸⁸ and that its mathematical precision similarly caused, as in earlier cases, a regulatory impracticality which could only be escaped through the help of the necessary and proper clause. While he avoided the "flow" analogy in this case, Hughes overlooked the inherent conflict between the "great concept" of "interstate commerce" limited to crossing state boundaries and the actual intercourse inside states he had described the year before in *Jones and Laughlin*.⁸⁹

A few years later, in *United States v Darby*,⁹⁰ a very important 1941 New Deal case upholding the wages and hours provisions of the Fair Labor Standards Act of 1938, Chief Justice Stone tried to reconcile the actual language of the Constitution with "interstate commerce" and its extensions, but instead only tied himself in linguistic knots:

[t]he power of Congress over *interstate commerce* is not confined to the regulation of *commerce among the states*. It extends to those activities *intrastate* which so affect *interstate commerce* or the exercise of the power of Congress over it as to make regulation of them *appropriate* means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate *interstate commerce*. See *McCulloch v. Maryland*⁹¹

Stone's first sentence is certainly ambiguous (as well as anachronistic.) It literally seems to state that the power over

87. *Supra* p. 435.

88. *Supra* pp. 454, 458, and *infra* p. 489.

89. See discussion *supra* p. 465. *Santa Cruz*, 303 U.S. at 464–68.

90. 312 U.S. 100 (1941). Interestingly, *Darby* applied the "interstate doctrine" to overrule and broaden *Hammer v. Dagenhart*, 247 U.S. 251 (1918), the opinion and holding in which arguably limited the regulation of the already limited concept of interstate commerce to even less than interstate commerce.

91. *Darby*, 312 U.S. at 118–19 (emphasis added).

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interstate commerce goes beyond the power granted in the actual English words of the Constitution. However, since that reading is implausible, on more careful reading Stone probably meant that the two terms were identical, and the “is not confined” language was setting the stage for his second sentence. This says that the power over “interstate commerce” extends to *intrastate* activities which sufficiently affect interstate commerce or Congress’s power over it, via the necessary and proper clause, which he invokes by citing and paraphrasing *McCulloch*, the case which of course famously explicated the necessary and proper clause. Thus, depending on the meaning of his first sentence, it would seem that Stone assumed that the power to regulate “commerce among the states” could either at most (and perhaps not even) cover only activities crossing state lines, or it could parallel the power over interstate commerce, which could not reach inside states by itself, but could be extended to *intrastate* activities by means of the affecting commerce test based on the necessary and proper clause. Thus it seems clear that Stone believed that reaching inside states via the interstate commerce power would require the necessary and proper clause and reaching inside a state via the power to regulate commerce among the several states either would require the same assistance or would not be possible at all. In either case, he had pulled back from Marshall’s statement that the power over commerce among the states reaches *of its own power* that commerce which affects more states than one, and instead asserted that it could only do so with the help of the necessary and proper clause.

Stone also stated that the “interstate commerce power” is the actual power in the Constitution when he said that the power of Congress is “the *granted* power. . . to regulate *interstate commerce*.”⁹² To be sure, Stone presumably knew that the actual words in the Constitution were not literally “interstate commerce.” However, so entrenched had “interstate commerce” become in Court and general discourse that apparently “interstate commerce” was how Stone and presumably the rest of the Court and much of the public had long conceived, expressed, comprehended, and applied the actual words of the power to regulate commerce among the several states.

92. *Id.* at 118 (emphasis added).

But how a power can be granted in the Constitution even though it is not stated there (and can possibly be broader than the power that is granted there) is certainly quite a puzzle. Anyone subscribing to the narrow “interstate commerce” view of the meaning of the power over commerce who carefully read Stone’s statement, especially someone already opposed to the New Deal’s expansion of federal power in the first place, could well have looked at Stone’s statement where the Court seemed to actually state that it was going beyond the reach of the literal power stated in the Constitution, as an expression of an imperial Court stretching the Constitution beyond its proper bounds to extend big government. Even if his statement was only an explanation of why the necessary and proper clause had to be applied to reach intrastate activities, many could still object. And if the power “granted” in the Constitution really is the “interstate commerce” power, perhaps they have a point!

In our view, however, the problem is not stretching the “interstate commerce power” too far, as commonly argued, but the Court’s narrowly conceiving of the power in the Constitution as the “interstate commerce power” in the first place, and then gradually extending the latter by the affecting commerce test or similar extending doctrines. The force of the long-established “interstate commerce” terminology and the appeal of the interstate-intrastate dichotomy had become so great by the 1930s that even while defending a newly broad application of “the interstate commerce power” as necessary and proper to sustain the New Deal, Stone reinforced the legitimation of artificially new language and narrow doctrine, albeit arguably only reinventing in a much more complicated way largely what Marshall had already explicated over a century before.

Finally, in *Darby* Stone invoked a form of the term “mingled” in explicating “interstate commerce.” Shortly after his discussion of the necessary and proper clause quoted above, Stone said “[a] familiar like exercise of power is the regulation of *intrastate* transactions which are so *commingled with* or related to *interstate commerce* that all must be regulated if the *interstate commerce* is to be effectively controlled.” By using “comingled” Stone might just as well have called it an exercise of the power to regulate commerce among the several states, but like predecessors and successors on the Court, Stone was apparently unaware that “comingled with” arguably *was the actual meaning*

of “among,” as stated in *Gibbons* and Dr. Johnson’s *Dictionary*.⁹³ So enmeshed was Stone in the linguistic tangle of the interstate-intrastate distinction that to extricate himself he unwittingly deployed the original meaning of the Constitution as though it were a new gloss necessary to adapt the Constitution to modern circumstances. Stone’s elaborate explication of extra-Constitutional language is further testimony to how “interstate commerce” had replaced, unworkably narrowed, and generally confused the meaning of what the Framers had arguably understood “commerce among the several states” to mean in the first place.

A few years later, in 1942, the Court decided *Wickard v. Filburn*,⁹⁴ generally regarded as extending the “interstate commerce power” as far as it has ever gone in allowing the regulation of activity inside states.⁹⁵ Here, contrasting with the enormous, international, vertically integrated industrial conglomerate of *Jones & Laughlin*, the issue was whether a single farmer, Filburn, could be fined for violating the second Agricultural Adjustment Act by growing wheat for ‘personal’ consumption,⁹⁶ beyond the amount of wheat allocated him under the Act. Here the Court accepted the idea of regulating even very minor productive activities inside a state if the individual activities collectively as a class affected commerce, sometimes called the “aggregation” test:

That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.⁹⁷

This rationale laid the basis for cases in the 1960s and afterwards upholding civil rights, environmental and other regulations, many of which reach individual intrastate activities

93. See *supra* pp. 435–36.

94. 317 U.S. 111 (1942).

95. However, we agree with Balkin that *Wickard* was actually not that much of an extension of the power over commerce. BALKIN *supra* note 4, at 164–65.

96. How “personal” Filburn’s consumption of the additional wheat actually was is debatable, since most of it went to feed his dairy cattle or poultry, whose products in turn went to market, and for next year’s seed. Thus in reality, nearly all of Filburn’s wheat went directly to market or substituted for it, and despite all the controversy, the case seems clearly about commercial activity. *Wickard*, 317 U. S. at 114–15.

97. *Id.* at 127–28.

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that might be trivial and even non-economic in themselves, but which collectively exert a substantial effect on “interstate commerce.”⁹⁸

And in again dismissing the “direct” versus “indirect” effects test applied earlier to production in *Knight* and some other cases, and sustaining federal regulation of “local” activity, Justice Jackson’s opinion in *Wickard* applied the “affecting commerce” doctrine. But even the broad application of doctrine by such a master of words as Justice Jackson remained bound largely within the discourse of “interstate commerce” and “intrastate” or “local” activity:

even if appellee’s activity be *local* and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on *interstate commerce*, and this irrespective of whether such effect is what might at some earlier time have been defined as “direct” or “indirect.”⁹⁹

But arguably the Court’s extension of the “interstate commerce power” through the affecting commerce test or similar extending doctrines in *Wickard* and the other cases above amounted largely to what we argue Chief Justice Marshall said *was* the power to regulate commerce among the several states in *Gibbons* in 1824, i.e., the power to regulate that commerce “that concerns more states than one”—a power that regulates “intercourse” “intermingled with” the states. The crucial difference is that in *Gibbons* Marshall explicated the *actual* language of the Constitution, so that for him going inside a state was *part of* “commerce among the several states,” while in these more recent New Deal era “interstate commerce” cases, adding the “affecting commerce” test was necessary to reach “intrastate commerce” or other activities which the original language of the Constitution might have reached unaided. How originalists on the modern Court and twentieth century scholars, especially originalists and conservatives, have treated these extensions of the “interstate commerce” power is a point to which we now turn.¹⁰⁰

98. See discussion *supra* p. 430.

99. *Wickard*, 317 U.S. at 125 (emphasis added).

100. This is not to say that the original understanding or Marshall in *Gibbons* did not also include an “affecting commerce” test as part of the power to regulate commerce, only to say that its application did not necessarily begin at the same restricted point somewhere

D. MODERN ORIGINALISTS AND THE “INTERSTATE COMMERCE” POWER

Many modern conservatives have attacked the Court’s broad interpretation of the “interstate commerce power” since *Jones & Laughlin*, or in some cases, even its narrower decisions during the Progressive era, often on originalist grounds.¹⁰¹ To be sure, as already mentioned,¹⁰² there are several dimensions to critiques of the power over commerce among the several states, and because of space limitations we deal here only with aspects of whether the power extends inside states.

1. Conservative Originalists on the Modern Court

Many years after the New Deal Court first allowed broad use of the commerce power beginning in 1937, a more conservative Court in 1995 ended the long period of broad and essentially unquestioned congressional use of that power. Chief Justice Rehnquist, writing the majority opinion in *United States v. Lopez*,¹⁰³ overturned the Gun Free School Zone Act as exceeding the power over commerce among the several states, the first time the Court had overturned a law passed only under that power since 1936.¹⁰⁴

After first reviewing the facts and providing an overview of the development of commerce law, Rehnquist invoked originalism with a call for a return to “first principles.”¹⁰⁵ After this portentous call, however, he repeatedly referred to the power over activities inside states as stemming from the ability to “affect” “interstate commerce”: “[w]here economic activity *substantially affects interstate commerce*, legislation regulating that activity will be sustained.” In fact, Rehnquist wrote the neologism “interstate commerce” a total of 56 times, while

along the mathematical line of a state boundary where it begins under “interstate commerce.” See also *infra* at pp. 491–92 and 494–95.

101. See the Federalist Society reading lists on Federalism and the Commerce Power. Roger Clegg et al., “*Conservative and Libertarian Legal Scholarship: An Annotated Bibliography*”, THE FEDERALIST SOCIETY (2011), <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/urFFkbJ6p75qQKfGEoNvG84wzfbwqsaijGRPtB J.pdf>. See also, David F. Forte, *Commerce Among the Several States*, in THE HERITAGE GUIDE TO THE CONSTITUTION, 101 (David F. Forte, ed., 2005).

102. See *supra* p. 451.

103. 514 U.S. 549, 552 (1995).

104. With the brief exception of *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

105. *Lopez*, 514 U.S. at 552.

quoting the actual language of the Constitution, “commerce . . . among the several states,” exactly two times, and once without “several.”

Apparently, the conservative Chief Justice did not notice he was applying “first principles” using language not invented until well after the Constitution was written, nor did many conservatives and originalists who praised the decision. But more important is how “interstate commerce” thinking affected Rehnquist’s reasoning: one of the key parts of the opinion is where Rehnquist first considered how much something had to affect commerce in order to be within the “interstate commerce” power:

. . . Congress’ commerce authority includes the power to regulate those

activities having a substantial relation to *interstate commerce*, . . . i.e., those activities that substantially affect *interstate commerce* Within this final category, admittedly, our case law has not been clear whether an activity must “affect” or “substantially affect” *interstate commerce* in order to be within Congress’ power to regulate it under the Commerce Clause. . . . We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity “substantially affects” *interstate commerce*.¹⁰⁶

Requiring the regulated activity to “substantially affect” rather than just to “affect” interstate commerce more narrowly construes and limits the reach of the “affecting commerce” test, and hence narrows the reach of the “interstate commerce” power, because to “substantially affect” something is more difficult than merely to “affect it.”¹⁰⁷ This is on top of the fact that, as discussed more fully below, measuring effects—substantial or not—on “interstate commerce” generally means measuring the effect that something inside a state has on an activity at the state border rather than on other activity inside a state, which is already arguably more restrictive of the power. In turn, the latter could require a longer reach of the “affecting commerce” test—i.e., the

106. *Lopez*, 514 U.S. at 558–59 (emphasis added).

107. *Lopez* also required that the activity must be “economic.” *Id.* at 560. *But see* criticism of Rehnquist’s anachronistic conception of what is “economic” in Conrad J. Weiler, Jr., “Explaining the Original Intent of *Lopez* to the Framers: Or, the Framers Spoke Like Us, Didn’t They?”, 16 WASH. U. J. L. & POL’Y, 163 (2004) [hereinafter Weiler, *Explaining*].

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necessary and proper clause — than what would be required under what we argue is the actual meaning of “among the several states,”¹⁰⁸ because the latter may already locate the commerce that can be regulated inside states. Thus whatever affects “commerce among the states” might already be quite close by inside a state, while an effect on “interstate commerce” must be measured to the mathematical line of the state border.

Related to that point, Rehnquist’s *Lopez* opinion, like McKenna’s, Hughes’s, and Stone’s before him, referred to a form of the term “mingle” to justify extending the “interstate commerce” power,¹⁰⁹ apparently also like them, unaware of using the very term that defined “among” in the first place with no need for any extending corollaries. In paraphrasing the 1914 *Shreveport Rate Cases*, Rehnquist said “the Court held that, where the interstate and intrastate aspects of commerce were so *mingled* together that full regulation of interstate commerce required incidental regulation of intrastate commerce, the Commerce Clause authorized such regulation.”¹¹⁰ In this and the other instances a form of “mingle” was applied in support of a commerce-extending doctrine under the necessary and proper clause to overcome the artificial narrowing of the power caused by imposition of the anachronistic interstate-intrastate dichotomy, even though the “mingle” meaning was already arguably contained in the first place within the meaning of the word “among” in the actual language of the Constitution, and commerce power-extending doctrines might not even be needed. In its recurring use of versions of “mingled” as if it were a helpful new gloss to justify extending the “interstate commerce power,” the Court is perhaps subconsciously recognizing the same reality of the need to reach inside states that the Framers (and Marshall) explicitly did in the first place when they wrote “among the several states” instead of “between the states.”

Justice Thomas concurred in *Lopez*, making a very strong conservative originalist argument for cutting back the commerce clause even more than the majority opinion had. But his originalism was perhaps more conservative than originalist, since after calling for a return to the original meaning of the Constitution and suggesting on originalist grounds that many

108. See *supra* pp. 435–36 and *infra* Part IV.E.

109. *Supra*, pp. 435–36 459, 462, 468–69, and note 13.

110. *Lopez*, 514 U.S. at 554 (emphasis added).

more laws be overturned as exceeding the commerce power,¹¹¹ Thomas used the term “interstate commerce” a total of *thirty-two* times. To be sure, many of his mentions were quotes from other cases as he argued that the “affecting commerce test” was improper, but he never expressed any criticism of the use of “interstate commerce” and seemed completely unaware of its “unoriginalism.” Confirming this point, Thomas anachronistically added in rejecting the “affecting commerce” test that “the Framers could have drafted a Constitution that contained a ‘substantially affects *interstate commerce*’ clause had that been their objective.”¹¹² This is all the more ironic as elsewhere *in the same concurrence* Thomas utilized Dr. Johnson’s 1773 *Dictionary* to give a very selective reading of the supposed original meaning of “commerce,”¹¹³ and completely (and inconsistently) overlooked the absence from that *Dictionary* of “interstate.”¹¹⁴ But the larger point is that Justice Thomas apparently considered “interstate commerce” in its narrow sense to actually *be* the equivalent of what the Framers understood as “commerce . . . among the several states,” and thus vulnerable to attack for being overextended inside states via the “affecting commerce” test.¹¹⁵ But while the “interstate commerce” power might arguably be overextended, if “among the several states” is actually broader than “interstate,” as we have argued, the power over commerce among the several states could reach much of what Justice Thomas rejects even without an affecting commerce test.

111. “[O]ur case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.” *Id.* at 584.

112. *Id.* at 588 (emphasis added). See *infra* pp. 494–96.

113. Selective, because in concluding that “commerce” meant “selling, buying, and bartering, as well as transporting for these purposes,” Thomas first quoted Dr. Johnson’s full definition of “commerce:” “[i]ntercour[s]e; exchange of one thing for another; interchange of any thing; trade; traffick,” but his analysis skipped right over “intercourse.” Arguably, analyzing “intercourse” would have made arguing for Thomas’s narrow “selling and buying” definition of “commerce” more difficult. *Lopez*, 514 U.S. at 585–86.

114. Inconsistent use of dictionaries is not unknown in originalist analyses. See *supra*, note 12.

115. Following *Lopez*, *United States v. Morrison* affirmed to the conservative/originalist movement that *Lopez* was not a fluke. 529 U.S. 598 (2000); AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION, 112, 151 (2015). In *Morrison* Rehnquist’s majority opinion used “interstate commerce” 36 times, and the actual language of the Constitution *once*.

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2. “Interstate Commerce” in the Legal Academy and Beyond

a. Early Writers

Though here we can only review a tiny sampling of how the legal literature has treated the “interstate commerce power,” with a few prominent exceptions, “interstate commerce” seems to have been fully accepted as the working language for analyzing the constitutional power over commerce in the legal community and beyond within less than a generation of its 1869 introduction and continues to be so today. This is generally true even among most originalists, especially among many who argue for narrow interpretations of the power.

Among pre-New Deal writers with a narrow interpretation of the power, for example, Robert E. Cushman’s 1919 article, “The Police Power Under the Commerce Clause” criticized those who would broaden the commerce power beyond its then narrow interpretation, though he argued that it already had a broad interpretation, and portrayed the power Congress had recently begun exercising over food and drugs and railroad safety as an improper exercise of a federal police power.¹¹⁶ He uncritically and frequently used the term “interstate” as though it were the original language of the Constitution, and gave it the narrow “between” meaning. For example, he quite anachronistically said that “perhaps the most important cause for the formation and adoption of our federal constitution was the desire to establish a government with power to regulate foreign and *interstate* commerce. . . .”¹¹⁷ Later he wrote about “congressional responsibility for the safe, free, uninterrupted flow of commerce *between* the states”¹¹⁸ Similarly, in a 1932 book on the commerce clause, Professor Gavit wrote that “prior to the adoption of the Constitution the phrase “interstate and foreign commerce” had no particular legal significance.”¹¹⁹ This is indisputably correct since the word “interstate” did not yet exist, but this stunningly anachronistic statement from an expert shows how completely the legal community had convinced itself within

116. Robert E. Cushman, *The Police Power Under the Commerce Clause*, 3 MINN. L. REV. 289 (1919).

117. *Id.* at 309.

118. *Id.* at 319 (emphasis added).

119. BERNARD C. GAVIT, *THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION*, 100 (1932).

a few years of the introduction of “the interstate commerce power” that it *was* the constitutional power. Even Albert Abel, in what was in many ways a thorough and originalist, though also conservative, analysis of the origins of the power to regulate commerce among the states, frequently used “interstate commerce” and “between the states” as the equivalent of the actual language of the Constitution.¹²⁰ For example, in surveying the documents of the Framing era, he says “[t]he only thing approaching a full discussion of the *power over interstate commerce* is found in *The Federalist*, where it was touched on three times”¹²¹ Of course, *The Federalist* never discussed “interstate commerce.” Elsewhere Abel paraphrased a Framers’ words that literally said “among the several states” as “between the states.”¹²² These early discussions demonstrate “interstate commerce’s” early dominance and narrow embodiment of the power over commerce, and show how long and often both the Court and the legal community have convinced themselves that “interstate commerce” is actually the language as well as the meaning of the Constitution.

Even Professor Corwin, who also claimed in 1936 to be interpreting the original understanding, while arriving at what today would be considered “liberal” conclusions that the commerce power was very broad and reached inside states, frequently and uncritically used the term “interstate commerce” even while arguing against several of the Court’s commerce-narrowing doctrines. While he never explicitly discussed the meanings of “between” versus “among” or “interstate,” he clearly argued that the power to regulate commerce among the several states could go inside states. So his use of “interstate commerce” did not carry the “between” meaning, but so far as we can tell he is the only scholar before recent years to examine original evidence who regularly used the term “interstate commerce”

120. See Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941).

121. *Id.* at 473.

122. Sherman, enumerating the main functions of the federal government, lists the duties “to preserve . . . a beneficial intercourse *among* themselves [the states]”, The language is interesting; the beneficial intercourse *between* the states was merely to be preserved” The italics are added to show how Abel deftly and perhaps unconsciously reduced Sherman’s “among” to “between” so as to support his own general thesis. *Id.* at 473 (emphasis added).

while arguing broadly for a power to go inside states.¹²³ A year later, the soon to be Justice, Professor Felix Frankfurter, also an advocate of broad application of the power over commerce among the states, wrote anachronistically regarding Justice Taney, saying he “furthered his general policy of giving restrictive scope to the Commerce Clause by narrowing the conception of *interstate commerce*[.]” and emphasized the “geographical dichotomy between state and *interstate commerce*.”¹²⁴ This reinforces our point above about Taney’s narrow dual federalist views of the power over commerce,¹²⁵ but also shows that even before joining the Court, Frankfurter already conceptualized the power in the Constitution to be the “interstate commerce” power contrasting with apparent “intrastate” power.

But a few broad commerce power advocates in and after the 1930s did argue that “interstate commerce” was being used to convey an improperly narrow meaning of the power over commerce among the states. In 1937 Hamilton and Adair’s major critique of narrow views of the commerce power briefly mentioned the “interstate” theory, pointing out that the word “interstate” did not exist at the Founding, and that the use of “interstate commerce” instead of “among” contributed to an idea of “separation of dominions between state and nation” that did not exist regarding commerce at the Framing.¹²⁶ But apparently the only extended criticism of the use of “interstate” and the results of substituting it for “among the states” was by Crosskey. Crosskey heavily criticized what he called “the interstate theory” of the commerce power, or “the interstate limitation,” i.e., “the moving of persons, things, and intelligence, *from the territory* of one state *to the territory* of another.”¹²⁷ He attributed its rise to the pre-Civil War effort beginning with Taney to narrow the power over commerce so that it would not threaten states’ rights, and presumably slavery, and then its adaptation after the Civil War

123. See generally, CORWIN, *supra* note 21, at Chs. 5–6, 171–72, 209.

124. FELIX FRANKFURTER, *THE COMMERCE POWER UNDER MARSHALL, TANEY AND WAITE*, 59–60 (Quadrangle Paperbacks 1964) (1937) (emphasis added).

125. *Supra* pp. 437–38.

126. WALTON H. HAMILTON & DOUGLASS ADAIR, *THE POWER TO GOVERN: THE CONSTITUTION—THEN AND NOW*, 142 (1937). Stern earlier briefly also noted how “interstate” narrowed the understanding of the power, but undertook no analysis. Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1348 (1934).

127. CROSSKEY, *supra* note 6 at 17–19. Curiously he did not comment on interstate’s post-constitutional origins.

into the “interstate theory” by a Court increasingly committed to laissez-faire policies.¹²⁸

But despite the Court’s narrow phrasing of the power over commerce among the several states as “interstate,” Crosskey agreed that it had nonetheless extended the power over commerce inside states through doctrines such as the direct-indirect doctrine of *Knight*,¹²⁹ or later, as in *Jones and Laughlin*,¹³⁰ based on whether something *substantially affected* interstate commerce, even if not defined as commerce at all. However, Crosskey thought these doctrines would not have been necessary if the Court had stayed with the original broad understanding of the power over commerce among the several states, and were possibly not themselves even constitutional, but they had evolved because of the need to get around the confines of the “interstate doctrine.” Otherwise, without these compensating doctrines, he argued, under the interstate theory, virtually everything inside a state was “intrastate,” and, going back to Taney, left to the state to regulate.

Crosskey concluded that these corollary “interstate commerce”—extending doctrines did not reach what he believed to be the full extent of the power over commerce—but that was because he defined “commerce” as “all gainful activity” inside states and states as the people of the states.¹³¹ While we do not agree that “commerce” was so broadly understood,¹³² nor that “states” were not governmental units, those points are beyond the scope of this article. We do think Crosskey correctly argued that the general embrace of the “interstate theory” forced the Court to adopt a variety of corollary rationales when it wanted to extend the commerce power inside states beyond its “interstate” limitation.¹³³ After all, if the power to regulate commerce among the several states could go inside states to regulate “that commerce which affects more states than one,” as Marshall said, even if the commerce did not itself move across state lines, then

128. CROSSKEY, *supra* note 6, at 47, 287–88. As did CORWIN, *supra* note 21, at 131, 257–58, as well as many others.

129. *Supra* pp. 456–57.

130. *Supra* pp. 464–65.

131. CROSSKEY, *supra* note 6, at 50–55.

132. For one, the Framers distinguished between “commerce” and “economy,” both of which described “gainful” activities, but only the former was understood to be subject to regulation. See Weiler, *Explaining*, *supra* note 107, at 173–76, 182–93.

133. CROSSKEY, *supra* note 6, at 18.

the affecting commerce test is not needed, or is not needed as much. Nor does one need a “stream” or “current of commerce,” nor a “close and substantial relation to interstate commerce,”¹³⁴ to reach inside a state, if “among” already means to go inside a state to those activities which are mingled with those activities that concern more states than one.

Since Crosskey, however, there seems to have been little academic examination of the continuing substitution of “interstate commerce” for “commerce among the several states,” and the term’s use is either normally taken for granted, or (in our opinion properly) used as the equivalent of “between,” which in turn is often (in our opinion improperly) argued to be the actual meaning of “among the several states.”¹³⁵

b. Modern Writers

In recent decades, Raoul Berger, a founder of modern conservative originalism,¹³⁶ concluded that “among” meant “between,” partly based on such evidence as the fact that the Framers themselves sometimes used “between,” and the idea that the Framers intended only to stop obstacles to trade at state borders.¹³⁷ After accusing Chief Justice Marshall of an “importation” of the meaning of “commerce” in *Gibbons*,¹³⁸ Berger ironically and self-servingly then himself imported “interstate commerce” and “between” into the rest of his chapter on the commerce power.¹³⁹ “Undoubtedly Congress has power to govern commerce *between* the States Nor was *the inter-state grant* all-embracing.” Similarly with Bork and Troy, the late Judge Bork being another progenitor of contemporary modern conservative originalism who also regularly and uncritically used the term “interstate commerce” while expounding the Framers’ original understanding of commerce. For example, in discussing

134. See *supra* pp. 460, 464.

135. The examples are legion, we have cited only a few prominent examples.

136. JOHNATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS 129–32 (2005). Though some of Berger’s methods are now rejected by some modern originalists as not properly focused on the “original understanding,” their conclusions regarding commerce are often the same as his.

137. RAOUL BERGER, FEDERALISM: THE FOUNDERS’ DESIGN 126–33 (1987). See *supra* text pp. 451–455 and accompanying notes regarding the Framers’ use of “among” and “between.”

138. BERGER, *supra* note 137, at 124.

139. E.g., BERGER, *supra* note 137, at 123, 132, 133, 135, 136, 138, 140, 144, 145, 156.

the meaning of the power over commerce among the states, they anachronistically call it “interstate commerce” and correctly but largely irrelevantly equate the latter to “between”: “[i]nterstate commerce seems to refer to *interstate* trade—that is, . . . ‘transportation, purchase, sale and exchange of commodities *between* the . . . citizens of different states.’”¹⁴⁰ But the real question is not whether “interstate” is similar to “between,” which it unquestionably is, but what is the meaning of “among.”

The modern libertarian originalist Richard Epstein also seems to follow the “interstate theory,” though his primary focus is on the supposedly overbroad definition of “commerce,” beginning in the Progressive Era. He anachronistically says regarding *Gibbons* that “Marshall decided . . . that navigation among the several states was *interstate commerce*,”¹⁴¹ and quotes Marshall’s statement about leaving to the states that commerce which is “completely internal,” but like many conservatives leaves off Marshall’s qualifying phrase at the sentence’s end, “and which does not extend to or affect other states.” Moreover, Epstein’s general discussion heavily employs the language of interstate commerce and the “interstate-intrastate” distinction. Regarding the necessary and proper clause, he ties it to “interstate commerce” by saying that it “permits the regulation of local affairs that are in a sense inseparable from national ones, as happens when local and interstate cars, for example, move along the same line.”¹⁴² Of course, the meaning of “among” is “mingled with,” which “local and interstate cars. . . along the same line” would seem to exemplify with no further qualification, so that arguably Epstein’s approach like others would require the necessary and proper clause to reach that which “among the several states” already reaches unaided as an original and textual matter.

Another example of how deeply entrenched is the belief that the Constitution has the “between” meaning is shown by two writers praising Justice Thomas’s narrow view of the power over commerce in *Lopez*. They say that under Justice Thomas’s view “the power ‘to regulate Commerce . . . among the several States’

140. Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress’s Power to Regulate Commerce*, 25 HARV. J. L. & PUB. POL’Y 849, 863–64 (2002) (emphasis added).

141. Epstein, *supra* note 77, at 1401 (emphasis added).

142. Epstein, *supra* note 77, at 1398.

would be interpreted to cover only what the Constitution *literally* says: “the power to regulate commerce (buying and selling things) *across state lines*.”¹⁴³ Of course, what the Constitution *literally* says is *not* “across state lines” but “among the several states,” and whether the latter only means “across state lines” is very much the issue, but this exemplifies again the deep-seated and apparently unconscious assumption even among scholars that “among” not only means but actually is written as “interstate” or “between.”

In contrast, Randy Barnett, a leading original understanding originalist, largely avoids the term “interstate commerce,” instead, assimilating “among the several states” to “between the several states” based on originalist evidence.¹⁴⁴ But even though he focuses on transmuting “among” into “between” to reach narrow conclusions, as opposed to those who argue that the neologism “interstate commerce” has been extended too far, that is exactly the point. Barnett still has the initial (and in our opinion heavy) burden of proving in the final analysis along with Abel, Berger, and others that “among” means “between,”¹⁴⁵ despite the fact that the Constitution says “among,” *not* “between.”

An overview of the modern conservative original understanding of the Constitution is presented in *The Heritage Guide to the Constitution*. Regarding commerce among the several states it generously acknowledges Marshall’s “inside a state” view of “among,” but says “some commentators have defined ‘among the several states’ as the trading and movement of goods *between* two or more states. . .”¹⁴⁶ Obviously, the latter point refers to the narrow “interstate” meaning of “among” argued and accepted by most conservatives (as discussed above) as the true meaning of “among,”¹⁴⁷ and *The Guide’s* discussion itself mentions “interstate commerce” about four times as often

143. David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously: Lopez and the Partial Birth Abortion Act*, 30 CONN. L. REV. 59, 75 (1997) (emphasis added). See *supra* p. 492 for Justice Thomas’s view.

144. Barnett, *Original Meaning*, *supra* note 14, at 132–36, citing Framing era use of “between” as evidence of the actual and understood meaning of “among.” See *supra* note 16.

145. A burden which, in our opinion, has not been met, though that issue is largely beyond the scope of this paper. However, we did touch briefly on it, *supra* pp. 434–36, 476–79, and note 13, and *infra* pp. 482–83.

146. Forte, *supra* note 101, at 102 (emphasis added). On Marshall’s view see *supra* pp. 451–54.

147. See Part IV.D.1, IV.D.2.a and IV.D.2.b to p. 482.

as the actual constitutional language.¹⁴⁸ Additionally, a recent sympathetic historian of conservative originalism criticized the New Deal Court's "logic of the living Constitution" for abandoning "categorical distinctions arguably related to the text and original intent of the Commerce Clause" such as "whether commerce was interstate or intrastate."¹⁴⁹ But if making up new words and distinctions such as "interstate" versus "intrastate" and calling them the Constitution is originalist, it makes one wonder what real difference there is between "originalism" and the long castigated conservative straw man of "living constitutionalism."

Recent originalist scholars who conclude that the power over commerce among the several states was a broad power, like Corwin earlier, do not confront "interstate commerce." For example, while Nelson and Pushaw do not directly say that the meaning of "among the several states" was to go inside states, they extensively quote Marshall's language in *Gibbons* defining "among" as applying to "that commerce which concerns more states than one," and cite an array of programs inside states that they argue is justified by the power.¹⁵⁰ We think that they correctly conclude that the *Gibbons* Court "recognized that Congress could regulate wholly *intrastate* commerce . . . if it was connected with commerce in at least one other state."¹⁵¹ But in accepting the actual meaning that we argue "among" already had as expressed in the "affecting more states than one" principle, by using

148. Forte, *supra* note 101, at 101–07.

149. O'NEILL, ORIGINALISM, *supra* note 136, at 34–35. In broadly arguing that Holmesian legal realism eventually resulted in "living constitutionalism" by overturning the formal and categorical distinctions of the *Knight* Court, O'Neill makes the questionable assumption, at least regarding commerce, that categorical distinctions of pre-New Deal courts such as "interstate-intrastate" were somehow more originalist than the New Deal Court's decisions. Cushman similarly traces the rise and fall of formalistic categories, with an excellent analysis of Justice Jackson wrestling with the problem of extending the "interstate commerce" clause to local consumption in *Wickard*. See Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089 (2000). He concludes that "[t]he anachronism of studying doctrinal development through the categories comprising the modern constitutional sensibility only compounds the error" of tracing doctrine topically instead of synchronically. *Id.* at 1149. But Cushman misses the bigger chronicity problem by failing to examine the underlying linguistic problems and resultant doctrinal issues inherent in the Court's equating "interstate commerce" with "commerce . . . among the several states" and trying to regulate commerce among the several states under the "interstate-intrastate" dichotomy.

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

151. *Id.* at 60 (emphasis added).

“intrastate,” they perhaps inadvertently invoke the “interstate-intrastate” distinction. Though they would still uphold the vast majority of commerce power legislation under the “substantially affecting commerce” test, they think it too broad.¹⁵² It is thus not clear if their conclusion that the substantial effects test is too broad is affected by their apparent conceptualization of “among the several states” in terms of the narrow interstate-intrastate dichotomy.

Jack Balkin also applies originalist tools to conclude that the power over commerce among the states was originally understood to be a broad power. He agrees that in *Gibbons* Marshall ruled that regulation could reach inside a state, even to activity not crossing a state line, but argues that in *dictum* regarding the inspection clause Marshall limited the power over production, though Balkin’s own reading of original sources based on the Virginia Resolution would allow for a very broad reach of the power inside states.¹⁵³ Perhaps because of this, Balkin does not focus on the use of “interstate” versus “among.” Douglas Kmiec also relies on the Virginia Resolution, and argues that it justifies a broad “inside” meaning of “among the several states.” While he largely uses the language of “interstate commerce,” and while critical of the “substantially affecting commerce” test, he would extend federal power inside states to reach commercial activity where there is a national purpose or the states were separately incompetent.¹⁵⁴

Constitutional law texts also seem to accept the dominance of “interstate commerce.” Gunther and Sullivan somewhat neutrally entitled their chapter on the power to regulate commerce “The Commerce Power,” but in the opening sentence of the introduction said “[a] national regulatory power over *interstate commerce* was a major motivation for the framing of the Constitution. . . .”¹⁵⁵ Lawrence Tribe headed his discussion of the power over commerce among the states as “The Power to Regulate Interstate Commerce. . . .”¹⁵⁶

152. *Id.* at 158.

153. BALKIN, *supra* note 4, at 140–49, 180.

154. See Douglas W. Kmiec, *Rediscovering a Principled Commerce Power*, 28 PEPP. L. REV. 547 (2001).

155. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 119 (14th ed., 2001) (emphasis added).

156. 1 LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 807 (3rd ed. 2000). Political Science, the most frequent undergraduate major for law students, also generally

In sum, for the first eighty years of its existence the Supreme Court largely used the literal or near-literal original language of the middle part of Article I, sec. 8, Clause 3 of the Constitution, “commerce . . . among the several states,” in dealing with the regulation of domestic commerce, though as also noted above, the Court also but less frequently referred to “commerce between the states,” a phrase with an arguably narrower meaning. The occasional use of “between,” which might have been quite appropriate to the facts of individual cases, changed very rapidly however, with the Court’s discovery and embrace of the term “interstate” in 1869, a term that arguably meant the same thing as “between the several states.” The Court increasingly applied “interstate” to all challenges to the application of the national commerce power, especially challenges to the rising tide of federal legislation beginning in the late 1800s, itself increasingly based on the “interstate commerce” power. From the very moment of its introduction into a majority opinion in 1869, which seemed to legitimate its use, the term “interstate commerce” ascended, within two decades swamping use of the actual language of the Constitution, and continuing its dominance right up to the present. Since its introduction, “interstate commerce,” often paired with “intrastate,” has been used voluntarily or mostly so by the Court in over two thousand cases for a total of over eleven thousand uses, far more than the actual language of the Constitution, so that for all practical purposes “interstate commerce” is the working language of the Court regarding the power in question, generally conveying a narrower meaning that is arguably required by the Constitution. Even while making major doctrinal changes, the Court has remained within the language of “interstate commerce,” relying on commerce-extending doctrines to expand the reach of the power inside states. Thus, for most of the existence of the Constitution, and during essentially all of the time that Congress has actively regulated commerce among the states, the power to regulate

refers to this part of the Constitution as “the interstate commerce power.” For example, KAREN O’CONNOR & LARRY J. SABATO, *AMERICAN GOVERNMENT: CONTINUITY AND CHANGE* (2004) which described itself as “best-selling,” on p. 77, anachronistically discussed *Gibbons* as construing the power over “interstate commerce.” Also, their index cited “interstate commerce,” and virtually all such texts do this. The examples in academe generally of the dominance of “interstate commerce” are legion; the term is ubiquitous and widely accepted as the meaning if not the actual language of the Constitution without a second thought.

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commerce among the several states has been conceptualized and dealt with by the courts as the “interstate commerce power.”

Within the legal community generally, originalist or not, and whether reaching broad or narrow conclusions, “interstate commerce” has so permeated the legal (and popular) mind that for well over a century the assumption apparently has been that the two phrases—the actual language of the Constitution, and “interstate commerce”—are identical in (an often narrow) meaning, and that “interstate commerce” is the proper term by which to describe and interpret the relevant constitutional language. The legal community generally relies on the term to convey the meaning of the regulation of commerce among the several states, often in a more narrow way than we argue is warranted by the actual meaning of “among the several states.” Within the legal community, while the Federalist Society has actively developed much of the intellectual capital and contact network supporting the conservative turn on the Supreme Court in the last few decades, and conservatives have carefully developed a narrower and often “originalist” interpretation of the power over commerce among the several states to oppose the broader interpretations of the liberals and “living constitutionalists,”¹⁵⁷ their own discourse and their opposition to “living constitutionalists” (as well as the discourse of the latter) ironically still occur largely *within* the anachronistic and unoriginal linguistic framework of “interstate commerce.”¹⁵⁸

Thus the *fact* of the overwhelming dominance for well over a century of the term “interstate commerce” in legal and popular discussions of the federal power over commerce among the several states is unquestionable. The main questions are *why* this change, and, most important, whether it makes any important difference, points to which we now turn.

157. HOLLIS-BRUSKY, *supra* note 115, at 96–103. It is also an interesting question as to how “originalist” a set of interpretations carefully constructed by a political movement two centuries after the fact to serve current policy goals can truly be.

158. Although in itself this is not unknown with other parts of the Constitution; *see supra* note 1 regarding reliance on Jefferson’s “wall of separation between church and state” rather than the actual language of the Establishment Clause, but our concern is with the lack of recognition that such a change has occurred.

E. Why Did the Court Adopt “Interstate Commerce” in 1869, but Not Drop it in 1937 (or 1995)?

As to why the Court first turned to “interstate commerce,” we should first consider whether it was largely a result of litigation over language in legislation using “interstate commerce.” While statutory litigation has greatly added to the mentions of “interstate commerce” in Court cases, as discussed above, we have removed most such references from our data, the bulk of which concerned the Interstate Commerce Act,¹⁵⁹ so legislation does not account for the Court’s overwhelming use of the term in place of the actual constitutional language as shown above in Tables 1 and 2. Moreover, the Court itself adopted the term “interstate commerce” in 1869, eighteen years before the passage of the first national legislation to use the term, the Interstate Commerce Act,¹⁶⁰ and another five years before the Court’s first case involving the Act, in 1892. In those twenty-three years, the Court used the term “interstate commerce” *entirely on its own* in 93 majority opinions, for a total of 325 uses in those opinions, while using “commerce among the several states” in 94 majority opinions, a total of 273 times. This suggests that, if anything, the causality might be the reverse, with the Court’s adoption of “interstate commerce” promoting its use by Congress and the general public. Moreover, after the Court introduced the term “interstate commerce,” in 1869, the rate of use of “commerce among the several states” *immediately decreased*, before any litigation came to the Court involving “interstate commerce” in legislation, as shown above in Table 1, and by the decade 1910–1919 the rate of usage of the language of the Constitution was less than two times per opinion and has remained at that level since. And since the 1990’s, the constitutional language has been mentioned less than only one and a third times per case that mentioned it at all, which was not nearly as many times as cases mentioning “interstate commerce.” So there definitely seems to have been and still is a strong preference by the Court for “interstate commerce” regardless of legislation.

But given the Court’s already existing generally narrow interpretation of the power over commerce among the several states in 1869, when the Court adopted “interstate commerce,”

159. *Supra* Part III.D.

160. *Woodruff v. Parham*, 75 U.S. 123, 137 (1869).

there was less to the linguistic change than meets the eye. In other words, the Court did not change doctrine by adopting “interstate commerce” so much as simply rename and increasingly emphasize the preexisting narrow commerce power doctrine it had largely followed since the late 1830s.

Perhaps as puzzling as why the Court adopted “interstate commerce” in the first place is why it did not replace the term in the “constitutional revolution” of 1937 when it greatly expanded the reach of the power over commerce among the states. Certainly some scholars were already criticizing the Court’s narrow interpretation of the power over commerce among the several states as expressed through the “interstate” theory, as noted above.¹⁶¹ So if ever there were a time to change terminology to mark a major change in direction, this was it. Moreover, the Court could have justified its change in direction by reverting to the original language of the Constitution and arguing that it was merely returning to original meaning of the Constitution.¹⁶² But instead the Court actually intensified its reliance on “interstate commerce,” applying broad commerce power-extending doctrines to justify expansion of the power. Perhaps the Court lacked the scholarly capital it might have needed to return to the original language and to give it a broad meaning, or itself doubted that the original meaning was broad enough to support where the Court wanted to go.¹⁶³ Or perhaps it felt that it was making enough of a substantive change in direction in 1937 without also calling more attention to that change by making a major change in the language that the country had become accustomed to, however anachronistic that language was, in a kind of verbal path-dependency that partially concealed enormous actual change.¹⁶⁴

161. See pp. 476–79 above for contemporary scholarly criticism of the Court. There was also strong criticism from the President, Congress and the public. O’BIEN, *supra* note 42, at 60–68, 573–74. It might also be asked why the Court did not revert to the actual constitutional language in its early 1900s decisions, outlined above at Part IV.B, when it first began to develop its commerce power extending doctrines, and when the adoption of “interstate commerce” language was still in living memory.

162. In his speech introducing his “Court-packing plan,” Roosevelt argued that the Court should “enforce the Constitution as written.” O’BIEN, *supra* note 42, at 62–63.

163. Though Hollis-Brusky argues that there was significant legal intellectual capital to draw upon in the New Deal era to support expanding the reach of the power over commerce, as reviewed above, that literature also largely expressed itself as dealing with “interstate commerce.” See *supra* Part IV.C and HOLLIS-BRUSKY, *supra* note 115, at 165–66.

164. Hollis-Brusky and others correctly note that there is a strong tendency toward path-dependency in Court jurisprudence. HOLLIS-BRUSKY, *supra* note 115, at 149–51.

Also puzzling is why, in 1995, when the *Lopez* Court made the first real limitation in Commerce Clause doctrine since 1937—and did so moreover while claiming to represent “first principles” atop a rising tide of conservative originalism—the Court continued to discourse in the distinctly unoriginal language of “interstate commerce” and “intrastate.” Perhaps the simplest answer is that no one cared or noticed. A more cynical answer might be that in *Lopez* practical conservatism outweighed theoretical originalism, perhaps because too frankly opening up the can of worms of the actual original meaning of “among the several states” and the “interstate” doctrine might confuse things and pose more problems for conservatives than solutions, since it is much easier for conservatives to argue, as already discussed, that the “interstate commerce power” has been overly extended by the “affecting commerce” test to reach inside states than to argue that “among” means “between” and does not of its own meaning reach inside states.¹⁶⁵

In sum, for whatever reason, through major changes in how the Court applies it, for well over a century the Court has voluntarily continued to use the term “interstate commerce” far more than it has used the actual language of the Constitution.

F. So What? Implications of Reliance on the Interstate Commerce Power

Despite *Lopez* and what we argue is the narrow bias of “interstate commerce,” as actually applied and with the help of various extending doctrines based on the necessary and proper clause, the modern “interstate commerce” power is still broad,¹⁶⁶ and arguably corresponds roughly in practice to what we argue was Marshall’s view and evidence of the original understanding of “commerce among the several states.”¹⁶⁷ However, there are still

However, here we would distinguish between path-dependency in continuation of doctrinal language, and path-dependency in the actual application of the doctrine. While path-dependency may be the best explanation for the continuation of the words and the fundamental “between” concept of the “interstate commerce” doctrine, obviously its application through the various corollary doctrines we outlined above has varied since the 1890’s. Path-dependency also does not explain the rapid but apparently completely unquestioned adoption of “interstate commerce” in the first place.

165. *Supra* pp. 435–36; *see generally* Part IV.C, and *infra* p. 490.

166. *See generally*, Kmiec, *supra* note 154.

167. Obviously, many conservatives and some originalists will disagree with our conclusions and continue to argue for greater limits on the power over commerce, but

legal and policy reasons for concern about the all-pervasive dominance of “the interstate commerce power.”

First, to be sure, the Court had developed commerce power narrowing doctrines well before it adopted “interstate commerce.” However, especially when paired with “intrastate,” “interstate commerce” became its own self-limiting text and doctrine, because the words themselves so clearly and strongly conveyed the narrow meaning of only crossing state boundaries. If “interstate commerce” is the language and meaning of the Constitution, nothing more is needed to define federal power as limited to crossing state boundaries, at least without assistance from the necessary and proper clause. In contrast, while “among the several states” is not as self-evidently clear in its meaning, it is also not on its face literally or clearly limited to crossing state lines, and arguably extends inside more states than one. Thus, to the considerable extent that “interstate” and “intrastate commerce” have replaced the actual words of the Constitution on the Court and in the public mind, these neologisms facially privilege a narrow understanding of the power in the Constitution in a way that earlier or other limiting doctrines did not. The general acceptance and unquestioning use of such language not just as doctrine but as if it were the literal words of the Constitution cements a narrow view of the power in the public mind far more effectively than if the Court had to struggle with elaborate and obscure explanations of how “among” in the Constitution really meant “between,” especially in the face of its rejection by Marshall in *Gibbons*,¹⁶⁸ or with Tenth Amendment arguments about how principles of federalism prohibit regulating activity inside states even if it is of national economic importance.¹⁶⁹ In sum, the originalist and linguistic case that “among” really means “between” is neither self-evident nor as facially strong as the argument that “interstate” means “between.” And though obviously this is and will be disputed, that

hopefully without relying on interstate or intrastate commerce. See Justice Thomas’s view, *supra* note 113 and accompanying text. See also *supra* Part IV.C.1.

168. In RESTORING, Barnett very briefly reviews and rejects Marshall’s interpretation of “among” in *Gibbons* and does not consider it at all in *Original Meaning*. RESTORING, *supra* note 14, at 301–02, and *Original Meaning*, *supra* note 14 at 132–36. As noted *supra* note 14, he also did not consider Dr. Johnson’s definition of “among.”

169. To be sure, it is sometimes argued that the Tenth Amendment limits federal power to specific (though unwritten) functions or that certain functions are specifically left to the states.

is exactly the point—the meaning of the actual constitutional language is readily arguable to be much broader than its anachronistic gloss.

Thus, if we are debating the meaning of “among,” especially as originalists, the initial burden is on those who want to prove that “among” means “between” instead of “mingled with,” or “on every side,” and to explain why the text of the Constitution did not just say “between,” if that was the meaning.¹⁷⁰ Then they must account for the neologisms “interstate” and “intrastate,” which did not appear in Dr. Johnson’s *Dictionary* or any publication for nearly another century, or simply jettison these misleading neologisms, which would be the proper thing to do. Perhaps they can meet this burden, but that is the point: dealing with the actual language of the Constitution—“among”—imposes a greater burden of proof and explanation on the protagonist of a narrow meaning than dealing with “interstate commerce.”

But once it is believed and accepted that “interstate commerce” and “intrastate” are the actual language of the Constitution, or its precise embodiment, which belief seems to have been widespread for well over a century, there is no easy defense against the “between” meaning of “interstate.” This is because “interstate” by definition *really does mean* “between the states,” and the burden of proof then shifts to those arguing for a broader meaning of “interstate” than “between” states, and in turn this (usually) helps justify conservative arguments about an overreaching Court and federal power generally. Thus the Court’s virtual abandonment of the original language of the Constitution in favor of appealingly straight-forward though totally ersatz language, besides being anachronistic and misleading (and just plain wrong, in our opinion), also improperly shifts the initial burden of proof to those propounding the broader, “inside” meaning of the power over commerce among the states.

Second, the “interstate commerce power” as currently extended inside states is vulnerable to attack, in part—as shown in *Lopez*—because to reach much “intrastate” activity it requires a considerable extension of the “interstate commerce” power by means of commerce-extending doctrines often based on the necessary and proper clause.

170. See *supra* pp. 469–82 and notes 14 and 168, and *infra* pp. 492 and 495–96.

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For example, *Wickard*'s “aggregation” test, often cited (and criticized) as the high-water mark of the Court's extension of the “interstate commerce power,” was presumably based on the necessary and proper clause supplementing “the interstate commerce” power. Thus, if measured geographically, the starting point for application of the necessary and proper clause to Filburn's wheat would have been the “interstate” line—the Indiana-Ohio border—and the physical distance that the necessary and proper clause would have had to cover would have been the distance from that line to the billions of wheat kernels on Filburn's farm in Montgomery County, likely several miles inside the state. This is also a considerable conceptual distance for those who argue that the broad extension of the commerce power especially since 1937 is a danger to liberty and federalism.¹⁷¹ But if we assume that Filburn planted, grew and harvested all of his wheat together, mingling the wheat ultimately to be kept at home with that to be sold, and only separating out after harvest the wheat for truly “personal”¹⁷² use from that for sale, for his cattle, for his poultry, and for next year's seed, then if the federal power were defined as the power over intercourse or transactions mingled with the states and that affect more states than one, it could more readily be concluded that the entire process was commerce among the states from the spring day Filburn first sowed the wheat, and certainly at and past the time of harvest. At most, the necessary and proper clause would have come into play in the form of “affecting commerce” only to cover the microscopic distance between one kernel of wheat on a stalk or in a container that would end up in “personal” use and the adjoining kernel in a container destined for the wider market, or to replace the market, and not to reach over the miles of distance from a kernel on his

171. HOLLIS-BRUSKY, *supra* note 115, 93–103 (reviewing conservative and Federalist Society critiques of expansive commerce power based on *Wickard* and other decisions). But as to the degree that states should be independent economic units, see James Madison, *Vices of the Political System of the United States* (1787), reprinted in 1 THE FOUNDERS CONSTITUTION 348–57 (Philip B. Kurland & Ralph Lerner eds. 1987) (complaining bitterly about states as a danger to liberty, especially economic liberty). For a modern view of states as lesser, though still significant, barriers to broader trade see Conrad J. Weiler, Jr., *The United States of America*, in INTERNAL MARKETS AND MULTI-LEVEL GOVERNANCE 160–95 (George Anderson, ed., 2012) [hereinafter Weiler, *United*].

172. See discussion *supra* pp. 469–70.

farm that potentially affected transactions at the state border to the actual “interstate” border.¹⁷³

Thus, “interstate” as the starting point for applying the necessary and proper clause is a considerably more remote starting point from the “local, non-commercial” activity that was some portion of Filburn’s farming than if the commerce being affected was already inside his farm, i.e., among the states and mingled with the wheat kernels being grown on the farm which was part of a national market in wheat inside and affecting more states than one. In turn, the justification for and reach of the application of the “affecting commerce” test or some other formula under the necessary and proper clause must usually be far more extended under the “interstate commerce” conceptualization than under the “inside states” or “intermingled with” conceptualization of “among.” In the latter case the necessary and proper clause might not need to be extended nearly as far, or perhaps not be invoked at all. Similarly, “intrastate” is far broader, more all-encompassing and exclusive of “interstate commerce” activity inside states right up to the state or interstate line than mingled commercial and noncommercial activity inside states that might also be commerce among the several states.

In other words, as a matter of “original principles,” is the starting point for the application of the federal power over commerce “among the several states” a point along the “interstate” framework of the “mathematical lines” of the boundaries of the states which Marshall rejected in *Gibbons*, and which textually is all there is when seen in the context of the “interstate-intrastate” distinction, or, is the starting point for the regulation of commerce the actual commercial intercourse and intermingling that exists inside more states than one, as well as between states? This might also be relevant to the question raised in *Lopez*¹⁷⁴ and reemphasized in *Morrison*¹⁷⁵ as to whether there is a “jurisdictional element” connecting the activity to be regulated to “interstate commerce.” If the jurisdictional element must connect to “interstate commerce,” i.e., crossing a state boundary, that might exclude some activities inside a state

173. To be sure, this analysis might not end the argument that this might still be too much federal power, but it does arguably reduce the amount of federal “overreach” that is being disputed.

174. *United States v. Lopez*, 514 U.S. 549, 552–53 (1995).

175. *United States v. Morrison*, 529 U.S. 598, 613 (2000).

altogether and require a greater reach of the jurisdictional element than one connecting activity already inside a state to commerce among the several states.¹⁷⁶

The relevance of all this rests in part on the fact that two justices who were also in the *Lopez* majority explicitly criticized parts of doctrines extending the “interstate commerce power” inside states. The first, the late Justice Scalia, concurring in *Gonzalez v. Raich* said that the “substantially affecting interstate commerce” test is “misleading” because “activities that substantially affect interstate commerce are *not themselves part of interstate commerce*,” and thus the power to regulate them comes from the necessary and proper clause.¹⁷⁷ Scalia was arguing correctly as a textual matter (but from our viewpoint also irrelevantly and unoriginally) that those activities that substantially affect “interstate commerce” are not themselves interstate commerce, presumably because they are “intrastate.”¹⁷⁸

But again, our point is that many commercial activities that are inside a state — “intrastate” — and that are thus textually not “interstate commerce” might nonetheless actually still be “commerce among the several states,” i.e., inside more states than one.¹⁷⁹ Consequently, as a textual matter, some “intrastate” commerce might not qualify as the commerce that can be regulated without the assistance of the necessary and proper clause, or perhaps at all, yet it might readily be regulated as a

176. Obviously reaching inside states raises federalism issues, but while federalism is important, the explicit power in the Constitution is to “regulate Commerce . . . among the several states,” not to protect a rigid version of federalism despite the fact that evolving commerce among the several states over the years increasingly absorbs once “local” or “oeconomic” activities. See Weiler, *Explaining*, *supra* note 107 and Weiler, *United*, *supra* note 171.

177. *Gonzales v. Raich*, 545 U.S. 1, 34 (2005) (emphasis added).

178. We think that Raich’s growing of marijuana solely for her own medicinal use was “oeconomy,” the kind of gainful and productive but non-market household activity that was *not* understood by the Framers to be commerce, but since has otherwise generally been largely absorbed by the modern market “economy.” This distinction was well-known at the Framing and provides an originalist basis for distinguishing what is “commerce” and what is not, as opposed to the artificial and anachronistic “interstate-intrastate” distinction. See Weiler, *Explaining*, *supra* note 107, at 173–76. Interestingly, the originalist-textualist Justice Scalia relied on “interstate commerce,” while Justice Holmes, the legal realist, did not. See *supra* pp. 460–61 and note 149.

179. A possibility recognized by Balkin, though by another mode of reasoning, BALKIN, *supra* note 4, at 160; see also Nelson & Pushaw, *supra* note 150 and accompanying text, among others.

textual and original matter as commerce “among the several states” with no or little further assistance needed.

This difference in language is important also because even if the necessary and proper clause can and clearly has extended the reach of the power over commerce, the Court also can and has set limits on it. In his majority opinion in the *Obamacare* case,¹⁸⁰ Chief Justice Roberts specifically noted that the “proper” part of the necessary and proper clause sets limits on the use of the power.¹⁸¹ Other cases and commentators have also noted that there are limits on the necessary and proper clause, including those described in *McCulloch*.¹⁸² Thus if the “affecting interstate commerce” test is based upon the necessary and proper clause, in general it could be cut back again, as it was in *Lopez*, for exceeding the limits of that clause, much more readily than if the power over commerce among the states were construed as we argue the Framers and Marshall understood it. In the latter case, in general the same activity could possibly be regulated without resort to the necessary and proper clause at all, simply as commerce among the several states, and thus not suffer the risk of exceeding the Court’s limitations on the necessary and proper clause, or at least be exercised with a more modest use of the necessary and proper clause less subject to constitutional criticism.

As noted above,¹⁸³ the other *Lopez* Justice, Thomas, rejected the “affecting interstate commerce” test outright as not being part of the original understanding, and suggested that if they had understood “affecting interstate commerce” to be part of the Constitution, the Framers would have said so.¹⁸⁴ But besides anachronistically arguing that the Framers could have used a term that would not be invented for another half-century at least, and begging the question of whether “among the several states” in fact

180. *Nat’l Fed’n of Indep. Bus. v Sebelius*, 567 U.S. 519 (2012).

181. *Id.* at 558–61. *See also Original Meaning*, *supra* note 14, at 146–47.

182. *McCulloch v. Maryland*, 17 U.S. 316, 420–21. *See also* Epstein, *supra* note 77, at 1397–99. Even the liberal Professor Tribe holds that the clause can not be used to regulate anything with any kind of connection to the delegated powers, but must have a closer relationship. *TRIBE*, *supra* note 156, 801–02.

183. *Supra* p. 474.

184. Under what Balkin has described as Thomas’s narrow “trade” theory of the commerce power, the necessary and proper clause is probably needed to regulate nontrade or noneconomic activity that affects trade or economic activity. *BALKIN*, *supra* note 4, at 151, 177.

meant “interstate,” this also undercuts Thomas’s own argument because the fact of the absence of “interstate commerce” or, the historically available words, “between the states” from the Constitution implies that *they* were not understood as its meaning either.¹⁸⁵ It is also not clear whether in rejecting the “affecting commerce” part of the test Thomas was also rejecting any use of the necessary and proper clause to extend the commerce power, which would raise additional issues, or just this particular application.

But to take Thomas’s point seriously for a moment, if “interstate” and “intrastate” had been invented as words before 1787, instead of many decades later, and despite the fact that the Framers did not use the equivalent and available term “between,” and if the Framers nonetheless chose to write “interstate commerce” into the Constitution, and if they had left it at that, then Thomas would be right and clearly the power would have been narrower than we argue is its meaning. But it is also very possible that, in the unlikely event that the Framers had used those words, they would also have added additional language about going inside states for national purposes that would have been very much like the language Marshall used in *Gibbons*: “that commerce that affects more states than one” or the language of the Virginia Plan.

After all, as Stern, Kmiec, Balkin and others have noted, the Virginia Plan adopted by the Convention proposed to give the federal government all the powers needed “to which the states were separately incompetent.” That language sounds a lot closer to “that commerce that concerns more states than one” or “among the several states,” than it is to “interstate commerce.”¹⁸⁶ It is also clear that going into the Convention a prime concern was not only with eliminating state barriers to a national market, but also state oppression of liberty, especially commercial, both inside states and at their borders.¹⁸⁷ This is not to ignore the various compromises and needs that led away from some of the broad powers proposed by the Virginia Plan. But it does show that the Framers contemplated quite broad national powers that arguably

185. See *supra* p. 436 and note 13 for more discussion.

186. Virginia Plan (1787), 1 THE FOUNDERS CONSTITUTION 20–22 (Philip B. Kurland & Ralph Lerner eds. 1987); Stern, *supra* note 126, at 1338–44; Kmiec, *supra* note 154, at 548, 561–66, 571–75; and BALKIN, *supra* note 4, at 143–49, among others.

187. See Madison, *Vices*, *supra* note 171.

reached inside states, so that it is not at all clear that even if the Framers could have adopted “interstate,” they would have limited the statement of the power in the Constitution over commerce to that alone, or not added additional language about going inside states.

In any event, our point is that if more justices were to adopt Scalia’s or Thomas’s views we would have a greatly diminished power over commerce based in part on an anachronistic and arguably narrower replacement of the original English language in which the Constitution was written. Our point here is not in the first instance whether this would be good or bad, though we think the latter, or to naively assume that a conservative Court could not find other ways to limit the power over commerce, but simply to note that in theory, at least, any given extension of the power over commerce among the several states via the affecting commerce test, or the necessary and proper clause, would usually be less in extent and hence more defensible than an extension of “interstate commerce” to the same activity via the same means.

Third, the “interstate-intrastate” dichotomy implicitly favors state over federal power in a way that “among the several states” does not. As noted above, the “interstate” framework by definition leaves vast areas and activities of the country to state regulation, presumptively anything inside states, and generally requires help from the necessary and proper clause to reach inside states. But in addition to this inherent pro-state power bias implicit in the interstate framework, the Court also often adds additional federalism protections to its exercise of the power over commerce among the states.¹⁸⁸ Yet arguably, as noted above,¹⁸⁹ the purpose of the power to regulate commerce among, i.e., inside, the several, i.e., more than one, states, was to overcome state restrictions and regulate national commerce that was inside more than one states, and not to regulate only commerce crossing state borders. The characterization of the constitutional power as one to regulate “interstate commerce” with additional Tenth Amendment or other federalism protections thrown in is thus a double protection for federalism contained within the gloss on the

188. *United States v. Lopez*, 514 U.S. 549, 552, 564–68 (1995).

189. *Supra* pp. 432–36 and 495–96 and accompanying notes and notes 171, 173, 176, and 178.

language of a power one of whose significant purposes was to overcome state commercial protectionism and barriers.¹⁹⁰

Fourth, for all its linguistic appeal, the textual simplicity and almost total dominance of “interstate commerce” in constitutional discourse ironically creates an arguably more complicated and confusing way of applying the power over commerce among the several states than might be needed under the “inside” interpretation of “among the several states.” This is first because “interstate” *actually does only mean* “between states” or “crossing state boundaries,” meanings that, especially when paired with “intrastate,” as is so frequently done, literally exclude reaching inside a state unaided. Thus, because of this literal meaning of “interstate,” in order to reach inside states over the “intrastate” barrier, as discussed above,¹⁹¹ the Court has developed several doctrines to extend the “interstate commerce power” inside states. This in turn justifies opposition by those opposed to such extensions of power, but also confuses the public at large more generally over seemingly overly broad and varying interpretations of the federal power over commerce in order to reach inside states.¹⁹² As just discussed, this might not be the case, or be the case less, if the Court stayed with the actual original American English of the Constitution, which arguably already meant to go inside states.

In addition, whether or not “among the states” can be proved to mean “interstate” or “between the states,” those claiming to be originalist-textualists, like Justice Scalia, or originalists, like Justice Thomas, undermine the credibility of their own methodology by working with anachronistic, ersatz language rather than the actual language of the Constitution.

Finally, the rapid and seemingly unquestioned rise of “interstate commerce” calls into question the viability of Justice

190. This is not to disparage the importance of federalism, but only to keep it from gaining an extra advantage by means of a gloss on the Constitutional language.

191. *Supra* Part IV.B and IV.C.

192. Among many examples that could be given, see Intrastate Commerce Act, TENTH AMENDMENT CENTER (last accessed Jan 26, 2019), <https://tenthamendmentcenter.com/legislation/intrastate-commerce-act/>. Called “legislation to nullify federal overreach into virtually everything through a distortion of the “*Interstate Commerce Clause*,”” (emphasis added), the act “provides that “[a]ll goods grown, manufactured or made in (STATE) and all services, performed in (STATE), when such goods or services are sold, maintained, or retained in (STATE), shall not be subject to the authority of the Congress of the United States[.]”

Scalia's often made point that the Constitution should not be amended by "activist"—usually meaning liberal—judges, but only through the Article V amendment process.¹⁹³ To the extent that the replacement of "commerce among the several states" by "interstate commerce" makes a difference in the interpretation of the Constitution, which we argue it does, then the Constitution was amended seamlessly and silently in the 1870's and 1880's with almost no one noticing or objecting then or since, certainly not among many of those most eagerly propounding "originalist" and "textualist" interpretation. To be sure, publicly proposing constitutional changes and putting them on hold while they are debated and then put up for amendment may be the way constitutional changes *should* happen, and may be practical in situations where there is an overt debate over constitutional text.¹⁹⁴ But when language itself quickly and quietly changes, as is often the case and is apparently the case here, Scalia's approach is quite unrealistic. The United States does not have an *Académie Française* analogue for policing the American variety of the English language; consequently, who has the responsibility or ability to vigilantly monitor whether a linguistic or semantic change is being made in the language used to characterize the meaning and text of the Constitution and then to call a time-out in that change so that an amendment to the Constitution could be considered is quite unclear. Moreover, as this study illustrates, the pace of linguistic change is often so fast that by the time a constitutional challenge could be made, the Court and the public may already have adapted to the new words or meanings and perceive no difficulty with the changed language.¹⁹⁵

193. Antonin Scalia, *Originalism: The Lesser Evil*, in *JUDGES ON JUDGING: VIEWS FROM THE BENCH* 192 (David M. O'Brien ed., 1997). Scalia probably never expected this argument to apply to conservatives.

194. Though it is not clear how the Court would suggest that an amendment be considered.

195. Despite Justice Scalia's criticism of "living constitutionalists" for not changing constitutional meaning through Article V, the conservative legal movement, of which Scalia was a central part, does not seem to focus on Article V either. Instead, the movement has long focused on changing constitutional meaning through developing conservative scholarship, education, networking, vetting candidates for the bench, and other means, with little or no observed attention to change through constitutional amendments. Hollis-Brusky, for example, concludes that "the Federalist Society network has both (1) shaped the content, direction, and character of constitutional revolutions by supporting, developing and diffusing intellectual capital to Supreme Court decision-makers; and (2) helped foster the conditions that facilitate those constitutional revolutions in the first place by (a) identifying, credentialing, and getting the right kinds of judges and

V. CONCLUSION

The Constitution says that Congress “shall have power . . . to regulate commerce among the several states.” It does *not* say Congress “shall have power . . . to regulate ‘interstate commerce.’” Despite this, the actual language of the Constitution, “commerce among the several states,” long ago disappeared as the working language of the Court, the legal academy and apparently of Congress and the public at large—including most textualists and originalists—and has long performed little more than a symbolic function, if that.¹⁹⁶ In its place, the term “interstate commerce” (often complemented by “intrastate”) long ago came to be accepted as a working substitute for and as the equivalent of the actual words and meaning of the Constitution. Because “interstate commerce” arguably has a narrower “between” meaning than the broader “inside” meaning of the original language of the Constitution, “among,” the

Justices on the bench, (b) acting as a vocal and respected judicial audience to keep those judges and Justices in check once on the bench, and (c) creating an intellectual and political climate that is favorable to the desired change by reducing the stigma associated with once-radical ideas or constitutional theories.” But nothing on constitutional amendments. HOLLIS-BRUSKY, *supra* note 115, at 7, 152–64. Steven M. Teles also observed nothing about the constitutional amendment process. Instead, he tells the very political tale of how “[c]onservatives slowly recognized that they needed to develop their own apparatus for legal change, one that could challenge legal liberalism in the courts, in classrooms, and in legal culture.” STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT*, 57 (2008). See also U.S. DEPT OF JUSTICE, OFFICE OF LEGAL POLICY, *THE CONSTITUTION IN THE YEAR 2000: CHOICES IN CONSTITUTIONAL INTERPRETATION* (1988) generated under the supervision of Attorney General Ed Meese as a guide, not to amending the Constitution through Article V, but to changing the meaning of the constitution in fifteen areas important to conservatives through careful selection of judicial nominees.

196. Obviously glosses on constitutional meaning are unavoidable. For example, Jefferson’s “wall of separation between church and state” is a gloss on the Establishment Clause of the First Amendment. To be sure, the “wall” gloss has pulled jurisprudence as well as public understanding of what “an establishment of religion” actually means toward the meaning of the gloss. But at least most scholars and judges are well aware of the difference between the gloss and the actual language of the clause and the influence the gloss has had: “[t]he difference between the Constitution’s phrase and Jefferson’s is significant because Jefferson’s has tended to mean so much more.” PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 2 (2002). See also Christopher A. Boyko, *A New Originalism: Adoption of a Grammatical-Interpretive Approach to Establishment Clause Jurisprudence After District of Columbia v. Heller*, 57 CLEV. ST. L. REV. 703, 706-708 (2009). Boyko refers to creation of “supertext,” non-constitutional language that supplants the Constitutional language. See generally DANIEL L. DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* (2002). We cite these works not for their substance, but for the point that in this area there is widespread recognition of the difference between the Constitution and its gloss.

reliance on “interstate commerce” has both arisen from and contributed to a narrower understanding of what the power in the Constitution actually provides than might be justified under the actual language of the constitution. Moreover, the widespread acceptance of “interstate commerce” as the equivalent of if not the actual language of the Constitution has privileged this narrow understanding. In consequence, to meet many challenges over the years that Congress and the Court felt required reaching inside states, the “interstate doctrine” has been supplemented by a number of corollary doctrines that extend its reach, such as the “substantially affecting commerce” test and reliance on the necessary and proper clause. Because these compensatory doctrines are contested and contestable in themselves, they make extensions of the “interstate commerce” power less certain and contribute to or at least reinforce a perception as well as an argument in some quarters that the Court is overreaching and has ignored the Constitution. Moreover, these extending doctrines might not be as necessary or even be necessary at all under what we would argue is the correct original understanding of “commerce among the several states.”

Thus we are presented with the oddity—especially in the face of the recent rise if not dominance of originalist approaches to interpreting the Constitution—that neologisms invented decades after the adoption of the Constitution and certainly totally unknown to the Framers have largely become the primary terms to express and analyze the Framers’ language as well as to shape our understanding of the meaning of their language, both on and off the Court, and even among most originalists, in applying one of the most important powers in the Constitution, and one for which ironically the Constitution was originally created. For all practical purposes, the power “to regulate commerce among the several states” has become “the interstate commerce power,” with its narrow connotations, not only on the Court, but in the academy and the public at large.