

## JACK BALKIN'S INTERACTION THEORY OF "COMMERCE"

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*In his book, Living Originalism, Jack Balkin proposes what he calls the "interaction theory" of the original semantic meaning of the word "commerce" in the commerce clause. He claims that "commerce" meant "social interaction." In this Article, I explain why his theory is wrong due to errors of commission and omission. Balkin is wrong to reduce "commerce" to "intercourse," "intercourse" to "interaction," and "interaction" to "affecting." This triple reduction distorts rather than illuminates the original meaning of "commerce." Balkin furthermore omits from his discussion the massive amounts of evidence of contemporary usage—along with dictionary definitions of "intercourse"—establishing that "commerce" referred to the trade or transportation of things or persons, and did not include such productive economic activity as manufacturing or agriculture, much less all social interaction. I also reply to Balkin's criticisms of my book, Restoring the Lost Constitution. In particular I explain why his heavy reliance on Gunning Bedford's resolution in the secret Philadelphia convention is misplaced in a discussion of the original meaning of the commerce clause.*

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning.<sup>1</sup>

It is my pleasure to participate in this symposium on Jack Balkin's new book, *Living Originalism*.<sup>2</sup> I will not mince words. This book is a potential masterpiece. It is a work of remarkable sophistication, maturity, and grace. It is the culmination of years of scholarship but presents

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1. *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965) (Black, J., dissenting).  
2. JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

Balkin's previous insights in a whole that is greater than the sum of its previous parts. And it is beautifully written.

To appreciate where this book fits within the pantheon of constitutional scholarship, it is important to note that this is a work of constitutional *theory*. The work of other great scholars of our time, such as Balkin's colleagues Bruce Ackerman<sup>3</sup> and Akhil Amar,<sup>4</sup> while making enormous contributions to our understanding of constitutional history, can hardly be considered theoretical. Or, perhaps more accurately, they assume rather than present and defend a constitutional theory of popular sovereignty. The same is true of the recent work of Philip Hamburger,<sup>5</sup> Mark Graber,<sup>6</sup> and Barry Friedman.<sup>7</sup> Other constitutional scholars today, such as Sanford Levinson,<sup>8</sup> Dan Farber,<sup>9</sup> David Strauss,<sup>10</sup> and Kermit Roosevelt,<sup>11</sup> while making some theoretical claims, have written books largely for a popular audience that can be considered engaging and provocative polemics. Those readers who seek a rigorous defense of their more theoretical claims will be disappointed.

*Living Originalism* is not primarily a work of constitutional history, though it does include some important historical claims. Nor is it a polemic, though it is movingly written and accessible to a wider audience than legal scholars. Rather, it presents a comprehensive theory of constitutional interpretation and construction grounded in an integrated theory of constitutional legitimacy and social change. It is in the genre of Ronald Dworkin's *Law's Empire*<sup>12</sup> and, before that, John Ely's path-breaking *Democracy and Distrust*.<sup>13</sup> It has been nearly twenty-five years since we have had such a book in constitutional theory, and its publication is an important event.

Balkin presents a progressive case for original public meaning interpretation. Because he was long known as the preeminent defender of living constitutionalism, his relatively recent adoption of originalism has engendered consternation and skepticism among both his friends and intellectual opponents. Some progressives are concerned because one of

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3. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

4. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

5. See, e.g., PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008).

6. See, e.g., MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006).

7. See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

8. See, e.g., SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

9. See, e.g., DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE* (2007).

10. See, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

11. See, e.g., KERMIT ROOSEVELT, III, *THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS* (2006).

12. RONALD DWORKIN, *LAW'S EMPIRE* (1986).

13. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

their best and brightest seems to have joined the ranks of the enemy;<sup>14</sup> others doubt his good faith.<sup>15</sup> Conservative originalists also doubt both his sincerity<sup>16</sup> and the genuineness<sup>17</sup> of his version of originalism. Both sides are suspicious of his ability to reach progressive results with originalist methodology and are suspicious of what they perceive may be opportunism rather than a deep academic commitment.

This book undercuts all these intimations. It is a serious explication and defense of original public meaning originalism that both progressive nonoriginalists and conservative originalists alike must take seriously. It poses a significant intellectual challenge to the existing theoretical commitments of both sides, though there is much for both to appreciate here as well, if their minds are open.

But *Living Originalism* does more than explain and defend originalism. It also presents an extended theory of the practice of constitutional construction and situates the activities of interpretation and construction within a theory of democratic legitimacy. And it integrates this normative defense of interpretive and constructive methods into Balkin's theory of how constitutional practice evolves in response to social movements. That is a whole lot.

To repeat, this book represents the scholarly culmination of a lengthy career by one of the most creative, gifted, and personable scholars of our generation. But it is not without its weaknesses. In this Article, I examine one: Balkin's "interaction theory" of the original meaning of "commerce" in the commerce clause. In the interest of time and space, I confine myself solely to his interpretation of "commerce" and do not discuss other aspects of his treatment of the commerce clause and its application, with which I may also disagree.

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14. My personal perception of academic reactions to Balkin's adoption of originalism stems from numerous conversations with numerous constitutional law scholars. Given the recency of this development, however, citations are difficult to supply. But, for what it is worth, see, e.g., Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 355 (2007) ("[M]y main thesis here is that Balkin should no longer be welcomed by the living constitutionalists, despite his claim to be meeting their fundamental needs.").

15. See, e.g., *id.* at 353 ("It certainly seems like the originalists are winning. Professor Jack Balkin—finding that he couldn't beat 'em—joined them.").

16. See, e.g., *id.* at 355 ("[M]any originalists will read Balkin to be a living constitutionalist in disguise—and may not let him into their club, notwithstanding his bona fides as an adept historian of the Fourteenth Amendment.").

17. See, e.g., John O. McGinnis & Michael Rappaport, *Original Interpretive Principles As the Core of Originalism*, 24 CONST. COMMENT. 371, 373 (2007) ("Professor Balkin's normative defense [of originalism] proves insufficient, because he does not provide a persuasive reason why we should follow the original meaning of the Constitution, regardless of whether the Constitution or the process that led to its enactment were desirable.").

## I. BALKIN'S INTERACTION THEORY OF "COMMERCE"

This Article begins with a quotation from Justice Black's dissenting opinion in *Griswold v. Connecticut*.<sup>18</sup> Those who know my work will recognize that I believe that *Griswold* was correctly decided, and that I also reject a cramped interpretation of constitutional rights. Nevertheless, I find Justice Black's dissenting admonition insightful. Although he was speaking of rights and not powers, he was quite correct that one of the ways that interpreters can slip the bounds of meaning provided by the text of the Constitution "is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning."<sup>19</sup>

In his discussion of the original meaning of the word "commerce" in the Constitution, Balkin makes this move not once but three times: the word "commerce" is replaced by "intercourse," which is then replaced by "interaction." He then equates "interaction" with "affecting." That is a *lot* of reduction or translation, and the suspicion is that the semantic meaning is being altered in the process. Although it is fair to define "commerce" as "intercourse," it nevertheless invites distortion to simply substitute "intercourse" for "commerce" in the clause. And I do not think the available evidence of original meaning supports the substitution of "interaction" for "intercourse."

Let me begin by summarizing Balkin's reduction of "commerce." Quite properly, he begins with Johnson's dictionary definition. "Samuel Johnson's dictionary, roughly contemporaneous with the founding, defines 'commerce' as 'Intercourse; exchange of one thing for another, interchange of anything; trade; traffick.'"<sup>20</sup> Then, in an endnote, he reproduces examples from the first edition of Johnson's dictionary in 1755:

Places of publick resort being thus provided, our repair thither is especially for mutual conference, and, as it were, *commerce* to be had between God and us. *Hooker, [Ecclesiastical Polity,] b[ook].v.s., [Chapter] 17 [18].*

How could communities,  
Degrees in schools, and brotherhoods in cities,  
Peaceful *commerce* from dividable shores,  
But by degree stand in authentick place? Sh[akespeare],  
Troil[ius]. and Cress[ida].  
Instructed ships shall sail to quick *commerce*,  
By which remotest regions are ally'd;  
Which makes one city of the universe,  
Where some may gain, and all may be supply'd.  
*Dryden.*

18. See *supra* note 1 and accompanying text.

19. *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965) (Black, J., dissenting).

20. BALKIN, *supra* note 2, at 149.

These people had not any *commerce* with the other known parts of the world. *Tillotson*

In any country, that hath *commerce* with the rest of the world, it is almost impossible now to be without the use of silver coin. *Locke*.<sup>21</sup>

Balkin tells us that “[a]ll of these are examples of exchange, some social, some economic. The primary example is not economic: Hooker’s ‘places of public resort’ are not inns but churches for public preaching, and presumably our commerce with God is communication and prayer, not the trade of commodities.”<sup>22</sup> He then adds another example of usage from the fourth edition, printed in 1775, pertaining to “Johnson’s example of the second definition of *commerce*, ‘common or familiar intercourse’ . . . : ‘Good-nature, which consists of overlooking of faults is to be exercised only in doing ourselves justice in the ordinary *commerce* and occurrences of life. *Addison*.’”<sup>23</sup>

Balkin contends that, “[i]f we want to capture the original meaning of ‘commerce,’ we must stop thinking primarily in terms of commodities. We must focus on the ideas of interaction, exchange, sociability, and the movement of persons that business (in its older sense of being busy or engaged in affairs) exemplifies.”<sup>24</sup> In support of this conclusion, he offers that the meaning of “commerce” is informed by its Latin cognate “*commercium*,” which, he says “came to refer to traditional academic feasts, where *commercium* songs were sung around the table.”<sup>25</sup>

In light of Johnson’s definition of “commerce” as “intercourse,” Balkin naturally stresses the famous definition offered by Chief Justice Marshall in 1824 in *Gibbons v. Ogden*: “Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.”<sup>26</sup>

Further, Balkin characterizes what he calls the “trade theory” of commerce as a nineteenth century invention. “I will call the contrasting view held by Justice Thomas and others—that the original meaning of ‘commerce’ is the trade or exchange of commodities—the ‘trade theory.’”<sup>27</sup> Noting accurately that this meaning does “not include manufacturing, mining, or agriculture, much less any noneconomic activities,” Balkin claims that “[t]his reading is anachronistic; by focusing on the disposition of commodities, it reflects a *modern* conception of commerce viewed as a subset of economic activity; it completely misses the eighteenth-century dimensions of commerce as a form of social intercourse

21. *Id.* at 379 n.36.

22. *Id.* at 379–80 n.36.

23. *Id.* at 380 n.36.

24. *Id.* at 151.

25. *Id.* at 380 n.42. Balkin’s source for this claim is unclear from the endnote, but I have no doubt he has one.

26. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189–90 (1824).

27. BALKIN, *supra* note 2, at 151.

and exchange.”<sup>28</sup> But, as we shall see, Balkin fails to wrestle with the plentiful examples of persons associated with the Constitution’s drafting and ratification, equating “commerce” with “trade,” and distinguishing this economic activity from that of agriculture and manufacturing.

## II. OMITTED EVIDENCE

In this Part, I provide some of the evidence omitted from Balkin’s analysis of the original meaning of the term “commerce” in the Constitution.

### A. Dictionaries

Several key pieces of evidence are omitted from Balkin’s account. Given that Johnson (and Marshall) define “commerce” as “intercourse,” it is helpful to know how Johnson defines “intercourse.”<sup>29</sup> But let me first offer Johnson’s entire definition of “commerce” from the 1785 edition: “1. Intercourse; exchange of one thing for another; interchange of any thing; trade; traffick. . . . 2. Common or familiar intercourse.”<sup>30</sup>

Without anything more, Johnson’s first definition of “commerce” seems to generally track what Balkin calls the “trade theory,” albeit broader, including the “interchange of any thing.” “Things” are the focus of the first definition. Johnson’s second distinct definition seems more like the “social interaction” meaning that Balkin is claiming, as indicated by Johnson’s only example of usage: “Good-nature, which consists in overlooking of faults, is to be exercised only in doing ourselves justice in the ordinary *commerce* and occurrences of life. *Addison*.”<sup>31</sup>

This suggests that “commerce” is ambiguous in that it has two distinct senses:<sup>32</sup> one sense concerning the trade or interchange of things from one place to another, and another sense of social interaction. If so, in discerning the original meaning of “commerce” in the Constitution, one does not simply combine the one distinct meaning with the other, but asks *which* of the multiple meanings is the one that a reasonable reader would think was being conveyed in the relevant context, here in Article I, Section 8.

For example, would a reasonable English speaker in 1789 think the power “[t]o regulate [c]ommerce”<sup>33</sup> included the power to regulate “tra-

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28. *Id.* at 150.

29. In the draft of this paper presented at the symposium, I criticized Balkin for failing to include Johnson’s definition of “intercourse.” In response, he has since added this definition to an endnote in the book. See BALKIN, *supra* note 2, at 380 n.38.

30. 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, 6th ed. 1785) (unpaginated).

31. *Id.*

32. See E. Allan Farnsworth, “Meaning” in the Law of Contracts, 76 YALE L.J. 939, 953–56 (1967) (explaining the difference between vagueness and ambiguity).

33. U.S. CONST. art. 1, § 8, cl. 3.

ditional academic feasts, where *commercium* songs were sung around the table<sup>34</sup> or "communication and prayer" with God?<sup>35</sup> If not, then Johnson's secondary meaning is unlikely to be the reasonable meaning. Instead, a reasonable speaker would more likely conclude that "commerce" referred to the first meaning of "exchange," "trade," "interchange," or "traffick."<sup>36</sup>

But what about "intercourse," the very first synonym of "commerce" within Johnson's first definition? Here is how Johnson defined the term: "1. Commerce; exchange. . . . 2. Communication: followed by *with*."<sup>37</sup> This definition seems entirely consistent with the trade, traffic or interchange of things sense of "commerce." Indeed, so is the secondary meaning of "communication: followed by *with*." Communication is not limited to verbal acts—think of "communicable" diseases—but even verbal communication consists of transmitting a message from one person or place to another. Here is how Johnson defines "communication:" "1. The act of imparting benefits or knowledge. . . . 2. Common boundary or inlet; *passage* or means, by which *from one place there is a way without interruption to another*. . . . 3. *Interchange* of knowledge; good intelligence *between several persons*. . . . 4. Conference; conversation."<sup>38</sup>

Like Balkin, we are now moving steadily away from the term "commerce," to "intercourse" and "communication." But even as we do so, we continue to observe the movement of something from one place to another and, with verbal communication, that something is information. But the term "movement" is potentially misleading insofar as it includes people or things that are simply in motion. Rather, all these terms refer to types of activity, of human action, or as Johnson puts it, "the *act* of imparting benefits or knowledge." It is not just that goods or information happen to relocate themselves, like wind-borne particles. Commerce, intercourse, and communication are all forms of the human activity of transmitting or carrying things from place to place, typically in exchange for something in return. Communication, the saying goes, is a two-way street. So, "transporting" or "transportation" is a more accurate word than is "movement".

Which brings us to navigation. According to Johnson, to "navigate" means "[t]o pass by ships or boats," and "navigation" means "[t]he act or practice of passing by water."<sup>39</sup> Again, "passing" entails the activity of transporting something, in particular, a ship and its contents by water.

As we shall see, the Founding generation believed that "commerce" was conducted by merchants<sup>40</sup> so, to round out our definitions, we should

34. See *supra* note 25 and accompanying text.

35. See *supra* note 22 and accompanying text.

36. See *supra* note 20 and accompanying text.

37. 1 JOHNSON, *supra* note 30.

38. *Id.* (emphasis added).

39. 2 JOHNSON, *supra* note 30.

40. See *infra* notes 74, 76 and accompanying text.

also see how Johnson defines that term. A “merchant” was defined as “[o]ne who trafficks to remote countries.”<sup>41</sup> The verb “to merchandise” is defined as “[t]o trade; to traffick; to exercise commerce.”<sup>42</sup> And a “merchant-man” was “[a] ship of trade.”<sup>43</sup>

Today, we tend to use the term “intercourse” most often to refer to sexual intercourse. Balkin tells us that “sexual intercourse . . . is not the concept referred to by the commerce clause.”<sup>44</sup> But why not? He does not say. Even today we do not use the term sexual intercourse to describe all sexual “interactions.” Sexual intercourse, strictly speaking, involves the act of conveying, communicating, or transmitting something from one person to another in a particular way. If “commerce” meant “intercourse,” then on Balkin’s account sexual intercourse ought to be included in the original meaning of “commerce.” True, it is wholly intrastate, but so too is the cultivation of medical marijuana in one’s backyard. In the aggregate, both types of local activities could be said to substantially affect interstate commerce.

Of course, Johnson’s was not the only dictionary available at the Founding. As Justice Thomas noted in his concurring opinion in *United States v. Lopez*, other dictionaries provided comparable definitions.<sup>45</sup> Nathan Bailey’s 1775 dictionary defined “commerce” as: “Trade or Traffick” with a secondary meaning of “Converse, Correspondence.”<sup>46</sup> Thomas Sheridan’s 1796 dictionary defined “commerce” as “Exchange of one thing for another.”<sup>47</sup> Unlike Johnson, neither Bailey nor Sheridan defined “commerce” as “intercourse,” suggesting that “intercourse” was not the first synonym that leapt to everyone’s mind. Still, Bailey defined “intercourse” as “mutual Correspondence, Commerce, or Traffick,”<sup>48</sup> and Sheridan defined it exclusively as “Commerce; exchange.”<sup>49</sup> With these and Johnson’s definitions in hand, Balkin’s failure to examine seriously the contemporary meaning of “intercourse”<sup>50</sup> begins to look like a significant omission.

In his famous 1828 dictionary, Noah Webster defined commerce as “an interchange or mutual change of goods, wares, productions, or property of any kind, between nations or individuals, either by barter, or by purchase and sale; trade; traffick.”<sup>51</sup> Although this is well after the

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41. 2 JOHNSON, *supra* note 30.

42. *Id.*

43. *Id.*

44. BALKIN, *supra* note 2, at 150.

45. *United States v. Lopez*, 514 U.S. 549, 585–86 (1995) (Thomas, J., concurring).

46. N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (London, 21st ed. 1775).

47. THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (Philadelphia, W. Young, Mills & Son 6th ed. 1796).

48. BAILEY, *supra* note 46.

49. SHERIDAN, *supra* note 47.

50. Beyond the belated addition of Johnson’s definition to an endnote. *See supra* note 29.

51. 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 42 (New York, S. Converse 1828).

Founding, it is close in time to *Gibbons* and well before the "modern" era in which Balkin claims this meaning first arose.<sup>52</sup>

Also unmentioned by Balkin is the etymology of the word commerce. As Justice Thomas noted, "[commerce] literally means 'with merchandise.'"<sup>53</sup> He then cited the Oxford English Dictionary's etymology of "com—'with'; merci—'merchandise.'"<sup>54</sup> From commerce, to merchants, to merchandise, to trade is a much more natural sequence than is commerce, to intercourse, to interaction.

So far as contemporary dictionaries are concerned, then, a clear picture emerges of the meaning of commerce at the time of the Founding: Commerce concerned the trade, traffic, and transportation of things from one place to another. It somewhat metaphorically meant social exchange, but this was a secondary and distinct sense of the term. Nor did the term "intercourse" convey much more or different information. That the activity of passing or transporting things by water—or "navigation"—is subsumed within the core meaning of "commerce" seems an easy conclusion to reach. By contrast, these dictionaries provide no support for concluding that, as used in the Constitution, the term "commerce" was broad enough to include such interactions as "traditional academic feasts, where *commercium* songs were sung around the table," or communicating with God.

### B. Evidence of Contemporary Usage

In ascertaining the objective or public meaning of "commerce" in the Constitution, it is useful to examine uses of the word in that context. For this reason, in my article in *The University of Chicago Law Review*, I surveyed every use of the term in the Philadelphia convention, *The Federalist*, and the surviving reports of the state ratification debates.<sup>55</sup> I found not one example of the word being used in any broader sense than that of trade, including the activity of transporting goods by water.

Balkin does not deal with any of this evidence or even mention its existence. I will not rehearse all my findings here, except to report some of the examples of where "commerce" is clearly distinguished from the economic activities of agriculture and manufacturing. If "commerce" was typically used to embrace all forms of social interaction, including academic feasts and communications with the Deity, it would also have included farming and manufacturing. Yet, it is clearly and repeatedly used in a different and narrower sense.

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52. See *supra* note 28 and accompanying text.

53. *United States v. Lopez*, 514 U.S. 549, 586 (1995) (Thomas, J., concurring).

54. *Id.* (citing 3 OXFORD ENGLISH DICTIONARY 552 (2d ed. 1989)).

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

At the Philadelphia convention, James Madison proposed to grant Congress the power “[t]o establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades and manufactures,”<sup>56</sup> strongly suggesting that the members understood the term “commerce” to mean trading or exchange, distinct from the productive processes that made the things to be traded.

In several of his contributions to *The Federalist*, Alexander Hamilton repeatedly distinguished between the activity of “commerce” and that of production. In *Federalist 12*, he referred to the “rivalship,” now silenced, “between agriculture and commerce,”<sup>57</sup> while in *Federalist 17*, he distinguished between the power to regulate such national matters as commerce and “the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation.”<sup>58</sup>

In *Federalist 21*, Hamilton maintained that causes of the wealth of nations were of “an infinite variety,” including “[s]ituation, soil, climate, the nature of the productions, the nature of the government, the genius of the citizens, the degree of information they possess, the state of commerce, of arts, of industry.”<sup>59</sup> In *Federalist 35*, he asked, “Will not the merchant understand and be disposed to cultivate, as far as may be proper, the interests of the mechanic and manufacturing arts to which his commerce is so nearly allied?”<sup>60</sup> Hamilton’s understanding of the meaning of commerce as trade persisted when he was Secretary of the Treasury. In his official opinion to President Washington advocating a broad congressional power to incorporate a national bank, he repeatedly referred to Congress’s power under the commerce clause as the power to regulate “the trade between the States.”<sup>61</sup>

True, like many others, Hamilton thought that commerce between states and with foreign nations was a national concern, while agriculture and manufacturing were local. For this reason, including the commerce power in Article I, Section 8 was consistent with the principle expressed in the Bedford Resolution so stressed by Balkin<sup>62</sup> and discussed below.<sup>63</sup> But this does not entail that the word “commerce” was a proxy for “any activity (or ‘interaction’) that is of national concern.” Commerce had a clear, defined meaning and—whatever vagueness might exist in its penumbra—it was a different activity than that of production via farming or

56. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 478 (1987). The term “trades” connotes crafts and other types of trades, not trade or exchange.

57. THE FEDERALIST NO. 12, at 91 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

58. THE FEDERALIST NO. 17, at 118 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

59. THE FEDERALIST NO. 21, at 141 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

60. THE FEDERALIST NO. 35, at 216 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

61. Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), in 8 THE PAPERS OF ALEXANDER HAMILTON 97, 100 (Harold C. Syrett et al. eds., 1965); see also *id.* at 118 (referring to “the regulation of trade between the states”).

62. See BALKIN, *supra* note 2, at 143–46.

63. See *infra* Part IV.

manufacturing. And it was commerce and *only* commerce—although not even *all* commerce—over which Congress was given power.

The use of the term “commerce” was invariant during state ratification conventions. Elsewhere I summarize each use of the term.<sup>64</sup> Here I will confine myself to examples that clearly distinguish “commerce” from other economic activities.

In Massachusetts, Thomas Dawes, a prominent revolutionary and legislator, complained about the absence of a federal taxing power, the adverse consequences of which “will be evident if we take a short view of our agriculture, commerce, and manufactures.”<sup>65</sup> He then gave separate attention to each of these activities and the beneficial effect the Constitution would have on them.<sup>66</sup> Under the heading of “commerce,” he referred to “our own domestic traffic that passes from state to state.”<sup>67</sup> In Connecticut, Oliver Ellsworth referred to the Swiss who “[t]ill lately,” he said, “had neither commerce nor manufactures. They were merely a set of herdsmen.”<sup>68</sup>

In New York, Governor Clinton referred to “[t]he situation of [each state’s] commerce, its agriculture, and the system of its resources.”<sup>69</sup> Another delegate expressed skepticism about the need for a new Constitution because of recent economic improvement. “How [the country’s] agriculture, commerce, and manufactures have been extended and improved!”<sup>70</sup>

But, in New York, it was Hamilton who made the most repeated and clearest use of the term “commerce.” In one speech, he observed: “The Southern States possess certain staples,—tobacco, rice, indigo, &c.,—which must be capital objects in treaties of commerce with foreign nations . . . .”<sup>71</sup> And he employed the same distinction in replying to the objection that the regulation of commerce was outside the competency of a central government: “What are the objects of the government? Commerce, taxation, &c. In order to comprehend the interests of commerce, is it necessary to know how wheat is raised, and in what proportion it is produced in one district and in another? By no means.”<sup>72</sup> Later, in defending the power of direct taxation, Hamilton argued that, without such a power, “[o]ur neighbors, not possessed of our advantages for commerce and agriculture, will become manufacturers: their property will, in

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64. See Barnett, *supra* note 55, at 116–25.

65. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 57 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 2d ed. 1891) [hereinafter ELLIOT’S DEBATES].

66. *Id.* at 57–59.

67. *Id.* at 58.

68. *Id.* at 188.

69. *Id.* at 261.

70. *Id.* at 336.

71. *Id.* at 237.

72. *Id.* at 255.

a great measure, be vested in the commodities of their own productions; but a small proportion will be in trade or in lands.”<sup>73</sup>

In Pennsylvania, James Wilson clearly distinguished farming and manufacturing from commerce, while extolling the importance of the latter to the former when he asked:

Suppose we reject this system of government; what will be the consequence? Let the farmer say, he whose produce remains unasked for; nor can he find a single market for its consumption, though his fields are blessed with luxuriant abundance. Let the manufacturer, and let the mechanic, say; they can feel, and tell their feelings. Go along the wharves of Philadelphia, and observe the melancholy silence that reigns. . . . Let the merchants tell you what is our commerce . . . .<sup>74</sup>

In North Carolina, William Davie defined “[t]he general objects of the union” to be “1st, to protect us against foreign invasion; 2d, to defend us against internal commotions and insurrections; 3d, to promote the commerce, agriculture, and manufactures, of America.”<sup>75</sup> Later, he explained why the regulation of commerce, though distinct from agriculture and manufacturing, promoted them: “Commerce, sir, is the nurse of both. The merchant furnishes the planter with such articles as he cannot manufacture himself, and finds him a market for his produce. Agriculture cannot flourish if commerce languishes; they are mutually dependent on each other.”<sup>76</sup> And, Davie also distinguished between “the interest of agriculture and commerce” and explained how the Constitution would protect just claims of “the merchant or farmer.”<sup>77</sup>

In South Carolina, Charles Pinckney distinguished those “people [who] are employed in cultivating their own lands” from “the rest [who are] in handicraft and commerce.”<sup>78</sup> He then immediately expanded upon this by discussing the different “classe[s]” of society comprised of the “[c]ommercial men,” the “professional men,” those engaged in “the mechanical,” and the “landed interest—the owners and cultivators of the soil.”<sup>79</sup>

In Virginia, I counted at least seventeen references that link “commerce” in some way to ports, shipping, navigation, or the “carrying trades.” For example, Richard Henry Lee asked those who doubted the need for the Constitution to “go to our seaports; let him see our commerce languishing—not an American bottom to be seen.”<sup>80</sup> Edmund Randolph urged members to “[c]ast your eyes to your seaports; see how

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73. *Id.* at 369.

74. *Id.* at 524.

75. 4 ELLIOT’S DEBATES, *supra* note 65, at 17.

76. *Id.* at 20.

77. *Id.* at 159.

78. *Id.* at 321.

79. *Id.* at 321–22.

80. 3 ELLIOT’S DEBATES, *supra* note 65, at 43.

commerce languishes.”<sup>81</sup> He observed that “Virginia is in a very unhappy position with respect to the access of foes by sea, though happily situated for commerce,”<sup>82</sup> and that “[a]s it is the spirit of commercial nations to engross as much as possible the carrying trade, this makes it necessary to defend our commerce.”<sup>83</sup> Like Lee and Randolph, Francis Corbin asked his listeners to visit the empty ports, where “he will behold but a few trifling little boats; he will every where see commerce languish; the disconsolate merchant, with his arms folded, ruminating, in despair, on the wretched ruins of his fortune, and deploring the impossibility of retrieving it.”<sup>84</sup>

Future Chief Justice John Marshall asked whether “the Algerines . . . and every other predatory or maritime nation, [cannot] pillage our ships and destroy our commerce, without subjecting themselves to any inconvenience?”<sup>85</sup> Madison asserted that “American vessels, if they can do it with advantage, may carry on the commerce of the contending nations.”<sup>86</sup> William Grayson stated that the riches of all those “maritime powers of Europe . . . come by sea. Commerce and navigation are the principal sources of their wealth.”<sup>87</sup> And, echoing Marshall, James Innes asked, “Is it not in the power of any maritime power to seize our vessels, and destroy our commerce, with impunity?”<sup>88</sup>

But uses of “commerce” in Virginia were not limited to navigation. Edmund Pendleton, for instance, viewed “commerce” as the means by which “the people may have an opportunity of disposing of their crops at market, and of procuring such supplies as they may be in want of.”<sup>89</sup> So synonymous was “commerce” with “trade” that William Grayson worried that “the whole commerce of the United States may be exclusively carried on by merchants residing within the seat of government.”<sup>90</sup> He could not have been including agriculture or manufacturing in his definition of commerce. Nor could he possibly have thought that the term “commerce” equated with social interaction, such that all social interaction could possibly be conducted in the future District of Columbia.

To avoid cherry picking, in writing my *University of Chicago Law Review* article, I comprehensively surveyed every use of the term “commerce” in the Philadelphia convention, *The Federalist*, and the surviving records of the ratification conventions.<sup>91</sup> I did not expect usage to be uniform, but hoped rather to be able to distinguish normal usage from that

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81. *Id.* at 66.

82. *Id.* at 72.

83. *Id.* at 78.

84. *Id.* at 105.

85. *Id.* at 235.

86. *Id.* at 249.

87. *Id.* at 428.

88. *Id.* at 635.

89. *Id.* at 295.

90. *Id.* at 291.

91. See Barnett, *supra* note 55.

which was aberrational.<sup>92</sup> Hence, my surprise at finding that usage was consistently narrow where the context supplied meaning. In no case did I find an unambiguous use that connoted all social interaction.<sup>93</sup>

Balkin dismisses all this in a single sentence, and without revealing to his readers the fullness of these examples: “[C]onstitutional debates tend to focus on the key concerns that divide people at the time and not on the many possible applications of constitutional language.”<sup>94</sup> No, this is not what the evidence shows if one reads it. These statements show what the word “commerce” was assumed to mean—including by members of the ratification conventions which were deemed to represent the public. Of course, commerce was a “key concern,” which explains why the commerce clause was included in the text. But it was a concern about *commerce*, the activity described by the term “commerce,” as used in the commerce clause.

Balkin also seems to deny the accuracy of evidence presented above when he says, “Even if the framers used the term “commerce” in its narrowest possible sense (*which they did not . . .*), the public meaning of the word to a general audience was much wider, and surely it is the general publicly understood meaning of the words used that should count.”<sup>95</sup> Part of this depends on what is meant by “narrowest possible sense.” My evidence shows that “commerce” was routinely used to include “navigation.”<sup>96</sup> Is this the narrowest possible sense? At any rate, I found not a single example in these three sources in which “commerce” was used in the broader sense of “social intercourse.”

Apart from some illustrations from dictionaries, however, Balkin provides scant evidence of how the public actually used the word “commerce.” In contrast, to discern how the public used the term “commerce,” two research assistants and I conducted a study that goes unmentioned in *Living Originalism*.<sup>97</sup> I asked my assistants to examine, independently of me and of each other, every use of the term “commerce” in the *Pennsylvania Gazette* that appeared from 1728 to 1800.<sup>98</sup> The *Pennsylvania Gazette*, which, from 1729 to 1766, was published by Benjamin Franklin,<sup>99</sup> “[i]n its essential character, although not in its unusual longevity, . . . was representative of the great majority of the news-

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92. See *id.* at 111–12.

93. See *id.* at 112.

94. BALKIN, *supra* note 2, at 153.

95. *Id.* (emphasis added).

96. See *supra* notes 80–88 and accompanying text.

97. Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 856–65 (2003). My assistants were Stacy Cline and Adam Budesheim, who were then both students at Harvard Law School, where I was a visiting professor at the time. Once again, I extend my appreciation to them for the work they did on this study.

98. *Id.* at 856–57 (detailing the methodology of this study). We used the database provided by Accessible Archives. ACCESSIBLE ARCHIVES, <http://www.accessible.com> (last visited Mar. 15, 2012). Each entry on the database has a unique item number, which is included in my citations.

99. See Charles E. Clark & Charles Wetherell, *The Measure of Maturity: The Pennsylvania Gazette, 1728–1765*, 46 WM. & MARY Q. 279, 281, 291 (1989).

papers of the provincial period."<sup>100</sup> Were the term "commerce" to have had a readily understood broad meaning, one would expect it to have made its appearance in this typical newspaper whose publication spanned the colonial and postcolonial period. And if the term "commerce" was ambiguous, one could detect which of the multiple meanings of "commerce" was most common.

From 1728 to 1800, the term "commerce" appeared 1594 times. Rather than sample these uses, each assistant, separately from the other, examined *every* appearance of the word to see whether it was being used in the sense employed in the sources I had previously surveyed. In particular, I asked them to flag for my review any uses that even arguably represented a broader meaning. I also asked them to code the uses in a number of other ways, for example, whether the term is used in a couplet with "trade" or refers to shipping. What they found was dramatic, though it is impossible here to convey the overwhelming consistency of the usage of "commerce" to refer to trading activity (*especially* shipping and foreign trade) without listing one example after another.

The earliest use of the term appeared in 1728, and referred to "commerce" as "the Affairs of Merchandize."<sup>101</sup> One of the latest in 1798 refers to a 1765 caricature in which the messenger god Mercury was used to signify commerce. A 1787 entry defines the term explicitly: "[B]y commerce I mean the exports as well as the imports of a country . . ."<sup>102</sup> A 1773 entry notes the existence of "the Royal College of Physicians, and the Society for the Encouragement of Arts, Manufactures and Commerce."<sup>103</sup>

Of the 1594 examples examined, just three suggested a possible broader meaning, though the content of whatever broader meaning they might convey is obscure. In 1786, the following appeared:

Never were there a people on earth who possessed greater advantages than those of the United States. Never was there a path more plain, or means more simple, fully sufficient to establish our prosperity and happiness, than those which present themselves to us. Heaven, by the advantages put in our power, does almost compel us to be a happy people: While we seem to turn our backs on our advantages, seek the dark side of the cloud, and magnify our difficulties.—Establish but public faith and credit, and public confidence will follow, for they are concomitants of each other.—The salutary effects will be immediately diffused and felt among the people; a chearful air will be displayed in every countenance; trade,

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100. *Id.* at 280.

101. *Advertisement*, PA. GAZETTE, Oct. 1, 1728, available at Accessible Archives, Item No. 1.

102. *Common Sense, Addressed to the Opposers of the Bank*, PA. GAZETTE, Mar. 7, 1787, available at Accessible Archives, Item No. 73696.

103. *Bowen's Sago*, PA. GAZETTE, Dec. 29, 1773, available at Accessible Archives, Item No. 54627.

commerce and agriculture will flourish: While our republic becomes respectable, both at home and abroad.<sup>104</sup>

This passage suggests that trade and commerce are distinct. Nor does this appear to be an example of the couplet “trade and commerce” that made its appearance repeatedly in the *Gazette* as it had in the materials surrounding ratification that I earlier surveyed.

Taken literally, “commerce” here appears to be distinct from both “agriculture” and “trade” as it is again in the following passage from 1782: “Yet while the war was carried on by the mass of general opposition, the business of the country got deranged. Agriculture, trade and commerce became neglected, and something like poverty began to appear.”<sup>105</sup> Similar, but somewhat less suggestive, is the following from 1762:

And whereas such pernicious Practices may not only give Opportunities to evil disposed Persons to cheat and defraud the honest Inhabitants of this Province, but prove introductive of Vice, Idleness and Immorality, injurious to Trade, Commerce and Industry, and against the Common Good, Welfare and Peace of this Province . . . .<sup>106</sup>

In each of these phrases, the word “trade” precedes the word “commerce” as though the writer was echoing the couplet “trade and commerce,” while adding “agriculture” or “industry” to it. Indeed, in the 1782 passage, the phrase actually used is “trade and commerce.” To the extent, however, that by “commerce” these writers really meant something different than trade, it is not at all clear what activities they had in mind. Yet even these three exceptional uses are inconsistent with a broader meaning of “commerce” as embracing all social interactions.

Why might the general public have been particularly concerned about the subset of social interactions involving commerce? To give the flavor of this, consider this lengthy paean to the virtues of commerce by a writer calling himself “Leonidas,” as part of his plea for its protection by a powerful American Navy:

When the benefits of Commerce and the blessings of Liberty were set in competition with each other, it was the duty of every man to sacrifice the former to the latter. The only commerce that was in our power in the beginning of the war was the commerce of Great-Britain, and this entailed slavery upon us. No wonder therefore we spurned at it. The untanned skins and unmanufactured furs of our native wild beasts, with freedom, were splendid robes, compared with slavery clothed in the silks, &c. of Great-Britain. But the dec-

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104. *Charlestown (Massachusetts) June 30*, PA. GAZETTE, July 19, 1786, available at Accessible Archives, Item No. 73008.

105. Common Sense, *To the People of America*, PA. GAZETTE, Apr. 3, 1782, available at Accessible Archives, Item No. 67182. Though this could be the couplet “trade and commerce.”

106. *An Act for the More Effectual Suppressing and Preventing of Lotteries*, PA. GAZETTE, Mar. 4, 1762, available at Accessible Archives, Item No. 28196.

laration of independence has produced a revolution in the duties of an American. He has nothing now to fear from commerce! He is no longer restrained by arbitrary acts of navigation! He is no longer confined to one market. The whole world (Britain excepted) is open to the productions and demands of his country. Commerce has become therefore not only inoffensive, but useful; nay more, it has become absolutely necessary to the happiness of America.

Humanity revolts at the review of those times, when the inhabitants of the different countries in Europe were unconnected with each other by the ties of commerce. It served the same purposes, with respect to States, that the different occupations of men serve in the same community. By becoming necessary to each other, they promoted universal peace and benevolence. It was Commerce that taught the soldier to spare the industrious husbandman in war, and to feel an horror at shedding innocent blood. In a word—it was commerce that revived the belief and enforced the precepts of Christian religion, by teaching mankind that they were children of the same father, and members of one great family.

America requires more from commerce than any country in the world . . . .

America, disjointed from the civilized parts of the globe by an immense bed of waters, *can maintain an intercourse with them only by means of commerce*. It is this which must bring us all the improvements in arts and science of countries, where men are maintained in societies for the sole purpose of adding by their discoveries to the pleasures and conveniences of life.

Republics are the havens of commerce. Carthage, Holland, Venice and Genoa, have each in their turns been the carriers of Europe. It is essential to commerce that property be secure, and republics afford more security to property than any other form of government. The republics of America have every thing to hope from commerce that is friendly to liberty. It forms the only barrier that can be contrived to check the aristocratic tendency of a monopoly of land. It is in countries where commerce is unknown, that the peasant trembles at the sight of the hereditary landholder. Commerce, by opposing ships to farms, and substantial wealth to family pride, brings the ancient citizen to a level with the man of yesterday. It opens the door to power, rank and influence to every body. It is the magnet of talents and the cherisher of virtue. It is calculated to restore men to their original equality, and to expel tyranny from the world. It is impossible to be too sanguine as to the duration of freedom in America, while we continue a commercial people. In the extensive distribution and fluctuation of wealth, and in the variety of competitions and new combinations of inter-

ests and families, produced by commerce, monarchy and aristocracy can never raise their heads in America.<sup>107</sup>

For Leonidas and his audience, commerce is clearly a distinctive form of activity, and distinct especially from land ownership, though he is also a big fan of property. And he refers to “commerce” as a means of maintaining “intercourse” with “the civilized parts of the globe.” Do “countries where commerce is unknown” lack all social interactions? Does his opposition of “ships to farms” suggest that both activities are species of “commerce” as understood by the general public? Because Balkin ignores this and the other one hundred typical examples of the use of “commerce” in the *Pennsylvania Gazette* I included in my *University of Arkansas* article, I append them again to this Article for the convenience of readers.<sup>108</sup> Reading them demonstrates the public meaning of “commerce” far more effectively than would any comparable number of words from me.

The surveys in my *University of Chicago* and *Arkansas Law Review* articles establish that, both inside and outside the process of drafting and ratifying the Constitution, the normal, conventional, and commonplace public meaning of commerce from 1728 to 1800 was “trade and exchange,” as well as transportation for this purpose. The idea of “intercourse” subsumes these activities within the concept of transporting persons and things from one place to another. On the strength of this data, I find it difficult to believe that the term “commerce” was even ambiguous in those days. But if it was, the historical evidence clearly shows which of the two purported meanings was the normal public connotation of the word used in Article I, Section 8.

### III. AMBIGUITY

All of this omitted evidence of semantic usage refutes Balkin’s claim that “[t]he Supreme Court adopted the distinctions between commerce, agriculture, and manufacturing in the early nineteenth century, in part to maintain distinctions between local and national power.”<sup>109</sup> To the contrary, at the Founding, commerce was an activity that was distinct from the activities of agriculture and manufacturing. Nor can the “trade theory” be dismissed as “a *constitutional construction* adopted in a particular historical context that limited the scope of ‘commerce’ in order to maintain an underlying structural principle.”<sup>110</sup> This consistency of linguistic usage is simply too overwhelming to be anything other than evidence of the meaning of the word “commerce” itself in the relevant political and historical context.

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107. Leonidas, *The Subject of an American Navy Continued*, PA. GAZETTE, July 31, 1782 (emphasis added), available at Accessible Archives, Item No. 67554.

108. See *infra* app. 1.

109. BALKIN, *supra* note 2, at 153–54.

110. *Id.* at 154.

What evidence Balkin presents does not establish a broader meaning of "commerce" in the Constitution that subsumes the trade or transportation of people and things from one place to another, but evidence that the word "commerce" had more than one sense. In short, his is evidence that the term "commerce" was ambiguous. When confronted with ambiguity, an originalist attempts to identify which of the distinctive senses was the one conveyed by the passage in question given its context.<sup>111</sup> To the extent that the word "commerce" was ever used in common parlance to connote social interaction in general, was this the sense in which it was used in the commerce clause, or was "commerce" instead used in the commonplace sense of trading or transporting things from one place to another? This is a mutually exclusive choice unless it is contended that the writing would have been read as referring to both distinct but different meanings.

Consider, for example, today's meaning of "intercourse." The *Oxford English Dictionary* begins with the etymology of "intercourse" in old French as "*entrecours* exchange, commerce," and "*entrecorre* to run between."<sup>112</sup> It then offers these nine distinct senses of "intercourse":

1. Communication to and fro between countries, etc.; mutual dealings between the inhabitants of different localities. *In early use exclusively with reference to trade, and hence sometimes = commerce, traffic; now in more general sense. . . .*
2.
  - a. Social communication between individuals; frequent and habitual contact in conversation and action; dealings. . . .
  - b. With of (= in respect of, as regards). . . .
  - c. *pl.* Now rare. . . .
  - d. Sexual conne[ct]ion. . . .
3. Communion between man and that which is spiritual or unseen. . . .
4. Communication of ideas; discourse, conversation, discussion. *Obs.* (exc. as included in 2). . . .
5.
  - a. Intercommunication between things or parts. . . .
  - b. A means or way of intercommunication. . . .
6. Passage in; entrance. *Obs.* . . .
7. Continuous interchange or exchange *of* (letters, etc.). Now rare. . . .

111. See generally Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 631–37 (2009) (discussing how the resolution of ambiguity by interpretation in the Constitution differs from the resolution of vagueness by construction).

112. 7 THE OXFORD ENGLISH DICTIONARY 1094 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).

8. Interchange of one thing with another; alternation. *Obs.* . . .
9. a. The fact of coming between or intervening; intervention; an intervening course or space; an interval. *Obs.* . . .
  - b. Intervention on the part of some agent.<sup>113</sup>

One immediately notices that the primary meaning of “intercourse” as “[c]ommunication to and fro between countries, etc.; mutual dealings between the inhabitants of different localities” and its “early use exclusively with reference to trade, and hence sometimes = commerce, traffic” is distinct from its secondary sense of “[s]ocial communication between individuals; frequent and habitual contact in conversation and action; dealings” or “[s]exual conne[ct]ion.” Someone who was employing the term “intercourse” today would ordinarily mean *either* the sense of “[c]ommunication to and fro between countries” or the sense of “[s]ocial communication between individuals.” Unless they were being poetic, they would not mean both at the same time. Someone conveying both meanings simultaneously would be engaged in something like a double entendre; but, even so, typically a single meaning is meant by a play on words.

Balkin implicitly admits as much when he baldly asserts that “sexual intercourse . . . is not the concept referred to by the commerce clause.”<sup>114</sup> Yet “[s]exual conne[ct]ion” is a version of the second “social communication” sense of “intercourse.” Balkin is right that it is inconceivable that in context, the commerce clause conveyed to a reasonable reader that Congress had power over sexual intercourse among the states. But his entirely warranted assertion inadvertently undercuts his primary claim that Congress was given the power to regulate “social intercourse” of which sexual intercourse is a subset.

Another unrecognized admission immediately follows Balkin’s claim that “[t]he interaction theory defines ‘commerce’ according to its broadest eighteenth-century meaning as ‘intercourse.’”<sup>115</sup> In the next sentence, quoting *Gibbons*, he contends that “[t]he primary focus of the clause, as Chief Justice Marshall explained, is ‘commercial intercourse between nations, and parts of nations, in all its branches.’”<sup>116</sup> But if “commerce” simply meant “intercourse,” as Balkin claims, then Marshall’s use of “commercial intercourse” would be entirely redundant. To the extent that “intercourse” has any broader meaning than “commerce,” Marshall’s use of the phrase “commercial intercourse” limits its scope to one species of intercourse: commerce.

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113. *Id.* at 1094–95 (first emphasis added) (illustrations omitted).

114. BALKIN, *supra* note 2, at 150. I say “baldly” because there is no support offered for this assertion.

115. *Id.* at 155.

116. *Id.* (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189–90 (1824)).

So, to carry the day, it is simply not enough for Balkin to notice that "commerce" is defined as "intercourse," and provide a few examples of each term having a "social interaction" connotation. He must show that the distinctive "social interaction" sense was the one conveyed by the use of the term "commerce" *in the commerce clause*, which he has entirely failed to do. And one can see why. For had he shown that the public meaning of "commerce" was social intercourse, he would have been excluding from the Constitution the alternate distinctive meaning of "commerce" as the activity of trade in or the transportation of persons and things. So it is unsurprising that such proof is unavailable.

There is no intercourse clause in the Constitution, much less an interaction clause. Congress is given power over *commerce*, and not even all commerce at that: just that commerce that takes place between states, and between persons in the United States and those in foreign nations and the Indian tribes.<sup>117</sup> As Justice Black cautioned, one must always be careful when substituting one word for another.<sup>118</sup>

Still, when properly defined, the primary sense of "intercourse" is entirely consistent with the historical and traditional understanding of commerce as exchange, but also the transportation of things from one place to another on ships and by other means of conveyance. And it is no stretch to include the interstate transmission of electricity or the electronic transmission of information between states within the original meaning of "commerce."

It was precisely for moments like this that I surveyed *every* use of the term "commerce" in the relevant sources, and I reported any examples that even came close to the line. None of this evidence of contemporary usage is treated in *Living Originalism*. Perhaps the most succinct way to summarize the evidence is this: Not one person in Philadelphia or the state ratification conventions is recorded as unambiguously using "commerce" in the broad sense of social interaction that Balkin contends that *everyone* would have understood was its meaning in the Constitution. Neither did the authors of *The Federalist*, including nationalist Alexander Hamilton. Conversely, examples are legion of persons distinguishing "commerce" from agriculture and manufacturing, a distinction that Balkin contends was invented as a constitutional construction sometime in the nineteenth century.

Of course, if I am mistaken and one, two, or ten such examples exist, this would still not establish "social interaction" as the dominant or objective meaning of "commerce" in context. Such extrinsic evidence would only establish that the term "commerce" was ambiguous. We would then have to assess which sense of "commerce" was conveyed by the commerce clause.

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117. See U.S. CONST. art. 1, § 8, cl. 3.

118. See *supra* note 1 and accompanying text.

## IV. THE BEDFORD RESOLUTION

In light of this evidence of semantic meaning, there is little reason to comprehensively discuss Balkin's heavy reliance on Gunning Bedford's Resolution VI in the Philadelphia convention that read (as amended):

That the national legislature ought to possess the legislative rights vested in Congress by the confederation; and moreover, to legislate in all cases for the general interests of the union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.<sup>119</sup>

Giving Congress power over commerce with foreign nations, among the several states, and with Indian tribes would have been, and still is, consistent with this expression of principle. That *other* activity over which Congress was *not* given power might one day fall within the "general interests of the union" does not change the original meaning of "commerce" one whit.

Nor would the adoption of this resolution by the secret Philadelphia convention expand the power of Congress under Article I, Section 8. To the extent it was originally proposed to be incorporated into the text of the Constitution—which is surely how it reads—that idea was obviously rejected since it was not so incorporated. That it might have provided guidance for the Committee of Detail did not enact its wording into law. Instead, the Committee set out to detail or enumerate powers that fit the description of objects of legislation serving the "general interests of the union" that states were "separately incompetent" to address. The result was the list of powers expressed in the text of Article I, Section 8.

Why might Bedford's proposal have been replaced by specific enumeration? This question is extensively addressed by Joseph Lynch in his 1999 book, *Negotiating the Constitution*.<sup>120</sup> Lynch contends that "Bedford intended, as all the delegates understood, that the general language he proposed be inserted into the text of the Constitution in just that form."<sup>121</sup> Lynch's presentation of the records of the Convention supports the conclusion that, when Virginia thought that both houses of Congress would be allocated on the basis of population, its delegates supported broad federal powers. But as soon as the Convention adopted equal representation in the Senate, Virginia cooled on this aspect of the "Virginia Plan."<sup>122</sup>

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119. MADISON, *supra* note 56, at 380. For a description of the drafting history that led to this language, see BALKIN, *supra* note 2, at 143–46.

120. JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT* (1999). In *Restoring the Lost Constitution*, I relied upon and cited Lynch's analysis in discussing the fate of the Bedford Resolution. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 274–76 (2004).

121. LYNCH, *supra* note 120, at 18.

122. See *id.* at 8–20.

"In the beginning, George Washington and James Madison were committed nationalists."<sup>123</sup> In his original proposal, now called the "Virginia Plan," Madison proposed a bicameral legislature in which both houses were apportioned by population.<sup>124</sup> At that time Virginia "had the largest number of both free persons and slaves,"<sup>125</sup> so it would be very well represented in the new Congress.

It was within that context that the Virginia Plan, contemplating a truly national government, boldly provided that the legislature, in addition to the powers granted to the Continental Congress under the Articles, would be authorized to pass laws "in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation."<sup>126</sup>

After the Great Compromise, according to which the House would be elected by population but the several states would have equal representation in the Senate, Virginia's position changed. "After the compromise, the Virginia delegation abandoned the proposal for broad legislative powers and fought instead for the specific enumeration of congressional powers . . ."<sup>127</sup> On this matter, my own reading of the exchanges at the Convention on which Lynch relies supports his account.<sup>128</sup>

After neglecting Lynch entirely in his earlier draft, Balkin has now added a lengthy endnote discussing my reliance upon Lynch in *Restoring the Lost Constitution*.<sup>129</sup> But Balkin does not comment on Lynch's claim that Bedford had proposed his language be included in the text "in just that form," an idea that was obviously rejected by the Convention in the end, since that language does not appear in Article I. Instead, Balkin focuses on Lynch's contention that the spirit of the Bedford Resolution was preserved by the necessary and proper clause, which was deliberately left ambiguous so both sides would later be free to argue their meaning had prevailed.<sup>130</sup>

This claim by Lynch is irrelevant, however, to Balkin's thesis that the *commerce clause* incorporated the Bedford Resolution by employing the word "commerce" in the sense of "social intercourse," rather than trade. Indeed, Balkin claims that Lynch is wrong to focus on the neces-

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123. *Id.* at 8.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 9.

128. Lynch employs this narrative in service to his claim that the necessary and proper clause was deliberately ambiguous, so that each side of the debate over the scope of federal power could claim it supported its position. See *id.* at 21 ("[F]or Virginia and the South the deliberate ambiguity of the Necessary and Proper Clause represented a substantial improvement over the Bedford resolution.").

129. BALKIN, *supra* note 2, at 376–77 n.27.

130. *Id.* I responded to this claim by Lynch in BARNETT, *supra* note 120, at 156–57. Indeed, Balkin himself does not share Lynch's reading of the necessary and proper clause. See BALKIN, *supra* note 2, at 376–77 n.27 ("I do not agree in all respects with Lynch's . . . view that the necessary and proper clause is the source of congressional power to legislate in the interests of the Union.").

sary and proper clause because the original meaning of “commerce” did all the work of the original Virginia Plan and Bedford’s resolution. Whatever may have motivated the convention, however, Balkin never clearly confronts the semantic significance of shifting from Bedford’s broad statement of principle in a secret convention to the specific enumeration of powers, in particular the semantic meaning of the commerce clause.

In his endnote discussing Lynch, Balkin says this is a matter of constitutional construction. “In my view, the principle of [the Bedford Resolution] underlies and should inform the proper construction of all of Congress’s enumerated powers.”<sup>131</sup> But first comes interpretation, and then comes construction. As Balkin well knows, an originalist must first determine the semantic meaning of the word “commerce,” and only then engage in construction where that meaning is vague.<sup>132</sup> An originalist does not use “construction” to create an ambiguity by identifying a deviant semantic sense of a term and then adopt the deviant sense because it best fits an underlying principle.

I do not deny that the powers specified in Article I, Section 8 attempted to implement the principle articulated in the Bedford Resolution, although Balkin’s claim that James Wilson relied publicly on the Bedford Resolution when addressing the Pennsylvania ratification convention<sup>133</sup> has been disputed by Kurt Lash.<sup>134</sup> But this change of wording communicated to the public a more specific commitment to granting only these powers, regardless of how changing circumstances might create a need for additional powers to be allocated to the national government. The commitment to enumerated powers was widely trumpeted and crucial to the Constitution’s narrow adoption, and was the Federalists’ principal response to the omission of a bill of rights in the original Constitution.<sup>135</sup>

So, regardless of whether the Bedford Resolution was ever “rejected” by the secret convention in Philadelphia, the fact that its wording was never incorporated into the text of the Constitution entails that it did not become part of its public meaning. From the standpoint of original meaning, all that matters is the original public meaning of each power

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131. Balkin, *supra* note 2, at 377 n.27.

132. See *supra* note 111 and accompanying text.

133. BALKIN, *supra* note 2, at 143 (quoting Wilson’s statement to the Pennsylvania ratifying convention).

134. Kurt T. Lash, “Resolution VI”: *National Authority to Resolve Collective Action Problems Under Article I, Section 8*, 87 NOTRE DAME L. REV. (forthcoming Apr. 2012) (manuscript at 33–34), available at <http://ssrn.com/abstract=1894737> (explaining that Wilson was actually likely to be referring to a resolution by Roger Sherman that had been rejected by the Philadelphia convention).

135. See, e.g., THE FEDERALIST NO. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[B]ills of rights . . . are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?”).

that *was* specified in Article I, Section 8—including the original public meaning of “commerce” in the commerce clause. To establish this meaning, one looks not to secret resolutions, but to the evidence of original meaning arrayed above.<sup>136</sup>

In a blog post responding to Kurt Lash’s powerful critique of his claim that Resolution VI informs the original public meaning of the commerce clause or necessary and proper clause, Balkin now maintains that he offered Resolution VI solely as a constitutional construction, or what he calls a “structural” argument: “[M]y argument about Resolution VI is . . . not . . . an argument about the original meaning of the words of the constitutional text. That is because it is not a claim about original semantic meaning, reasonable implications to be drawn from original semantic meaning, or widely acknowledged terms of art.”<sup>137</sup>

This is a major concession by Balkin, and one that undermines how his originalist analysis of the commerce clause has already been used in important litigation. In its amicus brief to the U.S. Supreme Court on behalf of state legislators supporting the constitutionality of the individual insurance mandate in the Patient Protection and Affordable Care Act, the Constitutional Accountability Center read Balkin, and Akhil Amar, as making a claim about original public meaning rather than constitutional construction: “With respect to ‘commerce,’ the *original meaning* at the time of the Founding carried ‘a broader meaning referring to all forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets.’”<sup>138</sup> But Balkin now expressly denies he is making any such claim about original meaning, at least with respect to his heavy reliance upon the Bedford Resolution, i.e., Resolution VI.

As Lash rightly observes, however, “the principle of federal power supposedly represented by Resolution VI is only one of many possible principles or rules of construction that might be brought to bear in applying the text of Article I, Section 8 to a legal dispute.”<sup>139</sup> The choice of “Resolution VI (whatever *its* meaning) over other possible rules of construction requires a normative theory that justifies the use of Resolution VI.”<sup>140</sup>

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136. See *supra* Part II.

137. Jack M. Balkin, *Resolution VI As a Principle of Construction*, BALKINIZATION (Aug. 12, 2011, 5:55 AM), <http://balkin.blogspot.com/2011/08/resolution-vi-as-principle-of.html>.

138. Brief of *Amicus Curiae* Constitutional Accountability Center in Support of Appellant and Reversal at 14, 14 n.5 *Virginia ex rel. Cuccinelli v. Sebelius*, Nos. 11-057 & 11-1058 (4th Cir. Mar. 7, 2011), 2011 WL 792217 at \*14, \*14 n.5 (emphasis added) (quoting AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 107 (2005), and citing Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 44 (2010)).

139. Lash, *supra* note 134 (manuscript at 21).

140. *Id.* Not that there is anything wrong with that. The “presumption of liberty” I propose in *Restoring the Lost Constitution* is expressly defended as a principle of construction rather than as an interpretive claim about original meaning. See BARNETT, *supra* note 120, at 268–69. In contrast, the

Indeed, in the very passage of the speech quoted by Balkin, James Wilson himself offered his own repudiation of Balkin's use of the Bedford Resolution in constitutional construction. "In order to lessen or remove the difficulty arising from *discretionary construction* on this subject," said Wilson, "an enumeration of particular instances, in which the application of the principle ought to take place, has been attempted with much industry and care."<sup>141</sup> What Wilson is saying here is that, precisely to avoid resorting to constitutional construction, text with a more specific original meaning was selected to define the scope of Congress's power.

## V. CONCLUSION

In this Article, I have identified the serious weakness with Jack Balkin's "interaction theory" of "commerce." Balkin reduces "commerce" to "intercourse" and "intercourse" to "interaction" and "interaction" to "affecting." The evidence presented on behalf of this triple reduction is very thin. Nor does he offer much, if any, evidence of the public meaning of the crucial (for him) concept of "intercourse," which some contemporary dictionaries circularly defined as "commerce."

Balkin relies more heavily on John Marshall's definition of "commerce" as "intercourse" than he does on any other source. And, as I have written, Marshall was unquestionably correct in his finding that navigation was included within the meaning of commerce. My sources are overwhelmingly clear. Defining "commerce" as a subset of "intercourse"—as suggested by Marshall's use of the phrase "commercial intercourse"—resolves this question. If the activity of engaging in commerce included the transportation of persons and things from one place to another, this would surely include transporting things on ships.

While Balkin characterizes the nineteenth and early twentieth century Supreme Court's distinction between commerce, manufacturing, and agriculture as a constitutional construction, he fails to acknowledge the substantial evidence that the general public in the eighteenth century commonly distinguished between commerce, manufacturing, and agriculture. In addition to evidence of usage found in the framing and ratification debates, there is also a comprehensive survey of all the uses of the term "commerce" in the *Pennsylvania Gazette* over a seventy-year peri-

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original meaning of the Constitution does include the rules of construction provided by the Ninth and Eleventh Amendments. See U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

141. Speech of James Wilson, as it appears in BALKIN, *supra* note 2, at 145–46 (emphasis added) (quoting 2 ELLIOT'S DEBATES, *supra* note 65, at 424–25). It is worth noting that when historical figures use the term "construction," they sometimes mean what is now called "interpretation" of the semantic meaning of the text. But more typically, they are referring to the method now labeled "construction," and Wilson's use of the phrase "discretionary construction" signals that this is his meaning.

od. This evidence indicates that the original meaning of "commerce"—though broader than trade in goods—is narrower than all "social interaction."

Commerce can mean a good deal more than trade—and the fact that it includes navigation is important evidence that it did—while meaning a good deal less than interaction, which would subsume the economic activities of manufacturing and agriculture. Indeed "intercourse" or "communication with" is consistent with the transportation of anything—from goods, to people, to ships, to messages—from one place to another. Even in the sexual context, "intercourse" refers to the act of transmission, as distinct from other types of sexual "interactions." Intercourse, therefore, would not include the manufacturing of the items or the growing of crops that are then traded and transported from one place to another.

While Balkin approves of Chief Justice Marshall's definition of "commerce" as "intercourse," he then rejects Marshall's treatment of inspection laws as not within the definition of the commerce power. That move requires a lot more defense than merely labeling Marshall's view "dicta"<sup>142</sup> based on the lack of national economic integration (which, by the way, was anticipated at the time of the Founding<sup>143</sup>). And the further move to reduce "intercourse" between or among the states to the New Deal's "substantial effects" doctrine would then require much more defense than it currently receives. But I shall leave these matters to another day.

In discussing the Bedford Resolution, Balkin insists it was "adopted" and not rejected. But he fails to consider the potential relevance of the switch to equal representation in the Senate on the attitude of the larger states towards sweeping allocations of power to the national government, and a subsequent insistence on enumerated powers. Another way to put this is that, while the "principle" of the Bedford Resolution may never have been formally rejected, it was certainly not explicitly included in the text (as Balkin acknowledges), and it is not clear what relevance this literally secret-from-the-public intention had on the public meaning of "commerce among the several states"—especially in light of the protests expressed against the uncertainty of this principle even by delegates in the secret convention deliberations.

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142. BALKIN, *supra* note 2, at 180.

143. See BARNETT, *supra* note 120, at 315.

Just as substituting other words for the words included in the text can be used to avoid rather than illuminate original meaning, so too can replacing what the text says with its allegedly “underlying principle”<sup>144</sup> or swapping a broader dictionary meaning of a word with the more specific meaning that word would have had in context. Even if he was wrong about the liberty protected in *Griswold v. Connecticut*, Justice Black well described how that game is played.

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144. See Randy E. Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405, 411–16 (2007) (criticizing Balkin for making this move).

APPENDIX 1:  
TYPICAL USES OF THE TERM "COMMERCE" IN THE  
PENNSYLVANIA GAZETTE (1731–1800)<sup>145</sup>

1. July 1, 1731 (#737): Upon the whole; if we permit the northern colonies to continue their Commerce in the Way they are now in, the Nation in general will be benefited by it, because the French must pay (either in Money, or what will at last turn into Money) the whole Charge of the Shipping employ'd in it, and the Value of the Cargoes, which will add so much to the Balance of our Trade[.]
2. December 18, 1740 (#4275): This was the Time to have wrested Gibraltar out of British hands, to have deprived England of the Mediterranean Trade, and made an advantageous Treaty of Commerce with his Catholick Majesty, whereby to have effectually tripped up the Heels of the English in their Trade to America likewise.
3. August 30, 1750 (#12025): Tho' the "Accounts from Ohio mention that the French still continue their Threats against the Indians, who carry on Commerce with our Traders,"
4. August 23, 1753 (#15973): The great King GEORGE has, no Doubt, well considerof the most likely Method of establishing a Friendship between his Subjects the English in this Country and the Indians, and wisely concluded, that the most likely Way to unite them, and to cement a Friendship betwixt them, would be by trade and Commerce; and as he knew that the Indians were a poor People, and had few or no Goods to give in Exchange for those Things they might want from the English, therefore it was agreed upon, that Skins should be the Commodity to be given in Exchange for what they might so want.
5. February 11, 1755 (#17919): We are told, by their Historians, that what principally induced the French to make Settlements on this Continent, was the Prospect of reaping vast Advantages from and extensive Commerce with the Natives of the Country; and it must the confessed, that they have so far succeeded in their Design, as to have engrosses, at this Time, almost the whole Trade to themselves, of which, a few Years since, we enjoyed no small Share.
6. March 3, 1757 (#20378): But as the Amendments proposed by your Honour for laying an Embargo generally on Provisions, intended to be exported to any of the Neutral Ports in Europe as well as America, if ac-

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145. This Appendix originally appeared in Barnett, *supra* note 97, at 868–99. For a description of the Appendix's creation, see *supra* note 98.

ceded to, will effectually prevent the Commerce carried on with several of the Neutral Ports in Europe, without which our Trade must be in a Manner destroyed, we cannot admit of them in the Bill.

7. March 27, 1760 (#24584): Our Government has settled a Treaty of Peace and Commerce with a Chief of the Indians of St. John River, and a Chief of the Pasamaquadie Tribe. Large Quantities of Goods for that Trade are bought up, and shipped on board Capt. Cobb, who will sail in a Day or two with the above Indians for the River St. John.

8. November 7, 1765 (#37061): AT a general Meeting of the Merchants of the City of New York, trading to Great Britain, at the House of Mr. George Burns, of the said City, Innholder, to consider what was necessary to be done in the present Situation of Affairs, with respect to the STAMP ACT, and the melancholy State of the north American Commerce, so greatly restricted by the Impositions and Duties established by the late Acts of Trade[.]

9. November 7, 1765 (#37069): THE Merchants and Traders of the City of Philadelphia, taking into their Consideration the melancholy State of the North American Commerce in general, and the distressed Situation of the Province of Pennsylvania in particular, do unanimously agree, THAT the many difficulties they now labour under as a Trading People, are owing to the Restrictions, Prohibitions, and ill advised Regulations, made in the several Acts of the Parliament of Great Britain, lately passed, to regulate the Colonies; which have limited the Exportation of some Part of our Country Produce, increased the Cost and Expence of many Articles of our Importation, and cut off from us all Means of supplying ourselves with Specie enough even to pay the Duties imposed on us, much less to serve as a Medium of our Trade.

10. January 9, 1766 (#37260): He enforced his Observations, by expatiating on the Advantage which we should receive on a Submission to the Act, by carrying on an extensive Commerce, while our Rival Colonies on the Continent, by their Refusal of the Stamps, had entirely obstructed their own Trade[.]

11. August 7, 1766 (#38486): That we apprehend no Arguments can be necessary to prove, that Commerce cannot be carried on to any beneficial Extent, without a proper Medium of circulating Cash, destitute of which, the Trade of this Colony must, in a short Time, be confined to the restricted Limits of Barter among ourselves, and the commercial Inter-course with Great Britain be greatly diminished, to the manifest Loss of the Mother Country, and Impoverishment of the Colony.

12. September 25, 1766 (#38825): The trade with the Indians, though carried on in America, IS NOT AN AMERICAN INTEREST. The people of America are chiefly farmers and planters; scarce any thing that they raise or produce is an article of commerce with the Indians.

13. October 23, 1766 (#39020): Had not a repeal of the stamp act (accompanied with prospect of the extension of trade) taken place, commerce must have ceased here, agriculture, manufacture, and economy, become the sole object of the attention and pursuit of those colonies.

14. December 10, 1767 (#41598): All before, are calculated to regulate trade, and preserve or promote a mutually beneficial intercourse between the several constituent parts of the empire; and though many of them imposed duties on trade, yet those duties were always imposed with design to restrain the commerce of one part, that was injurious to another, and thus to promote the general welfare.

15. April 7, 1768 (#42248): In regulating the trade of the colonies, great attention ought to be exercised, and the consequences of such regulations should be deliberately considered. Rather than to violate the rights of the colonies, it is the interest of Great Britain, in her regulations of trade, to grant them the greatest indulgence; for commerce delights and flourishes in a free air; and the FARMER hath proved, that the flourishing state of Great Britain, is owing to the trade she carries on with these colonies.

16. July 7, 1768 (#42773): The oppressive stamp act confessedly imposed internal taxes, and the late acts of parliament, giving and granting certain duties in the British colonies, plainly tend to the same point. Duties have been imposed to restrain the commerce of one part of the Empire that was likely to prove injurious to another, and by this means the welfare of the whole promoted; but duties imposed on such of the British exports as are necessaries of life, to be paid by the colonists on importation, without any view to the interests of commerce, but merely to raise a revenue, or in other words to compel the colonists to part with their money against their inclinations, they conceive to be a tax internal to all intents and purposes. And can it be thought just or reasonable, restricted as they are in their trade, confined as they are in their exports, obliged to purchase these very necessaries at the British market, that they should now be told they shall not have them without paying a duty for them?

17. July 28, 1768 (#42935): To this Gentleman, you must attribute the Loss of your Reputation: and it was, certainly, your Misfortune, and the

Misfortune of all America, that you did not know him, as well as he knew you,—He imposed Duties upon Paper, Glass, and Painters Colours; Articles of Commerce, which will prove most greivous Taxes upon the Country in general; but cannot affect you as merchants: For it is notorious, that a Merchant must have his Profit on every Article of his Trade, let the Original Cost be what it may[.]

18. June 1, 1769 (#44735): Therefore, in Justice to ourselves and our Posterity, as well as to the Traders of Great Britain concerned in the American Commerce, we, the Subscribers, have voluntarily and unanimously entered into the following Resolutions,

19. June 28, 1770 (#46916): 5. RESOLVED, That it appears to this Meeting, that the Merchants of Newport, in Rhode Island, have been guilty of violating the Non-importation Agreement; and consequently have acted as Enemies to the Liberties of North America; and that, for the future, we will have no Commerce or Dealings with them, until they do return to a strict Adherence to their solemn Agreement of Non-importation.

20. December 12, 1771 (#50149): A Rev. Divine, in his sermon last Sabbath, speaking of the clause in the late proclamation, relating to our returning thanks to God for the encrease of our commerce, said, that as to trade in general he did not pretend to know a great deal about it, but this he knew, that unless it was like a plant that grew more from pressing, it was in a very poor condition.

21. February 6, 1772 (#50425): and not the Importations of our own Merchants; who, in all sound Policy, and well regulated Commerce, ought to have a Preference in the Benefits arising from our Trade,

22. June 29, 1774 (#55632): By shutting up the port of Boston, some imagine that the course of trade might be turned hither, and to our benefit; but nature, in the formation of our harbour, forbids our becoming rivals in commerce with that convenient mart.

23. April 26, 1775 (#57516): That an imposition of duties upon articles of commerce imported from Great Britain, is oppressive and impolitic, as it gives the greatest encouragement to illicit trade, and operates as a prohibition on our commerce with the mother county, which for the mutual advantage of both, we conceive, ought to be free and unrestrained.

24. September 18, 1776 (#60033): To remove all future suspicions from the minds of the Colonists, that under the appearance of regulating

commerce, duties may be imposed for the farther purposes of revenue, an application of the produce of all duties, imposed on articles of trade by the British legislation, shall b [sic] made towards defraying the expences of collection, and the surpluses in each colony to be paid into their separate treasuries, and to be subject to the disposal of the respective houses of Assembly.

25. March 21, 1778 (#61739): The act for prohibiting vendues not having had the intended effect, but the evil so justly complained of daily increasing, it appears necessary to make trial of some other remedy; and as a plentiful supply of goods is the surest way of reducing the price of them, I submit to your judgment, whether it may not be expedient to establish a Board of Commerce, for importing such merchandize as may be wanted for the Indian trade, and other public services, and for accommodating the inhabitants of this State who are in low or middling circumstances, with the articles most requisite for their own consumption at reasonable rates.

26. February 3, 1779 (#64122): Instead of their affections, she has provoked their utmost hatred; and instead of monopolizing their whole commerce (that commerce which yielded her a clear profit of two millions per ann. and which carried her triumphantly through the last war) she no longer retains the smallest share of it; nor can she even protect the trade of her own island. Both the arms and the commerce of America, which were the principal supports of Britain, are now employed against her.

27. June 9, 1779 (#64475): The merchant, in the connection of the old trade with Britain, will cast a look wishfully upon the ocean, and will desire too anxiously a restoration of peace and of commerce, in the old channel of a close and intimate connection with her island.

28. June 30, 1779 (#64537): Will it not be wise therefore in the Congress of these States, in whose power it is to regulate our commerce, to divert, by every regulation, the current of our trade as much as possible from Britain to other ports in the trading European countries? It will not be necessary to restrain exportation; for it is our interest how much of our commodities are taken from us by any nation. Nor will I undertake to say what duties shall be laid upon articles imported from the shores of Britain in order to restrain that importation; but I am clear and decided in my judgment, that it will be wise in the inhabitants of this country to reprobate every idea of an alliance with that people.

29. April 4, 1781 (#66070): The Dutch commerce in Europe and the West Indies hath already suffered very much. Many of their seamen are in the hands of the enemy: and it is highly probable that they will soon lose much of their trade and some of their most valuable settlements in the East Indies.

30. April 16, 1783 (#68488): By the definitive treaty, all those which have existed till now between the two High Contracting Parties, and which shall not have been derogated from either by the said Treaty or by the present Preliminary Treaty, shall be renewed and confirmed; and the two Courts shall name Commissioners to enquire into the state of commerce between the two nations, in order to agree upon new arrangements of trade, on the footing of reciprocity and mutual convenience.—The said two Courts shall together amicably fix a competent term for the duration of that business.

31. May 7, 1783 (#68568): Therefore, for the purpose of making a temporary regulation of commerce and intercourse between Great Britain and America, and in order to evince the disposition of Great Britain to be on terms of the most perfect amity with America, and in confidence of a like friendly disposition on the part of the said states towards Great Britain, it further enacts, that after (a time to be named in the bill) the ships and vessels of the subjects of America, with the merchandises on board the same, shall be admitted into all the ports of Great Britain in the same manner as vessels of the subjects of other independent states; but the merchandize and goods on board such vessels, being of the produce of the said states, shall be liable to the same duties only, as the merchandizes would be subject to, if they were the property of British subjects, and imported in British built vessels.

32. October 8, 1783 (#69240): With respect to France, a nation that has so essentially supported our independence, has given us every pledge of friendship, and whose interest it is, as a rival of Britain, to cultivate a commerce with us as far as possible, the difficulties attending a free trade from America to her islands are still stronger.

33. December 17, 1783 (#69527): What is this more or less than to tell us, that while we have no National System of Commerce, the British will govern our trade by their own Laws and Proclamations as they please.

34. March 24, 1784 (#69901): That as this town is most advantageously situated for commerce, having a spacious and safe harbour, surrounded by a very extensive and fertile country, which is inhabited by an industrious and enterprising people, fully sensible of the advantages of trade;

and as the relative and essential importance and consequence of this state depend on the prosperity and extent of its agriculture and commerce, neither of which can alone render it important and happy, we are of opinion that in point of real honour and permanent utility, the measure proposed will be highly expedient.

35. June 2, 1784 (#70215): It will certainly be admitted, that Congress must be vested with powers competent to the protection of commerce, or the United States can never command reciprocal advantages in trade; and unless they are regarded by foreign powers as an entire, united nation, conducting their commerce jointly and fairly, on principles of exact reciprocity with all nations, I fear Great Britain will not be led to make extensive concessions[.]

36. August 18, 1784 (#70510): Tuesday, the 23d ult. a meeting of gentlemen deputed by several towns in New Jersey, was held at New Brunswick, for the purpose of encouraging commerce.—They agreed to petition the Legislature, who are now sitting, to impose duties on all foreign products and manufactures imported into that state, and to establish free ports, with liberal charters.

37. November 17, 1784 (#70876): It were therefore to be wished, that commerce were as free between all the nations of the world, as it is between the several counties of England; so would all, by mutual communication, obtain more enjoyments. Those counties do not ruin each other by trade, neither would the nations. No nation was ever ruined by trade, even, seemingly, the most disadvantageous.

38. June 22, 1785 (#71708): Resolved, That reciprocity of advantages and benefits in trade, ought to be secured, by treaties of commerce between the citizens of the United States and the subjects of those powers with whom they have commercial intercourse, so as to render our commerce with other nations beneficial to our country.

39. January 18, 1786 (#72428): To hear a *London-trader*, who in two years accumulated more wealth by his infernal commerce with the enemy, and furnishing them with materials to continue their unnatural war against his bleeding country, than he could in ten by his honest industry[.]

40. April 19, 1786 (#72720): The Mediterranean trade shut to America by the depredations of the Barbary corsairs—the French and British West India islands refuse admittance to American vessels but in a very limited way—to what quarter of the world can she export her wheat,

corn and lumber—to whom and where can her citizens look for some participation of the commerce of the world[.]

41. April 26, 1786 (#72737): From the foregoing account, we can form a full idea of the resentment which still influences the politics of Britain against this country—America, however, has only to pursue a proper system of commerce by prohibiting all British vessels from carrying supplies to the English islands; which method, if steadily pursued on our part, together with their own ill-judged policy, will reduce the West Indies to such distress as finally to force the haughty nation of Britain to a commercial treaty, greatly advantageous to this country.

42. May 17, 1786 (#72824): By recent letters from Spain we hear, that the account of the cession of the Floridas to France is premature; but that there was great reason to believe that something of the kind would take place between England and Spain, in exchange for the fortress of Gibraltar, which would besides be followed by a very favorable treaty of commerce. Should it take place it may prove of a very alarming nature to the United States, both as neighbours and as rivals in several important branches of trade.

43. July 19, 1786 (#73000): But further—Our trade was formerly carried on with men of our own country, and who spoke our own language. But now we trade with men of all countries and languages. It is incumbent upon us therefore to use a currency in our commerce with them which speaks a language that is alike intelligible in all countries.

44. July 26, 1786 (#73027): He began by declaring, that the measures pursued last year in respect to the West Indies had proved, that under due regulations our commerce with that quarter of the world had grown and increased considerably, since the separation between Great Britain and the United States of America, and there was every reason to believe our Newfoundland trade and fishery, when properly conducted, would prove equally successful.

45. August 2, 1786 (#73047): No relaxation of the regulations prohibiting the importation of flour into Portugal could be obtained—the condition of that branch of our commerce remains under the treaty as it formerly was—the trade with Portugal has always been a favorable one to this country; with Portugal and Spain the balance has been, as I wish it was with all foreign nations, in our favor.

46. August 16, 1786 (#73099): Sufficient pains (says a correspondent) are not taken to distinguish between the distresses of the COMMERCE, and

the distress of the MERCHANTS of the United States. While the produce and manufactures of our country command ready money, and a high price, our commerce cannot be said to be distressed, although it be carried on by foreign merchants, and in foreign bottoms.

47. August 16, 1786 (#73099): If it should be said, that in all communities there are persons who possess a genius for navigation and a naval life, and that this genius cannot be employed while the nations of Europe export our produce, it may be answered, that the commerce which necessity or habit made necessary between the different states, will always afford sufficient employment and encouragement for that proportion of our youth who may be supposed to prefer a life at sea to the occupations of agriculture or the mechanical arts.

48. December 20, 1786 (#73493): That such a currency can answer neither the purpose of carrying on trade, or of discharging our foreign debt; the consequence must be, either this state will be deprived of its commerce or drained of its specie, while no subject can have the least motives to import any.

49. March 7, 1787 (#73694): The commerce and traffic of the Back Country members and the parts they represent goes to Baltimore. From thence are their imports purchased and there do their exports go. They come here to legislate and go there to trade. In questions of commerce, and by commerce I mean the exports as well as the imports of a country, they are neither naturally nor politically interested with us, and the delicacy of the case when matters of this kind are agitated should have with them a greater weight.

50. June 13, 1787 (#73981): The duties and restrictions which one state imposes, the neighbouring states enable the merchants to elude; and besides, if they could be enforced, it would be highly unjust, that the duties collected in the ports of one state should be applied to the sole use of that state in which they are collected, whilst the neighbouring states, who have no ports for foreign commerce, consume a part of the goods imported, and thus in effect pay a part of the duties.

51. July 11, 1787 (#74035): When Congress have plenary power to support the national faith and honor, by wise measures to do justice to foreign and domestic creditors, to regulate trade and not be counteracted by any partial adjustments of particular states, then commerce will flourish; all nations will seek to trade with us, we shall have a ready market, and a good price, for whatever we have to part with. Articles for exportation will increase rapidly.

52. March 5, 1788 (#74659): While we rejoice in the step which has been taken by the convention to put a total stop to the commerce and slavery of the negroes one and twenty years hence, it is to be hoped the publication of the memorial may have some weight with individual states, to pass laws to prohibit that inhuman traffic, before the power of Congress over that part of the commerce of the states shall take place.

53. April 2, 1788 (#74741): Instead of which, you wish us to continue to view, with unavailing sorrow, the commerce of our country the devoted means of enriching foreign nations, whose partial restrictions have excluded us from enjoying any participation of their trade, in return.

54. April 30, 1788 (#74819): Tho' the late arret of his Most Christian Majesty is exceedingly favorable to the commerce of the United States, particularly in putting us on a footing with his own subjects in all the ports of India belonging to his crown, yet the same difficulty stands in the way of more important advantages. In short, commerce, whereby we are to vend the surplus of our produce to foreign nations is circumscribed and suspended, by our standing in the light of separate commonwealths, instead of ONE CONFEDERATED REPUBLIC.

55. July 9, 1788 (#74990): The subsistence of man, the materials of manufactures, the articles of commerce—all spring originally from the soil. On agriculture, therefore, the wealth of nations is founded.

56. July 23, 1788 (#75008): Rank for a while forgot all its claims, and Agriculture, Commerce and Manufactures, together with the learned and mechanical Professions, seemed to acknowledge, by their harmony and respect for each other, that they were all necessary to each other, and all useful in cultivated society.

57. August 6, 1788 (#75038): The Hanseatic league was the greatest, the most curious, regular and wise combination for the promotion of commerce that the world has ever beheld. While the cities engaged in it obtained all the benefits of domestic and foreign trade, for which they associated, they afforded an happy assylum for religious and civil liberty, and became the masters of the ocean.

58. August 13, 1788 (#75054): Agriculture will no longer languish under the oppression of direct taxation—the rising government will be its tutelary God—our rivers will once more be whitened by the canvass of commerce—our manufactures will be encouraged and our coffers, as a nation, enriched by wise and general duties.

59. January 7, 1789 (#75465): Because some of the southern states have been seriously alarmed at those parts of the constitution, which cloathe a majority of the legislature with the power of regulating commerce, which may tend to confine and monopolize the carrying trade—as well as with the power of establishing duties on foreign imports, which, under the specious and seducing plea of encouraging domestic manufactures, may be carried to so injurious an extreme, as to operate as a prohibition[.]

60. July 1, 1789 (#75890): This would include to establish an office of treasury—to regulate commerce with foreign nations, and with Indian tribes. This comprehended a power of erecting a board of trade, &c. and in order to carry these powers into execution, they were to make all laws necessary to carry the constitution into effect.

61. December 16, 1789 (#76325): You have wisely banished your paper tender. Commerce, foreign and domestic, sickens at the sight of it. Since the foederal constitution has removed all danger of our having a paper tender, our trade is advanced fifty per cent.

62. January 6, 1790 (#76370): An enlightened planter is a friend to manufacturers, by which his raw materials are prepared for the use of man—he is a friend to commerce, which converts the surplus of his perishable produce into permanent wealth[.]

63. February 3, 1790 (#76452): An import in commerce is an article of goods brought from a foreign country, either by land or water, chiefly by water.

64. March 10, 1790 (#76574): Nothing can more pleasing evince the progress of agriculture and commerce in these states than the following facts. The export of flour from Philadelphia in 1786 was 150,000 barrels; in 1787 it was 202,000 barrels; in 1788 it was 220,000 barrels; and in 1789 it was 369,000 barrels.

65. May 5, 1790 (#76683): ALTHOUGH, at first view, the preceeding interpretation of the London Custom House, may seem chiefly to affect British vessels, by whom foreign produce could only be shipped from this country; yet a more minute examination must convince us, that the American commerce is thereby materially injured.

66. July 13, 1791 (#77685): That the solemn declarations of these gentlemen, and of Matthew Montague and William Smith, Esquires, that they will not relinquish but with life their Struggle for the abolition of the

slave trade, are not only highly honorable to themselves as Britons, as statesmen, as Christians, but must eventually, as the light of evidence shall be more and more diffused, be seconded by the good wishes of every man not immediately interested in the continuance of that detestable commerce.

67. November 2, 1791 (#77910): We are in high spirits on the subject of the grand manufactory, the establishment of which is meditated in this state. Certain it is, that in a territory like our's (deprived as we are of the advantages of external commerce) agriculture and manufactures ought to be the main objects of our pursuit.

68. April 18, 1792 (#78231): The effect of this appears to me so extensive, as to induce a doubt, whether I understand rightly the determination to enforce it, which you notify, and to oblige me to ask of you, whether we are to consider it as so far a revocation of the proclamation of your government, regulating the commerce between the two countries, and that henceforth no articles of the growth, production or manufacture of the United States, are to be received in the ports of Great Britain or Ireland, in vessels belonging to the citizens of the United States?

69. June 27, 1792 (#78353): The National Assembly of France have determined to adopt the general principle of the abolition of the slave trade; that is, they have resolved to proceed in exact conformity with other nations in effecting a complete abolition of so infamous an abuse of commerce.

70. September 12, 1792 (#78495): But to return to the New Jersey manufactory; It appeared prudent to take a position in that state for the purpose of interesting New York and Philadelphia, and as New Jersey has very little foreign commerce, it was presumed that both her legislature and her citizens would promote so valuable a branch of internal trade.

71. September 4, 1793 (#79199): Upon enquiring, however, more particularly into the facts, the Master Warden reported, that the ship came hither to take in a cargo for the island of Jamaica; and it appearing that her equipments and commission were intended for protection, in a course of commerce, and not for offensive war, I did not conceive that the case was comprehended within the provisions of the treaty[.]

72. December 24, 1793 (#79344): The ship Jane is an English merchant vessel, which has been many years employed in the commerce between Jamaica and these states. She brought here a cargo of produce from that island, and was to take away a cargo of flour.

73. December 24, 1793 (#79344): The occupation of a privateer is attack and plunder, that of a merchant vessel is commerce and self-preservation. The article excludes the former from our ports, and from selling what she has taken, that is, what she has acquired by war, to shew it did not mean the merchant-vessel and what she had acquired by commerce. Were the merchant-vessels, coming for our produce, forbidden to have any arms for their defence, every adventurer who has a boat, or money enough to buy one, would make her a privateer; our Coasts would swarm with them, foreign vessels must cease to come, our commerce must be suppressed, our produce remain on our hands, or at least that great portion of it, which we have not vessels to carry away, our ploughs must be laid aside, and agriculture suspended.

74. March 19, 1794 (#79538): To this list of grievances, the committee are sorry to find it their duty to add, that by reason of the vexation, loss, and outrages, suffered by the merchants of the United States, its commerce already begins to languish, and its products are likely to be left upon the hands of those who raise them.

75. April 1, 1795 (#80354): There are other things that attend this trade, that should not pass unnoticed: The Danes, or rather Dutch, under Danish colours, are powerful and jealous competitors for a share in this commerce: Their flags being also neutral, they swarm here from St. Thomas's, &c.—and so far as relates to dry goods and groceries, endeavour to undersell us.

76. June 10, 1795 (#80477): When the account of the exports was given, it was stated that the exports of 1793 were less by four millions than in 1792; but that in 1794 the exports exceeded those of 1793 two millions. To lose in one year two ninths of all our export trade must strike at the root of our commerce; and though this decrease was lessened afterwards, I appeal to gentlemen, whether this circumstance was not occasioned by the temporary possession of the West Indies, and by many sanguine speculations.

77. July 1, 1795 (#80519): Free commerce shall be allowed to British subjects in any part of the United States, and vice versa, subject only to the general laws of trade.

78. July 8, 1795 (#80532): And in like manner all goods and merchandize, whose importation into the United States shall not be wholly prohibited, may freely, for the purposes of Commerce, be carried into the same, in the manner aforesaid, by his Majesty's subjects, and such goods

and merchandize shall be subject to no higher or other duties than would be payable by the citizens of the United States on the importation of the same in American vessels into the Atlantic ports of the said States.

79. September 16, 1795 (#80633): Proximity of territory invites to trade; the bordering inhabitants, in spite of every prohibition, will endeavour to carry it on; if not allowed, illicit adventurers take place of the regular operations of legal commerce; individual interest leads to collusions, to evade restraining regulations; habits of infracting the laws are produced; morals are perverted; securities necessarily great, in proportion as they counteract the natural course of things, lay the foundation of discontents and quarrels.

80. September 23, 1795 (#80650): The goods and merchandize, for the privileged importation of which it provides, are restricted to no particular object, have no special reference to Indian more than to other trade: On the contrary, they are expressly to be imported for “the purposes of commerce” at large; so that in the cases in which they are privileged, they are equally so, whether it be for a trade with our citizens, or with Indians.

81. September 23, 1795 (#80650): The same objection of superiority of capital may, with as much reason, be applied to any other branch of trade between us and Great Britain. Why does it not give her a monopoly of the direct trade between her European dominions and the United States? The argument, if valid, would prove that we ought to have no commerce, not only with Great Britain, but with any nation which has more commercial capital than ourselves.

82. September 30, 1795 (#80663): The product of all this trade, he says, must go down the Mississippi [Mississippi], and but for the stipulation of the third article, would have been exclusively ours; because “by the treaty of Paris, though the British might navigate the Mississippi [Mississippi], yet they did not own a foot of land upon either of its banks; whereas the United States possessing all the Indian country in the vicinity of that river and the East bank, for many hundred miles, could, when they pleased, establish factories and monopolize that commerce.”

83. September 30, 1795 (#80663): The more we can make our country the ENTREPOT, the EMPORIUM of the trade of foreigners, the more we shall profit. There is no commercial principle more obvious than this, more universally agreed, or more generally practised upon, in countries where commerce is well understood.

84. September 30, 1795 (#80663): The pretended inequality of the article as arising from greater extent of the United States than of the British territories, is one of those fanciful positions which are so apt to haunt the brains of visionary politicians. Traced through all its consequences, it would terminate in this, that a great empire could never form a treaty of commerce with a small one; for to equalize advantages according to the scale of territory, the small state must compensate for its deficiency in extent, by a greater quantum of positive privilege, in proportion to the difference of extent, which would give the largest state the monopoly of its trade.

85. March 9, 1796 (#81010): May all sea-robbers, who prey upon the commerce and navigation of the United States be indiscriminately engulfed in the whirlpool of destruction.

86. March 16, 1796 (#81027): The French treaty with Spain has given the republic free commerce to the Spanish ports; from which there are daily opportunities of annoying the British Mediterranean trade.

87. March 23, 1796 (#81046): the Mississippi, New Orleans, and the Indies will be shut against us; and instead of compensation for the past injuries to our trade, the spoliations will be renewed and aggravated, and that which is now sought by commerce, will be taken by robbery.

88. January 25, 1797 (#81638): That common interest has a peculiar relation to commerce, on the freedom and extension of which the public revenue and the general prosperity of our country chiefly depend. Will it then be believed that the government wished this commerce to be restrained, particularly the commerce in meals, which compose the most valuable part of our exports? Especially will it be believed that the government desired that our citizens might have commerce only with England?

89. November 29, 1797 (#82086): Their cities have been formed and exist upon commerce. Our agriculture, fisheries, arts and manufactures are connected with and depend upon it. In short, commerce has made this country what it is[.]

90. December 13, 1797 (#82114): The command of the Mediterranean trade, with all the naval force of Italy, if required, will enable France to make some figure on the water, and repair, in a degree, the loss of the Atlantic commerce.

91. February 28, 1798 (#82243): To shew how deceitful and how weak this pretended obligation to deny ourselves the benefits of an equal trade with England is, let us look at the conduct of France herself. First, the republic has decreed a navigation act, as hard upon American trade as that of Britain. Secondly, she required an enormous duty on tobacco imported in American bottoms, from which French ships were exempted. Thirdly, she has shut her islands against the most lucrative part of our commerce. Molasses and taffia, a very bad kind of rum, being all that her permanent peace regulations will allow us to bring away; and there is little besides lumber, that we are allowed to carry to her islands; our fish was by heavy duties almost prohibited; flour she sent out from France. The war at present suspends these prohibitions, but peace will renew them.

92. December 12, 1798 (#82560): that contagious sickness may be communicated through the channels of commerce, there seems to be a necessity that Congress, who alone can regulate trade, should frame a system, which, while it may tend to preserve the general health, may be compatible with the interests of commerce, and the safety of the revenue.

93. February 6, 1799 (#82649): Affairs in this island, seem to bear a very serious aspect at present. The brigands are determined to massacre all the whites, and offered a free and unmolested commerce on their part, to all nations that will trade with them.

94. May 8, 1799 (#82786): The grand nation are making at present more havoc among the American ships, than they have ever yet done; and unless the American government can give their commerce some protection to Europe, there will scarcely be a ship let to bring the produce to market. I am very certain, that these last ten days the privateers out of France have captured ten millions of dollars, bona fide American property, bound to different ports in Europe.

95. June 12, 1799 (#82830): That with the forces of that country France would irrecoverably destroy the trade of England; and, by means of her navy, soon command the Baltic; and that, an intimate union between France and Holland being once formed, the supremacy of the English trade both in the East and West Indies would rapidly disappear.— Where are now those navies that were to usurp the empire of the sea, and controul the commerce of the world!

96. July 10, 1799 (#82870): It is expected that permission will be granted to vessels, which shall have made report at one of the ports of entry be-

fore mentioned, to proceed, for purposes of commerce, to any other ports within the district aforesaid.

97. January 8, 1800 (#83038): The agency of the Executive Directory, considering that by the first article of the 14th Thermidor, year 7, to facilitate the commerce of St. Domingo, different objects of importation were summarily mentioned as free, and that by the 12th article all other merchandize were obliged to pay 12 and an half per cent.

98. May 28, 1800 (#83261): A communication having been made by the Minister of His Britannic Majesty to the Department of State, that in consequence of complaints made by sundry merchants of the city of London, to their government, that the citizens of the United States have opened and are carrying on a trade to the British settlements in the Bay of Honduras, his Britannic Majesty "has resolved, that as such a commerce was contrary to the laws of England, all but British subjects in British ships navigated according to law, shall be excluded from cutting log-wood, or trading to those settlements in time to come"—it has been deemed proper, for the information of the citizens of the United States, that the same should be published.

99. June 11, 1800 (#83271): Whilst a great part of Europe is involved in a most sanguinary and calamitous war, the people of this country are favoured with internal peace, and are at liberty to make improvements in agriculture, and advance toward perfection in the useful arts; but as the nations with whom we are most concerned in commerce are parties in the war, the United States have not been able to maintain her neutral character, without experiencing frequent and vexatious interruptions to their trade, by infractions of the law of nations.

100. June 18, 1800 (#83281): Invited by these resources, their extensive sea coast and their characteristic enterprise, to embark largely in a commerce rendered doubly profitable by their neutrality, the United States have experienced frequent interruptions to their trade by unprovoked infractions of the law of nations.

