



2003

## New Evidence of the Original Meaning of the Commerce Clause

Randy E. Barnett

*Georgetown University Law Center*, [rb325@law.georgetown.edu](mailto:rb325@law.georgetown.edu)

Georgetown Public Law and Legal Theory Research Paper No. 12-045

This paper can be downloaded free of charge from:

<https://scholarship.law.georgetown.edu/facpub/837>

<http://ssrn.com/abstract=2022476>

---

55 Ark. L. Rev. 847-899 (2003)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.

Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>



Part of the [Constitutional Law Commons](#)

# New Evidence of the Original Meaning of the Commerce Clause

Randy E. Barnett\*

## I. INTRODUCTION

When, more than a century after the founding, political progressives sought to extend the commerce power of Congress to reach intrastate activities, they were not content to declare the existence of a “constitutional moment” or revolution. Instead, they took pains to claim that they were seeking the “restoration” of the Constitution that had been willfully distorted by the Progressive Era Supreme Court we call the *Lochner* Court. The evidence for their historical claim was exceedingly thin, consisting primarily of expansionist readings of already expansionist opinions by John Marshall such as *Gibbons v. Ogden*<sup>1</sup> and *McCulloch v. Maryland*.<sup>2</sup> Some also offered additional historical evidence purporting to show the intent of the Founders.

One such historical work, *The Power to Govern: The Constitution—Then and Now*,<sup>3</sup> offered little evidence of original meaning besides a pamphlet by Tench Coxe, written before the Constitution and Alexander Hamilton’s 1791 *Report on Manufactures*. Later, William Crosskey attempted to prove that the Commerce Clause had a meaning so expansive at the founding that it amounted to a plenary police power in Congress.<sup>4</sup> Neither work offered any evidence from the drafting or ratification processes to support their contentions. Indeed, Crosskey went to

\* Copyright © 2003 Randy E. Barnett. Austin B. Fletcher Professor, Boston University School of Law (rbarnett@bu.edu). For reasons that will become obvious, I extend a special thanks to my research assistants Stacy Cline and Adam Budesheim for their invaluable contribution to this article.

1. 22 U.S. (9 Wheat.) 1 (1824).

2. 17 U.S. (4 Wheat.) 316 (1819).

3. WALTER HALE HAMILTON & DOUGLASS ADAIR, *THE POWER TO GOVERN: THE CONSTITUTION—THEN AND NOW* (1937).

4. See WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION: IN THE HISTORY OF THE UNITED STATES* (1953).

some lengths to explain why he deliberately ignored this sort of evidence, claiming he looked to evidence that was outside the ratification process to avoid partisan statements and establish an objective dictionary of public meaning.<sup>5</sup> In so doing, Crosskey failed to note how convenient to his conclusion was this selective methodology.

By the time Crosskey's work was published in 1953, however, the post-New Deal withdrawal from the judicial review of the enumerated powers of Congress had been accomplished in the courts. As a result, little attention was paid to Crosskey's claims other than to thoroughly debunk his various calumnies on the integrity of James Madison.<sup>6</sup> With the Supreme Court now ruling their way and deferring to Congress, progressives lost interest in either original intent or original meaning, and Crosskey's work remained obscure.

So matters stood until 1995. That year, in *United States v. Lopez*,<sup>7</sup> the Supreme Court had the temerity, for the first time in over fifty years, to hold that Congress had exceeded its powers under the Commerce Clause when it made the possession of a firearm within 1000 feet of a school a federal crime.<sup>8</sup> In *Lopez*, while the majority did not justify its decision by reference to original meaning, it did emphasize the constitutional first principle that Congress had not been given by the Constitution a plenary power to enact any legislation it desired. "The Constitution," wrote Justice Rehnquist, "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation."<sup>9</sup>

In his concurring opinion, Justice Thomas went further to assert that the Commerce Clause jurisprudence of the past five

5. Specifically, Crosskey noted that:

[B]y using such materials, a dictionary can be made which will not, it is conceived, be open to the many natural suspicions that arise from the known or suspected political bias of speakers and writers on the Constitution. And in consequence of this, it should lead to constitutional conclusions having a very high and singular cogency.

*Id.* at 5.

6. See Irving Brant, *Mr. Crosskey and Mr. Madison*, 54 COLUM. L. REV. 443 (1954); Donald O. Dewey, *Crosskey Versus Madison: James Madison and the United States Constitution*, 19 U. RICH. L. REV. 435 (1985).

7. 514 U.S. 549 (1995).

8. *Id.* at 561.

9. *Id.* at 566.

decades had seriously distorted the original meaning of the Clause.<sup>10</sup> According to Justice Thomas, "[a]t the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes."<sup>11</sup> He cited the etymology of the word, which literally means "with merchandise."<sup>12</sup> He then noted that "when Federalists and Anti-Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably."<sup>13</sup> The term "commerce," according to Justice Thomas, "was used in contradistinction to productive activities such as manufacturing and agriculture."<sup>14</sup>

In 1999, Justice Thomas's claim was sharply criticized as historically inaccurate by Professors Robert Pushaw and Grant Nelson. In a lengthy and thoughtful article in the *Iowa Law Review*,<sup>15</sup> they claimed that, while not unlimited, the original meaning of the Commerce Clause was much broader than Jus-

10. *Id.* at 585 (Thomas, J., concurring).

11. *Id.* (Thomas, J., concurring) (citing 1 A DICTIONARY OF THE ENGLISH LANGUAGE 361 (4th ed. 1773) (defining commerce as "[i]ntercour[s]e; exchange of one thing for another; interchange of any thing; trade; traffick"); AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (26th ed. 1789) (defining commerce as "trade or traffic"); A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796) (defining commerce as "[e]xchange of one thing for another; trade, traffick"))).

12. See 3 OXFORD ENGLISH DICTIONARY 552 (2d ed. 1989) (defining com-"with" and merci-"merchandise"). *Lopez*, 514 U.S. at 585-86 (Thomas, J., concurring).

13. *Lopez*, 514 U.S. at 586 (Thomas, J., concurring). In support of this proposition, Justice Thomas cited: THE FEDERALIST NO. 4, at 22 (John Jay) (Jacob E. Cooke ed., 1961) (asserting that countries will cultivate our friendship when our "trade" is prudently regulated by Federal Government); THE FEDERALIST NO. 7, at 39-40 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (discussing "competitions of commerce" between states resulting from state "regulations of trade"); THE FEDERALIST NO. 40, at 262 (James Madison) (Jacob E. Cooke ed., 1961) (asserting that it was an "acknowledged object of the Convention . . . that the regulation of trade should be submitted to the general government"); Richard H. Lee, *Letters of a Federal Farmer No. 5*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 1787-88 319 (Paul L. Ford ed., 1888); Melancton Smith, *An Address to the People of the State of New-York*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 13, at 107.

14. *Lopez*, 514 U.S. at 586 (Thomas, J., concurring). Justice Thomas cites Alexander Hamilton in *The Federalist* and two instances of such usage in the ratification conventions in support of his contention. See *id.* at 586-87 (Thomas, J., concurring).

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

tice Thomas had claimed. In particular, they contended that the term “commerce” embraced not only trade and transportation for purposes of trade, but included any productive activity intended for trade. In addition, they accused those scholars upon whom Justice Thomas relied of failing to produce historical evidence in support of the narrow meaning of those terms.<sup>16</sup>

Around this time I was in the process of writing a book on liberty and the Constitution<sup>17</sup> in which I would need to advance an opinion on the meaning and scope of the Commerce Clause. Naturally, the first thing I read was the fat reprint sitting on my desk that Pushaw and Nelson had been good enough to send me. There they claimed that, while “commerce” did indeed have a narrow meaning at the founding, it had a broader meaning as well, and that this broader meaning was the one adopted by the Founders in the Commerce Clause. I next turned my attention to the works of Hamilton and Adair and of Crosskey, which Pushaw and Nelson had praised and partially endorsed. After reading these three secondary sources, I was nearing the conclusion that the term commerce did indeed have a broader as well as a narrower meaning at the time of the framing.

But there was one further step I wanted to take before endorsing that view: I wanted to read how the term “commerce” (and the other terms used in the Clause) had actually been used in the Constitutional Convention, the Ratification Debates, and the *Federalist Papers*. So I undertook to examine each and every mention of the term in these sources. I fully expected to find a mix of usages and my task would be to assess which, if any, was the dominant public meaning.

Much to my surprise, I found that, while there were many examples of the term “commerce” clearly being used in the narrow sense, I could find not a single unambiguous example of it being used in any broader sense than that. In 2001, I published these findings in the *University of Chicago Law Review*.<sup>18</sup> In that article, I provided numerous examples of the term being

16. See, e.g., *id.* at 101 (“Thomas, Berger, and Epstein do not even cite—much less refute—the massive evidence of this broader meaning.”).

17. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (forthcoming Fall 2003) [hereinafter BARNETT, LOST CONSTITUTION].

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

used in the narrow sense. I also endeavored to report any use of the term that others might argue suggested a broader meaning along with reasons why I did not believe such usage was intended even in these few examples.

Recently, Professors Pushaw and Nelson published their reply to my article in the *Northwestern Law Review*<sup>19</sup> after kindly allowing me to read and comment on an earlier draft and making several changes in response to my suggestions. Nevertheless, they continue to insist that a broader meaning of "commerce" not only existed at the time of the founding, but that it was both the prevailing meaning and the meaning employed in the Commerce Clause. So far as I can tell, in their new article they present little, if any, new evidence but instead critically evaluate and reinterpret the evidence I discovered and presented in my article. I would largely refer readers to the evidence of usage I present in my original article and ask them to reach their own conclusion on the plausibility of Pushaw and Nelson's claim that "commerce" had a broader meaning than I contended on the basis of the numerous contemporary statements I report.

In this paper, rather than respond to each point of their critique, I will instead do three things that hopefully will advance the debate. First, I distinguish between terms that are vague and those that are ambiguous. I will contend that realizing the dispute is over the ambiguity rather than the vagueness of "commerce" helps resolve the conflict between interpretations. Second, I will present the results of new empirical research into the original public meaning of "commerce" that extends well beyond the sources immediately surrounding the drafting and ratification of the Constitution. Finally, I will also report the results of a similar survey of the use of the terms "regulate" and "regulation."

19. Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 NW. U. L. REV. 695 (2002) [hereinafter Pushaw & Nelson, *Narrow Interpretation*].

## II. AMBIGUITY AND VAGUENESS OF CONSTITUTIONAL TERMS

Depending on the context, the meaning of any word can be uncertain due to either ambiguity or vagueness. As explained by Allan Farnsworth:

Ambiguity, properly defined, is an entirely distinct concept from that of vagueness. A word that may or may not be applicable to marginal objects is vague. But a word may also have two entirely different connotations so that it may be applied to an object and be at the same time both clearly appropriate and inappropriate, as the word "light" may be when applied to dark feathers. Such a word is ambiguous.<sup>20</sup>

A term is ambiguous, then, when it has more than one meaning; a term is vague, then, when its border is sufficiently indefinite that it cannot always be determined whether it includes a particular object.

To better appreciate this distinction and why it matters, consider the Second Amendment's reference to "the right . . . to keep and bear Arms."<sup>21</sup> While the term "arms" unquestionably referred to firearms and edge weapons, it is a matter of legitimate dispute whether it would apply to handheld explosives, like grenades, or large crew-served weapons like tanks or artillery. When a term is vague there may not be any definitive historical evidence as to whether a particular object is or is not to be included within its ambit. In the absence of such evidence, arriving at some conclusion would be more a matter of constitutional construction than interpretation, strictly speaking.<sup>22</sup>

20. E. Allan Farnsworth, "Meaning" in the Law of Contracts, 76 YALE L.J. 939, 953 (1967).

21. U.S. CONST. amend. II.

22. On the distinction between interpretation and construction, see KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, & JUDICIAL REVIEW (1999):

Regardless of the extent of judicial interpretation of certain aspects of the Constitution, there will remain an impenetrable sphere of meaning that cannot be simply discovered. The judiciary may be able to delimit textual meaning, hedging in the possibilities, but after all judgments have been rendered specifying discoverable meaning, major indeterminacies may remain. The specification of a single governing meaning from these possibilities requires an act of creativity beyond interpretation. . . . This additional step is the construction of meaning.

*Id.* at 7; see also KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED

The meaning of a particular term could also be "ambiguous" rather than vague. A term is ambiguous if it has more than one meaning. So the term "arms" in the Second Amendment might refer to weapons. But it could also refer to the limbs or appendages to which our hands are attached. Unlike vagueness, ambiguity can often, perhaps always, be addressed by historical evidence because the alternatives are few; the choice is typically binary. It is either weapons or limbs, there is no in between or gray area between the two, and historical evidence usually pretty clearly establishes which of two (or more) distinct meanings was the one used.

The relevance of this distinction to the matter of determining the meaning of the word "commerce" is as follows. Pushaw and Nelson, indeed even Crosskey, do not disagree that "commerce" had a narrow meaning of "trade or exchange" at the time of the founding. They simply contend that the same word *also* had a broader meaning. Crosskey says in one place that the broader meaning is "any or all of the manifold activities that men carry on together,"<sup>23</sup> and in another that it is used "to signify the country's entire body of gainful activities; or in other words, its business a whole."<sup>24</sup> In contrast, Pushaw and Nelson claim the broad meaning is "all gainful activities intended for the marketplace."<sup>25</sup>

The interpretive issue is to decide which of these two meanings—narrow or broad—a reasonable speaker of English would have placed on the word "commerce" as it appeared in the Constitution at the time of the founding. The choice between these two possible meanings is binary, not a matter of degree or construction as it would be if the issue was the vagueness of the term "commerce." We are bound to ask, not whether there are examples of the broad meaning of commerce in con-

POWERS AND CONSTITUTIONAL MEANING 1-19 (1999).

23. CROSSKEY, *supra* note 4, at 84.

24. *Id.* at 89.

25. Nelson & Pushaw, *Rethinking*, *supra* note 15, at 14. In support of this claim they cite the pages from Crosskey on which his previously quoted definitions appear, but do not explain, so far as I can tell, the evidence of usage that leads them to adopt the narrower "broad" definition. Elsewhere in their article they say they are endorsing Crosskey's conclusion on the broad meaning of "commerce," though in their latest reply they continue to insist on their somewhat narrower meaning. See Pushaw & Nelson, *Narrow Interpretation*, *supra* note 19, at 697 n.18.



temporary use at the time of the founding, but *which* of the two meanings was associated with the term in the Commerce Clause. Evidence that a broader usage exists, such as it is, only establishes the word as ambiguous, it does not resolve the ambiguity. Such examples do not establish which of the two meanings is the one publicly associated with the term in the Commerce Clause.

Similarly, the production of examples of such broad usage creates no special burden “to prove that no one used the language of the Commerce Clause in its ordinary broader sense.”<sup>26</sup> The burden here is entirely symmetrical. Those claiming that “commerce” is being used in its narrow sense face no greater burden than those claiming its meaning was broader. The question for both is: which of the two different meanings does the evidence more strongly support? Moreover, Pushaw and Nelson refer to the “ordinary broader sense” of “commerce,” but I know of no evidence advanced by them, or those on whom they rely, as to what would be the “ordinary” and what would be the “extraordinary” public meaning of this term.<sup>27</sup> This type of claim would require the sort of empirical study I produced in my *Chicago Law Review* article, in which I located a mere handful of quotations that arguably could be read in the broader sense. Even were this not a mistaken reading as I maintain, it is still an aberrational one—especially in light of the new evidence of public usage I produce below in Part III.

Of course, assuming *arguendo* that the term “commerce” was ambiguous—and depending on the context—it may also be vague. That is, even given the narrow meaning of “commerce,” it is not always clear which activities are included in its ambit and which are not. Borderline cases will exist. Is shipping for purposes of trade and exchange included? The historical evidence that it was is overwhelming. How about the transportation of *people* not goods? This is not clear on the evidence I

26. Pushaw & Nelson, *Narrow Interpretation*, *supra* note 19, at 697.

27. The same is true for their unsupported claim that the word “among” had “its *usual* broader meaning.” *Id.* at 701 (emphasis added). In light of the evidence I present elsewhere, see BARNETT, LOST CONSTITUTION, *supra* note 17, there is little reason to doubt that “among” in the Constitution has the same syntactical meaning as today: it is used in place of “between” when referring to more than two objects, in this case, when referring to “among the *several* [thirteen] states.”

have examined, but also not clearly excluded either; hence, the term is vague. Though deciding whether trade and exchange embraces these examples of trade is a matter of construction, it remains the narrow meaning of commerce that is being construed.

What then is excluded by the narrow meaning? The easiest examples are activities that do not involve any exchange at all, such as possession or personal activities for which no money changes hands. On this point, Pushaw, Nelson, and I are all in complete agreement.<sup>28</sup> In addition, on my reading of the evidence, activities such as manufacturing and agriculture that produce the items that are eventually the subject of exchange are excluded *from the narrow definition*. Though they claim that it was the broader meaning that was intended, I take it that Pushaw and Nelson agree (as would Crosskey) that the narrow definition of "commerce," had it been adopted, would exclude manufacturing and agriculture.

Their claim (and Crosskey's too) is that "commerce" had a broad as well as a narrow meaning in common parlance, and that this broad meaning is expansive enough to include productive activities *as well as* trade and exchange. But this is a matter of ambiguity, not vagueness. The choice is a binary one: which word was used, "commerce" (in its narrow sense) or "commerce" (in its broader sense)? I think the evidence on this choice is overwhelming. Given the usage in the Constitutional Convention, Ratification Debates, or *Federalist Papers*, there is little or no reason to believe that the broader term was being used as opposed to the narrow term.

But what of Pushaw and Nelson's (and Crosskey's) claim that evidence of public usage outside the immediate context of the drafting and ratification processes reflect a broader meaning, a meaning, they go so far as to claim, that is the "ordinary" meaning of commerce?<sup>29</sup> Though I do not find the few examples they have presented very persuasive, I want to advance the debate beyond isolated examples by offering new evidence of the original public meaning of "commerce," and it is to that evi-

28. See Nelson & Pushaw, *Rethinking*, *supra* note 15, at 109-10, 131-39.

29. See Pushaw & Nelson, *Narrow Interpretation*, *supra* note 19, at 697.

dence I now turn. I also report additional evidence on the public use of the terms “regulate” and “regulation.”

### III. NEW EVIDENCE OF PUBLIC USAGE FROM THE *PENNSYLVANIA GAZETTE*

#### A. Usage of “Commerce”

One practical problem of establishing the historical meaning of a particular term is the inability to discern whether particular examples are aberrational or represent the mainstream use of a term. Language after all is susceptible of many uses, some commonplace, others idiosyncratic or even metaphoric or poetic. Until recently, it was difficult to know whether the evidence of usage offered by a particular historian was typical or cherry-picked.<sup>30</sup>

For this reason, I previously surveyed *every* use of the term “commerce” in the Constitutional Convention, Ratification Debates, and the *Federalist Papers*. I did not expect usage to be uniform, but hoped rather to be able to distinguish normal usage from that which was aberrational. Hence, my surprise at finding that usage was consistently narrow where the context supplied meaning.

Pushaw and Nelson (and also Crosskey), however, contend that the general public would have taken the word in its broader sense notwithstanding how participants in the drafting or ratification processes might have used the term. They claim that “many of the citizens who ratified the Constitution likely understood ‘commerce’ in this larger sense.”<sup>31</sup>

To assess this claim, I asked two research assistants, Stacy Cline and Adam Budesheim, independently to examine every use of the term “commerce” in the *Pennsylvania Gazette* that appeared from 1728-1800.<sup>32</sup> The *Pennsylvania Gazette*, which

30. By “cherry-picked” I do not mean to suggest any impropriety. Until the advent of electronic searches, it was highly impractical to conduct comprehensive empirical surveys of the sort I have presented in my *Chicago* article and present here.

31. Pushaw & Nelson, *Narrow Interpretation*, *supra* note 19, at 700.

32. This search was made possible by the database provided by Accessible Archives, Inc., on its website <http://www.accessible.com>. There they describe the *Gazette* somewhat hyperbolically as follows:

Published in Philadelphia from 1728 through 1800, The Pennsylvania Gazette is considered The New York Times of the 18th century. It provides the reader with

from 1729 to 1766 was published by Benjamin Franklin,<sup>33</sup> "in its essential character, although not in its unusual longevity, . . . was representative of the great majority of the newspapers of the provincial period."<sup>34</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 post-colonial period. And if the term "commerce" was ambiguous, one could detect which of the multiple meanings of "commerce" was most common.

From 1728-1800, the term "commerce" appeared 1594 times.<sup>35</sup> 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 its narrower or broader sense. 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

a first hand view of colonial America, the American Revolution and the New Republic, and offers important social, political and cultural perspectives of each of the periods. Thousands of articles, editorials, letters, news items and advertisements cover the Western Hemisphere, from the Canadian Maritime Provinces, through the West Indies and North and South America, giving a detailed glimpse of issues and lifestyles of the times. Also included is the full-text of such important writings such as: the Declaration of Independence, the Constitution, Letters from a Farmer, Thomas Payne's Common Sense, The Federalist Papers, etc.

Accessible Archives, Inc., at <http://www.accessible.com/about/aboutPG.htm> (last visited Nov. 15, 2002).

For a strictly descriptive summary of this paper's history, see CLARENCE S. BRIGHAM, 2 HISTORY AND BIBLIOGRAPHY OF AMERICAN NEWSPAPERS, 1690-1820 933-34 (1947). Though the electronic archives end at 1800, Brigham dates the demise of the paper as 1815. *Id.* at 934.

33. See BRIGHAM, *supra* note 32, at 933-34.

34. Charles E. Clark & Charles Wetherell, *The Measure of Maturity: The Pennsylvania Gazette from 1728-1765*, 46 WM. & MARY Q. 279, 280 (1989).

35. A brief note on the methodology employed. When this survey was made, the Accessible Archives database was divided into the following periods, 1728-1750, 1751-1765, 1766-1783, and 1784-1800. At the time of this study, each period must be searched separately and, if there were more than 500 hits during any period, only a random selection of 500 results would be displayed. The periods before 1750 each had fewer than 500 hits, but after 1750, the number of hits per period exceeds 500. Therefore, to ensure that every example was surveyed, it was necessary to search the periods after 1750 year by year with a search string of the following type: <commerce & ,1766>. Extraneous references to articles containing somewhere within it the date searched for, e.g., 1766, but which were published in some other year were easily identified by their heading and ignored. I was told by Accessible Archives that they will be redesigning the search engine to make this sort of effort unnecessary.

the term is used in a couplet with “trade” or referred 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.<sup>36</sup>

The earliest use of the term appeared in 1728, and referred to “commerce” as “the Affairs of Merchandize.”<sup>37</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>38</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>39</sup> But these are mere pinpricks of data.

As with the data I reported from the drafting and ratification proceedings, the term “commerce” was routinely used to refer to trade or exchange, including shipping. Indeed, so identified was “commerce” with shipping that ninety-nine of the references were to ships named “Commerce.” Commerce was also routinely distinguished from agriculture and manufacturing.<sup>40</sup> Since Pushaw and Nelson have questioned whether the repeated appearance of this triad necessarily connotes distinct activities,<sup>41</sup> a passage from the January 13, 1790 issue is particularly revealing:

36. To this end, I attach an appendix to this article containing 100 typical uses of the term where the context makes the meaning discernable. These were selected to give the cumulative flavor of the usage rather than randomly. I discuss the very few possible counterexamples in the text of the article below.

37. Oct. 1, 1728 (#1). Citations to the database will be by date and the unique item number of each entry. Any entry cited here can be retrieved by searching for <commerce & [item number]> (except for item #1 which can be found by searching for <commerce & “october 1 1728”>).

38. Mar. 7, 1787 (#73694).

39. Dec. 29, 1773 (#54627).

40. Adam found 156 examples of this; Stacy identified 83.

41. Specifically, Pushaw and Nelson state:

[Barnett] relies heavily upon contemporaneous statements that use “commerce” in the same sentence as words like “agriculture” and “manufacture,” which purportedly establishes that those terms had completely distinct meanings. Another logical explanation, however, is that people often speak or write in a redundant or overlapping manner to reinforce certain ideas.

Pushaw & Nelson, *Narrow Interpretation*, *supra* note 19, at 705.

Agriculture, manufacturers and commerce [a]re acknowledged to be the three great sources of wealth in any state. By the first [agriculture] we are to understand not only tillage, but whatever regards the improvement of the earth; as the breeding of cattle, the raising of trees, plants and all vegetables that may contribute to the real use of man; the opening and working of mines, whether of metals, stones, or mineral drugs; by the second [manufacturers], all the arts, manual or mechanic; by the third [commerce], the whole extent of navigation with foreign countries.<sup>42</sup>

It is clear here that no redundancy or “couplet” could possibly have been intended. As I showed in my *Chicago* article, each is considered a distinct activity. With these data, as there, commerce is typically associated with merchants, which should come as no surprise since both terms share the same common root, “merci” or merchandise. For example, “As a Merchant, it was thought that no Person amongst us understood Commerce in general, and the trading Interests of this Province in particular, better than he . . . .”<sup>43</sup>

Since Crosskey, as well as Pushaw and Nelson, agree that the term “commerce” did have a narrow meaning, it does not pay to offer many examples of this usage. No matter how many examples I may provide, they can still claim that this does not establish the narrow meaning as the *exclusive* use of the term. For this reason, it was necessary to survey every use of the term to see how often, if ever, a broad meaning was conveyed. If this occurred very rarely, then the public would not have been deceived by the Framers’ decision to employ “commerce” to convey a narrow meaning. A reasonable speaker of English would have understood the term “commerce” in the Commerce Clause in its narrow sense.

In the nearly 1600 uses of the term, my assistants could identify a mere handful of candidates for a broad usage—thirty-one in all with only two entries appearing on both lists.<sup>44</sup> Hav-

42. Jan. 13, 1790 (#76406).

43. Dec. 5, 1754 (#17724).

44. Stacy identified eleven possible broad uses of the term; Adam identified twenty-two. The general lack of overlap suggests a low degree of confidence that these are indeed instances of broader usage. Adam, who found more possible examples of broad usage (22 to 11) also found more examples of where context indicated a narrow use (342 to 234), suggesting a more liberal reading of the context.

ing reviewed each of their suggestions, I found none to be *unambiguously* broad, reflecting my charge to them to produce anything that *might* suggest a broader use for my review (though three examples, discussed below, could conceivably indicate a broader meaning). Those they identified coming closest to the line without crossing it are the following:

Every enterprize, public as well as private, in the United States (says a correspondent) seems suspended, till it is known what kind of government we are to receive from our national Convention. The states neglect their roads and canals, till they see whether those necessary improvements will not become the objects of a national government. *Trading and manufacturing companies suspend their voyages and manufactures, till they see how far their commerce will be protected and promoted by a national system of commercial regulations.*<sup>45</sup>

One of my assistants thought this might suggest that manufacturing was a part of commerce. I think it is a reference to the dependency of “manufacturing companies” on the commerce or trade in their goods.

Another thought that this statement from 1756 might suggest a broad meaning as well:

The Hand of the Almighty has visited this Kingdom with the most dreadful Earthquake that has been known in these Parts of the Globe; and what remained in this City from its Devoration [sic], has been since consumed by Fire. In short, every Thing which relates to Commerce is totally ruined and destroyed.<sup>46</sup>

Here the reference is to everything which “*relates to*” commerce, not commerce itself, and what exactly the writer thought was “related to” commerce is not at all clear from the context.

Then there is the following 1779 order, translated from French that seemingly describes “fishing” as a form of “commerce” with a reference to “that class of my subjects whose employment is fishing, and who have no other subsistence than the only resources which this commerce affords.”<sup>47</sup> But the rest of

45. Aug. 29, 1787 (#74156) (emphasis added).

46. Jan. 8, 1756 (#19115).

47. Dec. 22, 1779 (#65004) (emphasis added).

this passage makes it clearer that the reference is to fishing vessels which would be well within the conventional narrow meaning of "commerce":

In consequence of which I have wrote this letter to inform you, that I have given orders to all commanders of my ships, and to owners and captains of privateers, not to trouble, until a new order, the English fishery, and *not stop their vessels, notwithstanding they are loaded with fresh fish*, and even though this fish may not have been caught on board of these vessels, provided they are not armed with any offensive arms, and they convinced that they have not given signals, which announce a suspected intelligence with the ships of war of our enemies.<sup>48</sup>

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

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, commerce and agriculture will flourish*: While our republic becomes respectable, both at home and abroad.<sup>49</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

48. *Id.* (emphasis added).

49. July 19, 1786 (#73008) (emphasis added).



surveyed.<sup>50</sup> Taken literally, “commerce” 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>51</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 ths [sic] 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>52</sup>

I find it interesting, and perhaps important, that 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.

Notwithstanding these few possible counterexamples, this survey clearly establishes that outside as well as inside the process of drafting and ratifying the Constitution, the normal, conventional, and commonplace public meaning of commerce from 1728-1800 was “trade and exchange,” as well as transportation for this purpose. On the strength of this data, added to that which I have previously reported, I no longer believe that the term “commerce” was even ambiguous in those days, but even if it was, the historical evidence clearly shows which of the two purported meanings was the normal public connotation of the word.

50. Adam identified 132 instances of “trade and commerce.” Stacy noted 124 such references.

51. Apr. 3, 1782 (#67182) (emphasis added). This actually could be the couplet “trade and commerce.”

52. Mar. 4, 1762 (#28196) (quoting from “An ACT for the more effectual suppressing and preventing of Lotteries”).

### B. Usage of "Regulate" and "Regulation"

In my *Chicago* piece I advanced the thesis, based largely on intratextual examination of the Constitution itself, that the core meaning of the term "to regulate" was "to make regular."<sup>53</sup> So a proper regulation was one that told you how to do a particular activity, rather than one that prohibited the activity altogether. In essence, a pure regulation was a rule that says, "If you want to do X, here is how you must do it." A power to regulate, therefore, did not typically include the power of prohibition, other than to prohibit activities that are inconsistent with the regulation.

I also presented the contrary intratextual and historical evidence that suggested that the commerce power included the power to prohibit the slave trade, as well as the power to prohibit trade with countries as a means of securing free trade agreements with them or perhaps for reasons of national security. In short, while there is a considerable reason to believe that the term "to regulate" did not ordinarily include a power of prohibition, the usage in the Constitution is not as clear-cut as it is with "commerce." Some, perhaps limited, power of prohibition might well have been included in the public meaning of the term "to regulate."

Nevertheless, I thought it would be useful for my assistants to examine the use of the terms "regulate" and "regulation" to see if they could discern these terms being used to refer to a power of prohibition over and above the power to prohibit actions inconsistent with a particular regulation. What they found—or rather failed to find—was striking. The term "regulate" appears 393 times. The term "regulation" appears 410 times. Rarely, if at all, was either term used, as it is today, as a synonym for prohibition. While, as with "commerce," a great many uses are unclear, Adam could find only twenty-five uses of the terms which *might* have been referring to a power of prohibition; Stacy found but ten. Once again, only two items appeared on both lists, suggesting a low degree of confidence that the rest were actually unambiguous uses of regulate/regulation to include prohibition.

53. Barnett, *Original Meaning*, *supra* note 18, at 1, 139, 146.

Here are the two items they both listed as including the power to prohibit:

I WROTE you last by a Mr. —, of this place, who would be able to satisfy you respecting the prohibition of importing to English islands from neutral of others. You will too have had advice of it from Europe, and perhaps in time to regulate the next voyage.<sup>54</sup>

It is not at all clear to me that the use of “to regulate” in this passage refers to the prohibition mentioned in the preceding sentence.

While the next passage does indeed seem to include the power of prohibition, it falls clearly within the narrow exceptional category I identified from other sources in my *Chicago* article, namely, the power to prohibit foreign trade as a means of opening foreign markets to American vessels or goods:

By vesting Congress with full powers to regulate the trade of foreign nations with America. This, and this alone, can turn the balance in favor of America, which has so long fatally vibrated against her. Were Congress possessed of this power, the first step necessary to be taken would be, to prohibit British vessels from carrying British or West India produce to any part of the United States, until a full power was granted for American vessels freely to carry American produce to any part of the European or West India dominions of Britain.<sup>55</sup>

None of the handful of other examples they identified as possible uses of the terms “regulate” or “regulation” to include prohibition appear to me to convey such a meaning. Most seem clearly a reference to rules stipulating the method or mode by which particular activities should be conducted. For example, here is a passage that one assistant thought might convey the power to prohibit:

And be it further enacted by the authority aforesaid, That one other Act of General Assembly, intituled “An Act to prohibit the sale of goods by Public Vendue, and to regulate Hawkers and Pedlars within this State” passed on the 19th day of June, which was in the year of our Lord One

54. July 25, 1787 (#74069).

55. July 19, 1786 (#73009).

thousand seven hundred and seventy-seven, is also repealed.<sup>56</sup>

To the contrary, I read this as distinguishing the power "to regulate Hawkers and Pedlars" from the power "to prohibit the sale of goods by public Vendue" altogether.

Here, then, as with the material I surveyed in my *Chicago Law Review* article, the paradigm meaning of the term "to regulate" was used "to make regular." Any use of this term to include a power of prohibition was either incidental—prohibiting activity inconsistent with a regulation—or highly aberrational. In sum, the original meaning of "to regulate" was a far cry from the euphemism for prohibition it is today.

#### IV. CONCLUSION: THE IMPORTANCE OF COMMERCE

The rhetorical problem in taking even this much space to analyze these few examples of allegedly broad use of "commerce" or "regulate/regulation" is that it gives disproportionate attention to these at the expense of the hundreds of counterexamples. To counteract this and give readers ready access to the flavor of the prevailing usage, I am appending to this article a list of 100 uses of the term commerce from 1731 to 1800 to mean trade. To be clear, this is not a random sample, but a selection of typical uses of the term "commerce" to refer to trade or exchange to give readers a sense of the cumulative weight of the evidence.

Still, it may seem to some today that a grant of power to Congress over mere "trade and exchange" is too mundane and constricted to possibly have been the sole purpose of the Commerce Clause. Surely, something more ambitious was intended; something more grand. So to capture the spirit of the age that resulted in replacing the Articles of Confederation with a Constitution that delegated a power over international and interstate commerce—but no more—to Congress, it is perhaps appropriate to close this essay with the following lengthy excerpt from a 1772 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:

56. Dec. 1, 1779 (#64950).

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 the unmanufactured furs of our native wild beasts, with freedom, were splendid robes, compared with slavery cloathed in the silks, &c. of Great Britain. But the declaration 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 interests and families, produced by commerce, monarchy and aristocracy can never raise their heads in America.<sup>57</sup>

From Leonidas's lips to your ears. Will you hear him?

57. July 31, 1782 (#67554).

APPENDIX: TYPICAL USES OF THE TERM  
"COMMERCE" IN THE *PENNSYLVANIA GAZETTE*  
(1731-1800)

- 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[.]
- 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.
- 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,"
- 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.

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 be confessed, that they have so far succeeded in their Design, as to have engrossed, at this Time, almost the whole Trade to themselves, of which, a few Years since, we enjoyed no small Share.

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 acceded 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.

March 27, 1760  
(#24584)

Our Government has settled a Treaty of Peace and Commerce with a Chief of the Indians of St. JohnRiver, and a Chief of the Pas-

---



amaquadie 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.

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[.]

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.
- 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[.]
- 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 Intercourse with Great Britain be greatly diminished, to the manifest Loss of the Mother Country, and Impoverishment of the Colony.
- 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.
- 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.

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.

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.

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?

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[.]

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,

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.

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.

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,

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 forma-

tion of our harbour, forbids our becoming rivals in commerce with that convenient mart.

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.

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.

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.

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.

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.

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.

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.

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.



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.

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.

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.

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.

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[.]

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 en-

couraging 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.

- 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.
- 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.
- 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[.]
- 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[.]

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.

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.
- 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.
- 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.
- 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.
- August 16, 1786  
(#73099) Sufficient pains (says a correspondent) are not taken to distinguish be-

tween 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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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[.]

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.

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.

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[.]

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.

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.

May 5, 1790  
(#76683)

ALTHOUGH, at first view, the preceding 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.

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.

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.

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?

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.

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.

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[.]

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.

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.

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.

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.

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 tempo-

rary possession of the West Indies, and by many sanguine speculations.

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.

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.

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.

September 23, 1795

The goods and merchandize, for the

(#80650)

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.

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.

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 hun-



dred miles, could, when they pleased, establish factories and monopolize that commerce.”

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.

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.

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.

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.
- 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.
- 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?
- 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[.]
- 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.

- 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.
- 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.
- 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.

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.

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!

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

January 8, 1800

The agency of the Executive Direc-

---

(#83038)

tory, 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.

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.

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.

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.

