

9-18-2013

## The Right to Buy Health Insurance Across State Lines: Crony Capitalism and the Supreme Court

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### Recommended Citation

Steven G. Calabresi, *The Right to Buy Health Insurance Across State Lines: Crony Capitalism and the Supreme Court*, 81 U. Cin. L. Rev. (2013)

Available at: <http://scholarship.law.uc.edu/uclr/vol81/iss4/5>

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## THE RIGHT TO BUY HEALTH INSURANCE ACROSS STATE LINES: CRONY CAPITALISM AND THE SUPREME COURT

*Steven G. Calabresi\**

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The Supreme Court’s blockbuster decision in *National Federation of Independent Businesses v. Sebelius*<sup>1</sup> settled the question of the constitutionality of President Obama’s health care mandate.<sup>2</sup> Four Supreme Court justices, joined by Chief Justice John Roberts, have now held that Americans must buy health insurance or pay a federal tax penalty. The question that next arises is whether Congress can use its tax power to compel individuals to buy health insurance in fifty separate state markets each of which is dominated by a monopoly or oligopoly health care provider.

According to statistics from the Kaiser Family Foundation (KFF) a single leading insurance provider covered at least half the population in thirty states (plus the District of Columbia).<sup>3</sup> The median market share of the leading health insurer per state is 54% easily enough to give it monopoly status. In Indiana, for example, one health insurer covers 84% of the population. In Alabama, a single insurer covers 86%. There

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\* Professor of Law, Northwestern University; Visiting Professor of Law, Yale University; Visiting Professor of Political Science, Brown University. I am deeply grateful to Gary Lawson for his extremely helpful comments on an earlier draft. I am also grateful to Larissa Price Leibowitz and to Abe Salander whose work on these subjects I draw from here. See, e.g., Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J. L. & PUB. POL’Y 983 (2013); Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause*, FLA. L. REV. (forthcoming 2013). I am also very grateful to Jason Fried for his splendid work as my research assistant on this article. Finally, I would like to thank Dan Rodriguez, my Dean at Northwestern Law School, and John Tomasi, who runs the Political Theory Project at Brown University, for creating the unique working environment which made it possible for me to write this article. This article grows out of the William Howard Taft lecture which I gave in 2012 at the University of Cincinnati College of Law.

1. 132 S. Ct. 2566 (2012).

2. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2011).

3. See *infra* Fig. 1.

are seventeen states in which a single insurer covers more than 65% of the population, and there are at least twenty-four states in which one insurer covers more than 55%. In states where the largest insurer is least controlling, such as: Wisconsin, Colorado, Missouri, Pennsylvania and New York, the largest insurers still accounted for between 21% and 34% of the total population. Even more illustrative of the oligopolistic nature of the health insurance market is the fact that forty-six states had fewer than six health insurance providers with more than a 5% market share.<sup>4</sup> According to the American Medical Association, the presence of health insurer market oligopolies has caused higher health care premiums and has greatly decreased benefits for patients. Similarly, doctors have been subject to an imbalance in bargaining power vis-à-vis oligopolistic health insurance providers.<sup>5</sup>

The roots of the state health insurance monopolies and oligopolies can be directly traced to a federal law. Thanks to the McCarran-Ferguson Act,<sup>6</sup> which was passed in 1945, each of the fifty states has the exclusive power to license health insurance within a state's own borders even if, in doing so, a state directly burdens interstate commerce by shutting out-of-state insurers out of the market. The McCarran-Ferguson Act purports to allow state governmental discrimination against inter-state commerce that would otherwise violate the Dormant Commerce Clause. It is this statute that has created the state health care oligopolies and monopolies and which is the cause of all our health care woes. I think Congress can no more license the states to discriminate against interstate commerce than it can license them to violate the Contracts Clause.<sup>7</sup>

The McCarran-Ferguson Act essentially sets up fifty separate state monopoly or oligopoly markets, each with its own set of state licensed health insurance providers. Citizens of Ohio who want to buy health insurance must buy it from an Ohio licensed provider, like Blue Cross Blue Shield of Ohio. They may not buy health insurance from an out of state insurer like say Blue Cross Blue Shield of Texas unless the state of Ohio approves. As a result, citizens buying health insurance pay more for it and get lower quality services than they would if there was interstate competition among health insurers. Congress has, in effect, turned the health insurance market into fifty separate state cartels, and it

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4. *Focus on Health Reform: How Competitive are State Insurance Markets?*, THE HENRY J. KAISER FAMILY FOUND. (Oct. 2011), <http://www.kff.org/healthreform/upload/8242.pdf>; see also Bob Cook, *AMA: Health Plan Market Dominance Causes "Competitive Harm,"* AM. MED. NEWS (Dec. 10, 2012), <http://www.ama-assn.org/amednews/2012/12/10/bisb1210.htm>.

5. AM. MED. ASS'N, *COMPETITION IN HEALTH INSURANCE: A COMPREHENSIVE STUDY OF U.S. MARKETS* (2012).

6. 15 U.S.C. §§ 1011–15 (2006).

7. U.S. CONST. art. I, § 10, cl. 1.

has allowed the states to cut off choices for citizens buying health insurance. The lack of competition and of choice has led to spiraling costs for health care and to lower quality health insurance.

This point is made clearer if we consider, as a thought experiment, what would happen if Congress passed a law allowing the fifty states to license grocery stores so as to protect in-state grocery stores from out-of-state competitors. Imagine what it would be like to buy groceries from say Whole Foods of Ohio, while being unable legally to buy groceries instead from Whole Foods of Kentucky? Food would be much more expensive and the quality of service would clearly be lower in this hypothetical. Less competition means by definition higher prices and lower quality service. What is true for grocery stores is also true for health insurance. The McCarran–Ferguson Act is one of the villains behind America’s spiraling health care costs and the impending bankruptcy of Medicare and Medicaid. The country desperately needs interstate competition among health insurers.<sup>8</sup>

So how did we get into the mess we are in where health insurers are insulated from out of state competition when grocery stores are not? Therein lies an interesting and complex tale of American constitutional history. The Framers of the U.S. Constitution were desperate to create one North American common market among the thirteen original states because, between 1776 and 1787, the states had begun to set up trade barriers to protect in state businesses from out of state competition. These early state trade barriers against interstate commerce killed the American economy in the 1780’s, and the main reason the Philadelphia Constitutional Convention was convened in 1787 was to give Congress the power to protect interstate commerce by overriding state barriers to interstate commerce. The Constitution accomplished this goal in Article I, Section 8, Clause 3, which says that: “Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>9</sup> For good measure, Article IV, Section 2 adds that: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”<sup>10</sup>

The purpose of these two clauses was to ensure the existence of a competitive common market among all the states such that interstate competition was guaranteed. The Supreme Court recognized this in

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8. To truly appreciate the insanity of the way in which we provide health care, imagine in my grocery store hypothetical that not only did States create monopoly or oligopoly providers of groceries, but that two-thirds of Americans had their groceries purchased by their employers who bought them a food-care plan with pre-income tax dollars while the other third of the population had to buy their groceries out-of-pocket in competition with those whose groceries were subsidized.

9. U.S. CONST. art. I, § 8, cl. 3.

10. *Id.* art. IV, § 2, cl. 1.

*Gibbons v. Ogden*, the first big Commerce Clause case decided under the Constitution.<sup>11</sup> Chief Justice Marshall held unconstitutional, in *Gibbons*, a New York state law, which gave monopoly privileges to one company to provide steamboat ferry service between Elizabethtown, New Jersey and New York City, thus discriminating against Gibbons' competing steamboat, which had been licensed under a 1793 congressional law regulating the coasting trade.<sup>12</sup>

Chief Justice Marshall said in *Gibbons v. Ogden* that New York State could not create a steamboat monopoly in this case, first, because Congress had exercised its commerce power by licensing Gibbons' boat, and, second, because even if Congress had not licensed Gibbons' boat, the Commerce Power was an exclusively federal power such that states cannot discriminate against interstate commerce without violating what has come to be known as the Dormant Commerce Clause. Under the Dormant Commerce Clause doctrine as it stands today, a state may not discriminate against interstate commerce or adopt any law that unduly burdens interstate commerce. If the Dormant Commerce Clause applied to the health insurance market today, the fifty state healthcare monopolies and oligopolies would be quite clearly unconstitutional.

The reason the Dormant Commerce Clause doctrine does not apply to the health insurance market today is because in *Paul v. Virginia*—in 1869—the Supreme Court held that “issuing a policy of insurance is not a transaction of commerce.”<sup>13</sup> The Court seems to have thought that insurance policies were not merchandise, which was traded and bartered by merchants, but that such policies instead were adopted pursuant to a state's police power to protect the health of that states' citizens. In the wake of *Paul v. Virginia*, there grew up a practice in each of the states of licensing insurance and of discriminating against out-of-state insurers. This practice was tempered slightly by the Supreme Court's 1897 holding in *Allgeyer v. Louisiana*. In that case, a unanimous Court held in an opinion by Justice Peckham that the Due Process Clause of the Fourteenth Amendment protected liberty of contract and that a State could not prohibit a person within its jurisdiction from contracting out-of-state with an out-of-state insurer.<sup>14</sup> *Allgeyer* became a dead letter after the New Deal revolution on the Supreme Court, which ended economic substantive due process.<sup>15</sup>

In 1944, the U.S. Supreme Court overruled the Dormant Commerce

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11. 22 U.S. 1 (1824).

12. HERBERT A. JOHNSON, *GIBBONS V. OGDEN: JOHN MARSHALL, STEAMBOATS, AND THE COMMERCE CLAUSE* 123 (2010).

13. 75 U.S. 168, 183 (1868).

14. 165 U.S. 578, 591 (1897).

15. *W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

Clause holding in *Paul v. Virginia* in a famous New Deal case: *United States v. South-Eastern Underwriters Association*.<sup>16</sup> The New Deal Supreme Court thought that anything that was sold and bought was commerce including insurance policies. The *South-Eastern Underwriters Association* opinion triggered a backlash in Congress from state licensed insurance companies, which led to the passage in 1945 of the McCarran–Ferguson Act. The McCarran Ferguson Act did not require that the states regulate insurance, but it did insulate state regulation of insurance from the federal anti-trust laws, from federal regulation generally, and from Dormant Commerce Clause scrutiny. This, in effect, restored the pre-*South-Eastern Underwriters* status quo whereby the states could regulate and license insurance companies—an outcome that insurance companies no doubt lobbied for and sought.

Health insurers today are therefore licensed and regulated by the fifty states for historical reasons that have nothing to do with an assessment of whether this outcome is desirable as a policy matter or whether it serves anyone’s interests other than the interests of current health insurers. Health insurers are a powerful and formidable special interest lobby, and they worked together with the Obama Administration and Congress to prevent repeal of the McCarran–Ferguson Act since that would have exposed the health insurance industry to competition. The health insurance industry would have no reason, however, not to love the ObamaCare tax mandate that pushes people to buy health insurance since that is the product the insurers are selling. Oligopolies and monopolies will often price themselves out of the market as to some consumers because their fees are so outrageously high. It is no wonder, therefore, that the health insurance lobby would love the ObamaCare tax mandate because it coerces even more consumers to buy their product than are already compelled by circumstance to do so.

The question I want to examine in this lecture is whether Congress has the power under the Constitution to exempt state licensed health insurance from Dormant Commerce Clause and Privileges and Immunities Clause scrutiny? Can Congress by passing a statute, like the McCarran–Ferguson Act, insulate in-state health insurers from competition from out-of-state health insurers? Can Congress use its powers under the Commerce Clause, the Tax Clause, or the Necessary and Proper clause to shut down interstate competition and create fifty state oligopolies or monopolies in a health insurance industry that presently accounts for one sixth of the nation’s GDP? Can Congress promote Crony Capitalism in the health insurance industry by propping up the big insurers and insulating them from interstate competition?

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16. 322 U.S. 533 (1944).

I think the answer to all of these questions is an emphatic “no.” Congress cannot use its enumerated powers to create or reinforce monopolies or oligopolies at the state level. Congress cannot exempt state health insurers from Dormant Commerce Clause scrutiny. The Supreme Court case law, which says that Congress can exempt state health insurers from Dormant Commerce Clause scrutiny is wrong and should be overruled. Moreover, I think originalists in particular ought to agree that the Dormant Commerce Clause doctrine is generally correct and that it reflects the fact that most federal powers are exclusive and not concurrent. Finally, even if the Dormant Commerce Clause did not render state licensing of insurance unconstitutional, the Privileges and Immunities Clause of Article IV also renders state licensing of insurance to be unconstitutional at least when the insurance is issued by an individual and probably also when it is issued by a corporation.

Moreover, all of these questions take on a much greater urgency in light of the Supreme Court’s upholding of the ObamaCare mandate as a tax. Congress and President Obama have been practicing Crony Capitalism by forcing consumers, through the tax code, to buy health insurance from oligopolists or monopolists. The Supreme Court has never before held that the Tax Power can be used in this way. This question needs to be brought before the Supreme Court for its consideration since the Court in *NFIB v. Sebelius* did not address the issues of the constitutionality of the McCarran–Ferguson Act and of the Affordable Care Act working together in tandem to support oligopoly and monopoly. I think the combination together of the McCarran–Ferguson Act with the Affordable Care Act is unconstitutional because Congress does not have the power to create monopolies outside the area of patents and copyrights and then compel consumers to buy their product.

Moreover, even if Congress could create monopolies in other contexts, it cannot use its Commerce Power to balkanize the nation into fifty separate state oligopoly or monopoly marketplaces. This kind of balkanization is arbitrary and capricious. It does not accomplish any identifiable national goals, while it does cause a huge rise in the cost of healthcare, which rise is now threatening to bankrupt Medicare and Medicaid. The Supreme Court ought to put an end to the Crony Capitalism that is insulating health insurers from interstate competition and is bankrupting the country. Having upheld the ObamaCare tax mandate, the Supreme Court now has a special responsibility to make sure that when Americans are compelled to buy health insurance they can do so in a competitive and not in an oligopolistic market.

This lecture will consider and address six questions: First, is *South-Eastern Underwriters* correct in its holding that the buying and selling

of insurance is commerce? Second, is the Commerce Power at least partly an exclusive national power such that the Dormant Commerce Clause doctrine is correct as an original matter? Third, is the Supreme Court case law correct in so far as it allows Congress to sometimes override Supreme Court rulings in Dormant Commerce Clause cases? Fourth, does Congress have the enumerated power to create monopolies other than by issuing patents and copyrights, and, if it does, can Congress rationally balkanize the health care industry by creating fifty separate health insurance oligopolies and monopolies at the state level? Fifth, does the McCarran–Ferguson Act violate the Privileges and Immunities Clause of Article IV by denying to “The Citizens of each State . . . all [the] Privileges and Immunities [that are enjoyed by] Citizens in the several States.” And, Part VI concludes.

#### I. THE BUYING AND SELLING OF INSURANCE IS COMMERCE

Congress has power under Article I, Section 8, Clause 3: “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>17</sup> Is the buying and selling of insurance policies “Commerce” as that word is used in Article I, Section 8? There are in essence two theories that are widespread, today, as to the meaning of the word “Commerce” in the Commerce clause. Both of these theories may very well be wrong.

First, some scholars and judges, led by Professors Randy Barnett<sup>18</sup> and Rob Natelson,<sup>19</sup> argue that the word “Commerce” refers only to the interstate trade and barter of goods and commodities among merchants. Professors Barnett and Natelson think that the word “Commerce” does not include the buying and selling of goods and services in the intrastate fields of manufacturing, mining, or agriculture, and they think further that the Framers meant to draw a line between trade as a category which is federally regulable and manufacturing, mining, and agriculture as categories control over which is reserved to the States. Under Professors Barnett and Natelson’s reading, Congress has no enumerated power to pass either the McCarran–Ferguson Act<sup>20</sup> or the Patient Protection and Affordable Care Act.<sup>21</sup> Both acts license and regulate the insurance industry, and, if the Commerce Clause only gives Congress

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17. U.S. CONST. art. I, § 8, cl. 3.

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

19. Robert G. Natelson, *The Legal Meaning of “Commerce” in the Commerce Clause*, 80 ST. JOHN’S L. REV. 789 (2006).

20. 15 U.S.C. §§ 1011–15.

21. Pub. L. No. 111-148, 124 Stat. 119 (2011).



power to regulate trade, then Congress lacks the power to license and regulate insurance as the U.S. Supreme Court held long ago in *Paul v. Virginia*.<sup>22</sup>

Professors Barnett and Natelson make a very powerful originalist case for reading the word “Commerce” to mean only “Trade among merchants” using source materials drawn from the Eighteenth Century. Their view of the Commerce Clause was, however, rejected by the Supreme Court, in 1937, in *NLRB v. Jones & Laughlin Steel*<sup>23</sup> and in 1941 in *United States v. Darby*.<sup>24</sup> Since the New Deal era, the Supreme Court has read the Commerce Clause as applying to more than just trade among merchants in upholding the Civil Rights Act of 1964<sup>25</sup>—a foundational event—and in recent years only one justice out of nine—Justice Clarence Thomas—has argued for reading the Commerce Clause as applying only to trade among merchants and not to manufacturing, mining, and agriculture.<sup>26</sup>

I will thus take it to be settled law in this lecture that the Barnett–Natelson reading of “Commerce” as meaning only “Trade among merchants” has been carefully considered and has been decisively rejected by a substantial majority of the American people acting through the Supreme Court since at least 1937. Observers have long noted that the Supreme Court follows presidential and senatorial election returns and is rarely out of step with a majority of the American people for a long period of time.<sup>27</sup> Like Justice Scalia, I am a sufficiently faint-hearted originalist to be unwilling to hold the New Deal unconstitutional.<sup>28</sup> The Supreme Court should not overrule *Jones & Laughlin Steel*, *Darby*, or for that matter the 1944 decision in *United States v. South-Eastern Underwriters Association*, which itself overruled *Paul v. Virginia*. A longstanding interpretation of the Constitution, shared by all three branches of the federal government, acquiesced to by the States, and which the American people consistently seem to approve of counts as a settled precedent which trumps the original meaning of the Constitution.

22. 75 U.S. (8 Wall.) 168 (1868).

23. 301 U.S. 1 (1937).

24. 312 U.S. 100 (1941).

25. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

26. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2677 (2012) (Thomas, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 598–99 (1995) (Thomas, J., concurring).

27. The argument that the Supreme Court follows presidential and senatorial election returns and is rarely out of step with a majority of the American people is made in: Robert A. Dahl, *Decisionmaking in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. LAW 279 (1957); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

28. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (Justice Scalia said this in his William Howard Taft Lecture).

Rejecting the Barnett–Natelson reading of the word “Commerce” as meaning “Trade” does not answer the question of what the word “Commerce” now means. A second, and very different group of scholars and judges from Barnett and Natelson, led by Yale Law Professor Jack Balkin, argue that the word “Commerce” not only includes manufacturing, agriculture, and mining, but that it also includes all forms of social intercourse, exchange, and interaction! Professor Balkin thinks that the Commerce Clause allows Congress to regulate any activity, even non-economic activities, which in any way spills over from one state to another and thus has interstate effects.<sup>29</sup>

Professor Balkin’s interpretation of the Commerce Power holds that the act of buying and selling is utterly irrelevant to defining the meaning of the word “Commerce.” Professor Balkin thinks that Congress could use its commerce power to regulate all forms of social intercourse, exchange, or interaction anywhere in the United States. No Commerce Clause precedent that I am aware of goes this far. Professor Balkin is quite simply wrong in arguing that the post-1937 Commerce Clause applies to all forms of social intercourse, exchange, or interaction even when buying and selling is not going on.

Professor Balkin supports his broad reading of the Commerce Clause as being an Intercourse Clause by citing Samuel Johnson’s dictionary from the era of the Founding.<sup>30</sup> Samuel Johnson defines the word “Commerce” as meaning:

*Cómmence. n.s. [commercium, Latin. It was anciently accented on the last syllable.] Intercourse; exchange of one thing for another; interchange of any thing; trade; traffick.*

The etymology of the word “Commerce” is given in The Chambers Dictionary of Etymology as being:

Commerce *n.* 1537, borrowed from Middle French *commerce*, learned borrowing from Latin *commercium* trade, trafficking (*com-* together, with + *merx*, genitive *mercis* wares, merchandise; see MARKET)<sup>31</sup>

The second syllable of the word “Commerce” is thus “mercis” a Latin root that appears in such other English words as “mercenary,” “mercantile,” “merchant,” “merchandise,” and “market.” The root “mercis” refers in Latin to the buying and selling of goods or “merchandise” a meaning that would have been self-evident to the Framers so many of whom knew Latin and were trained in the classics.

The word “intercourse” in Samuel Johnson’s dictionary at the time of

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29. JACK M. BALKIN, LIVING ORIGINALISM 149–52 (2011).

30. *Id.* at 149.

31. THE CHAMBERS DICTIONARY OF ETYMOLOGY (Robert K. Barnhart & Sol Steinmetz eds., 2006).

the Founding did not yet include sexual intercourse, but it did refer instead to the “exchange of one thing for another.” In other words, the word “intercourse” in 1787 referred to buying and selling and not to gratuitous transfers. The Framers might well have considered prostitution to be a form of “intercourse” in 1787 since prostitution is an activity that involves the buying and selling of sex. The buying and selling of slaves was clearly considered to be commerce, which is why it was thought necessary in Article I, Section 9, Clause 1 for the Framers to forbid congressional interference with the slave trade prior to 1808. When Congress banned the importation of new slaves from Africa in 1808, it did so under its power to regulate commerce—the buying and selling of human beings—in our trade with foreign nations. There is no enumerated federal power, other than the Commerce Power, under which Congress could have banned the foreign slave trade after 1808.

Professor Balkin and others make much of the fact that Chief Justice Marshall in *Gibbons v. Ogden* says the following:

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

What Professor Balkin overlooks is that Chief Justice Marshall makes it as clear as day in *Gibbons* that the “intercourse” that is included within the meaning of “commerce” is “*commercial* intercourse”—i.e. intercourse or interaction where there is buying and selling going on. Marshall does not talk of “a commerce in ideas” in *Gibbons v. Ogden* as Balkin seems to think.

Moreover, the *Gibbons* case on its facts involved the validity of a New York State law that gave Ogden and others a legal monopoly right to offer steamboat trips in exchange for money between Elizabethtown, New Jersey and New York City. Gibbons wanted to compete in this market by offering his own steamboat service between New Jersey and New York City in exchange for money. In the context of *Gibbons v. Ogden*, Congress’s Commerce Power included a power over the navigation at issue because it was “*commercial* navigation.” *Gibbons v. Ogden* was not a case that was all about the trading of ideas, but it was a case about the legal right to buy and sell interstate ferryboat trips. Professor Balkin’s claim that *Gibbons* was about social intercourse,

exchange, or interaction ascribes to *Gibbons* language that is not in Chief Justice Marshall's opinion and language that would have been dicta had it been in the *Gibbons* opinion. The holding in *Gibbons* was that New York could not give a monopoly to one company on the buying and selling of interstate ferry boat rides to the exclusion of another company. There was buying and selling going on in *Gibbons v. Ogden*.

The federal government can certainly regulate commercial navigation under the Commerce Clause, but federal power to regulate recreational navigation poses a harder question. Federal regulation of recreational and non-commercial navigation among the States is probably in most situations incidental to federal regulation of commercial navigation and is thus probably within Congress's power to enact under the Necessary and Proper Clause while carrying into execution the Commerce Power. The key point, however, is to remember that *Gibbons*, itself, was a case where buying and selling was going on and the holding of the case is confined to that commercial context.

There is today a lot of federal regulation of people travelling in interstate commerce by air, train, or in cars and trucks which are federally regulated under the Interstate Commerce Act and which occurs in a commercial setting. Shipping merchandise or people for hire is obviously a commercial activity that involve buying and selling, and which Congress can therefore regulate under the Commerce Clause. Similarly, recreational travel on those federal highways, railroads, air plane routes, and by ferry boats which belong to the federal government would seem to be authorized by Congress's power under Article IV, Section 3 "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>32</sup>

I cannot think of a single Commerce Clause case that either holds or implies that Congress can regulate the intercourse of ideas or even the recreational travel of people that Balkin writes about. Every single Commerce Clause case—except for *Gonzales v. Raich*<sup>33</sup>—involved the regulation either of buying and selling or of an actor who was to some extent engaging in buying and selling. Even in *Wickard v. Filburn*,<sup>34</sup> a

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32. U.S. CONST. art IV, § 3, cl. 2.

33. 545 U.S. 1 (2005). This case could be understood, as Justice Scalia argued in his concurrence, as being a Necessary and Proper Clause case. 545 U.S. 1, 38–39 (2005) (Scalia, J., concurring). Congress's power to outlaw the buying and selling of marijuana would be fatally undercut if individuals could grow and possess marijuana in their homes. The ban on possession of marijuana was thus incidental to Congress's power under the Commerce Clause to ban the buying and selling of marijuana. I am not persuaded by Justice Scalia's concurrence and would have joined the dissent, but I think Scalia's argument here is a plausible one.

34. 317 U.S. 111 (1942).

famous New Deal case, which read the Commerce Clause expansively, the farmer who was trying to grow wheat on his farm was a commercial farmer who wanted to feed some of his homegrown wheat to livestock that he would ultimately sell.

Congress can forbid race discrimination in entities engaged in commerce, and I will stipulate that the buying and selling of hotel rooms and of food and of places of public accommodation can all be regulated under the post-1937 understanding of the Commerce Clause together with the Necessary and Proper Clause. But, Congress cannot regulate all forms of gratuitous social intercourse under the Commerce Clause as Professor Balkin suggests. This is a simple misunderstanding of the original meaning of the word “Commerce.” There is a textually plausible middle ground between reading the word “Commerce” to mean “Trade among merchants” and reading it to mean “Intercourse.” That middle ground is to read “Commerce” to mean “Buying and Selling.” This reading is the one that is the most faithful to the Commerce Clauses etymological Latin roots.

I want to close my consideration of the original dictionary meaning of the word “Commerce” as comprehending only “Buying and Selling” by considering the approved examples Samuel Johnson’s dictionary offers as exemplary usages of the word. Examples three, four, and five are as follows:

3. 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*.
4. These people had not any *commerce* with the other known parts of the world. *Tillotson*.
5. 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*.

None of these three exemplary usages supports Balkin’s reading of the word “Commerce” as encompassing all forms of social intercourse, exchange, or interaction. The examples given from Dryden and Locke clearly contemplate the activity of buying and selling. John Locke specifically says that no country that has commerce with the other known parts of the world can be without silver coins. He thus clearly understands commerce as the buying and selling of goods or services and not as a social exchange or interaction or gratuitous transfer. Dryden, in turn, talks explicitly of “Commerce” allowing some to “gain” and all to be “supply’d.” Again, Dryden is clearly using “Commerce” as if it referred to buying and selling. The approved usages from Tillotson seems to me to be best understood as using the word “Commerce” to connote buying and selling, although it is arguably vague. Two other

exemplary usages of the word “commerce” are also essentially void for vagueness.<sup>35</sup> One talks of the commerce between God and mankind, a concept, which could mean anything depending on whether one believes in God and, if so, how one thinks we interact with him.

The bottom line is that Balkin’s attempt to turn the Commerce Clause into an Intercourse Clause is not clearly supported by any of the five exemplary usages in Samuel Johnson’s dictionary. It is also not consistent with the etymology of the word “Commerce,” nor is it consistent with the facts and holding of *Gibbons v. Ogden*, a case that concerned the buying and selling of ferry boat tickets. The word “Commerce” in Article I, Section 8, Clause 3 plainly refers at a bare minimum to activities where buying and selling is going on. Commercial intercourse can be regulated under the Commerce Clause but non-commercial intercourse cannot be. No post-1937 Commerce Clause case embraces Balkin’s reading of commerce as meaning social intercourse, exchange, or interaction. The buying and selling of manufactured goods and service, or of agricultural products, or of mined products is commerce under a post-1937 understanding of the Commerce Clause but gratuitous or social or academic intercourse are not.

## II. THE COMMERCE POWER IS PARTLY EXCLUSIVE

The buying and selling of health insurance is clearly commerce among the several states—under the post-1937 understanding. Neither Balkin nor I disagree about that. There is quite simply no reason to think that the buying and selling of health insurance implicates State power any more than does the buying and selling of apples or of services in a hotel or restaurant or of dental services.<sup>36</sup> It is true that even after 1937 the States retain a local police power over the health, morals, and public safety concerns of their citizens but that State police

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35. The two other approved usages are from Hooker and from Shakespeare. They read as follows:

1. Places of public resort being thus provided, our repair thither is especially for mutual conference, and, as it were, *commerce* to be had between God and us.

Richard Hooker, *The Works of that Learned and Judicious Divine, Mr. Richard Hooker* (1723).

2. How could communities, Degrees in schools, and brotherhoods in cities, Peaceful *commerce* from dividable shores, But by degree stand in authentick place?

*Troil. and Cress*, in 8 William Shakespeare, *The Plays of William Shakespeare* (1804). Neither of these two examples clearly uses the word “Commerce” to mean social intercourse, interaction, or exchange. 1 SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (1820).

36. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

power ends under *Jones & Laughlin Steel*<sup>37</sup> or under *Darby*<sup>38</sup> once there is buying and selling are going on. The health insurance industry is just as much an industry as are General Motors and Ford. Just as the Commerce Clause allows Congress to regulate automobile emissions on cars that are bought and sold, the Commerce Clause also allows Congress to regulate the buying and selling of health insurance.

The next question is to ask is whether the power to regulate commerce among the states belongs in part exclusively to the national government or whether such commerce can always be concurrently regulated by the states. In a series of cases, the Supreme Court has held that the Commerce Power is in part exclusive and that it precludes state legislation that discriminates against or burdens commerce among the States. In these Dormant Commerce Clause cases, state laws that regulate commerce where Congress has not acted may nonetheless violate the Dormant Commerce Clause if they discriminate against or unduly burden commerce among the States.

Justices Antonin Scalia and Clarence Thomas take issue with the Supreme Court's Dormant Commerce Clause caselaw, which they think violates the original meaning of the Commerce Clause.<sup>39</sup> Justice Scalia makes a very powerful argument in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*,<sup>40</sup> but at the end of the day I disagree with Justices Scalia and Thomas and think that as an original matter it is likely that the Commerce Power was meant to be at least in part an exclusively congressional prerogative.

I would begin by noting that the overwhelming majority of powers granted in the original Constitution were exclusive federal powers. The enumeration of powers in Article I, Section 8<sup>41</sup> operates at least in part in tandem with Article I, Section 10,<sup>42</sup> which explicitly forbids the states from doing certain things that the federal government is empowered to do. Thus, Article I, Section 8 read together with Article I, Section 10 make it clear that five of the eighteen federal powers enumerated in Section 8 are exclusive. Thus, Congress has the exclusive power: 1) to lay uniform taxes, duties, imposts, and excise taxes on exports or imports; 2) to coin money and to make anything but gold and silver coin a tender in payment of debts; 3) to declare war, grant letters of marque and reprisal; 4) to raise and support armies; and 5) to provide and maintain a

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37. 301 U.S. 1 (1937).

38. 312 U.S. 100 (1941).

39. *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 254, 259–65 (1987) (Scalia J., concurring in part and dissenting in part).

40. *Id.*

41. U.S. CONST. art. I, § 8.

42. *Id.* art. I, § 10.

navy. In addition, Article II, read together with Article I, Section 10 makes it clear that the President and the Senate's power to enter into treaties with foreign nation is also an exclusively federal power.<sup>43</sup>

The critics of the Dormant Commerce Clause have inferred that since Article I, Section 10 expressly makes five of the eighteen federal powers exclusive the other thirteen federal powers must be concurrent. But, if one excludes the Commerce Power and the Necessary and Proper Clause Power from consideration, and if one looks at the other eleven Section 8 powers that do not have a Section 10 analogue, it is obvious on the face of things that these federal powers are all clearly exclusive as a matter of original meaning as well. Article I, Section 8, clause 2 gives Congress the power "To borrow Money on the credit of the United States."<sup>44</sup> No one would seriously contend this power was concurrent. Article I, Section 8, Clause 4 gives Congress the power to adopt uniform rules of naturalization.<sup>45</sup> Again, this power is obviously an exclusively federal power, which the states cannot exercise concurrently. As Alexander Hamilton specifically said in *The Federalist* No. 32, the federal government's power "to establish a UNIFORM RULE of naturalization throughout the United States[] . . . must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE."<sup>46</sup> This is striking because Article I, Section 10 does not bar the States from adopting naturalization laws so this is at least one exclusive federal power in Article I, Section 8 which has no Article I, Section 10 analogue.

Article I, Section 8, Clause 5 gives Congress the power to "fix the Standard of Weights and Measures."<sup>47</sup> The existence and meaningfulness of the grant of this power to Congress would be obviously be endangered if it could be concurrently exercised by the states. This is especially relevant to the question of whether there is a Dormant Commerce Clause because the Commerce Power could itself be read as granting Congress the power to "Fix the Standard of Weights and Measures" even if this Clause had been omitted from the Constitution.

Similarly, Article I, Section 8, Clause 8 gives Congress the power to

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43. *Id.* art. II, § 2; *id.* art. I, § 10.

44. *Id.* art. I, § 8, cl. 2.

45. *Id.* art. I, § 8, cl. 4. This clause goes on to give Congress exclusive power to pass bankruptcy laws, but, surprisingly, the Marshall Court held in *Sturges v. Crowninshield* that the power to adopt bankruptcy laws was held concurrently by Congress and the States. 17 U.S. 122, 193–96 (1819). Chief Justice Marshall, joined by Justice Joseph Story seemed to take this back in *Ogden v. Saunders*. 25 U.S. 213, 335 (1827) (Marshall, C.J., dissenting).

46. ALEXANDER HAMILTON, *THE FEDERALIST* NO. 32.

47. U.S. CONST. art. I, § 8, cl. 5.



grant copyrights and patents.<sup>48</sup> Again, it seems on the face of things that as a matter of original meaning this must be an exclusively federal prerogative as well at least as to novel inventions and writings. Justice Scalia in his opinion in *Tyler Pipe* argues the patent power was found to co-exist with some degree of state power in the 1970's Burger Court case *Kewanee Oil Co. v. Bicron Corp.*,<sup>49</sup> and that the copyright power was also found by the Burger Court to co-exist with state power in *Goldstein v. California*.<sup>50</sup> But, the Burger Court's originalist bona fides are open to question, and a recent provocative working draft by Camilla Hrdy posted on the Social Science Research Network (SSRN)<sup>51</sup> concedes that the "states do not grant their own patents and have not done so for over two hundred years."

The fact of the matter is that Congress alone issues patents for novel inventions, there is a United States Patent and Trademark Office which alone issues such patents, and the U.S. Court of Appeals for the Federal Circuit alone hears patent appeals from federal district courts which have exclusive jurisdiction over those appeals.<sup>52</sup> "[T]he prevailing view of the Supreme Court and of legal academia [is] that the Constitution prohibits states from granting patents."<sup>53</sup> Professor Hrdy notes that prior to the ratification of the Constitution the States had issued patents, but this, of course, is completely irrelevant to the question of whether the Constitution divested the States of this power. Professor Hrdy shows that New York State and a few other States created monopolies after the Constitution went into effect, but she errs in equating all monopolies with patents and she overlooks the strong anti-monopoly tradition in Anglo-American law discussed in Steven G. Calabresi & Larissa Price, *Monopolies and the Constitution: A History of Crony Capitalism*.<sup>54</sup> She ends up conceding that, "Today it is essentially a unanimous assumption that states cannot grant their own patents." Professor Hrdy quotes Edward Walterscheid, "the preeminent historian of the IP Clause and American patent law" as saying that "the 'enactment of federal patent and copyright laws in 1790 was largely viewed as removing the needs for state patents and copyrights, because the advantages of uniformity and broader protection inherent in the federal system were obvious to almost everyone.'"<sup>55</sup> Congressional power to issue patents and

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48. *Id.* art. I, § 8, cl. 8.

49. 416 U.S. 470, 479 (1974).

50. 412 U.S. 546, 560 (1973).

51. Camilla A. Hrdy, *State Patent Laws in the Age of Laissez Faire*, 28 BERKELEY TECH. L.J. (forthcoming Feb. 2013).

52. *Id.* at 2.

53. *Id.* at 4.

54. Calabresi & Price, *supra* note \*.

55. *Id.* at 7 (quoting Edward C. WALTERSCHEID, NATURE OF THE INTELLECTUAL PROPERTY

copyrights was obviously meant to be an exclusive national power. Otherwise, State patents and copyrights might frustrate the federal law governing the degree of protection given to intellectual property.

Two clauses in Article I empower Congress specifically to punish crimes. Article I, Section 8, Clause 6 allows Congress to punish counterfeiting,<sup>56</sup> and Article I, Section 8, Clause 10 allows Congress to punish piracy and felonies committed on the high seas and offenses against the law of nations.<sup>57</sup> Both these clauses seem most plausibly to contemplate an exclusively federal role. State punishment of piracy and of offenses against the law nations, while not forbidden by Article I, Section 10 would have dire foreign policy consequences. State punishment of counterfeiting of federal money also seems like an odd thing to contemplate.

Article I, Section 8, Clause 7 gives Congress power to establish post offices and post roads, and Article I, Section 8, Clause 9 gives Congress power to constitute tribunals inferior to the Supreme Court. The Post Office has always been an exclusively federal operation while the states have never tried to create or regulate the jurisdiction of new tribunals that are inferior to the Supreme Court. Again, our practice in this area clearly contemplates an exclusive role for the national government and for Congress.

Article I, Section 8, Clause 14 gives Congress power “To make Rules for the Government and Regulation of the land and naval Forces;”<sup>58</sup> while Article I, Section 8, Clause 15 allows Congress to federalize the state militias to “suppress Insurrections and repel Invasions;”<sup>59</sup> and Article I, Section 8, Clause 16 allows Congress to make rules for the “organizing, arming, and disciplining [of the] Militia, and for governing such Part of them” as has been federalized.<sup>60</sup> None of these Clauses have analogues in Article I, Section 10, but all three of these federal powers are clearly meant to be exclusive. In *Houston v. Moore*, the Supreme court upheld a State court-martial jurisdiction over members of the state militias, but that is hardly a surprise because the militias, unlike the U.S. Army and Navy are state institutions, which we today call national guard units.<sup>61</sup>

Finally, Article I, Section 8, Clause 17 gives Congress power “To exercise exclusive Legislation in all Cases whatsoever” in the District of

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CLAUSE 436–37 (2002)).

56. U.S. CONST. art. I, § 8, cl. 6.

57. *Id.* art. I, § 8, cl. 10.

58. *Id.* art. I, § 8, cl. 14.

59. *Id.* art. I, § 8, cl. 15.

60. *Id.* art. I, § 8, cl. 16.

61. 18 U.S. 1, 25–28 (1820).

Columbia.<sup>62</sup> Again this is an exclusive federal power with no Article I, Section 10 analogue. Justice Scalia claims in *Tyler Pipe* that the use of the word “exclusive” here implies that the Commerce Power is held concurrently with the States, but this seems like an effort to make an awfully small tail wag a very large dog. The word “exclusive” in the District of Columbia Clause is more plausibly read as a provision added *ex abundanti cautela*—out of an abundance of caution—to make it even clearer than it already was that the States had NO power at all in the District of Columbia.

Looking outside of Article I, Section 8, it is clear that many, although not all powers that are vested or are implied elsewhere in the original Constitution were meant to be exclusive. The President’s powers to execute the law, as Commander in Chief, to pardon, to make treaties (with the senate) and to appoint officers of the United States (with the senate) are all obviously exclusive federal powers that are not shared concurrently in any way with the states.<sup>63</sup> On the other hand, the jurisdiction of the Article III federal courts over nine categories of cases and controversies<sup>64</sup> has always been concurrent unless Congress expressly divests the states of jurisdiction in an area, which it can and does sometimes do.<sup>65</sup>

Congress has power under Article IV, Section 1 to pass a full faith and credit statute. This is obviously an exclusively federal power. Article IV, Section 2 contains clauses requiring the states to return fugitives from justice and fugitive slaves.<sup>66</sup> In *Prigg v. Pennsylvania*,<sup>67</sup> the Supreme Court held in an opinion by Justice Joseph Story that the Fugitive Slave Clause, read together with the Necessary and Proper Clause,<sup>68</sup> gave Congress the exclusive power to regulate the return of fugitive slaves. Justice Story thus invalidated a Pennsylvania state statute that regulated the use of self-help in recovering fugitive slaves on the grounds that it was preempted by the federal constitution even absent federal statutory preemption.

Article IV, Section 3 gives Congress power to admit new states into the Union,<sup>69</sup> and it also gives Congress the power “to dispose of and make all needful Rules and Regulations respecting the Territory or other

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62. U.S. CONST. art. I, § 8, cl. 17.

63. *See id.* art. II, §§ 1–3 (granting and describing the president’s powers and the duties imposed on him).

64. *Id.* art. III, § 2 (giving the federal courts jurisdiction over only nine categories of cases and controversies).

65. *See, e.g.,* *Claflin v. Houseman*, 93 U.S. 130 (1876).

66. U.S. CONST. art. IV, § 2, cls. 2 & 3.

67. 41 U.S. 539 (1842).

68. U.S. CONST. art. I, § 8, cl. 18.

69. *Id.* art. IV, § 3, cl. 1.

Property belonging to the United States.”<sup>70</sup> These powers of Congress are all obviously exclusive even absent a statement to that effect in Article I, Section 10. Article IV, Section 4 imposes on Congress the duty and the power to “guarantee to every State in this Union a Republican Form of Government.”<sup>71</sup> Again, one does not need Article I, Section 10 to know that this is an exclusively federal power. Finally, Article V does give both Congress and the states a role in amending the Constitution, but it does so by expressly describing the state powers that were contemplated.<sup>72</sup> Any effort by the states to amend the Constitution outside of Article V would plainly be unconstitutional.

Thus, almost every congressional grant of power beyond the five that are matched by explicit Article I, Section 10 prohibitions on the States turns out upon closer examination to be a grant to the federal government of exclusive power. This should predispose us in looking at the Commerce and Necessary and Proper Clauses toward the conclusion that federal powers are presumptively exclusive rather than presumptively concurrent. This is why the old doctrine of dual federalism,<sup>73</sup> which was temporarily extinguished in 1937, turns out to have been right after all, in some respects, although maybe not in so far as it denied federal power that bore on manufacturing where there is buying and selling going on.

The federal sphere and the state sphere of power in the Constitution are mostly separate and distinct and are not congruent and overlapping. The New Dealers denied this because they wanted government to be able to regulate the liberty and property of persons both at the federal and at the state level. Michael Greve following Richard Epstein calls this a program of “cartels at every level”—both federal and state.<sup>74</sup> The New Deal understanding was wrong, however, and it is in obvious tension with the text of the Constitution. Michael Greve shows this brilliantly in his splendid new book *The Upside-Down Constitution*.<sup>75</sup>

I want now to talk about an exclusive federal sphere in the most famous Necessary and Proper Clause cases before turning to the exclusivity of the Commerce Clause. My reason for starting here is that most readers will assume that congressional power under the Necessary and Proper Clause must be concurrent to state power and not exclusive of it. The Clause does after all refer to incidental, implied federal

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70. *Id.* art. IV, § 3, cl. 2.

71. *Id.* art. IV, § 4.

72. *Id.* art. V.

73. Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

74. MICHAEL GREVE, *THE UPSIDE-DOWN CONSTITUTION* 211 (2012).

75. *Id.*

powers while imposing fiduciary limits on Congress to act “properly.”<sup>76</sup> One would think, therefore, that incidental, implied federal powers might often be concurrent, but in one of the most important cases it ever decided the Supreme Court said otherwise.

In *McCulloch v. Maryland*, Chief Justice Marshall struck down a state tax, which fell exclusively on a Maryland branch of the Bank of the United States.<sup>77</sup> The Maryland law violated no federal statute, but Marshall held it was preempted by the Constitution anyway. Congress would surely have had power under the Necessary and Proper Clause to pass a federal statute that would have preempted state taxes that fell exclusively on the federal Bank but here Congress had not acted. Marshall said in effect that the Dormant Necessary and Proper Clause preempted the Maryland state tax even where Congress had not acted. The Maryland tax on the federal Bank was an unconstitutional effort by the state of Maryland to tax an institution that all the other states were paying for. The Dormant Commerce Clause idea is thus central to *McCulloch v. Maryland*. In fact, as John Hart Ely shows in *Democracy and Distrust*, the Dormant Commerce Clause theme of *McCulloch v. Maryland* embodies a whole theme of judicial policing of the political process to prevent the States from “discriminating” against federal instrumentalities and officers who may lack power in the State political processes.<sup>78</sup>

More recently, the Supreme Court has struck down other state laws that intruded into the federal sphere holding that the states may not establish term limits for Members of Congress<sup>79</sup> and finding, as Justice Scalia quite rightly did, that state tort law cannot be used to second guess the military’s design choices on a helicopter escape hatch.<sup>80</sup> During the scandals in the Administration of President Bill Clinton, the question arose whether the president of the United States could be prosecuted by a state while he was serving as president.<sup>81</sup> The best commentary at that time and my own view is that “no,” a state cannot prosecute a president until his term as president is over. Otherwise a single state prosecutor could hobble and paralyze one whole branch of the federal government. Presidents cannot be prosecuted until they leave office either as a result of impeachment or because their terms

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76. GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON, & GUY SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (2010).

77. 17 U.S. 316 (1819).

78. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 85–86 (1980).

79. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 820–21 (1995).

80. *Boyle v. United Tech.*, 487 U.S. 500, 511–12 (1988).

81. Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11 (1997).

come to an end.

So what about the exclusivity of Congress's Commerce Power? Is federal power under Article I, Section 8, Clause 3 exclusive, concurrent, or a mixture of both. The Clause says that Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."<sup>82</sup> There are thus three parts to the Commerce Clause all of which intersect: a foreign Commerce Clause, an Indian Commerce Clause, and the Commerce Among the States Clause.<sup>83</sup> Congress's power to regulate commerce with foreign nations is almost certainly an exclusive federal power. Article I, Section 10 explicitly forbids the states from entering into any treaties, alliances or confederations, and it is hard to imagine how a state could regulate commerce with foreign nations if it could not enter into treaties, alliances, or confederations.

The same argument almost certainly applies to "Commerce . . . with the Indian Tribes." This is almost certainly an exclusive federal power as well since the Article I, Section 10 bar on entering into treaties, alliances, or confederations appears to apply to state undertakings with the Indian Tribes and not only with foreign nations. The bar in Article I, Section 10 applies to all treaties, alliances, and confederations and not merely those with foreign nations. It thus presumptively applies to the Indian Commerce Clause as well as to the Foreign Nations Commerce Clause. Both those clauses appear to grant Congress exclusive power over the commerce in question.

What then can be inferred as to commerce among the several states? There is an important canon of textual interpretation that goes by the name of *noscitur a sociis*.<sup>84</sup> This canon reflects the idea that a word or clause might be construed in light of the company it keeps and the context it appears in.<sup>85</sup> Professor Saikrishna Prakash has quite rightly argued that the Commerce Among the States Clause should be construed under *noscitur a sociis* in light of the Foreign and Indian Commerce

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82. U.S. CONST. art. I, § 8, cl. 3.

83. Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149 (2003).

84. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 195 (2012).

85. Thus, Article I, Section 10 bars the States from passing Bills of Attainder, Ex Post Facto Laws, or Laws impairing the Obligation of Contracts. In *Calder v. Bull*, the Supreme Court had to decide whether the ban on State ex post facto laws banned only retroactive criminal laws or whether it banned retroactive civil laws as well. 3 U.S. 386 (1798). The Court concluded that the Ex Post Facto Laws Clause banned only retroactive criminal laws because if it were read to ban retroactive civil laws the Contracts Clause would have become redundant. See generally *id.* In *Ogden v. Saunders*, a majority of the Court held that only retroactive impairments of contracts were prohibited by the Contract Clause and not prospective impairments. 25 U.S. 213 (1827). Chief Justice Marshall, joined by Justice Story dissented. *Id.* *Noscitur a sociis* was discussed there as well. *Id.*

Clauses to which it is attached. For this reason, Professor Prakash argues correctly that the substantially affecting interstate commerce line of cases identified in *United States v. Lopez* ought to be viewed not as Commerce Clause cases but instead as Necessary and Proper Clause cases because no-one thinks that Congress has power under the Foreign or Indian Commerce Clauses to regulate activities in foreign nations or on Indian tribal lands that substantially affect U.S. commerce.<sup>86</sup>

The same *noscitur a sociis* argument applies to the exclusivity of the three Commerce Clause heads of power. If congressional power is exclusive under the Foreign Commerce Clause and under the Indian Commerce Clause then maybe it is exclusive in the Commerce Among the States Clause as well? It is at least a little odd to think that the word “Commerce”, which is mentioned only once in Article I, Section 8, Clause 3, is exclusive with foreign nations, concurrent with the states, and exclusive with the Indian Tribes. This is a possible construction, but it seems surprising especially since the overwhelming majority of constitutional power grants are exclusive rather than concurrent.

Chief Justice Marshall and Justice Joseph Story offer a second argument for the exclusivity of the Commerce Clause in a powerful dissenting opinion in the 4-to-3 ruling in *Ogden v. Saunders*.<sup>87</sup> *Ogden v. Saunders* was a case that arose under the Contracts Clause of Article I, Section 10, which provides that “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”<sup>88</sup> The issue in the case was whether a state law that prospectively limited the right to make contracts was unconstitutional or whether the Contracts Clause only applied instead to retrospective laws limiting freedom of contract. The majority thought that only a retrospective law could “impair the Obligation of Contracts.” The use of the word “obligation” made it clear to the majority that for the Contract Clause to be triggered a contract had to already be in effect when the challenged law was passed. Chief Justice Marshall and Justice Story, however, argued in dissent that the Commerce Clause of Article I, Section 8 and the Contracts Clause of Article I, Section 10 should be read together as removing the whole field

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86. Since the Foreign and Indian Commerce Clauses are not read as conferring power to pass laws about wholly foreign or Indian activities that substantially affect U.S. commerce, Professor Prakash argues it is non-sensical to read the “Commerce Among the States Clause” as one that allows federal laws based on the Commerce Clause to ban wholly intrastate activities merely because they substantially affect interstate commerce. This is a *noscitur a sociis* argument that the domestic Commerce Clause can be best understood with the Foreign and Indian Commerce Clauses in mind. The answer, of course, is that the substantially affecting interstate commerce line of cases are all really Necessary and Proper Clause cases instead of being Commerce Clause cases as Chief Justice Rehnquist said they were in *United States v. Lopez*.

87. 25 U.S. 213 (1827).

88. U.S. CONST. art. I, § 10.

of commercial legislation from the states and granting it exclusively to the federal government.

Chief Justice Marshall only dissented once during his thirty-four year tenure on the bench. The lone Marshall dissent in *Ogden v. Saunders* was, moreover, joined by Justice Story and occurred in a case decided on a 4-to-3 vote. The very fact that Marshall and Story thought there was such a tight nexus between the Commerce Clause and the Contracts Clause shows again how wrong Jack Balkin is when he claims that Marshall understood “commerce” as including more than buying and selling. One cannot enter into a binding contract under the common law unless there is consideration, which is being bought or sold. Moreover, Marshall’s argument that the Commerce and Contracts Clauses work in tandem explains his support for the idea of the Dormant Commerce Clause in *Gibbons v. Ogden*. Both the Commerce Clause and the Contracts Clause were enacted in part to protect constitutionally the freedom to buy and sell. The Marshall and Story dissent in *Ogden v. Saunders* is thus quite plausible.

A final argument, which for me seals the question that the commerce power was originally meant to be an exclusive federal power, is that I think, as a general matter, the Constitution ought usually to be read with the *expressio unius, exclusio alterius* canon of construction in mind. Under this canon, the writing down of one thing, especially in a list, should usually be presumed to exclude other things that are not mentioned. This is a useful canon to invoke to ensure that the constitutional text does not become a jumping off point as opposed to being the beginning *and* the end of a constitutional analysis.

Thus, the Constitution says that Congress shall have the power to regulate commerce just as it says that Congress shall have power to fix the standard of weights and measures and just as it says that the President shall have the pardon power. *Expressio unius, exclusio alterius* applies. The writing down and giving of this power to Congress, or to the President, implies that the same power has been taken away from the states. When the Constitution contemplates a role for the states as to a power it has conferred on Congress it provides for such a role textually as in the amendment process in Article V. Powers not delegated by the states to the federal government are reserved to the states or to the people, but the commerce power has, in fact, been delegated to the Congress. *Expressio unius, exclusio alterius*. The states no longer have the power to regulate commerce among the states just as they no longer have the power to regulate commerce with foreign nations or with the Indian Tribes.

Of course the principle of *expressio unius, exclusio alterius* applies to the prohibitions on State actions in Article I, Section 10 as well as to the



rest of the Constitution. The listing of prohibitions on state actions may be the only things the federal government is empowered to do which the states cannot also do. But, if that is the case then the states can adopt naturalization laws, they can fix the standard of weights and measures, they can run a post office, and they can prosecute the President under state law during his term in office. Congress can by statute under the Necessary and Proper Clause preempt such action, but the Constitution by itself does not accomplish the preemption. I think this view is at war with the foundational second holding of *McCulloch v. Maryland* and is thus clearly wrong.

The best way to understand the Article I, Section 10 list of things the States cannot do is to recognize that it was added *ex abundanti cautela*—out of an abundance of caution. This is not a widely known principle of construction, but I think it is foundational in U.S. constitutional law and is essential to mention.<sup>89</sup> Sometimes language gets added to a legal text two or three times for the same reason that people may lock the doors to their apartments and houses with two locks. If you really care about something you will sometimes protect it twice!

My favorite example *ex abundanti cautela* in constitutional interpretation is the Opinions Clause in Article II, which enumerates a presidential power to request the opinions in writing of the principal officer in each of the executive departments of government. Some law professors argue that this proves the Vesting Clause of Article II is not a general grant of the executive power including removal power to the President. If it was, they say the Opinions Clause would become redundant.<sup>90</sup>

I disagree. I think the Opinions Clause was added out of an abundance of caution *ex abundanti cautela* and that the president would have had this power even if Article II, Section 2 had not explicitly provided for it.<sup>91</sup>

It is a mistake to try zealously to construe constitutional provisions so that nothing is redundant. When Constitution writers feel strongly about something they sometimes say it twice! Article I, Section 10 is an example of this. The powers of the federal government are all exclusive and the states have no reserved power to regulate in the federal sphere but out of an abundance of caution Article I, Section 10 makes this even more emphatic as to some of the federal enumerated powers. This does not mean the other federal enumerated powers like the Commerce and

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89. SCALIA & GARNER, *supra* note 84, at 176–77.

90. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 72 (1994).

91. Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647 (1996).

Necessary and Proper Clause powers are concurrent. It simply means that the Framers double-locked the door on state intrusion in the federal domain as to war, foreign policy, and issuance of paper money where a state role would be especially destructive.

In my opinion, the canon of *expressio unius, exclusio alterius* for grants of power is the master canon in all of constitutional law. *Expressio unius, exclusio alterius* is of central importance to understanding the Constitution. I will now try to prove this by discussing six other contexts where the canon's applicability is dispositive one way or the other. Cumulatively, these six examples show that I am right to argue that the Commerce Power is an exclusive power of the federal government.

First, almost twenty years ago, Larry Lessig and Cass Sunstein argued in a much cited and admired article in the *Columbia Law Review* that the Framers believed there were actually four powers of government, instead of three, and that they believed there was an Administrative Power in addition to the Legislative, Executive, and Judicial Power.<sup>92</sup> Lessig and Sunstein thought that this unwritten belief of the Framers was originally part of the Constitution. They made an explicitly originalist argument against the unitary executive on historical grounds.

My response then and now was that Lessig and Sunstein's view was nonsense because the writing down in the Constitution of the three traditional powers of government was meant to be an exclusive list. *Expressio unius, exclusio alterius*. There is no unenumerated fourth power of government in the Constitution.<sup>93</sup> In theory, any list in the Constitution could be either an exclusive list or an exemplary list. Given the Framers concerns about cabining government power, it is as clear as day that they would not have failed to mention something as important as a fourth power of government, if they had believed it existed. Moreover, the Framers not only neglected to talk about the fourth power of government in the Constitution; such a power also goes unmentioned in the Federalist Papers and in Anti-Federalist writings. The central claim of Lessig's and Sunstein's article is quite simply absurd. The first context of constitutional interpretation where the *expressio unius, exclusio alterius* canon of interpretation applies then is with the enumeration of three and only three types of governmental powers.

A second exclusive list of powers that appears in the Constitution is the list of the nine categories of cases or controversies that the Article III federal courts have jurisdiction to hear. This list is precisely described

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92. Lessig & Sunstein, *supra* note 90.

93. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

as comprehending the only cases and controversies to which the federal judicial power “shall extend.” In *National Mutual Insurance Co. v. Tidewater Transfer Co.*,<sup>94</sup> the Supreme Court upheld a federal statute allowing citizens of the District of Columbia to sue citizens of a state in the diversity jurisdiction even though doing so seemed to add to the list of nine categories of cases or controversies that Article III empowers the federal courts to hear. Interestingly, although a majority of the Court upheld the federal statute, a majority of the justices also said in dicta that Congress cannot add to the nine categories of cases or controversies that Article III empowers the federal courts to hear. A majority of the Supreme Court held that *expressio unius, exclusio alterius* applies to the Article III list of nine heads of jurisdiction. Congress may not give the federal courts power to hear cases or controversies that are not on that list.

A third exclusive list of powers in the Constitution appears in Article I, Section 8 which enumerates eighteen and only eighteen powers of Congress some of which are admittedly pretty broad. When cases like *United States v. Lopez* say that the federal government is one of limited and enumerated powers, one of the things that is implied is that the listing and enumeration of congressional powers was meant to be exclusive and not exemplary.<sup>95</sup> The Tenth Amendment makes it even clearer that the Article I, Section 8 list is exclusive and that all powers not delegated to the federal government by the Constitution are reserved respectively to the States or to the federal government.<sup>96</sup> Again, *expressio unius, exclusio alterius* underlies all of the many case law claims that the federal government is one of limited and enumerated powers however broad some of those powers may be.

It should be noted here that Justice Stephen Breyer in *United States v. Comstock* reads the Article I, Section 8 list as being in effect an exemplary list by claiming that the 18<sup>th</sup> Clause—containing the Necessary and Proper Clause—is a freestanding grant of power to Congress to enact any law not within the prior seventeen clauses so long as it is “necessary and proper” which words he further dilutes to mean “convenient or useful”<sup>97</sup> But, the Necessary and Proper Clause is not a freestanding invitation to Congress to pass all useful laws. The text of the Necessary and Proper Clause expressly limits the power to the enacting of laws *which carry into execution* some other enumerated power. The Article I, Section 8 list is thus an exclusive list, and it exemplifies the *expressio unius, exclusio alterius* principle of

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94. 337 U.S. 582 (1949).

95. 514 U.S. 549, 592 (1995).

96. U.S. CONST. amend. X.

97. 130 S. Ct. 1949, 1956 (2010).

construction.

As I have just shown both the Article III, Section 2 list of nine categories of cases or controversies that the federal courts can hear and the Article I, Section 8 list of enumerated powers of Congress are exclusive lists of powers, but the list of the President's powers in Article II is, in my opinion, quite different. The Vesting Clause of Article II vests a President of the United States with all of the executive power, which the later sections of Article II go on to define, limit, and explain in part. Thus, the President is given a general grant of the executive power in Section 1, and Section 2 of Article II then goes on to elaborate how the executive power will work in the context of the President being Commander in Chief and of his having the pardon power, the power to request opinions from the heads of departments, and the appointment and treaty powers shared with the Senate etc . . . .<sup>98</sup>

I think the best way to understand Article II is to read it as providing an exemplary list of some but not necessarily all executive powers. "The executive Power shall be vested in a President of the United States", and it shall include e.g. (exempli gratia—for the sake of an example) the Commander in Chief Power, the Pardon Power, etc . . . . Thus, the President has: 1) the removal power even though it is not explicitly listed, as *Myers v. United States*<sup>99</sup> held; 2) he has the power to control all prosecutions *brought* in the name of the United States even though that power is not specifically listed, see *Robertson v. United States ex rel Watson*;<sup>100</sup> 3) he has the power to take life without a basis in statute to protect government officials, see *In re Neagle*;<sup>101</sup> and 4) he has at least some unenumerated foreign policy powers, see *United States v. Curtis Wright*.<sup>102</sup> The executive power of the President of the United States is a grab bag of powers left over after all legislative powers herein granted are given to a Bicameral Congress and after it is made clear that the judicial power to hear nine and only nine categories of cases or controversies is given to the life tenured Article III federal courts. Anything that is not *done* by the federal government with either: 1) bicameralism and presentment or 2) in a case or controversy decided by a life tenured Article III court is an exercise of "The executive Power" all of which is vested in the one President.

The contrasting view of Article II is the one taken by Justice Hugo Black in his opinion of the court in the *Youngstown Steel Seizure*

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98. Calabresi & Prakash, *supra* note 93, at 575.

99. 272 U.S. 52, 119 (1926).

100. 130 S. Ct. 2184 (2010).

101. 135 U.S. 1, 59 (1890).

102. 299 U.S. 304 (1936).

*Case*.<sup>103</sup> Justice Black seemed to read Article II as if it said “The executive Power shall be vested in a President, and (it is—*id est*) or i.e. the Commander in Chief power, the pardon power etc . . . .” The problem textually with Justice Black’s reading of Article II is that he implicitly rewrites the text to say (as Articles I and III do) either that “All executive Powers herein granted shall be vested in a President” or “The executive Power shall extend to: a finite list of enumerated powers.” But, Justice Black’s reading of Article II is simply incorrect.

*Expressio unius, exclusio alterius* does not apply to the list of presidential powers in Article II, Section 2. Nor does it apply to the list of duties imposed on the President in Article II, Section 3 like the duties of giving a state of the union address or receiving ambassadors or taking care that the laws be faithfully executed. In fact, the President would arguably not have the power to fulfill the duties which Article II, Section 3 imposes on him if the Vesting Clause of Article II were not itself a grant of the executive power. The wording of the Take Care Clause as one that imposes a duty on the President thus strengthens the argument that the Vesting Clause of Article II had already conferred on him the executive power.

Yet another example of *expressio unius, exclusio alterius* arose with the Civil War, which raised the question whether the southern states could unilaterally secede without permission from Congress or the other states in the union. A question here is whether the Tenth Amendment reserves a power of secession to the states. For a textualist, the place to look for an answer to this question is in Article IV, which is the part of the Constitution that originally addressed federal-to-state and state-to-state constitutional relations.

Article IV explicitly provides that “New States may be admitted by the Congress into this Union,”<sup>104</sup> and it also explicitly protects the states from having their boundaries changed without their consent, but it is silent on the question of whether a state can secede. Since the constitutional text specifies a way by which states can join the union but no way by which they can leave it, I think the likeliest inference to draw is that unilateral secession is not permissible without the adoption of a constitutional amendment specifying what the secession process should be? Will the process require Congress’s consent? The consent of a majority of the other States? Consent of three-quarters of the other States? The text just does not say although it does address these issues for states joining the union. *Expressio unius, exclusio alterius*—the Constitution’s specificity on how a state can join the union coupled with

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103. 343 U.S. 579 (1952).

104. U.S. CONST. art. IV, § 3, cl. 1.

its silence on how states can leave means that a constitutional amendment is needed before a state could ever legally secede.<sup>105</sup>

This, of courses, brings me to *United States Term Limits v. Thornton*<sup>106</sup> and *Powell v. McCormack*<sup>107</sup> both of which held that the list of three qualifications only to serve in Congress was an exclusive list instead of being an exemplary list that Congress or the States could add qualifications to. A majority of the Supreme Court held in both cases, in effect, that *expressio unius, exclusio alterius* applied to the Qualifications Clauses and that neither the Houses or Congress nor the States could add additional new qualifications for holding office. As a matter of pure textualist originalism, the majority view seems right to me, but it does overlook a two-hundred year practice of the states disallowing felons from voting or presumably from running for office. If forced as a judge to choose between the text's exclusive listing of three qualifications for holding federal office and contrary practice I would go with the text and join Justice Stevens' opinion in *United States Term Limits v. Thornton*.

Yet another famous invocation of *expressio unius, exclusio alterius* is to be found in *Marbury v. Madison*<sup>108</sup> where Chief Justice Marshall invokes the canon to say that Congress cannot add cases to the Supreme Court's original jurisdiction. For reasons that are too complicated to explain in this article, I think Marshall was actually wrong here,<sup>109</sup> but it is perhaps the most famous instance in American history of the *expressio unius, exclusio alterius* canon being invoked.

Finally, consider whether the Article V procedures for amending the Constitution are an express and exclusive list or whether they are merely an example of one of perhaps many ways in which the Constitution might be amended. Yale Law School Professor Akhil Reed Amar has argued that the Constitution can be amended by a simple majority vote in a national referendum without going through the cumbersome processes described in Article V.<sup>110</sup> Amar says Article V is merely one way of amending the Constitution, but it is not the only way. Amar's argument is purely originalist and focused on an 18<sup>th</sup> Century Lockean belief that a simple majority could always legally alter or abolish its forms of government. I think Professor Amar has confused a right to

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105. Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).

106. 514 U.S. 779, 783 (1995).

107. 395 U.S. 486, 550 (1969).

108. 5 U.S. 137, 138 (1803).

109. Steven G. Calabresi & Gary Lawson, *The Hamdan Case, the Unitary Executive, and the Constitutionality of Jurisdiction Stripping: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007).

110. Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).

revolution against a wicked, usurping government with the legal right to change the U.S. Constitution as it is written. Article V is the only process by which the U.S. Constitution can be legally changed. *Expressio unius, exclusio alterius*.

Another Yale Law Professor, Bruce Ackerman, has also devoted his entire scholarly career to defending the legitimacy of what he calls the New Deal Constitutional Moment, which in Ackerman's view successfully amended the Constitution outside of Article V.<sup>111</sup> Ackerman's theory fails for the same reason as does Amar's. Article V enumerates the only way in which the Constitution can be amended because of *expressio unius, exclusio alterius*. This master canon of constitutional interpretation makes it clear that Ackerman and Amar are wrong.

What these six examples all taken together show is that the canon of *expressio unius, exclusio alterius* for grants of power is, as I argued above, the master canon in all of constitutional law. One simply cannot understand the Constitution without appreciating the force in many contexts of *expressio unius, exclusio alterius*. The six examples I just gave help to show cumulatively that the Commerce Power is an exclusive power of the federal government and that the old doctrine of dual federalism is actually correct. The fact that the Supreme Court has not always understood that is irrelevant either as a matter of textualism or of originalism. Article I, Section 8, clause 3 completely preempts State regulations of commerce among the States and the health insurance industry is, as I have shown, engaged in such commerce. The next question, which thus arises is whether Congress can trump the Dormant Commerce Clause by delegating its commerce power over health insurance to state regulators. Can Congress overturn Supreme Court opinions like *South-Eastern Underwriters* simply by passing a statute?

### III. CAN CONGRESS OVERRULE THE SUPREME COURT IN DORMANT COMMERCE CLAUSE CASES?

As a general rule, it is widely believed that Congress cannot overturn Supreme Court interpretations of the Constitution by passing a simple statute. Ever since the Supreme Court's path-breaking opinion in *Marbury v. Madison* most Americans have quite rightly believed that

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111. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 23 (1998); BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY (2005); Steven G. Calabresi, *The President, the Supreme Court, and the Founding Fathers: A Reply to Professor Ackerman*, 73 U. CHI. L. REV. 469 (2006) (book review).

the federal courts have the last word in properly filed cases or controversies as to what the Constitution means as applied to the parties in those cases or controversies. Alexander Hamilton argued as much in *The Federalist No. 78*, and in the Founding era even Thomas Jefferson who hated the federal courts conceded that they had the last word on properly filed cases or controversies.<sup>112</sup> Jefferson argued that Congress and the President were co-equal constitutional interpreters along with the federal courts, and he thus believed that the President should sign or veto laws, execute laws, and issue pardons based on his own independent interpretation of the Constitution.<sup>113</sup> Jefferson thus believed in what we today call Departmentalism—the view that all three branches of the government must and do interpret the Constitution when they exercise their assigned powers. But, even Jefferson acknowledged that the federal courts have the last word on cases or controversies that are properly before them.

Other Departmentalist opponents of judicial supremacy have followed Jefferson's lead. James Madison, Andrew Jackson, Abraham Lincoln, Franklin D. Roosevelt, and Ronald Reagan all claimed the political branches had co-equal status in enforcing the constitution with the courts.<sup>114</sup> But, they all also conceded that the courts had the last word as to the litigants whose cases or controversies were before them. Andrew Jackson is sometimes said to have once said in a case involving the rights of Native Americans that “John Marshall has made his decision now let him enforce it,” but most historians today do not believe Jackson ever said this. In any event, there is a widespread consensus that if Jackson did ever say this he was wrong in saying it and his utterance has been repudiated by the unbroken practice of his successors.

Professor Michael Stokes Paulsen claims that President Abraham Lincoln asserted a presidential power to overturn Supreme Court judgments in *Ex Parte Merryman*—an 1861 case where Lincoln declined to release a Confederate terrorist, John Merryman, to whom Chief Justice Roger B. Taney had granted a writ of habeas corpus.<sup>115</sup>

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112. ALEXANDER HAMILTON, *THE FEDERALIST NO. 78*; Letter from Thomas Jefferson to Charles Hellstedt (Feb. 14, 1791), in 8 *THE WRITINGS OF THOMAS JEFFERSON* 126–27 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904) (“[T]he Constitution of the United States having divided the powers of government into three branches, legislative, executive, and judiciary, and deposited each with a separate body of magistracy, forbidding either to interfere in the department of the other, the executive are not at liberty to intermeddle in [a] question [that] must be ultimately decided by the Supreme Court.”).

113. See Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in 11 *THE WRITINGS OF THOMAS JEFFERSON* 50–51 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904); see also Letter from Thomas Jefferson to George Hay (June 2, 1807), in 11 *THE WRITINGS OF THOMAS JEFFERSON* 213–16 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904).

114. PAULSEN ET AL., *THE CONSTITUTION OF THE UNITED STATES* 219–38 (2010).

115. *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861).



But Paulsen's reading of Lincoln's claim of power is almost certainly wrong because Lincoln did otherwise follow court judgments won by individual litigants including ones like *Dred Scott v. Sandford*,<sup>116</sup> which he strongly disagreed with. Lincoln's claim of power in *Ex Parte Merryman* coupled with his support for execution of the judgment in *Dred Scott* shows that at most Lincoln thought that the State of Maryland where John Merryman was arrested was in a state of martial law in the spring of 1861 and that the civil courts should be considered as being closed. Congress evidently agreed since it retroactively approved everything Lincoln had done in the spring of 1861 including suspending the writ of habeas corpus. Had Congress not agreed with Lincoln, it could have impeached him for defying Taney's judgment, and the fact it never considered doing so means Lincoln's disposition of Merryman's case as arising under martial law was correct.

Only one law professor out of several thousand, to my knowledge, has denied that federal court judgments as to individual litigants in cases or controversies properly before them are binding on the executive and legislative branches. That law professor is Michael Stokes Paulsen, my co-author and good friend.<sup>117</sup> Paulsen thinks the President can exercise his own independent constitutional judgment in deciding whether or not to execute court judgments. In Paulsen's view, if a person violates say the federal partial birth abortion act and a court holds the act unconstitutional the President can nonetheless arrest and imprison that person if the President disagrees with the court as to that case or controversy.

I have previously written a short essay in which I explain why I think Professor Paulsen is wrong.<sup>118</sup> First, the courts do not have the power to issue advisory opinions. If presidents could decide for themselves whether or not to implement court judgments then court opinions would be advisory. We know the Framers deliberately did not give the federal courts the power to issue advisory opinions. In *Hayburn's Case* in the 1790's, the federal courts held they could only exercise judicial power where in doing so there was a substantial likelihood that their ruling would make a difference in the real world. The Framers must therefore have understood court judgments as being binding as to their execution by the President and the executive branch.

Second, the President may not under the Fifth Amendment deprive

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116. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

117. Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 84, 88-99 (1993).

118. Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421, 1425 (1999); see also Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191 (2001).

any person of life, liberty, or property without due process of law. It was well settled in 1789 and is even clearer today that litigants have a property right in their court judgments. Thus, a Paulsen-like presidential power to deprive people of the value of their court judgments is a violation of the due process clause.

Finally, even if Paulsen was right that Andrew Jackson and Abraham Lincoln on one occasion did not follow a court judgment they were bound to follow, this that would not change the fact that for 223 years presidents have in all but two instances acted as if they were bound by court judgments. Such an overwhelmingly followed practice must be constitutional if practice counts for anything in constitutional law, which I think it does. Paulsen is thus just plain wrong in his claim that Presidents can refuse to execute court judgments that they disagree with on constitutional grounds.

This then raises the next question, which is whether Congress can overturn court judgments in particular cases or controversies that were properly before the courts? The U.S. Supreme Court famously answered that question in Justice Antonin Scalia's opinion in *Plaut v. Spendthrift Farm*.<sup>119</sup> The Court ruled in that case that Congress may not retroactively require courts to reopen final judgments in cases that they had previously decided. Justice Scalia, writing for six of the nine justices, said quite rightly that Congress had violated the separation of powers by telling courts retroactively to reopen judgments. *Plaut* thus is a recent Supreme Court holding of six justices that Congress may not interfere with the courts' disposition of properly filed, individual cases or controversies.

A question that *Plaut* does not dispose of is whether Congress can enact laws pursuant to its Section 5 power to enforce the Fourteenth Amendment in a way that contradicts a Supreme Court interpretation of Section 1 of the Fourteenth Amendment in another case or controversy. This issue reached the Supreme Court in *City of Boerne v. Flores* in 1997.<sup>120</sup> The Supreme Court had previously held in 1990 in a 5-to-4 ruling in *Employment Division v. Smith*<sup>121</sup> that the Free Exercise Clause of the First Amendment as incorporated by Section 1 of the Fourteenth Amendment forbade only laws that discriminated on their face against religion and not those that were facially neutral but which had a disparate impact. Congress disagreed. By near unanimous votes in both the Senate and the House of Representatives, Congress adopted and President Clinton signed the Religious Freedom Restoration Act (RFRA)—a statute that was plainly designed on its face to overrule

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119. 514 U.S. 211 (1995).

120. 521 U.S. 507 (1997).

121. 494 U.S. 872 (1990).

*Employment Division v. Smith*. The Supreme Court heard a subsequent cases or controversy, *City of Boerne v. Flores*, in which the litigant asked it to give effect to RFRA and not to its precedent in *Employment Division v. Smith*. The Supreme Court held that RFRA, as it applied to the states, was unconstitutional because Congress could not use its power under Section 5 to enforce the Fourteenth Amendment to change the meaning the courts had given to Section 1.

*City of Boerne v. Flores* squarely holds that Congress cannot enact laws pursuant to its Section 5 power to enforce the Fourteenth Amendment in a way that contradicts a prior Supreme Court interpretation of Section 1 of the Fourteenth Amendment in another case or controversy like *Employment Division v. Smith*. As I have previously written, *City of Boerne v. Flores* is correct as an interpretation of the scope of Congress's Section 5 power, but wrongly decided on the facts because *Employment Division v. Smith* is wrong as to the original meaning of the incorporated Free Exercise Clause and of what the Supreme Court calls the Equal Protection Clause.<sup>122</sup> *City of Boerne v. Flores* thus squarely and correctly holds that Congress may not by statute change the meaning the Supreme Court has given to any portion of the Constitution including the Fourteenth Amendment. This ruling reflects the fact that while Congress has the power by a two-thirds vote of both Houses to overrule a presidential veto, it does not have a similar power to overrule Supreme Court decisions with which it disagrees. Separation of powers and judicial independence stop Congress from being able to overrule the Supreme Court by statute.

The issue of congressional power to overrule by statute a Supreme Court decision again reached the Supreme Court in 2000 in *Dickerson v. United States*.<sup>123</sup> *Dickerson* involved a congressional effort by statute to overrule the Supreme Court's decision in *Miranda v. Arizona* that required that criminal defendants be given a *Miranda* warning once they were taken into custody prior to police interrogation.<sup>124</sup> Two years after *Miranda* was handed down, Congress passed a law, which directed the courts to admit statements of criminal defendants if they were made voluntarily even if they had received no *Miranda* warning. *Dickerson* sought to suppress statements that he had made to the FBI prior to receiving his *Miranda* warning and the district court suppressed *Dickerson's* statements. The Fourth Circuit reversed, holding that the congressional statute overturning *Miranda* was good law,<sup>125</sup> and the U.S. Supreme Court then reversed the Fourth Circuit.

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122. Calabresi & Salander, *supra* note \*.

123. 530 U.S. 428 (2000).

124. 384 U.S. 436 (1966), *superseded by statute*, 18 U.S.C. § 3501.

125. *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000).

Chief Justice Rehnquist said in his opinion for seven of the nine justices of the Supreme Court that the rule of *Miranda* was a constitutional rule which the federal courts had applied for decades to state court decisions which they had reviewed and that Congress could not by statute overturn an established Supreme Court ruling like the one in *Miranda*. The opinion was especially startling to many observers of the Supreme Court because it came from Chief Justice Rehnquist who was well known for his opposition to *Miranda* and for his efforts to limit *Miranda* as a precedent. Rehnquist obviously thought that the principle that Congress cannot overturn Supreme Court decisions by statute was more important than getting rid of *Miranda*. I agree with Chief Justice Rehnquist that Congress cannot overturn Supreme Court decisions by statute, but I disagree with the holding in *Dickerson* because I disagree with the holding in *Miranda*.

We have thus seen that in three very important recent cases Rehnquist has held that Congress may not overturn Supreme Court decisions by passing a statute. I want now to turn to the question of whether Congress had the power to overturn the holding of *South-Eastern Underwriters* that the buying and selling of insurance across state lines was commerce by passing the McCarran–Ferguson Act. The question that is raised here is whether in Dormant Commerce Clause cases, Congress somehow has the power it lacks under Section 5 of the Fourteenth Amendment to overturn Supreme Court doctrines and precedents with which Congress disagrees?

The Supreme Court first considered the question of congressional power to overrule the Dormant Commerce Clause in Justice Benjamin Curtis's famous opinion in *Cooley v. Board of Wardens*.<sup>126</sup> I will draw here in my discussion of *Cooley* and of the Dormant Commerce Clause from Sullivan & Gunther's classic casebook on federal constitutional law.<sup>127</sup> In *Cooley v. Board of Wardens*, a Pennsylvania law of 1803 required that ships entering and departing from the port of Philadelphia hire a local pilot to direct their trip through the harbor.<sup>128</sup> A federal statute enacted by Congress in 1789 said that:

[A]ll pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing law of the states, respectively, wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress.<sup>129</sup>

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126. *Cooley v. Bd. of Wardens of Port of Phila.*, 53 U.S. 299 (1851).

127. GERALD GUNTHER & KATHLEEN SULLIVAN, *CONSTITUTIONAL LAW* 251–52 (15th ed. 2004).

128. *Id.* at 251–55.

129. *Id.*

The Supreme Court had ruled previously in *Gibbons v. Ogden* that Congress's commerce power included a congressional power to regulate navigation. Moreover, in *Gibbons*, Chief Justice John Marshall strongly implied that the federal commerce power was an exclusive national power and that it, of its own force, preempted states laws that regulated either commerce or navigation among the several states.<sup>130</sup> Since the Pennsylvania law of 1803 regulated navigation among the states in entering the port of Philadelphia, it was arguably preempted by the Constitution.

In a famous opinion, Justice Benjamin Curtis gave birth to the modern Dormant Commerce Clause doctrine by saying two things of great importance. First, Justice Curtis said that

If the States were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act [of Congress in 1789] could not confer upon them power thus to legislate. If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power. And yet this act of 1789 gives its sanction only to laws enacted by the States.

Justice Curtis concludes from this, quite correctly, that the congressional statute did not and could not authorize the States to regulate commerce among the states, but that it instead reflected Congress's recognition that pilotage into and out of state ports was not interstate commerce or navigation within the meaning of the Commerce Clause.<sup>131</sup> Chief Justice John Marshall in *Gibbons v. Ogden* famously distinguished between commerce and navigation among the States, as to which Congress had exclusive power, and wholly intrastate commerce or navigation that the States could regulate. In *Gibbons*, the issue was the constitutionality of a New York State law granting a monopoly on an interstate commercial ferry service between New York City and Elizabethtown, New Jersey. Chief Justice Marshall quite properly struck this monopoly down because it impeded buying and selling in navigation between the States of New York and New Jersey.

In *Cooley v. Board of Wardens*, however, Congress itself had recognized that wholly intrastate navigation by pilots into and out of particular ports was intrastate navigation and not navigation among the several States.<sup>132</sup> Justice Curtis agreed with this congressional determination and said that:

Either absolutely to affirm, or deny that the nature of this power requires

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130. *Id.* at 244–50.

131. GUNTHER & SULLIVAN, *supra* note 127, at 250–55.

132. *Id.*

exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really [only] applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain . . . .

Viewed in this light, so much of this act of 1789 as declares that pilots shall continue to be regulated 'by such laws as the [S]tates may respectively hereafter enact for that purpose,' [is] instead of being held to be inoperative, as an attempt to confer on the [S]tates a power to legislate, of which the Constitution had deprived them, is allowed an appropriate and [manifest] signification. It manifests the understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation.<sup>133</sup>

In other words, Justice Curtis did not say in *Cooley v. Board of Wardens* that Congress could delegate to the states the power to regulate commerce among the states. He said instead that Congress had by statute recognized a fact which he as a judge thought was true which was that navigation into and out of a state port was intrastate navigation and was not navigation among the states as described by Chief Justice Marshall in *Gibbons v. Ogden*.<sup>134</sup>

Gunther and Sullivan explain that the issue of congressional power to override judicial holdings striking down state laws for intruding on Congress's exclusive commerce power next arose in 1890.<sup>135</sup> The Supreme Court held in *Leisy v. Hardin* that Iowa had intruded on Congress's exclusive power over commerce among the states when it passed a law banning the sale of alcohol which law was applied to beer brewed in Illinois and offered for sale in Iowa.<sup>136</sup> Chief Justice Fuller applied the test in *Cooley* and said that the sale of alcohol across state lines was commerce among the states and that Congress had the exclusive power to regulate such commerce.<sup>137</sup>

Congress responded a few months later by passing the Wilson Act, which said that alcohol

transported into any [s]tate or [t]erritory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such [s]tate or [t]erritory be subject to the operation and effect of the laws of such [s]tate

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133. *Cooley v. Bd. of Wardens of Port of Phila.*, 53 U.S. 299, 319–20 (1851). GUNTHER & SULLIVAN, *supra* note 127, at 250–55.

134. 22 U.S. 1 (1824).

135. GUNTHER & SULLIVAN, *supra* note 127, at 333–35.

136. *Leisy v. Hardin*, 135 U.S. 100 (1890).

137. GUNTHER & SULLIVAN, *supra* note 127, at 333–34.

or [t]erritory enacted in the exercise of its police powers, to the same extent and in the same manner as though such . . . liquors had been produced in such [s]tate or [t]erritory . . . .<sup>138</sup>

In 1891, the Supreme Court held in *Wilkerson v. Rahrer* that the states could now apply their prohibition laws to alcohol sold in commerce among the states once the alcohol arrived in the Prohibitionist State.<sup>139</sup>

The Court in *Wilkerson* explained that:

[C]ongress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the [S]tates, or to adopt state laws . . . . [It] imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction . . . . No reason is perceived why, if [C]ongress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.<sup>140</sup>

The *Wilkerson* Court like the *Cooley* Court was thus crystal clear in saying that Congress could, by law, specify where commerce among the several states ends and where wholly intrastate commerce and police powers begin, but it did not say that Congress could authorize the states to regulate commerce among the several states.

In 1913, Congress passed the Webb–Kenyon Act, which as Gunther and Sullivan explain, forbade the shipment of alcohol into a state if it was to be “in any manner used in violation of any law of such State.”<sup>141</sup> The Supreme Court upheld this federal law in *The Distilling Company v. Western Maryland Railroad Co.* saying that the act was “but a larger degree of exertion of the identical power which was brought into play in the [Wilson Act].”<sup>142</sup> Gunther and Sullivan note that “The substance and much of the language of the Webb–Kenyon Act was written into the Twenty-[F]irst Amendment, which also repealed the Eighteenth [Amendment which had enacted Prohibition].”<sup>143</sup> Thus, on the eve of the New Deal crisis of 1937, the Supreme Court was on record saying in *Cooley v. Board of Wardens* that Congress could not delegate its power to regulate commerce among the states, and the Twenty-First Amendment was in place to provide specific authorization for Congress to ban the importation of alcohol into any state in violation of state law. Prior to 1937, Congress could decline to regulate commerce that the

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138. Wilson Act, 27 U.S.C. § 121 (1890).

139. GUNTHER & SULLIVAN, *supra* note 127, at 334; *Wilkerson v. Rahrer*, 140 U.S. 545 (1891).

140. *Id.* at 561–64. GUNTHER & SULLIVAN, *supra* note 127, at 334.

141. GUNTHER & SULLIVAN, *supra* note 127, at 334.

142. *Id.* (citing *James Clark Distilling Co. v. W. Md. R. Co.*, 242 U.S. 311, 330 (1917)).

143. *Id.* at 334 n.1.

Supreme Court agreed was wholly intrastate, but it could not overturn Supreme Court Dormant Commerce Clause holdings.

In *United States v. South-Eastern Underwriters Association*, the Supreme Court held in 1944 that the Sherman Antitrust Act applied to the insurance industry, which it said was a “nationwide business” involving the buying and selling of insurance.<sup>144</sup> The Court held as we saw above that the Commerce Clause allowed Congress to regulate the buying and selling of insurance, and it in the process overruled a contrary holding in *Paul v. Virginia*. By 1944, the domestic New Deal was at an end because President Franklin D. Roosevelt had lost his governing majority as to domestic issues. In 1945, a conservative Congress responded to *South-Eastern Underwriters* by passing the McCarran–Ferguson Act. Gunther and Sullivan explain that this act declared that:

‘[T]he continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.’ [Section 2 of the Act further provided that] ‘(a) The business of insurance [shall] be subject to the laws of the several States which relate to the regulation or taxation of such business. (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.’<sup>145</sup>

The McCarran–Ferguson Act on its face went way beyond *Cooley v. Board of Wardens* and the alcohol prohibition cases discussed above which are authorized today by the Twenty-First Amendment. The McCarran–Ferguson Act does not seek to draw a plausible line between interstate and intrastate commerce as the Pilotage Act in *Cooley* did or as the Wilson Act did as to sales of alcohol. The McCarran–Ferguson Act instead overturned Justice Curtis’s holding in *Cooley* that Congress could not delegate to the state its national and exclusive power to regulate commerce among the several states. Readers should be reminded at this point that Justice Curtis said in *Cooley* that:

If the [S]tates were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this [pilotage] act [of Congress in 1789] could not confer upon them power thus to legislate. If the Constitution excluded the [S]tates from making any law regulating commerce, certainly Congress cannot re-grant, or in any

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144. 322 U.S. 533, 546 (1944).

145. GUNTHER & SULLIVAN, *supra* note 127.



manner re-convey to the States that power.<sup>146</sup>

Justice Curtis was right, and the supporters of the McCarran–Ferguson Act were wrong. Congress cannot delegate to the fifty states its power to regulate commerce among the states.

Unless *South-Eastern Underwriters* was wrong in holding that the buying and selling of insurance, which was already in 1944 a nationwide business was not “commerce among the several States,” then the McCarran–Ferguson Act itself must exceed the scope of federal power by seeking to delegate to the states a power that the Constitution assigns to the federal government. The McCarran–Ferguson Act looked at in context seems to be much like the federal laws that the Supreme Court held unconstitutional in *Plaut v. Spendthrift Farms*; *City of Boerne v. Flores*; and *United States v. Dickerson*. Just as those acts of Congress had sought unconstitutionally to overturn a Supreme Court ruling, so too did the McCarran–Ferguson Act seek unconstitutionally to overturn *South-Eastern Underwriters*. Congress gave the states carte blanche to regulate the insurance industry in the McCarran–Ferguson Act even in ways that openly discriminate against commerce among the several states. Congress cannot do this. It has no enumerated power to cartelize a nationwide industry in which buying and selling is going on and turn it into fifty state-run oligopolies or monopolies.

The Supreme Court upheld the constitutionality of the McCarran–Ferguson Act in *Prudential Insurance Co. v. Benjamin*.<sup>147</sup> Justice Wiley Rutledge wrote for a unanimous New Deal Supreme Court that if Congress and the states wanted to use the Commerce clause to set up fifty state insurance cartels there was nothing in the Constitution that precluded that. The issue in *Prudential Insurance Co. v. Benjamin* was the constitutionality of a discriminatory tax that South Carolina had levied against Prudential, a New Jersey corporation. No similar tax was levied against South Carolina corporations. It was undisputed in this case that the South Carolina tax would have violated the Dormant Commerce Clause but for the McCarran–Ferguson Act.

Justice Rutledge was of the view that Congress and the states could legally get together and set up forty-eight state insurance cartels whereby the states could legally discriminate against out-of-state insurers. Justice Rutledge thought that Congress’s power under the Commerce Clause was plenary especially because in the case of the McCarran–Ferguson Act both the democratic Congress and the democratic process in the forty-eight states wanted the state insurance

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146. *Cooley v. Bd. of Wardens of Port of Phila.*, 53 U.S. 299, 318 (1851).

147. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946); *see also* *Robertson v. California*, 328 U.S. 440 (1946) (upholding state regulations of insurance backed by criminal penalties as well as the discriminatory state taxation upheld in *Prudential*); GUNTHER & SULLIVAN, *supra* note 127, at 335–36.

cartels. He also thought that the judicial application of the Dormant Commerce Clause was more of an art than a science and that Congress should therefore have the power to overrule Supreme Court Dormant Commerce Clause holdings. As Justice Rutledge put it in his opinion:

[The Dormant Commerce Clause] is not the simple, clean-cutting tool supposed. Nor is its swath always correlative with that cut by the affirmative edge, as seems to be assumed. For cleanly as the commerce clause has worked affirmatively on the whole, its implied negative operation on state power has been uneven, at times highly variable. More often than not, in matters more governable[ed] by logic and less by experience, the business of negative implication is slippery. Into what is thus left open for inference to fill divergent ideas of meaning may be read much more readily than into what has been made explicit by affirmation . . . . That the clause imposes some restraint upon state power has never been doubted. For otherwise the grant of power to Congress would be wholly ineffective. But the limitation not only is implied. It is open to different implications of meaning. And this accounts largely for variations in this field continuing almost from the beginning until now.<sup>148</sup>

Justice Rutledge was right of course that some Dormant Commerce Clause cases present close calls. *Cooley v. Board of Wardens* was such a case since federal commerce power over the *Gibbons v. Ogden* interstate ferry service had been held to be a federal power while the use of state and local pilots to guide ships in and out of major state ports was found in *Cooley* itself (with guidance from an Act of Congress) to be a state power. But it does not follow that just because *Cooley*, the Wilson Act, and the *Rahrer* case were close calls that *Prudential Insurance Co. v. Benjamin* and the McCarran–Ferguson Act were also a close call as to which the Supreme Court ought to have totally deferred to Congress!

The McCarran–Ferguson Act does not, like the federal pilotage Act of 1789 in *Cooley*, draw a fine line between intrastate and interstate navigation. It bluntly and outrageously gives the states carte blanche to discriminate against out-of-state insurers both by taxing them and by regulating them differently from in-state insurers. What the Supreme Court does in *Prudential Insurance Co. v. Benjamin* is to turn the Commerce Clause, which on its face guarantees free trade among the several states, into a power for Congress to authorize the states to in effect set up customs booths and tariffs for insurers every time they try to buy and sell across state boundary lines in the interstate market. This turns the Commerce Clause on its head as Michael Greve has argued in other contexts in his new book *The Upside-Down Constitution*.<sup>149</sup> Justice Rutledge is simply wrong when he argues that “[t]he commerce

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148. *Prudential Ins. Co.*, 328 U.S. at 418–19.

149. GREVE, *supra* note 74.

clause is in no sense a limitation upon the power of Congress over interstate and foreign commerce.” The power to regulate commerce among the States is a power to enhance free trade among the States and not a power to establish forty-eight state cartels.

Under Justice Rutledge’s reading, Congress could tomorrow cartelize the interstate market in groceries by giving the states carte blanche to license and discriminate in taxation and by regulation against out-of-state grocery stores. The result would be a grocery market with fifty separate Whole Foods grocery stores—one for each state. Such a cartelization of the market for groceries would send prices through the roof and would result in a lower quality of service. This is exactly what has happened with health insurance. The power to regulate commerce among the states is not a power to create cartels or monopolies as I shall explain in more detail below. It is a power to remove state barriers to trade, not to create them.

Shortly after *Prudential Insurance Co. v. Benjamin* was handed down, Professor Noel Dowling tried to defend Justice Rutledge’s opinion by arguing that:

Congress sometimes desires to give the states a helping hand by consenting to the application of their laws. In that situation the whys and wherefores of the states’ difficulties become of some interest, possibly also of some consequence. What we are dealing with is a very fine phase of federalism . . . . [O]n one theory or another, Congress can enable the states to enforce laws which otherwise would not be acceptable in the courts.<sup>150</sup>

Professor Dowling concedes that even in the New Deal era of revolutionary constitutional change, the holding of *Prudential Insurance Co. v. Benjamin*, that Congress could by statute overturn a Supreme Court opinion, was a breathtaking assertion of power. As Professor Dowling put it in summarizing the effects of the McCarran–Ferguson Act:

Taken as a whole, nothing just like this had ever before been written on the statute books. It includes a three-ply pronouncement: (a) declaration of policy in favor of the continued regulation and taxation of the insurance business by the several states; (b) denial of the applicability of the doctrine of the ‘silence of Congress’ to upset such regulation or taxation; (c) formulation of a substantive rule that in respect of regulation and taxation the business of insurance ‘shall be subject to the laws’ of the

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150. Noel T. Dowling, *Interstate Commerce and State Power—Revised Version*, 47 COLUM. L. REV. 547, 555 (1947). Dowling was the original editor of what has now become the GUNTHER & SULLIVAN casebook, which is cited at note 125.

several states.<sup>151</sup>

Professor Dowling praises Justice Rutledge's opinion in *Prudential Insurance Co. v. Benjamin* for recognizing that "coordinated action [between the nation] and the states" allows Congress and the States to "achieve legislative consequences, particularly in the great fields of regulating commerce and taxation, which, to some extent at least, neither could accomplish in isolated exertion." Surely, Professor Dowling is right that only Congress and the states can together set up a state insurance cartel, but why that is a good thing is harder to say! Thus, Professor Dowling admits that "This conception of the power of Congress troubles me [especially the assertion] that Congress can gain any increment of power as a result of state action . . . ."<sup>152</sup>

Professor Dowling concludes that Justice Rutledge's claim that when the Supreme Court has previously upheld

the sustaining of Congress' overriding action [in Dormant Commerce Clause cases, there has been] something beyond correction of erroneous factual judgment in deference to Congress' presumably better-informed view of the facts, and also beyond giving due deference to its conception of the scope of its powers . . . .

Dowling ends by saying:

At this point it seemed almost as if Mr. Justice Rutledge were leading to a mountain top from which he would point out the 'something beyond' which really went to the root of the matter. But after looking at this point and at that on the broad landscape of his opinion, I was still not sure that my vision had caught the 'something beyond.'<sup>153</sup>

The reason that Professor Dowling cannot see in Justice Rutledge's opinion in *Prudential Insurance Co. v. Benjamin* any reason for the Supreme Court's allowance of congressional overruling of Dormant Commerce Clause opinions beyond Congress' occasional better information as to the facts is because there is no other reason for allowing Congress to override the Dormant Commerce Clause.

Congressional overruling of the Dormant Commerce Clause to allow the states to discriminate explicitly in taxation and regulation against out-of-state insurers and in favor of in-state insurers is unconstitutional. The commerce power is a power to make commerce regular by eliminating tariffs and customs barriers at state lines and by enforcing the public policy of the United States as to those goods, which are travelling in commerce among the several states. The commerce power cannot be used to overturn Supreme Court opinions any more than other

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151. Dowling, *supra* note 150, at 556.

152. *Id.*

153. *Id.* at 557.

congressional powers could be used to: 1) reopen past courts judgments; 2) to overturn *Employment Division v. Smith*; or 3) to overturn *Miranda v. Arizona*. Congress lacks the enumerated power to override Supreme Court decisions the way it can override presidential vetoes by a two-thirds vote of both Houses. Congress also has no enumerated power to create government cartels and monopolies outside the area of copyright law and patents. It is to that subject that I will now turn.

#### IV. CONGRESS HAS NO ENUMERATED POWER TO CREATE MONOPOLIES OTHER THAN COPYRIGHTS AND PATENTS

The Constitution addresses the subject of congressional power to create monopolies in Article I, Section 8, Clause 8: “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>154</sup>

This Clause is the only place in which the Constitution confers a power to create monopolies, oligopolies, or cartels on Congress, and there is ample evidence that the Framers of the Constitution did not mean for it to allow Congress to create monopolies, oligopolies, or cartels in other contexts.

Prior to 1787, English Kings and Queens had frequently conferred monopolies on their favorite courtiers by issuing them exclusive corporate charters to conduct a certain kind of business or to do business in a certain place. There was no general law of incorporation so if someone, for example, wanted to get a corporate charter to be the exclusive seller of playing cards in London or to form the Massachusetts Bay Colony or to incorporate Dartmouth College, he had to go to the King of England to get such a corporate charter.

The delegates to the Philadelphia Constitutional Convention debated whether to give Congress the power to issue corporate charters (which might have been monopolies), and they decided against giving Congress that power. In 1787, the states had inherited the King’s power to issue corporate charters, and they were unwilling to surrender this prerogative to Congress. A proposal to give Congress the power to charter corporations or monopolies would have aroused opposition from financial interests already established in New York City or Philadelphia. A proposal to give Congress the power to charter corporations for the construction of canals was thus voted down by the Philadelphia Convention by a vote of eight to three.<sup>155</sup>

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154. U.S. CONST. art. I, § 8, cl. 8.

155. 2 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 615–16 (Farrand ed. 1937).

James Madison favored giving Congress the power to charter corporations in 1787 and perhaps even the power to create some monopolies, but he clearly realized that the Constitution of 1787, as written and adopted, did not give this power to the federal government. He thus opposed the constitutionality of the corporate charter for the Bank of the United States. Secretary of State Thomas Jefferson agreed with Congressman Madison that the Bank was unconstitutional.<sup>156</sup>

When President Andrew Jackson ultimately vetoed the renewal of the Bank, in 1832, a principle reason given in his veto message for the veto was that the bank had a monopoly corporate charter which, in Jackson's view, Congress had no power to issue. Jackson killed off the Bank in the 1830's, and it was not resurrected until Woodrow Wilson created the Federal Reserve Board as an executive branch entity in 1913. Even today, Corporate Law, as a field, is an area of state and not federal law, and all major U.S. corporations—both for profit corporations and not-for-profit corporations—are chartered at the state level. The Founding Era rejection of a congressional power to charter corporations or to create monopolies, oligopolies, or cartels outside the context of patent and copyright law could not be clearer.

As it happens, there is a long history in English and American constitutional thought of opposition to government grants of monopoly power outside the context of patents and copyrights. This history is retold in a recent article, which I have co-authored with Larissa Price Leibowitz entitled *Monopolies and the Constitution: A History of Crony Capitalism*.<sup>157</sup> This article is posted on SSRN and has been published in 36 *Harvard Journal of Law and Public Policy* 983 (2013), and I will therefore not repeat here what Ms. Leibowitz and I have already written elsewhere, but I do want to mention a few highlights and will draw on it extensively in the rest of this article.

The Framers of the U.S. Constitution inherited their distaste for government grants of monopoly from England where such figures as Queen Elizabeth I and King James I issued monopolies to their favorite courtiers usually in exchange for money that they could not otherwise get from Parliament. Queen Elizabeth had claimed that the legality of her monopolies could only be adjudicated in the Court of Star chamber, a fortress of royal power, but Parliament became so angry about her grants of monopoly that Parliament came to the verge of passing a bill that would have outlawed royal grants of monopoly forever. Queen Elizabeth deflected this bill by agreeing to allow some of the least popular monopolies she had granted as well as any new monopolies she

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156. PAULSEN ET AL., *supra* note 114, at 68–71 (2010).

157. Calabresi & Price, *supra* note \*.

might grant to be adjudicated for legality in the common law courts. As a result of this compromise, there emerged the famous decision of the Court of King's Bench in *Darcy v. Allen*, which is known popularly as the Case of the Monopolies.<sup>158</sup>

Edward Darcy sued Thomas Allen for infringing on his monopoly right and patent to be the exclusive producer, importer, and seller of playing cards in England. The Court held that the monopoly was void at common law. The opinion of the Court was reported by Sir Edward Coke, and the Court said that:

All Trades . . . which avoid idleness . . . and exercise men and youths in labor for the maintenance of them and their Families, and for the increase of their livings, to serve the Queen if need be were profitable for the Commonwealth; and therefore the grant to the Plaintiff to have the sole making of them is against the Common Law, and the benefit and liberty of the subject . . . .

The sole Trade of any Mechanical Artifice, or any other Monopoly is not only a damage and prejudice to those who exercise the same Trade, but also to all other subjects, for the end of all these Monopolies is for the private gain of the Patentees; and although provisions and cautions be added to moderate them; yet . . . it is meer folly to think there is any measure in mischief or wickedness . . . .

[Monopoly leads] to the impoverishing of divers Artificers and others, who before by labor of their hands in their Art or Trade had kept themselves and their families, who now of necessity shall be constrained to live in idleness and beggary.

[As a result of monopoly] the price of [a] commodity shall be raised, for he who hath the sole selling of any commodity, may make the price as he pleaseth . . . . That after a Monopoly [has been] granted, the Commodity is not so good and merchantable as it was before; for the patentee having the sole trade, regardeth only his private, and not the publicke weale.<sup>159</sup>

*Darcy v. Allen*, "The Case of the Monopolies," was a scathing rejection of royal power to issue monopolies at the start of the Seventeenth Century. The case quickly became a key bone of contention between the Stuart Kings of England and Parliament.

King James I continued to issue monopolies notwithstanding the decision of the Court of King's Bench in *Darcy v. Allen* that royal monopolies were illegal, and Sir Edward Coke who was by then Lord Chief Justice of England and head of the Court of King's Bench continued to strike them down. James I eventually fired Coke from his

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158. *Darcy v. Allen*, (1602) 77 Eng. Rep. 1260 (K.B.); 11 Co. Rep. 84b.

159. *Id.*

judicial office both because of Coke's opposition to royal monopolies and because Coke had enjoined some newly created royal courts of equity. Coke returned briefly to private life before being elected to the House of Commons where he ultimately helped draft the famous act of Parliament known as the Petition of Right.

James I called his third Parliament in 1621 after years of trying to govern without Parliament, and the first issue on Parliament's agenda was passing a statute to outlaw royal monopolies. The Statute of Monopolies finally passed the House of Commons and the House of Lords in 1624. It said that:

[A]ll Monopolies, and all Commissions, graunts, licences, Charters and lettres Patent heretofore made or graunted, or hereafter to be made or graunted, to anie Person or Persons, Bodies Politique or Corporate whatsoever, of or for the sole Buying, Selling, Making, Worcking, or Using of anie Thing within this Realme, or the dominion of Wales . . . or of any other Monopolies, or of Power, Libertie, or Facultie, to dispence with any others, or to give lycence or tolelracion to doe, use, or exercise anie Thing . . . are altogether contrary to the Laws of this Realme, and soe are and shalbe utterly voyde and of none Effect, and in noe wise to be put in Use or Execution.<sup>160</sup>

James I questioned Parliament's authority to pass the Statute of Monopolies, but he begrudgingly assented to it. Notwithstanding the Statute, James I and his son Charles I continued to issue royal monopolies enforceable in the Court of Star Chamber until the Long Parliament abolished that Court, in 1641, at the start of the English Civil War. Sir John Culpepper said of the royal monopolies of this time that:

They are a nest of wasps—a swarm of vermin which have overcrept the land. Like the frogs of Egypt they have gotten possession of our dwellings, and we have scarce a room free from them. They sup in our cup; they dip in our dish; they sit by our fire. We find them in the dye-fat, wash-bowl, and powdering-tub. They share with the butler in his box. They will not bait us a pin. We may not buy our clothes without their brokage. These are the leeches that have sucked the commonwealth so hard that it is almost [heretical].<sup>161</sup>

The abolition of the royal monopolies became a key tenet of the revolutionaries during the English Civil War along with the abolition of the Court of Star Chamber, the protection of the right of habeas corpus, and the freedom not to be taxed except by Parliament.

The English Civil War ended with the beheading of King Charles I for among other things refusing to follow the law of the land. There

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160. Statute of Monopolies, 21 Jam., c. 3 (1624).

161. Slaughter-House Cases, 83 U.S. 36, 47 (1872) (quoting Sir John Culpepper).



followed a period of dictatorial rule by Oliver Cromwell and eventually, in 1660, the Monarchy was restored under Charles's son, King Charles II, and the House of Lords, which had been abolished, was also restored. The Court of Star Chamber, however, was not restored, in 1660, nor was there any restoration of the claimed royal prerogative power to issue monopolies. Charles II's successor, James II, tried in his three-year reign to reassert royal power to dispense with and suspend statutes like the Statute of Monopolies, and the result was his overthrow in the Glorious Revolution of 1688. Never again after 1641 did an English King or Queen attempt to grant a monopoly.

From 1607 until 1776, Americans were Englishmen, and they passionately believed they were entitled to all the ancient liberties and freedoms of Magna Charta and of the common law including the right to be free of monopolies. The Statute of Monopolies itself did not apply outside of England and Wales, but in 1641 the Puritan Massachusetts Bay colony provided in *The Body of Liberties* that "No monopolies shall be granted or allowed amongst us, but of such new Inventions that are profitable to the Countrie, and that for a short time."<sup>162</sup> The Puritan Colony of Connecticut passed a similar law in 1672.<sup>163</sup> William Penn, the founder of Pennsylvania, wrote in 1687 in *The Excellent Privilege of Liberty & Property Being the Birth-Right of the Free-Born Subjects of England*, that "Generally all Monopolies are against this great [c]harter, because they are against the Liberty and Freedom of the Subject, and against the Law of the Land."<sup>164</sup>

It is important here to recognize that the New England Puritans all had favored Oliver Cromwell in the English Civil War, they had opposed Charles I, and they had admired Sir Edward Coke as a hero because he had stood up against the Stuart kings. The American colonists repeatedly relied in the Seventeenth and Eighteenth Centuries on Sir Edward Coke's declaration in *Dr. Bonham's Case* that the ancient Constitution and the common law governed parliamentary acts, and they argued against the legality of British regulations that were applied to them in violation of the common law. When King James II revoked and abrogated Massachusetts's original colonial charter and attempted to consolidate all the New England colonies in a so-called Dominion of New England, this even "provoked an outspoken claim [of]

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162. THE COLONIAL LAWS OF MASSACHUSETTS 35 (Boston 1890).

163. Oren Bracha, *The Commodification of Patents 1600–1836: How Patents Became Rights and Why We Should Care*, 38 LOY. L.A. REV. 177, 214 n.209 (2004).

164. Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785, 798 (1982) (quoting William Penn as reprinted in A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 621 (1968)).

independence” and Bostonians were said to “hold forth a law book, & “the Authority of the Lord Coke to Justifie their setting up for themselves; pleading the possession of 60 years against the right of the Crown.”<sup>165</sup>

Sir Edward Coke’s name and authority were also used by James Otis in 1761 in *Paxton’s Case* when he challenged the legality under the common law and English Constitution of the general warrants known as writs of assistance. The Stamp Act of 1765 was challenged as having “violated ‘Magna Carta and the natural rights of Englishmen, and therefore[,] according to Lord Coke[, was] null and void.”<sup>166</sup> Sam Adams agreed that “whether Lord Coke has expressed it or not . . . an act of parliament made against Magna Carta in violation of its essential parties, is void.”<sup>167</sup> Thomas Hutchinson, the royal Governor of Massachusetts complained that the colonists take “advantage of a maxim they find in Lord Coke that an Act of Parliament is *ipso facto* void,”<sup>168</sup> while John Adams started his argument that Parliament had no authority over the colonies in “Novanglus” in 1774 with an argument from Coke’s Institutes.<sup>169</sup> As Thomas Barnes writes “Beg the question as to what extent Coke fell in behind Citizen Sam [Adams]—scores of others of our Founding Fathers had no doubt which side he was on and none questioned the magnitude of the aid he gave them.”<sup>170</sup>

Colonial American enthusiasm about Sir Edward Coke and opposition to monopolies was stoked by the English mercantile laws, which granted English merchants monopolies in colonial trade ranging from manufactured goods to all kinds of raw materials. These laws led to the growth of black markets in the colonies, to widespread evasion of taxes, and to increasingly intrusive British searches to catch tax avoiders, which searches themselves infuriated the colonists all over again. A Franklin D. Jones writes:

[T]he efforts of the English government, backed by English merchants and manufacturers, to deny to the Americans the right to compete in foreign markets and to secure the benefits of foreign competition was one of the most potent causes of the American Revolution. The spirit of

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165. Theodore F.T. Plucknett, *Bonham’s Case and Judicial Review*, 40 HARV. L. REV. 30, 62–63 (1926) reprinted in LAW, LIBERTY, AND PARLIAMENT: SELECTED ESSAYS ON THE WRITINGS OF SIR EDWARD COKE 179 (Allen D. Boyer ed., Liberty Fund 2004).

166. Bernard H. Siegan, *Protecting Economic Liberties*, 6 CHAP. L. REV. 43, 50 (2003) (quoting Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 970 (1990)).

167. Thomas G. Barnes, *Introduction to Coke on Littleton*, reprinted in LAW, LIBERTY, AND PARLIAMENT: SELECTED ESSAYS ON THE WRITINGS OF SIR EDWARD COKE 65 (Allen D. Boyer ed., Liberty Fund 2004).

168. Plucknett, *supra* note 165, at 63.

169. Barnes, *supra* note 167, at 25.

170. *Id.*

monopoly which had permeated English business life for centuries and worked injury in so many ways now wrought irreparable harm to the British Empire by bringing about the loss of invaluable dominions and the irrevocable division of the English people.<sup>171</sup>

Consider here the facts of the Boston Tea Party, which was an act taken not only against the British government but also against the East India Company, which had a monopoly over tea importation into the American colonies! Americans did not accept the British claim that they could be taxed without representation in Parliament, and they also deeply resented the East India Company's monopoly. The Boston Tea Party led quite directly to Parliament's decision to close the port of Boston and to adopt the so-called "Coercive Acts," and these Acts led, in turn, to the American Revolution. It is fair to say that the Framers of the U.S. Constitution, in 1787, were steeped in a tradition of hatred for monopolies and of admiration for Sir Edward Coke.

The Philadelphia Convention that wrote the Constitution in 1787 gave Congress the power to regulate trade or commerce and to create monopolies only for limited periods of time for patents and copyrights. There was a widespread understanding in 1787 that Congress should not be able to use its commerce power either to charter corporations or to create monopolies outside the patent and copyright context. As I mentioned above, James Madison proposed during the Philadelphia Convention to give the federal government the power to grant charters of incorporation, but his proposal was voted down because, as Rufus King of Massachusetts argued, it might lead to "mercantile monopolies" as had happened in England before the American Revolution.<sup>172</sup> George Mason also objected to letting Congress have the power to grant corporate charters because such a grant would lead to "monopolies of every sort."<sup>173</sup>

While monopolies outside the patent and copyright context were not explicitly banned by the Constitution, it is quite clear that the Constitution would not have been ratified had the Founding generation understood that the Commerce Clause did in fact give Congress power to create monopolies. Thus, George Mason, who was a leading Anti-Federalist, refused to sign or support the Constitution because he was worried that Congress might use its powers under the Commerce Clause to regulate navigation and trade in favor of the eight northern and eastern states by giving them monopolies in trade to the detriment of the

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171. Franklin D. Jones, *Historical Development of the Law of Business Competition*, 36 YALE L.J. 42, 52 (1926).

172. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 638 (1985).

173. Daniel A. Crane, *Lochnerian Antitrust*, 1 N.Y.U.J. L. & LIBERTY 496, 506 (2005) (citing DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 141 (1990)).

five southern states.<sup>174</sup>

Thomas Jefferson also hated monopolies and wrote to his good friend James Madison saying they should be banned. Jefferson said the following in a letter to Madison after first reading the text of the new Constitution:

I will now add what I do not like. First, the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, *restriction against monopolies*, the eternal and unremitting force of the habeas corpus laws, and trials by jury . . . . Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference.<sup>175</sup>

Jefferson added that:

[It] is better to . . . abolish . . . Monopolies, in all cases, than not to do it in any . . . .[S]aying there shall be no monopolies lessens the incitements to ingenuity . . . but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression.<sup>176</sup>

Madison replied that:

With regard to Monopolies, they are justly classed among the greatest nuisances in Government. But it is clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced? Would it not suffice to reserve in all cases a right to the public to abolish the privilege at a price to be specified in the grant of it?<sup>177</sup>

Jefferson wrote Madison again, after reviewing a draft of the Bill of Rights on August 28, 1789 to say that he would have liked to see the following provision added to the Bill of Rights:

Art. 9. Monopolies may be allowed to persons for their own productions in literature and their own inventions in the arts, for a term not exceeding—years but for no longer term, and for no other purpose.<sup>178</sup>

Jefferson so opposed monopolies that he also opposed the creation of the federal Post Office at least after the fact of its creation and staffing by his Federalist opponents.<sup>179</sup>

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174. Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 339 (2004) (quoting George Mason to this effect).

175. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787) (emphasis added).

176. Nachbar, *supra* note 174, at 340 (alteration in original).

177. 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 617–18 (1971) (quoting a Letter from James Madison to Thomas Jefferson on Oct. 17, 1788).

178. Letter from Thomas Jefferson to James Madison (Aug. 28, 1789).

179. Letter from Thomas Jefferson to James Madison (Mar. 6, 1796), available at [Published by University of Cincinnati College of Law Scholarship and Publications, 2013](http://press-</a></p>
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The Anti-federalist Agrippa wrote in opposition to government grants of monopoly<sup>180</sup> and so did a self-styled “Son of Liberty”<sup>181</sup> and the Federal Farmer.<sup>182</sup> Six states proposed including a provision banning monopolies and special grants of privilege in the federal Constitution to the federal Bill of Rights. These six states included: New Hampshire, Massachusetts, New York, North Carolina, Virginia, and Rhode Island.

All of these proposed anti-monopoly amendments to the Constitution came from the state ratifying conventions, but since the task of writing the federal Bill of Rights in response to the requests for amendments from the states fell to newly elected Congressman James Madison, an anti-monopoly clause was omitted from the federal Bill of Rights. Madison was stubborn, persistent, and successful in keeping an anti-monopoly clause out of the Founders Constitution!<sup>183</sup>

Madison, however, personally recognized the evil of monopoly on March 29, 1792 when he wrote:

That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.<sup>184</sup>

So, why did James Madison, who was a friend of private property and of markets, oppose adding an anti-monopoly clause to the Constitution or the Bill of Rights?

Donald Lutz argues, and I think he proves conclusively, that the rights James Madison put in the federal Bill of Rights were not drawn from the English Bill of Rights of 1689 nor were they drawn from the resolutions of the states when they ratified the Constitution with a request for changes.<sup>185</sup> Instead, Congressman James Madison drafted the federal Bill of Rights so that it would look as much as possible like the State Declarations and Bills of Rights that had been adopted between 1776 and 1789. Madison quite deliberately excluded from the federal

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[pubs.uchicago.edu/founders/documents/a1\\_8\\_7s4.html](http://pubs.uchicago.edu/founders/documents/a1_8_7s4.html).

180. James P. Philbin, *The Political Economy of the Antifederalists*, 11 J. OF LIBERTARIAN STUDIES 79, 104 (1994) (citing HERBERT J. STORING, 4 THE COMPLETE ANTI-FEDERALIST 80, 81, 104 (1981)).

181. *Id.* at 104–05.

182. *Id.* at 105.

183. Calabresi & Price, *supra* note \*, at 34.

184. James W. Ely, Jr., *To Pursue Any Lawful Trade or Avocation: The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917, 931 (quoting Madison) (emphasis added).

185. Donald S. Lutz, *The States and the U.S. Bill of Rights*, 16 S. ILL. U. L.J. 251, 251–58 (1992); Donald S. Lutz, *The State Constitutional Pedigree of the U.S. Bill of Rights*, PUBLIUS 22, 19–20, 27–29 (1992).

Bill of Rights anything that would diminish Congress's enumerated powers including the commerce power.

Madison defanged the Anti-Federalist opposition to the Constitution by giving the Anti-Federalist only the mere parchment barriers that he had made fun of in *The Federalist Papers* and that were in the State Bills of Rights.<sup>186</sup> He added no new rights and took away from Congress none of its enumerated power. Since at the time of the Framing only two states out of thirteen had anti-monopoly clauses in their state Bills of Rights, Madison may have felt no political need to add such a clause to the federal Bill of Rights. He also had favored a federal power to charter corporations at the Philadelphia Convention and may have felt reluctant to add an anti-monopoly clause because of a thought that corporate charters were sometimes a good thing, which they certainly are both with for-profit corporations and with not-for-profit corporations.

In any event, James Madison would be on my side in this article in arguing that the federal power over commerce among the state is exclusive since he is quoted as having said at the Philadelphia Convention that: "Whether the States are now restrained from laying tonnage duties depends on the extent of the power 'to regulate commerce.' These terms are vague but seem to exclude this power of the States."<sup>187</sup>

James Madison would have been appalled by the McCarran-Ferguson Act's granting power to the states to discriminate against commerce among the states. Madison, like John Marshall, thought that the commerce power was an exclusive national power, and he would not have thought that Congress could by statute delegate its commerce clause powers to the states any more than Congress could have by statute delegated its power to declare war to the states.

In the end, Thomas Jefferson, the Anti-Federalists, and the six state ratifying conventions which asked for a federal Bill of Rights anti-monopoly clause got their way because the federal government issued no corporate charters or monopolies between the Founding and the Civil War, and corporation law remains predominantly a state dominated area of law right down to the present day. The new federal government experimented on and off with a federally chartered Bank of the United States, but the opponents of the Bank were loud and successful in complaining about the unconstitutionality of the Bank, and the Bank was killed by Andrew Jackson in the 1830's for being an unconstitutional monopoly that was neither necessary nor proper.

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186. JAMES MADISON, *THE FEDERALIST* NO. 38.

187. FARRAND, *supra* note 155, at 625.

As I hope I have by now shown, opposition to monopoly and to legislation that favored one class of people over another had deep roots in the common law and was a fundamental principle of the Founders of this country.<sup>188</sup> Abe Salander and I argue in a forthcoming article in the *Florida Law Review*,<sup>189</sup> that aversion to such laws grew out of a Lockean belief that the government existed for the purpose of protecting private citizens' natural rights.<sup>190</sup> As John Locke put it himself, there should be "one [R]ule for [R]ich and [P]oor, for the [F]avourite at Court, and the Country Man at Plough."<sup>191</sup>

Even before the federal Constitution was adopted, some states had banned monopoly and class legislation in their state declarations of rights or bills of rights.<sup>192</sup> For example, Virginia's Declaration of Rights of 1776 banned the granting of "exclusive or separate [E]moluments or [P]rivileges from the [C]ommunity, but in [C]onsideration of public [S]ervices."<sup>193</sup> James Madison spoke for all the Founders when he said that government should be "neutral between different parts of the Society," that "equality . . . ought to be the basis of every law," and that laws should not place "peculiar burdens" on some individuals or "peculiar exemptions" on others.<sup>194</sup>

When later generations looked back on the Founding, they realized that one of the Founders' primary goals was to ban monopoly and class legislation. As Representative Stephen L. Mayham said in 1870:

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188. See Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245 (1997) at 255–56; see Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366, 1372 (1990) (reviewing WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 1374–47 (Harv. Univ. Press 1988)).

189. Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why School vouchers are Constitutionally Required*, FLA. L. REV. (forthcoming 2013).

190. See JOHN LOCKE, *TWO TREATIES OF GOVERNMENT* §§ 123–24 (1764) (describing how "[t]he great and chief end . . . of [M]ens uniting into [C]ommonwealths, and putting themselves under [G]overnment, is the [P]reservation of their Property[P]roperty . . . their [L]ives, [L]iberties, and [E]states"); SIR WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS, NOTES SELECTED FROM THE EDITIONS OF ARCHIBOLD, CHRISTIAN, COLERIDGE, CHITTY, STEWART, KERR, AND OTHERS, BARRON FIELD'S ANALYSIS, AND ADDITIONAL NOTES, AND A LIFE OF THE AUTHOR BY GEORGE SHARSWOOD* 124–25 (Phila., J.B. Lippincott Co. 1893) ("[T]he principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without . . . mutual assistance.").

191. LOCKE, *supra* note 190, § 142.

192. See Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate about Equal Protection and Equal Civil Rights*, 8 SUP. CT. REV. 295, 346 (1992).

193. VA. DECLARATION OF RIGHTS OF 1776 art. 4; Hamburger, *supra* note 192, at 346 n.124.

194. Saunders, *supra* note 188, at 256. Saunders also references the position of Jeffersonian Republicans that government should provide "equal rights for all, special privileges for none," as well as the position of the Maine Whigs in the 1830s who advocated "[e]qual rights, equal laws, and equal privileges for all classes of the community." *Id.* (citations omitted).

[W]hen this Constitution was adopted there was no sentiment that was more universal in this nation than that of condemnation of all monopolies and privileged classes. It was to rid themselves of enormous and oppressive monopolies in the way of taxation and stamp duties that the colonists had severed their connection with Great Britain; and it was in the interest of equality and freedom of commerce, as well as freedom of person, that this Government was founded. It would be a slander upon the intelligence and patriotism of our fathers to say that this provision of the Constitution, which is the only one under which this doctrine of protection is claimed, intended it to foster monopolies and create invidious distinctions of caste based upon business or wealth.<sup>195</sup>

Senator James W. Nye said much the same thing in 1866:

Our forefathers were made to chafe under monarchical insult and imposition. They learned to know by experience that common protection would never be awarded by privileged class. They entered into the contest in defense of their natural and inalienable rights, and made the cause of popular justice in the strength and ennobling feature of the conflict.<sup>196</sup>

And Representative Owen Lovejoy said in 1860:

The object of government, according to the theory of the revered sages who organized this Republic, is a very simple one, namely, to protect the people in the peaceful enjoyment of their natural rights. In other words, it is a mutual pledge, each to all and all to each, to secure this result; designating the modes in which this end shall be achieved. Consequently, pensions, bounties, peculiar privileges, class legislation, and monopolies, sought from Government, is for one portion of the people to become beggars or vampires of the rest. For classes thus to beleaguer Government is as disgraceful to communities as it is to individuals . . . .<sup>197</sup>

As Thomas Cooley recognized over 100 years ago, the Constitution of 1787 banned monopoly and class legislation outside the context of patents and copyrights.<sup>198</sup> Cooley argued there were “implied restrictions” on Congress’ taxing power in Article I Section 8,<sup>199</sup> which states, “The Congress shall have Power To lay and collect Taxes,

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195. CONG. GLOBE, 41st Cong., 2d Sess. 180 (1870) (Speech by Representative Stephen L. Mayham discussing the merits of a tariff).

196. CONG. GLOBE, 39th Cong., 1st Sess. 1071 (1866) (Statement of Sen. James W. Nye) (Nye also condemned the conduct of southern states: “In the recent attempt at revolution the intended perpetuity of human bondage, added to the intended monopoly of wealth and political power, were the mainspringings of the rebellion”).

197. CONG. GLOBE, 36th Cong., 1st Sess. 174–175 (1860) (Speech by Representative Owen Lovejoy).

198. See THOMAS COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW (1880).

199. *Id.* at 58–60, 97–98.



Duties, Imposts and Excises, to pay the Debts and provide for the *common* Defence and *general* Welfare of the United States; but all Duties, Imposts and Excises shall be *uniform* throughout the United States.”<sup>200</sup> Cooley believed that “a tax can have no other basis than the raising of a revenue for public purposes, and whatever governmental exaction has not this basis is tyrannical and unlawful . . . . Where, however, a tax is avowedly laid for a private purpose, it is illegal and void.”<sup>201</sup>

Cooley argued that these same “implied restrictions” applied to all of Congress’s Article I, Section 8 powers, and not just to the taxing power<sup>202</sup>: “Every legislative body is to make laws for the public good, and not for the benefit of individuals; and it is to make them aided by the light of those general principles which lie at the foundation of representative [institutions].”<sup>203</sup> Cooley thus argued that the Just Compensation Clause of the Fifth Amendment embodied this public purpose doctrine.<sup>204</sup> Tying together congressional power to tax and take property, Cooley explained that:

Taxation takes property from the citizen for the public use, but it does so under general rules of apportionment and uniformity, so that each citizen is supposed to contribute only his fair share to the expenses of government, and to be compensated for doing so in the benefits which the government brings him.<sup>205</sup>

Cooley argued that the federal Constitution of 1787 banned monopolies. He argued that: “exclusive privileges are to some extent invidious and very justly obnoxious, and it is not reasonable to suppose that the State would grant them, except when some important public purpose or some necessary public convenience cannot be accomplished or provided without making the grant exclusive.”<sup>206</sup>

Several other constitutional provisions further support the view that the federal Constitution of 1787 banned monopolies and class legislation. The Preamble of the Constitution declares, for example, that the purpose, of the document is to “provide for the *common* defence” and to “promote the *general* Welfare.”<sup>207</sup> In addition, the Full Faith and

200. U.S. CONST. art. I, § 8, cl. 1 (emphasis added).

201. COOLEY, *supra* note 198, at 57–58.

202. Cooley’s assertion is bolstered by some of the language in Article I Section 8, which allows Congress “[t]o establish an *uniform* Rule of Naturalization, and *uniform* Laws on the subject of Bankruptcies throughout the United States.” U.S. CONST. art I, § 8, cl. 4 (emphasis added).

203. *See id.* at 97–98.

204. *Id.* at 332.

205. *Id.* at 333.

206. *Id.* at 306. Cooley does not specify which constitutional provision bars the states from granting monopolies, but he seemed to find the prohibition in the Contracts Clause.

207. U.S. CONST. pmb. (emphasis added).

Credit Clause only allows Congress to pass “general laws” when it legislates to enforce the Clause.<sup>208</sup> The Establishment Clause prevented the government from granting a special monopoly to one religion. The principle that federal laws should be general and should not favor one class over another by giving it monopoly privileges is made explicit in: 1) the requirement that “all duties, imposts and excises shall be uniform throughout the United States;”<sup>209</sup> 2) the requirement that all federal laws on naturalization be uniform;<sup>210</sup> 3) the requirement that all federal laws on bankruptcy shall also be uniform;<sup>211</sup> and 4) the requirement that no preference “be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another;”<sup>212</sup> Special grants of privilege are banned in the Title of Nobility Clause,<sup>213</sup> while the imposition of special burdens on individuals is banned at both the federal and the state level by the bans on bills of attainder and ex post facto laws.<sup>214</sup>

It is not plausible read a Constitution that requires that taxes, naturalization laws, and bankruptcy laws all be uniform, and, which forbids giving preferences to ports of one state over another, as giving Congress the power to regulate commerce among the states in a way that is not uniform. And yet by delegating to the fifty states total power to license health insurance within each state, Congress ensures as a matter of federal statutory law that health insurance will not be regulated in a way that is uniform throughout the United States.

Congress cannot use its commerce power in such a non-uniform way nor can it use any of its enumerated powers to create monopolies. The anti-monopoly tradition that began in England in *The Case of Monopolies* and *The Statute of Monopolies* and which gathered force in the original thirteen colonies suggests that Congress does not have the power to pass the McCarran–Ferguson Act. Congress cannot turn over the regulation of commerce among the states as to federal health insurance that people must buy to a non-uniform, monopoly set of licensed state health insurance providers.

In closing on this subject, consider the words of Andrew Jackson’s message vetoing the bill that would have renewed the corporate charter of the Bank of the United States—words that were written with the

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208. *Id.* art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”).

209. *Id.* art. I, § 8, cl. 1.

210. *Id.* art. I, § 8, cl. 4.

211. *Id.* art. I, § 8, cl. 4.

212. *Id.* art. I, § 9, cl. 6.

213. *Id.* art. I, § 9, cl. 8.

214. *Id.* art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 3.

assistance of future Supreme Court Chief Justice Roger B. Taney:

Every act of Congress, therefore, which attempts by grants of monopolies or sale of exclusive privileges for a limited time, or a time without limit, to restrict or extinguish its own discretion in the choice of means to execute its delegated powers is equivalent to a legislative amendment of the Constitution, and palpably unconstitutional.<sup>215</sup>

Jackson went on to argue that the Bank of the United States, as a monopoly, violated the core principle of what we would today call the equal protection of the laws:

Many of our rich men have not been content with equal protection and equal benefits, but have besought us to make them richer by act of Congress. By attempting to gratify their desires we have in the results of our legislation arrayed . . . interest against interest, and man against man, in a fearful commotion which threatens to shake the foundations of our Union . . . . If we can not at once, in justice to interests vested under improvident legislation, make our Government what it ought to be, we can at least take a stand against all new grants of monopolies and exclusive privileges, against any prostitution of our Government to the advancement of the few at the expense of the many . . . .<sup>216</sup>

Rather than accede to the rich men's request, the government should "confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor."<sup>217</sup> People should "take a stand against all new grants of monopolies and exclusive privileges, against the prostitution of our Government to the advancement of the few at the expense of the many."<sup>218</sup>

Jackson's hatred of monopolies was not unique to him, however, as I hope I have shown by now. It had its roots deep in the thinking of Sir Edward Coke and of Thomas Jefferson, the very man who founded the Democratic Party, which under Jefferson's and later Jackson's leadership received a majority of the popular vote in every presidential election held from 1800 through 1856. Jefferson's and Jackson's anti-monopoly party won thirteen out of fifteen presidential elections during those fifty-six years. The Jacksonians lost in 1840 to William Henry Harrison who died after only one month in office, and whose term was filled out by a Jacksonian Democrat, John Tyler, who twice vetoed bills to recharter the Bank of the United States. Tyler's vetoes were issued on Jacksonian grounds. The only other time that the Jacksonians lost the presidency was in 1848 and then, again, the man they lost to—

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215. Andrew Jackson, U.S. President, Address to the Senate Vetoing the Bank of the United States (July 10, 1832), available at [http://avalon.law.yale.edu/19th\\_century/ajveto01.asp](http://avalon.law.yale.edu/19th_century/ajveto01.asp).

216. *Id.*

217. *Id.*

218. *Id.*

Zachary Taylor—died in office, this time after two years of service. From the Age of Jefferson to the Age of Lincoln, the Commerce Power was emphatically read NOT to allow Congress to create government granted monopolies. As we will see shortly, Abraham Lincoln’s heirs—the Framers of the Fourteenth Amendment—hated government grants of monopoly as well. The Commerce Clause did not as an original matter allow the federal government to grant monopolies outside the context of issuing patents and copyrights.

#### V. THE McCARRAN–FERGUSON ACT VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE

The McCarran–Ferguson Act not only exceeds Congress’s enumerated powers under the Constitution but it also violates the Privileges and Immunities Clause of Article IV, Section 2. That Clause says that: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”<sup>219</sup> The Clause descends from a similar provision in the Articles of Confederation, which said that:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this [u]nion, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States.<sup>220</sup>

What these two Privileges and Immunities Clauses do is to constitutionalize the traditional rights that Englishmen had always had under the common law, Magna Carta, and the so-called ancient constitution at least as against discriminatory laws.<sup>221</sup> Sir Edward Coke

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219. U.S. CONST. art. IV, § 2.

220. ART. OF CONF. art VI, § 1.

221. The Privileges and Immunities Clause of Article IV and the Privileges or Immunities Clause of the Fourteenth Amendment have been the subject of much recent scholarly attention. Modern scholarship on the original meaning of the Privileges or Immunities Clause began with John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992), which argued that the Clause was an anti-discrimination guarantee and not a font of substantive due process individual rights. Phillip Hamburger reaches the same conclusion in *Privileges or Immunities*, 105 NW. U. L. REV. 61 (2011). Akhil Reed Amar and Randy Barnett read the Clause as protecting both against discrimination and as conferring unenumerated individual rights. AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 157 (2012); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 62–65 (2004). Kurt Lash argues in a series of three law review articles, which he is turning into a book, that the Privileges or Immunities Clause protects both against discrimination and that it also protects enumerated but not unenumerated individual rights. Kurt Lash, *The Constitutional Referendum of 1866: Andrew Johnson and the Original Meaning of the Privileges or Immunities Clause* (2012); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: “Privileges and Immunities” as an Antebellum Term of Art*, 98 GEO. L. J. 1241 (2010); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham*

said that government grants of monopoly violated the liberty guaranteed to all Englishmen by the common law, and the privileges and immunities of citizens of the United States were first and foremost their common law rights.

The original meaning of the Privileges and Immunities Clause of Article IV is embodied in Justice Bushrod Washington's famous opinion while riding circuit in 1823—an opinion that became gospel to the Framers of the Fourteenth Amendment's Privileges or Immunities Clause. Justice Washington said:

The inquiry is, what are the privileges and immunities of citizens [of the United States]? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.

The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might

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*and the Second Draft of the Fourteenth Amendment*, 99 GEO. L. J. 329 (2011). Robert Natelson argues in *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117 (2009) for the John Harrison and Phillip Hamburger interpretation of the Privileges and Immunities Clause of Article IV, Section 2. My view of the Privileges and Immunities Clause of Article IV, Section 2 and of the similarly worded clause in the Fourteenth Amendment is that they protect: 1) against laws that discriminate on the basis of class or caste or that confer monopolies and that are not just laws enacted for the good of the whole people; and that 2) they protect both enumerated individual rights and unenumerated individual rights that are deeply rooted in history and tradition subject always to the caveat that the states can override such rights if they pass a just law that is enacted for the general good of the whole people. This reading grows out of *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), which for better or worse is the foundational case. Philip Hamburger makes a good argument in his law review article cited above that Justice Washington construed the Article IV, Section 2 Clause too narrowly, but I think it is too late in our constitutional history to take that argument very far.

be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) ‘the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.’<sup>222</sup>

Justice Washington’s dictum clearly on its face recognizes federal constitutional protection for a very broad set of economic rights including the right to choose a trade or profession, and it clearly does not allow for government creation of monopolies. Economic liberties that are deeply rooted in American and English history and tradition can only be taken away “subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.” A monopoly is by definition “unjust,” and it is not enacted to pursue “the general good of the whole [people].”

Justice Washington’s opinion in *Corfield v. Coryell* thus confirms that Congress would violate Article IV, Section 2 if it were to set up monopolies, oligopolies, or cartels at the State level. Congress can no more pass a law that violates Article IV, Section 2 than it can pass a law that violates the Contracts Clause of Article I, Section 10. No one would contend that Congress could use its Commerce Clause and Necessary and Proper Clause powers to authorize the states to violate the Contracts Clause. So why should anyone think that Congress can use its enumerated powers to authorize the states to abridge the Privileges and Immunities of Citizens in the several states?

Did the words “Privileges and Immunities” mean at the Founding that citizens had a right to be free of government grants of monopoly or special privilege? Consider the fact, as Larissa Price and I point out in our article on *Monopolies and the Constitution*, that eight states at the time of the Founding had Privileges and Immunities Clauses. Those states included: Connecticut, Massachusetts, North Carolina, New Hampshire, New Jersey, New York, Rhode Island, and Virginia.<sup>223</sup> For example, Massachusetts’s constitution of 1780 provided that “[n]o subject shall be . . . deprived of his property, immunities, or privileges . . . but by the judgment of his peers, or the law of the land.”<sup>224</sup> Furthermore, “No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from

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222. *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (emphasis added).

223. See Steven G. Calabresi et al., *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1528 (2012).

224. MASS. CONST. OF 1780, pt. 1, art. XII.

the consideration of services rendered to the public.”<sup>225</sup> North Carolina’s constitution of 1776, which also banned monopolies, said that “[N]o [m]an, or set of [m]en are [entitled] to exclusive or separate [e]moluments or [p]rivileges from the community, but in consideration of public services.”<sup>226</sup> Virginia’s Constitution of 1776 stated “That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which nor being descendible, neither ought the offices of magistrate, legislator or judge, to be hereditary.”<sup>227</sup> These clauses all clearly ban government grants of monopoly on their face.

Larissa Price and I show in *Monopolies and the Constitution* that from the time of the American Founding to the Age of Andrew Jackson up through the ratification of the Fourteenth Amendment, in 1868, a central constitutional concern was a ban on class legislation or government monopoly. This ban was usually expressed in language that banned giving some privileges or immunities to a favored citizen or class of citizens while giving lesser privileges or immunities to the citizenry as a whole. Eventually, the Jacksonian hatred of monopoly, which echoed Thomas Jefferson the founder of Jackson’s political party, came to be embraced by Reconstruction Republicans! They argued that the Slave Power had an unconstitutional monopoly on the labor of slaves and after 1865 on the labor of newly freed African-Americans. The Republicans said the Civil Rights Act of 1866 and the Privileges or Immunities Clause of the Fourteenth Amendment were needed to end the Slave Power monopoly.

Consider the words of Massachusetts Senator Charles Sumner—a leader of Reconstruction:

The Rebellion began in two assumptions . . . first, the sovereignty of the States, with the pretended right of secession; and, secondly, the superiority of the white race, with the pretended right of Caste, Oligarchy, and Monopoly, on account of color . . . . The second showed itself at the beginning, when South Carolina alone among the thirteen States allowed her Constitution to be degraded by an exclusion on account of color . . . .<sup>228</sup>

In fact, for Sumner, slavery was a system of caste and of monopoly:

A Caste cannot exist except in defiance of the first principles of Christianity and the first principles of a Republic. It is Heathenism in religion and tyranny in government. The Brahmins and the Sudras in

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225. MASS. CONST. OF 1780, art. VI.

226. N.C. CONST. OF 1776, art. III.

227. VA. CONST. OF 1776, § 4.

228. CONG. GLOBE, 39th Cong., 1st Sess., 686 (1866) (Statement of Senator Charles Sumner).

India, from generation to generation, have been separated, as the two races are now separated in these States. If a Sudra presumed to sit on a Brahmin's carpet, he was punished with banishment. But our recent rebels undertake to play the part of the Bramhins, and exclude citizens, with better title than themselves, from essential rights, simply on the ground of Caste, which, according to its Portuguese origin, *casta*, is only another term for race.<sup>229</sup>

In 1866, Sumner proposed a bill in the Senate that would have banned all systems of caste, class, and monopoly at the state level. The language he used for the proposed statute is striking:

[T]here shall be no [O]ligarchy, [A]ristocracy, [C]aste, or [M]onopoly invested with peculiar privileges and powers, and there shall be no denial of rights, civil or political, on account of color or race anywhere within the limits of the United States or the jurisdiction thereof; but all persons therein shall be equal before the law.<sup>230</sup>

Senator Charles Sumner clearly understood the possession of special privileges and immunities as being a forbidden possession of a government monopoly.

Thomas Jefferson, George Mason, Agrippa, the Son of Liberty, and all the Anti-Federalists were wrong to fear that the Commerce Clause would inevitably lead to federal governmental grants of monopoly. It did not do so. In fact, the anti-monopoly principle was so important to Americans that it was eventually written into the Fourteenth Amendment to apply against the states as well as being present in the Privileges and Immunities Clause of Article IV, Section 2. The anti-monopoly principle is deeply rooted in English and American constitutional history and tradition, and Congress cannot therefore legalize state healthcare monopolies or oligopolies using its Commerce Clause and Necessary and Proper Clause powers.

At this point, a reader is bound to object that Congress has for a long time issued licenses to shippers, broadcasters, and many other commercial actors as well. It is well established that Congress can regulate commercial economic actors by licensing them and, if so, Congress must have the power to let the states license commercial health insurers in-state and out-of-state as well. The conclusion here does not follow from the premise. Congress cannot necessarily farm out to the states something that it could do itself.

Congress does have the power under the Constitution to pass laws itself that impair the obligation of contracts, but the Constitution bans the states from passing such laws. Congress cannot delegate its power

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229. *Id.* at 683.

230. *Id.* at 1287.



to pass laws impairing the obligation of contracts to the states any more than it can delegate its power to license the buying and selling of health insurance. Nor can Congress allow the states to discriminate against out-of-state insurers as compared to in-state insurers without violating along the way Privileges and Immunities Clause of Article IV, Section 2.

The Privileges and Immunities Clause is first and foremost a ban on state discrimination against citizens from other states. As James Madison himself explained in *The Federalist No. 42*:

Those who come under the denomination of free inhabitants of a State, although not citizens of such State, are entitled in every other State, to all the privileges of free citizens of the latter; that is to greater privileges than they may be entitled in their own State.<sup>231</sup>

Joseph Story said much the same thing in 1833:

It is obvious, that, if the citizens of each state were to be deemed aliens to each other, they could not take, or hold real estate, or other privileges, except as aliens. The intention of this clause was to confer on them, if one may say, a general citizenship; and to communicate all the privileges and immunities, which the citizens of the same state would be entitled to under the like circumstances.<sup>232</sup>

The U.S. Supreme Court finally acknowledged that the Privileges and Immunities Clause of Article IV was an anti-discrimination clause in the following famous passage from *Paul v. Virginia*:

It was undoubtedly the object of the clause in question to place the citizens of each [s]tate upon the same footing with citizens of other [s]tates so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it gives them the right of free ingress into other States and egress from them; it ensures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws.<sup>233</sup>

The Privileges and Immunities Clause bans discrimination by a state against an out-of-state citizen. This is clear beyond any shadow of a doubt.

The Supreme Court did hold, however, in *Paul v. Virginia* that a corporation is not a citizen within the meaning of Article IV, Section 2 (as well as holding that insurance contracts were not covered by the Commerce Clause). Since most health insurers are corporations and

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231. JAMES MADISON, THE FEDERALIST NO. 42 (1788).

232. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1800 (1833).

233. *Paul v. Virginia*, 75 U.S. 168, 180 (1868).

since corporations are not protected from discrimination for being out-of-state entities, under *Paul v. Virginia*, it could be argued that the McCarran–Ferguson Act is constitutional because the Article IV ban on discrimination against out-of-staters does not apply to health insurance corporations.

I reject this argument for three reasons. First, the McCarran–Ferguson Act is overbroad because on its face it allows the states to license insurance policies issued by an individual as well as those issued by a corporation. Congress clearly cannot permit the states to discriminate against out-of-state individuals without violating the Privileges and Immunities Clause. This suggests the McCarran–Ferguson Act, as combined with the health care mandate, is in part unconstitutional and should be struck down. The Supreme Court should make Congress re-pass the McCarran–Ferguson Act, in a form where it applies only to corporations then, if that is really what Congress wants to do.

Second, the McCarran–Ferguson Act is also highly suspect on enumerated powers and Dormant Commerce Clause grounds so surely this is an area where the Supreme Court might legitimately want to ask Congress to take a “second look” at the state of the law. Judge Guido Calabresi famously argued in *A Common Law for the Age of Statutes* that judges should force Congress to take a second look at old laws that are constitutionally dubious.<sup>234</sup> The McCarran–Ferguson Act is, in my opinion, an old statute as to which Congress ought to be forced to take a second look. The Act enhances the formation of state cartels, oligopolies, and monopolies, and it thus diminishes consumer welfare. There is nothing in the Constitution that empowers Congress to create such state level cartels, oligopolies, and monopolies, and there is a lot of history that suggests that Congress lacks this power.

Third, and finally, the holding of *Paul v. Virginia* that corporations are not citizens of the United States is in flat contradiction to the Supreme Court case law construing Article III, Section 2 as saying that corporations are citizens for purposes of being able to sue in the federal courts diversity jurisdiction.<sup>235</sup> One or the other of these two lines of case law must be wrong. It is inconceivable that a corporation could be a citizen of the United States for purposes of suing in federal court but not be a citizen under Article IV, Section 2.

In *Citizens United v. Federal Election Commission*, the Supreme Court recently held that corporations have extensive First Amendment rights—a position with which I agree. Corporations should be treated as

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234. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

235. *See, e.g., Hertz v. Friend*, 559 U.S. 77 (2010) (continuing to recognize corporations as being citizens of the United States for purposes of the diversity jurisdiction).

persons entitled not only to First Amendment privileges but also to Fourth, Fifth, and Eighth Amendment purposes as well. The New York Times and the University of Cincinnati are both corporations, and they both have, in my opinion, constitutional rights. But, if this is really the case, why on earth would we conclude that corporations have a right to speak but not a right to compete on a level playing field in commerce among the states?

The holding of *Paul v. Virginia* that corporations are not citizens under Article IV, Section 2 is a catastrophe from a policy perspective because it allows in-state corporations to use state law to protect themselves from out-of-state competition subject however to the constraints of the Dormant Commerce Clause. In areas like insurance, where Congress has somehow purported to “override” the Dormant Commerce Clause by statute, the costs are immense. It is quite simply absurd to say that corporations have free speech rights and the right to sue in federal court but no right to compete on an even playing field in interstate commerce.

A Supreme Court that continues to draw such a line is inadvertently fostering a cartel and crony capitalism. Now that the Court has held in *NFIB v. Sebelius* that Congress can use its taxing power to compel us to purchase health insurance, the Supreme Court has a special responsibility to go back and reconsider, in the health insurance context only, decisions like *Prudential Insurance Co. v. Benjamin* and *Western & Southern Life Insurance Co. v. California*.<sup>236</sup> If the Supreme Court is going to allow Congress to tax us for not buying health insurance, it ought at least to stop Congress from making us pay money to buy a service from fifty state licensed health insurance cartels, oligopolies, and monopolies.

## VI. CONCLUSION

I want to end with one additional observation with which I think Chief Justice Taft would have sympathized. Congress may have broad power to delegate to the executive and judicial branches of the federal government, but there are real limits on congressional power to delegate to the states or to private parties. In *Schechter Poultry Corp. v. United States*, the Supreme Court held that the National Industrial Recovery Act unconstitutionally delegated legislative power to private economic actors in an effort to cartelize the whole U.S. economy.<sup>237</sup> I think this unanimous decision is one of the great, unsung triumphs of American

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236. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946); *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648 (1981).

237. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

constitutional law and that it saved us from an American version of Mussolini's fascism. It is very, very dangerous to allow Congress to delegate federal power to private persons. Such persons are not accountable to the voters and to Congress in the way that executive and judicial branch personnel are. As the Supreme Court found in *Larkin v. Grendel's Den*, it is even constitutionally problematic to allow a state or local government to delegate to a private church a veto over a nearby restaurant's ability to obtain a liquor license.<sup>238</sup>

When Congress delegates its Commerce Clause power to the States—a power that is almost certainly exclusive in some respects—it violates the text of the Constitution just as surely as it would if it delegated its power to declare war to the states. There are fifty states today, not thirteen as at the founding, and as a result there are countless more external effects of state legislation on other states as well as many more state line crossings.<sup>239</sup> The fifty states simply cannot be trusted to regulate a huge national service industry on which we spend one-sixth of our GDP as a nation if the states have carte blanche to discriminate in licensing against out-of-state health insurers.

By upholding the healthcare mandate, the Supreme Court has ruled that all of us MUST now buy the services of the fifty state health insurance cartels, oligopolies, and monopolies. It is incumbent on the Supreme Court to make sure that American consumers are not turned into the victims of crony capitalism by a weird confluence of its bizarre Dormant Commerce Clause and Privileges and Immunities Clause doctrines. *NFIB v. Sebelius* obligates the Supreme Court to take a second look in the healthcare context at decisions like *Prudential Insurance Co. v. Benjamin*; *Western & Southern Life Insurance Co. v. California*; and even *Paul v. Virginia*.<sup>240</sup> In *A Common Law for the Age of Statutes*, Judge Guido Calabresi argued for second look judicial review when a set of statutes passed at very different times in our history and coupled with old case law produce a result we doubt Congress would legislate today. It is time for the Supreme Court to put an end to Crony Capitalism in the health insurance industry.

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238. *Larkin v. Grendel's Den*, 459 U.S. 116 (1982).

239. Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 FLA. L. REV. 1 (2011).

240. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946); *456 W. & S. Life Ins. Co. v. State Bd. of Equalization of Cali.*, 451 U.S. 648 (1981); *Paul v. Virginia*, 75 U.S. 168 (1869).

APPENDIX

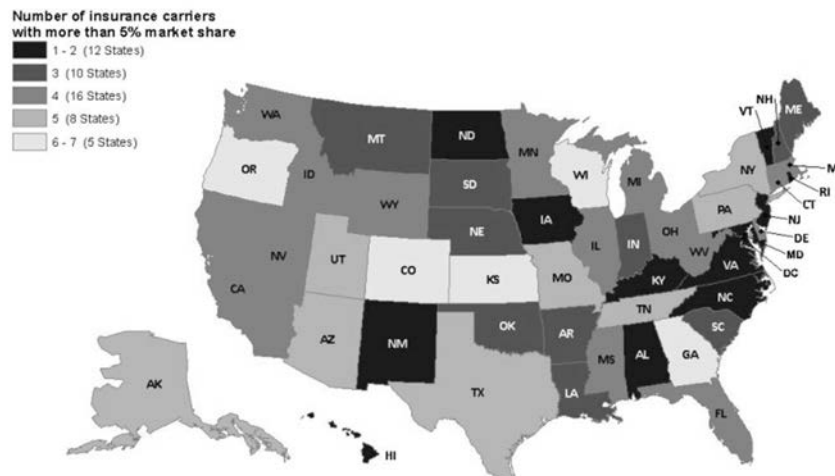
Figure 1: Market Share of Largest Insurance Carrier in the Individual Insurance Market, 2010



Source: Kaiser Family Foundation analysis of 2010 insurer filings to the National Association of Insurance Commissioners and the California Department of Managed Health Care using the Mark Farrah Associates Health Coverage Portal TM. Market share was calculated as the percent of the state's individual insurance market enrollment accounted for by each parent company (measured in member months).



Figure 2: Insurance Carriers with Greater than 5% Market Share in the Individual Insurance Market, 2010



Source: Kaiser Family Foundation analysis of 2010 insurer filings to the National Association of Insurance Commissioners and the California Department of Managed Health Care using the Mark Farrah Associates Health Coverage Portal TM. Market share was calculated as the percent of the state's individual insurance market enrollment accounted for by each parent company (measured in member months).

