Regulate/Mandate: Two Perspectives

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ABSTRACT

The debate and litigation over the constitutionality of the individual mandate during the past few years has revealed an utter lack of consensus on the bench and in the academy concerning the scope of and limits on the congressional commerce power. The parties here are divided into two different camps and see questions and cases from opposing perspectives which color and frame their perception and understanding of the topic. One perspective is a dynamic take on the New Deal Settlement which sees Congress as possessing essentially unlimited legislative power over commerce. The other perspective freezes doctrine in place and accepts the New Deal Settlement and cases decided before the individual mandate debate, but will go no farther than that.

This article takes up the question of whether Congress’ power to regulate commerce also includes the power to mandate commerce and uses it to reciprocally explore and illuminate both the individual mandate debate and the dueling perspectives which underlie and shape that debate. It does this by examining the ways in which the meaning and significance of the activity/inactivity distinction and the words “regulate,” “commerce,” “mandate” and “commandeer” are understood, analyzed and argued from the two perspectives and then trying to determine what progress toward consensus is attainable there.
# TABLE OF CONTENTS

I. **INTRODUCTION**  

II. **DUAL DEFINITIONS, DUELLING PERSPECTIVES**  
   A. DUAL DEFINITIONS  
      i. TWO WAYS TO READ A DICTIONARY  
      ii. “IT’S DEJA VU ALL OVER AGAIN”  
   B. DUELING PERSPECTIVES  
      i. AND NOW FOR SOMETHING COMPLETELY DIFFERENT  
      ii. PERSPECTIVES, VIRTUES AND NESTED OPPOSITIONS  

III. **PERSPECTIVES ON “REGULATION”**  
    A. NFIB ON REGULATION  
    B. INSIDE AND OUTSIDE  

IV. **ACTIVITY AND INACTIVITY**  
    A. DECISIONS AND ACTIVITY  
    B. TIME AND ACTIVITY  
    C. INDIVIDUALS AND ACTIVITIES  

V. **MANDATE AND COMMANDEER**  
   A. MANDATE  
   B. COMMANDEER  

VI. **CONCLUSION**
I. INTRODUCTION

“When I use a word,” Humpty Dumpty said in a rather scornful tone, “it means what I choose it to mean—neither more nor less.”

“The question is,” said Alice, “whether you can make words mean so many different things.”

If nothing else, the debate and litigation over the constitutionality of the “individual mandate” of the Patient Protection and Affordable Care Act of 2010 has demonstrated that its disputants, on the bench and off, do not even agree on the meaning and scope of basic terms in the conflict, most notably the word “regulate” in the Commerce Clause, and whether that word gives Congress the power to enact economic mandates. Several prominent writers have recently argued that this lack of agreement has arisen because the two sides here look at and conceptualize the terms of the mandate debate (and the Constitution itself, for that matter) through the looking glasses of quite different gestalts, visions or worldviews. Whichever metaphor you choose, the point here is that

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1 LEWIS CARROLL, ALICE’S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS 171 (Schocken Books 1979) (emphasis in original).
2 26 U.S.C. § 5000A (Supp. IV 2010) (“An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.”).
4 U.S. CONST. art. I, §8, cl. 3 (“Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).
5 See Lawrence B. Solum, The Legal Effect of NFIB v. Sebelius and the Constitutional Gestalt 1, 2 (Georgetown Public Law Research Paper No. 12-152, October 16, 2012), available at SSRN: http://ssrn.com/abstract=2152653 (“Whatever direct legal effects the Court’s decision ultimately produces, the thesis of this Essay is that the most important and far-reaching legal effects of NFIB are likely to be indirect. NFIB marks a possible shift in what we can call the ‘constitutional gestalt’ regarding the meaning and implications of what is called the ‘New Deal Settlement.’”) (citations omitted).
the difference between the two sides goes far beyond a simple disagreement over particular facts or propositions of law; instead it is global, basic and foundational, involving quite different understandings of the text, underlying principles and purposes of the Constitution.

This article asks where this situation leaves us and seeks to determine the effect of these competing perspectives on the wrangle over the individual mandate in particular and on constitutional argument and theory in general. While this diversity of viewpoints precludes easy consensus, it does not mean that the two sides have nothing in common and just talk past each other without actually joining issue. After all, they do share the same constitutional text and precedent. However, they do not share the same constitutional doctrines, purposes and underlying principles. And even that which they share, they weigh and interpret quite differently, thus leading to their opposition. This situation is not completely negative, but is rather a mixed blessing, for while it makes disagreement inevitable, it also makes argument possible. Just as the adversarial process at trial can lead to the discovery of truth (or so we believe in our judicial system), the contest of constitutional gestalts can illuminate unseen and undervalued aspects (both strengths and weaknesses) of constitutional argument and doctrine in a way that unquestioned consensus does not and cannot.

In order to better understand the effects of this diversity of perspective on constitutional debate, doctrine and decisions, this article examines some important

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6 See Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 Harv. L. Rev. 83, 83 (2012) (“Two very different visions of the national government underpin the ongoing battle over the Affordable Care Act[,]”) (citation omitted).

7 See Martha Minow, *Affordable Convergence: “Reasonable Interpretation” and the Affordable Care Act*, 126 Harv. L. Rev. 117, 118 (“[T]he two opinions embodied distinctive approaches to the issues at hand, to constitutional interpretation, and indeed, to how to view the world.”).

8 See id. at 122 (“These differences in view do not reflect reliance on different sources; both opinions used the same texts and decisions.”).
definitions, terms and distinctions from the individual mandate debate. These include the
definition of “regulate” in the Commerce Clause, the activity/inactivity distinction proposed
by individual mandate critics\(^9\) and the words “mandate”\(^10\) and “commandeer”\(^11\) from the
individual mandate lexicon. These terms and distinctions attempt, in their own ways and
with varying degrees of success, to clarify the limits and meaning of regulation. This article
takes these items from the individual mandate lexicon and runs them through the contest of
constitutional worldviews in order to better understand and evaluate these terms and their
interplay with larger constitutional perspectives. A primary aim of this article is to capture
something of the back and forth of the particular and the holistic in constitutional argument
and thinking, to capture not only the fixed points of reference, but also the practice in
process, and in this way, to take constitutional theory from its usual goal of Newtonian
objectivity to an appreciation of its relativistic side, too. Because the relation explored here
is reciprocal rather than one-directional, the meaning and salience of terms and distinctions
are not simply functions of the perspectives from which they are viewed; they also help to
constitute and shape these very perspectives. An examination of constitutional law and
theory as a process and as a practice will show how elements and notions which appear to
be contradictory and mutually exclusive in the abstract, may actually complement and
supplement each other in debate, discourse and litigation taken holistically and practically.

individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to
become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate
commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely because
they are doing nothing would open a new and potentially vast domain to congressional authority.”) (emphasis
in original).

\(^10\) Id. at 2594 (“The most straightforward reading of the mandate is that it commands individuals to
purchase insurance. After all, it states that individuals ‘shall’ maintain health insurance.”).

Reclamation Assn., Inc., 452 U.S. 264, 288 (1981)) (“As an initial matter, Congress may not simply
‘commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal
regulatory program.’”).
II. DUAL DEFINITIONS, DUELING PERSPECTIVES

A. DUAL DEFINITIONS

i. TWO WAYS TO READ A DICTIONARY

The several opinions in the healthcare case go back to basics, which is to say to
original public meaning, in defining the word “regulate” in the Commerce Clause. They
start out by offering founding era dictionary definitions of the word. The four joint
dissenters, for example, examine four dictionaries. The first dictionary they look at
(Webster’s)\(^\text{12}\) defines “regulate” as “[t]o adjust by rule, method or established mode.”\(^\text{13}\)
They also find similar definitions in dictionaries by Samuel Johnson,\(^\text{14}\) John Ash\(^\text{15}\) and
Dyche and Pardon.\(^\text{16}\) From these definitions of “regulate,” the four joint dissenters conclude
that, “It can mean to direct the manner of something but not to direct that something come
into being.”\(^\text{17}\) In his opinion, Chief Justice Roberts likewise concludes that, “The power to
*regulate* commerce presupposes the existence of commercial activity to be regulated.”\(^\text{18}\)

In response to these takes on the meaning of “regulate,” Justice Ginsburg
counters that, “Indeed, as the D.C. Circuit observed, ‘[a]t the time the Constitution was

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\(^{12}\) See *NFIB*, 132 S.Ct, at 2644 (Scalia, Kennedy, Thomas and Alito, JJ., dissenting).
\(^{13}\) 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).
\(^{14}\) 2 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (7th ed. 1785) (“[t]o adjust by rule or
method”).
\(^{15}\) J. ASH, NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775) (“[t]o adjust, to direct
according to rule”).
\(^{16}\) T. DYCHE & W. PARDON, A NEW GENERAL ENGLISH DICTIONARY (16th ed. 1777) (“to put in order, set
to rights, govern or keep in order”).
\(^{17}\) *NFIB*, 132 S.Ct at 2644 (Scalia, Kennedy, Thomas and Alito, JJ., dissenting)...
\(^{18}\) *Id.* at 2586.
Here, however, Justice Ginsburg compresses things a little bit too much. True, Judge Silberman in *Seven-Sky* does say “to ‘regulate’ can mean to require action,” but he only gets there by eliding a step. First he cites Samuel Johnson’s definition of “regulate” as “[t]o adjust by rule or method’ as well as ‘[t]o direct.” Then, he says, again citing Johnson, that “To ‘direct,’ in turn, included ‘[t]o prescribe certain measure[s]; to mark out a certain course,” and ‘[t]o order; to command.’ Justice Ginsburg and Judge Silberman, as it turns out, only get from “regulate” to “command” or “direct” by way of a secondary meaning of a secondary meaning and not as a matter of straightforward definition, as the Chief Justice remarks. This is something well short of equivalence with the conservative founding era dictionary definitions of “regulate.”

Chief Justice Roberts and the four joint dissenters seem to have the advantage over Justice Ginsburg in the contest of founding era dictionary definitions of “regulate.” Their definitions are primary and not secondary definitions, they are more numerous and they are definitions of “regulate” and not of “direct” or some other word. But this is not the whole story; it resolves the issue only if it is the case that the current meaning of a constitutional term is solely a function of its founding era dictionary definition and if that founding era dictionary definition comprises only the first or primary given definition and not any secondary definitions. But neither of these assumptions is self-evidently true; they

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19 Id. at 2621 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting *Seven-Sky* v. Holder, 661 F.3d 1, 16 (D.C. Cir. 2011)).
20 *Id.* (quoting *Seven-Sky* v. Holder, 661 F.3d 1, 16 (D.C. Cir. 2011)).
21 *Id.* (quoting *Samuel Johnson*, 2 Dictionary of The English Language 1619 (4th ed. 1773)).
22 *Id.* (quoting *Samuel Johnson*, 2 Dictionary of The English Language 514 (4th ed. 1773)).
23 *See NFIB* 132 S.Ct. at 2586 n. 4 (“But to reach this conclusion, the case cited by Justice Ginsburg relied on the dictionary in which ‘[t]o order; to command’ was the fifth-alternative definition of ‘to direct,’ which was itself the second-alternative definition of ‘to regulate’….It is unlikely that the Framers had such an obscure meaning in mind when they used the word ‘regulate.’”) (citation omitted).
are, at least, debatable. A term’s founding era dictionary definition may well be only one aspect of a large, more complex, determination. Moreover, it is not at all clear that Justice Ginsburg takes the battle of dictionaries here as seriously as do the five conservatives she argues with. She may well only be using a conservative device or author to mock conservative arguments, as she does elsewhere in her opinion, quoting Judge Frank Easterbrook on the line between activity and inactivity and Robert Bork on slippery slopes.

Unfortunately for the commerce arguments of the five conservative justices in *National Federation of Independent Business v. Sebelius* (NFIB), the assumption that “regulate” or any other constitutional term must have one and only one meaning is contradicted by the founding era dictionaries (on which they rely) themselves. These dictionaries all give multiple definitions for “regulate” and many other words. It should not be surprising that a word like “regulate” should have more than one definition. Many words found in dictionaries today and in the eighteenth century have multiple definitions, some broader than others and some figurative extensions of more basic definitions. Perhaps unsurprisingly, none of the justices proffering founding era dictionary definitions of regulate also provides a non-tendentious explanation of why their definition should be preferred to the alternatives. The result, then, is not just law office history, but also law office lexicography.

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24 *NFIB*, 132 S.Ct. at 2622 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting in part) (quoting Archie v. Racine, 847 F.2d 1211, 1213 (7th Cir. 1988 (en banc)) (“[I]t is possible to restate most actions as corresponding inactions with the same effect.”).

25 *NFIB*, 132 S.Ct. at 2625 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting in part) (“Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom.”) (quoting ROBERT BORK, THE TEMPTING OF AMERICA 169 (1990)).
If we take a closer look at these definitions, we find that they do not quite do the work they are claimed to do. This should not be surprising since the eighteenth century dictionary definitions were not crafted with the individual mandate dispute in mind. The assertion by Chief Justice Roberts and the joint dissenter that regulation presupposes already existing commercial activity is precisely the point that divides the five conservative justices from the four liberal justices on the commerce power in the healthcare case. These five justices believe that it does, while the four do not. But this point is not clearly or convincingly demonstrated by a founding era dictionary definition which equates regulation with adjustment. That is certainly one possible interpretation of “regulate,” perhaps even the most common or natural interpretation, but it is not the only possible reading. If one is asked to adjust a machine or process, it is perhaps natural to assume from that request that the machine is already on or that the process is ongoing, but one would not be perplexed or be unable to understand or comply with the request if that were not the case.

Justice Ginsburg’s equation of “regulate” with “require action” is, if anything, less decisive. The action required might be an action in addition to the one already being performed or it might instead be a direction that the ongoing action be performed in a different way or manner. In neither of these cases would the definition do the work Justice

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26 NFIB, 132 S.Ct. at 2591 (“The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to ‘regulate Commerce.’”); NFIB, 132 S.Ct. at 2660-61 (Scalia, Kennedy, Thomas and Alito, JJ., dissenting) (“It is true that, at the end of the day, it is inevitable that each American will affect commerce and become a part of it, even if not by choice. But if every person comes within the Commerce Clause power of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end.”)

27 NFIB, 132 S.Ct. at 2621 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). (“Article I, § 8, of the Constitution grants Congress the power “[t]o regulate Commerce ... among the several States.” Nothing in this language implies that Congress’ commerce power is limited to regulating those actively engaged in commercial transactions.”).
Ginsburg would have it do—permit the legislator to order the underlying commercial action which will, in turn, be regulated.

One problem and source of confusion here is the largely undiscussed difficulty of individuating actions in a natural, non-tendentious way. Just as inaction may be redescribed as action (as Justice Ginsburg notes elsewhere in her opinion), two actions may be redescribed as one (or vice versa), thus blurring the distinction Chief Justice Roberts and the four joint dissenters seek to make clear. The counterargument may be made that one description may be more natural or common than the other, but that is not decisive either. The less common meanings and less natural descriptions still exist and may sometimes be more appropriate in particular contexts. Moreover, naturalness is in the eye (or mind) of the beholder—every theorist believes that she is “cutting nature at its joints.” For this reason, naturalness claims will be unsuccessful in attempting to convince those with different general perspectives on the matter.

ii. “IT’S DEJA VU ALL OVER AGAIN”\textsuperscript{29}

The disagreement by the justices in the Supreme Court’s healthcare case over the definition of “regulate” has a familiar ring to it as it recapitulates important aspects of three other earlier Commerce Clause disputes (and doubtless numerous others). These involve the question of whether commerce also includes navigation raised in the landmark

\textsuperscript{28} Id. at 2622 (“The minimum coverage provision could therefore be described as regulating activists in the self-insurance market.”).
Marshall Court case of *Gibbons v. Ogden*, the issue of whether the congressional power to regulate commerce comprehends the complementary power to prohibit commerce raised in *The Lottery Case*, and the recent academic wrangle between Jack Balkin and Randy Barnett over the meaning of the word “commerce” in the Commerce Clause.

Gibbons was one of first of the Supreme Court’s Commerce Clause cases and, like many later cases, it was concerned with the definition and limits of the commerce power. In *Gibbons*, a party who possessed a license pursuant to a federal coasting statute was sued by the possessor of a conflicting state-granted ferry monopoly between the states of New York and New Jersey. To undercut the force of the federal coasting statute, Odgen argued that the coasting statute exceeded the constitutional scope of Congress’ commerce power because navigation was not part of commerce. Chief Justice Marshall rejected this argument, saying, “This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly is traffic, but it is something more: it is intercourse.”

Here it seems that all three opinions in NFIB, in arguing that founding era dictionaries can provide the one and only definition of “regulate’ in the Commerce Clause, “restrict a general term, applicable to many objects, to one of its significations” in violation of Marshall’s rejoinder to Ogden’s counsel in *Gibbons*. They also go against Marshall’s

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30 22 U.S (9 Wheat.) 1 (1824) (holding that Congress’ commerce power includes the power to regulate navigation).
31 188 U.S. 321 (1903) (holding that Congress’ commerce power included the power to prohibit the interstate transportation of lottery tickets).
32 The syllabus for the case begins by saying, “The laws of New York granting to Robert K. Livingston and Robert Fulton the exclusive right of navigating the waters of that State with steamboats are in collision with the acts of Congress regulating the coastal trade [.]” *Gibbons* 22 U.S., (9 Wheat.) at 1.
33 See id. at 189 (“the counsel for the appellee would limit it to traffic, to buying and selling, or the exchange of commodities, and do not admit that it would comprehend navigation.”).
34 Id.
35 This includes Justice Ginsburg’s opinion, at least to that extent that it employs founding era dictionary definitions seriously and not merely to tweak the conservatives.
description of “our constitution being….one of enumeration, not one of definition.”\textsuperscript{36} A definitional argument over the meaning of “regulate” which, like this one, sides with Ogden and against Marshall has wrong footed itself from the start. At the very least it should justify its method (which it does not). John Marshall has placed the burden of persuasion on the proponent of such an argument.

This methodological difficulty is exacerbated by the second commerce dispute—the argument in \textit{The Lottery Case} over whether Congress’ constitutional power to regulate commerce covers the power to prohibit commerce.\textsuperscript{37} The Court there concluded that “regulation may sometimes appropriately assume the form of prohibition[.]”\textsuperscript{38} This assertion states the current doctrine, too, but this rule is in conflict the definition of “regulate” the five conservative justices take from founding era dictionaries because a prohibition seems to be more than a mere adjustment. One can make symmetrical arguments that both prohibitions and mandates are more than go qualitatively beyond regulation to something further.

In the individual mandate debate, Mark Hall makes just this sort of argument,\textsuperscript{39} citing statements by individual mandate opponent Randy Barnett.\textsuperscript{40} From Barnett’s definition of “regulate,” he concludes, “Based on the meaning of ‘regulate,’ there is no reason why a mandate to engage in commerce could not be considered the \textit{regulation} of

\textsuperscript{36} \textit{Gibbons}, 22 U.S. (9 Wheat.) at 189.

\textsuperscript{37} The Court there saw the issue as one of “determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition.” \textit{The Lottery Case} 188 U.S. at 327.

\textsuperscript{38} Id. at 328.

\textsuperscript{39} See Mark A. Hall, \textit{Commerce Clause Challenges to Health Care Reform}, 159 U. PA. L. REV. 1825, 1833 (2011) (“Some have argued that the meaning of regulate was historically far more limited than now, signifying to modulate or ‘make regular’ but not the power to ban or mandate commerce.”).

\textsuperscript{40} See, e.g., Randy E. Barnett, \textit{The Original Meaning of the Commerce Clause}, 68 U. CHI. L. REV. 101, 112 (2001) (“To regulate might be limited to ‘make regular,’ which would subject a particular type of commerce to a rule and would exclude, for example, any prohibition on trade as an end in itself.”) (emphasis in original).
commerce just as much as a prohibition of commerce.”

Neither the five conservative justices nor their academic defenders give an effective answer to this difficulty, that is to say, provide an explanation of why original public (i.e., founding era dictionary) meaning should control concerning commercial mandates, but may be overlooked without problem when it comes to prohibitions of commerce. There are similar, symmetrical difficulties in fitting both prohibitions and mandates within the “adjustment” founding era dictionary definitions cited by the four joint dissenters in NFIB.

The conflict over founding era dictionary definitions of the word “regulate” in the Commerce Clause discussion in NFIB also recapitulates, on a lesser scale, the disagreement between Jack Balkin and Randy Barnett over the original meaning of “commerce” in the same clause. In that debate, Balkin defines “commerce” broadly as intercourse or interaction, basing his argument, in large part, on founding era sources (including the seemingly mandatory reference to Samuel Johnson’s dictionary).

Barnett, also using sources from that time period, defines “commerce” more narrowly as trade or exchange. He, too, quotes the definition of “commerce” given in Samuel Johnson’s dictionary but his aim in doing so is not to equate it with intercourse or interaction, but rather to distinguish it from agriculture and manufacture and thereby narrow

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41 Mark A. Hall, supra note 39, at 1834 (emphasis in original).
42 See supra notes 10-17 and accompanying text.
43 See JACK M. BALKIN, LIVING ORIGINALISM 140 (2011) (In the eighteenth century, however, the word commerce did not have such narrowly economic connotations. Instead, commerce meant ‘intercourse,’ and it had strongly social overtones.”) (emphasis in original).
44 See id. (“Commerce was interaction and exchange between persons or peoples. To have commerce with someone meant to exchange things or ideas with them, converse with them, or interact with them.”).
45 See id. at 143-151 (collecting founding era sources on the original meaning of “commerce.”).
46 See id. at 149 (“Samuel Johnson’s dictionary, roughly contemporaneous with the founding, defines ‘commerce’ as ‘Intercourse; exchange of one thing for another, interchange of anything; trade; traffick.’” (quoting SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (9th ed. 1805, 1790) (unpaginated).
48 See id. at 280.
its meaning.\textsuperscript{49} In an attempt to prevail in his definitional conflict with Balkin and others who broadly interpret the word “commerce,” Barnett also investigates eighteenth century general usage of the word, for example by analyzing the 1,594 appearances of “commerce” in \textit{The Pennsylvania Gazette}, a major Philadelphia newspaper of the time, between 1728 and 1800.\textsuperscript{50} Through this, he shows that his definition was, by far, the more common in that day than the broader definition Balkin favors.\textsuperscript{51} While this move at least has the merit of recognizing the problem of the existence of multiple original meaning of terms such as “regulate” and “commerce,” it is not decisive in resolving the debate. The determination of original public meaning is not simply a popularity contest. There may well be more than one original meaning of a word and nonoriginalist factors may also influence current meaning determination.

Post-founding era cases perpetuate, rather than dispel, the meaning disagreement here. For example, in \textit{Gibbons v. Ogden}, the Marshall Court’s most relevant case, the Chief Justice says that the power to regulate is the power “to prescribe the rule by which commerce is to be governed.”\textsuperscript{52} This definition is close to the founding era dictionary definitions proffered by the four joint dissenters in the healthcare case.\textsuperscript{53} Like them, it is helpful to the establishment of the activity/inactivity distinction, but not decisive. More helpful is Justice Johnson’s statement in his concurrence in the same case that, “The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to

\textsuperscript{49} See id. \\
\textsuperscript{50} See id. at 289-291. \\
\textsuperscript{51} See id. at 290 (“the term ‘commerce’ was routinely used to refer to trade or exchange, including shipping.”). \\
\textsuperscript{52} Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824). \\
\textsuperscript{53} See NFIB, 132 S.Ct. 2566, 2644 (2012) (Scalia, Kennedy, Thomas and Alito, JJ., dissenting).
limit or restrain it at pleasure.”

This definition combines the power to adjust and prohibit, excludes the power to mandate activity. One consideration, however, should prevent us today from making too much of the differences we might perceive among these earlier definitions, such as the definitions given by Marshall and Johnson here—these sharp differences of meaning now noted were not noted and were probably not intended by the earlier writers themselves. The differences have only come into clear focus as they have come to assume greater relevance and importance in the context of the recent dispute over the constitutionality of the individual mandate, i.e., as they were brought, by shifting considerations and attentions, from the perspectival background of commerce power discourse to the foreground.

But even these additional quotations will not forestall those seeking a broader meaning for the word “regulate.” Starting with John Marshall’s just quoted definition of the term, for example, Jack Balkin concludes, “Thus when it ‘regulates,’ Congress can prescribe rules that require people to do things as well as rules that require people not to do things.”

We do not need more definitions and distinctions at this point in order to resolve this constitutional dispute. They will not be effective in persuading both sides in this disagreement. Barnett and Balkin have demonstrated that opponents can even both accept the same founding era dictionary definition of a basic term like “commerce’ and still fundamentally disagree about what is and is not commerce and about the scope of Congress’ commerce power. Yet another definition will not help very much. What we need

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instead here is an explanation of why this seemingly intractable disagreement has occurred and how we can now productively proceed in the face of it. This requires that we go beyond the conflicting definitions and other disputes on the surface of the dispute in order to discover their interrelation with background features that do not necessarily receive direct attention in the argument. That is what the next sections of this article attempts through a discussion of constitutional perspectives and the individual mandate debate.

**B. DUELING PERSPECTIVES**

i. **AND NOW FOR SOMETHING COMPLETELY DIFFERENT**\(^{56}\)

Perspectives\(^{57}\) are the conceptual constructs that best explain and illuminate the similarities and differences between the two sides in the individual mandate debate, to get us past the seemingly closed loop of argument we see here and to overcome the persistence and repetition of the same sorts of flawed arguments and the resistance to correction or alteration we encounter in the current individual mandate discourse. One important initial difficulty is that perspectives have no obvious place in the customary contemporary analytic division of legal norm into three classes—rules, standards and principles.\(^{58}\) They are

\(^{56}\) This was the title of a 1971 Monty Python movie made up of classic sketches from their television show. “And now for something completely different.” was the slogan they used as a non-segue segue between bits. It is the slogan I use here to highlight the difference between perspectival constitutional argument and standard doctrinal debate.

\(^{57}\) “Perspective” is the term I use here to generally stand in for the gestalts, visions and world views used by writers, such as Lawrence Solum, Gillian Metzger and Martha Minow, who use these terms in this debate. See supra notes 5-8 and accompanying text.

\(^{58}\) For a “hornbook” description of these categories, see Lawrence Solum, *Legal Theory Lexicon 026: Rules, Standards, and Principles* (http://www.typepad.com/services/trackback/6a00d8341bf68d53efood83463bae869e2).
included in none of the three categories. That is because perspectives, instead of fitting in one of these three classifications, stand above and apart from them. The trick, however, will be in explaining, in a not purely metaphorical way, exactly how this is so.

Lawrence Solum suggests that a constitutional gestalt (his term for perspective) is more abstract than the other categories of legal norms and that it “organizes our perception of cases, rules, and doctrinal theories.” Rules, standards and principles already stand in an ascending order of abstraction for Solum (for example when contrasts “a bright line rule, a standard that is in the form of a balancing test, or even an abstract principle”). My main problem with this description is that it suggests a formal, explicit classification system like the periodic table of elements in chemistry. But this would not be right. A perspective stands apart from legal and constitutional norms, not as a more abstract, more general classification system would, but as a background that provides context, place, interconnection and meaning for terms might. Solum is closer to the mark, I believe, when he says that gestalts provide “the big picture” and that they “organize our perceptions of particulars.” These particulars do not exist in splendid isolation from one another, but in changeable relationships to innumerable other particulars within the perspective. For this reason, both perspectives and particulars are subject to change in both intended and unintended ways.

But if perspectives are not formal systems of classification, how can they perform this organizing function? They do it in the same way that our own mental

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59 See supra, note 5, at 18 (“Constitutional gestalts operate at a level of abstraction that floats above doctrines, theories, and narratives.”).
60 Id. (citation omitted).
61 Lawrence Solum, supra note 58.
62 Id.
worldviews provide us with common sense ways of organizing, understanding and reacting to the everyday world we encounter. They provide an unstated, perhaps unnoticed, mental background which enables the classification and interpretation of what we perceive and encounter. Perspectives are holistic, implicit as much as they are explicit and unconscious as much as they are deliberately constructed. They are the way we “fill in” the content suggested by our discrete conscious perceptions and deliberate constructions (and are all the more strongly, perhaps stubbornly, held because of it) based on preexisting patterns and understandings we have always already formed.

Just as one can have a general or everyday perspective or worldview, one can also have a more specialized constitutional perspective or gestalt. The main difference between the two is that the constitutional perspective is of necessity of a more limited object than the everyday worldview and may well, for that reason, be held by a significantly smaller number of interested and involved people. But in both cases, it is the perspective which organizes and evaluates our perceptions and other inputs. It is a preconception in the literal sense--it is formed in advance and it is a bias or prejudice (in a non-pejorative sense). It is a way of seeing and conceptualizing the world and is typically shared with others. It is a general idea and is not a complete and detailed account which fully determines meaning and perceptions in all ways, at all times and in all cases (for this reason shared perspectives are most often not identical in all their particulars). It is not permanent or fixed either, but is quite open to change and shift (both consciously and unconsciously) in highly unpredictable ways.

The boundaries of a perspective are fuzzy and its outer limits are not bright lines. Perspectives comprehend tendencies rather than fixed, always repeated formulas,
further adding to their “for the most part” nature. Yet they usually tell us how to proceed in a practice or activity (such as constitutional interpretation) when we encounter new cases and situations. Since perspectives are of an object or practice, there can be (and often is) more than one perspective (i.e., way of seeing or conceptualizing) of that object or practice. When there is more than one perspective of an object, the perspectives, of necessity, conflict in important ways. Because of all this, it is often only after the fact that one realizes or can say that a perspective has formed, shifted or dissolved. But a perspective is not, for this reason, merely an external, observer’s description of the coherence of a view or manner. It is first and foremost a distinctive internal point of view and way of acting.

iii. PERSPECTIVES, VIRTUES, AND NESTED OPPOSITIONS

The notion of perspectives (and gestalts, visions and worldviews, for that matter) is a relative novelty in constitutional law and theory. For that reason, it is underdeveloped and little discussed in the literature. To make up for this and to help clarify the concept, in the next few pages perspectives will be compared to and contrasted with two better known accounts of similar concepts. The first is the account offered by Lawrence Solum and others of virtue jurisprudence. The second is Jack Balkin’s account of nested oppositions in law and deconstructive theory. All three concepts seek to explain and accommodate the conflict and contradiction between formalism and realism where other

63 If everyone shared a perspective, its existence would be little noted and discussion of it would serve little purpose because of the absence of systematic contrast and conflict. It would only come to the foreground when perspectival differences become obvious as in the case of individual mandate debate. Absent such conflict to focus attention on the perspectival web(s), a single shared perspective would remain hidden (in the background) in plain sight.
concepts and techniques have failed. This does not, of course, make them identical. Their
differences will be as importance for the purposes of this article as their similarities.

Although he does not make the connection himself, Professor Solum’s account
of constitutional gestalts bears more than a passing resemblance to his earlier and better
known account of virtue jurisprudence. Since his explanation of constitutional gestalts is
one recent short paper and, therefore, not fully developed and because Professor Metzger’s
notion of constitutional visions and Dean Minow’s account of constitutional worldviews are
even more briefly set out, a comparison with the better known theory of virtue
jurisprudence here may aid in the understanding of the nature and function of constitutional
gestalts.

The notions of both virtue jurisprudence and constitutional gestalts have
Aristotelian roots. They are also both devised to deal with “certain recurring patterns of
irresolvable argument” in legal theory. One of those irresolvable arguments takes the form
of the antinomy of realism and formalism, which manifests itself in legal theory’s attempt
to simultaneously adopt and utilize the contradictory and conflicting tropes and concepts of
both legal realism and legal formalism. Virtue jurisprudence itself developed from virtue
ethics, which Elizabeth Anscombe in 1958 revived from its slumber of centuries, in order to
deal with the conflict between consequentialism and deontology in ethical theory. Virtue
jurisprudence, like virtue ethics from which it grew, is conceived of as a way of dealing

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64 For a leading survey of and introduction to virtue jurisprudence, see VIRTUE JURISPRUDENCE (Colin
Farrelly & Lawrence B. Solum eds., Palgrave Macmillan 2008).
65 See supra notes 6-8 and accompanying text.
66 For a good, brief discussion of Aristotle’s role in the virtue ethics tradition (out of which virtue
jurisprudence grows), see Robert P. George, The Central Tradition--Its Value and Limits, in VIRTUE
67 Colin Farrelly & Lawrence B. Solum, An Introduction to Aretaic Theories of Law, in VIRTUE
JURISPRUDENCE 1, 6 (Colin Farrelly and Lawrence B. Solum eds., Palgrave Macmillan 2008).
68 See id. at 3-7.
with and explaining antinomies in law and ethics in which two things can appear to be true and/or necessary and, yet, at the same time seemingly be incompatible or contradictory. It is a means of reconciling the irreconcilable, not permanently, but on an ongoing, developing basis.

The conflict between realism and formalism is ubiquitous in law and legal theory. As Farrelly and Solum describe it, legal theory wants to have its cake and eat it, too, when it comes to realism and formalism, that is, to employ both realist and formalist techniques and yet somehow avoid the conflict between them. The approaches I am discussing here seek to allow it to do so. On one hand, legal theory uses realist arguments for critique and, on the other, there are places where it finds that formalism is easier and more natural to employ. Virtue Jurisprudence seeks to explain how this peaceful coexistence can be accomplished, how realism and formalism can be accommodated in law generally. Constitutional gestalts illustrate how the tension between the two crops up and may be dealt with in constitutional law and theory. The conflict between opposing constitutional perspectives or gestalts is often a conflict between realist and formalist moves and mindsets. It is not always the case that one perspective is purely realist and the other purely formalist, but the assignment will vary on a topic by topic and case by case basis.

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69 See Hamish Stewart, *Contingency and Coherence: the Interdependence of Realism and Formalism in Legal Theory* 30 VAL. U. L. REV 1,3 (1995) (“A recurring theme in legal theory is the conflict between two approaches I will call formalism and realism...[E]ach approach does have a central tendency that distinguishes it sharply from the other.”).

60 See Collin Farrelly & Lawrence B. Solum, *supra* note 67, at 5 (“Contemporary legal theory is of two minds about realism and formalism.”).

71 See id. (“The practitioners of legal theory have incorporated the standard realist moves into the conceptual toolbox.”).

72 See id. (“We are all realists. But legal formalism is surprisingly resilient to attempts to declare its demise. Once formalism is rescued from the realist caricature of a self-contained system of pure deduction, it is hard to deny that (1) there are easy cases and (2) while the law may underdetermine judicial making, it is rarely radically indeterminate.”).
But how can the two conflicting types of moves be accommodated within one practice and one discourse, one that is neither simply “a self-contained system of pure deduction” nor a completely ad hoc stream of decisions (or, perhaps, it may be one that is somehow a combination of the two)? This is accomplished by the combination of sameness and difference in the opposing perspectives and the case-by-case judgment which they employ. The difference occurs at points of conflict and disagreement, but it is argued out using the shared terms and content. This argument is rhetorical; it foregrounds, rearranges and reemphasizes previously backgrounded content (and the reverse, too). Through this rhetorical argument the content of both perspectives is revised (remember that proponents of opposing perspectives are operating within the same practice or legal system), only to have the same thing occur again when the next constitutional controversy arises. This relationship, although in some ways antagonistic, is also accommodating and fruitful.73

In his explanation and defense of deconstruction in legal theory, Jack Balkin employs the concept of nested oppositions to show how concepts can, in different manners, contain their opposites.74 Deconstruction uses nested oppositions to deal with questions of similarity and difference.75 He notes that, “Many of the arguments made by feminists and by members of the Critical Legal Studies movement rely upon demonstrating a nested

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73 See Hamish Stewart, supra note 69, at 50 (“If realism and formalism are related in the manner that I have suggested, their antagonism should be seen as fruitful rather than mutually exclusive. The possibility of a more systematic reconciliation of these two tendencies is a subject for future research.”).

74 See J.M. Balkin, Nested Oppositions, 99YALE L. J. 1669, 1676 (1990) (reviewing JOHN M. ELLIS, AGAINST DECONSTRUCTION (1989)) (“A nested opposition is a conceptual opposition each of whose terms contains the other, or each of whose terms shares something with the other. The metaphor of ‘containing’ one’s opposite actually stands as a proxy for a number of related concepts—similarity to the opposite, overlap with the opposite, being a special case of the opposite, conceptual or historical dependence upon the opposite, and reproduction of the opposite or transformation into the opposite over time.”).

75 See id. (“Deconstruction makes a basic claim about the logic of similarity and difference. All conceptual oppositions can be reinterpreted as some form of nested opposition. This follows from the contextual and relational nature of conceptual oppositions…Thus, to deconstruct a conceptual opposition is to reinterpret it as a nested opposition.”).
opposition between legal concepts traditionally thought separate and distinct.” The nested opposition allows for the “postulating [of] a countervision of politics and law” and, thus, to see that change can flow from another way of talking about the text, practice and/or institution in question. Balkin’s description of nested oppositions is similar to that given by Thomas Boswell of former Baltimore Orioles manager Earl Weaver (who died as this article was being written), “Whatever you think he was, you’re right. But he was probably also, to some degree, the opposite as well.”

Like nested oppositions, perspectives deal with the occurrence of conceptual oppositions. But while deconstruction is more focused on “teasing out the hidden antinomies in our language and thought,” my use of perspectives here is motivated by a desire to explain and navigate antinomies that are in plain sight and which other theories and approaches cannot explain and accommodate. Deconstructive nested oppositions are proffered to counter established hierarchies and orthodoxies; perspectives are used to understand and negotiate opposing viewpoints which contest for superiority and authority.

All three notions—perspectives, virtue jurisprudence, and nested oppositions—deal with a problem normally assumed away by analytic legal theory, the problem of different and conflicting intuition and belief. Analytic legal theory employs conceptual

\[\text{76 Id. at 1689.}\]
\[\text{77 See id. (“The answer is that once the logic of nested opposition is grasped, one can see that there are really two different ways of describing the same phenomena. It is really a matter of how one wishes to talk about it.”).}\]
\[\text{79 J.M.BALKIN, Deconstructive Theory and Practice, 76 YALE L. J. 743, 744 (1987).}\]
\[\text{80 There is an overlap here for antinomies that are hidden in plain sight. “Hidden” and “in plain sight” are both themselves a nested opposition and also sometimes a matter of perspective.}\]
analysis and, in turn, “conceptual analysis proceeds on the basis of our intuitions.” But “we” do not always share intuitions, even on fundamental matters, or, to put it another way, there can be more than one “we.” Many basic disagreements in law, legal theory and elsewhere can be traced to this phenomenon, which cannot be ignored or postponed indefinitely without serious consequences. This is the function of perspectives (as well as, in their own ways, virtue jurisprudence and nested oppositions); it seeks to explain the problem of antinomy which embarrasses more conventional and traditional approaches. In contrast to nested oppositions, perspectives do not necessarily seek the reversal of traditional hierarchies. Instead, perspectives help us understand the relation and interplay of competing (would be) hierarchies. This negotiation of perspectives is a practical process, not a logical or metaphysical deduction, and, for this reason, it is perhaps best illustrated by example—which shall next be attempted.

III. PERSPECTIVES ON REGULATION

A. NFIB AND REGULATION

81 Scott J. Shapiro, Legality 17 (2011).
82 I have already argued that a practice like constitutional law can have more than one perspective. Whether it can have more than one concept is another question, one which would take us beyond the scope of this article. One possible answer would be that there is only one concept per object, but there may be a number of conceptions (i.e., versions) of that concept. This argument grew out of Gallie’s notion of essentially contested concepts. See generally, W.B Gallie, Essentially Contested Concepts, 56 PROC. ARISTOTELIAN SOC’Y (1955-56). The concept/conception distinction entered legal theory mainly through the writings of Ronald Dworkin in the 1970’s and 1980’s. See, e.g., Ronald Dworkin, Taking Rights Seriously 134-36 (expanded ed., 1978) (applying the distinction to a discussion of the notion of fairness).
83 In the headnote to a 1987 article on deconstruction and legal theory, for example, Balkin quotes Psalms. See J.M. Balkin, supra note 77, at 743 (“The stone that the builder rejected has become the chief cornerstone.”) (quoting Psalms 118:22).
This part of the article brings the discussion down from metaphysical heights and back to the level of constitutional debate, decisions and doctrine (and then back up again). It does this first by going back to the disagreement in \textit{NFIB} over founding era dictionary definitions of “regulate” and “commerce”\textsuperscript{84} and uses this discussion to illustrate, develop and particularize the abstract description of perspectives just given. Reciprocally, it uses the description of perspectives to organize and bring meaning to the dictionary definition disagreement.

The discussion here looks at four aspects (there are doubtless more, too) of perspectives on “regulate” and “commerce.” The first is how perspective indicates the textual constitutional readings and interpretations which seem reasonable or natural. The second is the way in which perspective affects and determines the scope and singularity/multiplicity of the meaning of terms. The third is the constitutional “space” formed by perspectives. The fourth and last is the function of weight or “gravitational force” in perspectives.

Consider first the notion of reasonable constitutional interpretation. Martha Minow begins her article on competing constitutional worldviews, the Affordable Care Act and \textit{NFIB} by quoting from Justice Story’s constitutional commentaries on the need for and nature of reasonable interpretation of the constitutional text.\textsuperscript{85} Justice Story’s advice is beyond criticism as an ideal to be sought after in constitutional interpretation. Few will deny that the constitutional text should be given its reasonable or natural reading and most

\textsuperscript{84} See \textit{supra} notes 12-27 and accompanying text.

\textsuperscript{85} See Martha Minow, \textit{supra} note 7, at 117 (quoting \textsc{Joseph Story, Commentaries On The Constitution Of The United States} § 419 (Boston, Hillard, Gray & Co. 1833) (“The constitution of the United States is to receive a reasonable interpretation of its language, and its powers, keeping in view the objects and proposes, for which those powers are conferred. By a reasonable interpretation, we mean, that in case the words are susceptible of two different senses, the one strict, the other more enlarged, that should be adopted, which is most consonant with the apparent objects and intent of the constitution…..”)).
will attempt to do just this. The difficulty will come in successfully applying this method in
a case like *NFIB* where, although the text and important precedent are accepted by both
sides,\textsuperscript{86} there is sharp disagreement over just what “the apparent objects and intent of the
constitution” are.

Conflicting objects and intent appear to each side as a result of their divergent
perspectives on the matter. This leads, in turn, to different “reasonable” constitutional
interpretations. Each conflicting view appears reasonable and natural to the party holding it.
One side might just be wrong, of course, but there is no single agreed upon standard for
determining the rightness or wrongness of the two conflicting perspectives here. One seeks
to avoid the conclusion that reasonableness is perspective-relative, that opposing sides
cannot reason together, but the path of avoidance is neither clear nor certain.

One might also say that what we have here is simply an ideological
disagreement, that something more than “interpretive methodologies, constitutional
doctrines and neutral principles”\textsuperscript{87} is involved in the *NFIB* case, that ideology has infected
the decision.\textsuperscript{88} There are, however, two problems with this statement. One is that the
disagreement here also extends to interpretive methodologies, constitutional doctrines and
underlying principles and not merely to conflicting ideologies. It is not possible to neatly
separate the neutral and objective factors in constitution argument and decisionmaking from
the partisan and ideological elements on the premise that the former constitutes the realm of
similarity and the latter is the realm of difference mainly because these oppositions are

\textsuperscript{86} As Dean Minow notes. *See supra* note 8.
\textsuperscript{87} Erwin Chemerinsky, *Political Ideology and Constitutional Decisionmaking: the Coming Example of
the Affordable Care Act*, 75 LAW & CONTEMP. PROBS. 1, 13 (2012).
\textsuperscript{88} *See id.* at 12 (“It is a mistake to think that constitutional decisionmaking in such areas is entirely a
product of precedent and doctrine and not influenced, often decisively, by larger ideological orientation on the
issue in society.”).

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nested and, so, are not readily separable. Second, it will not do to say that doctrine supports one’s own side, while only ideology supports the other side,\(^89\) although this may be the way it looks from one’s own perspective. There is no neutral test or vantage point for this determination. Whether a constitutional argument is “off-the-wall” or “on-the-wall”\(^90\) is as much a social fact as it is a reasoned or logical conclusion.\(^91\)

The notion of ideology that Dean Chemerinsky and others use has similarities to my concept of perspective, but it also has several important differences. The relation depends, in part, on how one defines “ideology.” A neutral, although still normative, definition of legal ideology, for example, as “the framework of ideas and beliefs that give meaning to legal concepts and shape legal thought and discourse”\(^92\) is close to the concept of perspective; it differs mainly in being limited to ideas and beliefs, while perspectives cast a wider net. On the other hand, an understanding of ideology which treats it as slanted and

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\(^89\) See id. at 2 (“As a matter of constitutional law, under existing doctrines, it [i.e., \(\text{NFIB}\)] should be an easy case. The Act is clearly constitutional under the commerce power or under the taxing and spending power or as an exercise of authority under the Necessary and Proper Clause. But the outcome in the Supreme Court is very much in doubt because of the way in which the constitutional issue has come to be defined by political ideology.”) (citation omitted).

\(^90\) The distinction between “off the wall” and “on the wall” constitutional arguments is described by Jack Balkin (its author) in this way, “Off-the-wall arguments are those that most well-trained lawyers think are clearly wrong; on-the-wall arguments, by contrast, are arguments that are at least plausible, and therefore may become law, especially if brought before judges likely to be sympathetic to them.” Jack M. Balkin, From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream, THE ATLANTIC, June 2012, http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/.

\(^91\) See id. (“But how do constitutional arguments like the challenge to the individual mandate move from off the wall to on the wall? Law, and especially constitutional law, is grounded in judgments by legal professionals about what is reasonable: these judgments include what legal professionals think is obviously correct, clearly wrong, or is a matter of dispute on which reasonable minds can disagree. But what people think is reasonable depends in part on what they think that other people think. Arguments move from off the wall to on the wall because people and institutions are willing to put their reputations on the line and state that an argument formerly though beyond the pale is not crazy at all, but is actually a pretty good legal argument.”).

partisan in contrast to precedent and doctrine, adds a pejorative note to the term that perspective lacks.

We see assertions of reasonableness and nonreasonableness in the NFIB opinion itself. Both sides in the case believe that they are interpreting the Constitution reasonably and that the other side is not. Chief Justice Roberts, for example, says that, “The language of the Constitution reflects the natural understanding that the power to regulate assumes something to be regulated.” He then asserts that Justice Ginsburg’s definition of “regulate” does not reflect this sort of understanding, but instead reflects obscure and unlikely meanings. Justice Ginsburg responds by saying that, “The Chief Justice’s crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress’ efforts to regulate the national economy[.]”

Although, the Chief Justice’s approach to the definition of the word “regulate” has the advantage over Justice Ginsburg’s approach when it comes to the original public meaning of the word, that does not resolve the issue of constitutional meaning because other factors may also be involved in the determination of the current meaning of the constitutional text, such as the post-1937 constitutional doctrine changes adverted to by Justice Ginsburg. Chief Justice Roberts here assumes (but does not establish) that words like “regulate” should be treated as if they have a single meaning and that this single

93 See, e.g., Erwin Chemerinsky, supra note 88.
95 NFIB 132 S.Ct. 2586, 2586 (2012). He then cites John Marshall for authority. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188 (1824) (“[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said.”)
96 See supra note 19 and accompanying text.
97 See supra note 23.
98 NFIB, 132 S.Ct. at 2609 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting part).
meaning is their primary dictionary definition. But if the framers “intended what they said” and they used a word with more than one meaning, may they not have intended or meant to include any or all of the definitions of the word?

The Chief Justice’s contrary determination is a function of other aspects of his perspective on the commerce power, aspects which go beyond the simple dictionary definitions of the word “commerce” and not merely of founding era dictionary definitions. Thus, the Chief Justice’s definition of “regulate,” contrary to the impression he creates by beginning his opinion with this definitions, is actually determined by other, more general aspects of his constitutional perspective, rather than the reverse. The same is also true, it must be said, of the definitions presented by Justice Ginsburg and the four joint dissenters in \textit{NFIB}. The breadth of the definition of a constitutional term (and the range of its permissible meanings) is determined by “the apparent objects and intent of the constitution” Justice Story tells us,\textsuperscript{99} but what those objects and intents are is, in turn, a function of the particular constitutional perspective one takes. On the commerce power issue in \textit{NFIB}, the different definitions of “regulate” proffered in the two conservative opinions and Justice Ginsburg’s progressive opinion reflect and derive from the divergent perspectives of the two groups.

The same conclusion can also be presented in terms of the differing conceptual and definitional space given to the word “regulate” by the two perspectives. Seeking to limit the scope of the term, the two conservative opinions restrict the meaning of the term to the primary dictionary definitions of the founding era. Justice Ginsburg, reflecting the broader contemporary understandings of the term, casts a wider net over more definitions

\textsuperscript{99} See supra note 85.
and catches more and broader meanings for the term. Not all of these meanings may have been frequently used in the framing era, but, like dark matter in the universe, they have been there all the time until needed and noticed today, so the progressives would argue.

Different perceptions of constitutional “space” also explain the charges of constitutional novelty that both sides trade in the individual mandate debate. After advancing his definition of “regulate” and criticizing the definitions Justice Ginsburg gives, the Chief Justice continues by saying, “Our precedent also reflects this understanding. As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common. They uniformly describe the power as reaching ‘activity.’ It is nearly impossible to avoid the word when quoting them.” The definitions of “regulate” and the mention of the ubiquity of the word “activity” in commerce power precedent serve to set up the Chief Justice’s penultimate point and his conclusion, “The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce.”

The force of this argument is dependent upon the Chief Justice Roberts’ presupposition that his definition occupies all the logical space of the word “regulate” in the Commerce Clause, thereby excluding the propriety of regulating inactivity, which would not only be novel, but ultra vires. However, the force of this argument is lost on Justice Ginsburg because she has a different conception of the space occupied by “regulate” in the commerce power. She does not deny that “regulate” includes the congressional power to

100 See supra notes 12-22, 95-98 and accompanying text.
101 NFIB, 132 S.Ct. at 2587.
102 Id. (emphasis in original).
regulate activity, but she does not accept the Chief Justice’s assertion that this is all that it does. She views his reading of the clause as crabbed and outdated.\textsuperscript{103} She sees more legislative space in the clause than do the Chief Justice and the four joint dissenters. How much more? She avoids line drawing and eschews formal limits on the power. She makes the unassailable point that there is no activity/inactivity distinction in prior doctrine or precedent.\textsuperscript{104} She argues, for example, that compelled commercial activity was upheld by the Court in the \textit{Wickard} case.\textsuperscript{105}

Justice Ginsburg goes beyond particular definitional quibbles to take on the central underlying, motivating fear of the Chief Justice and the joint dissenters that upholding the individual mandate on commerce power would give Congress unlimited regulatory power.\textsuperscript{106} She notes this worry\textsuperscript{107} and then strives to allay, or at least deny, it by noting the existence of two limits on congressional power in the individual mandate case wholly apart from the newly proffered activity/distinction. She first explains that “the unique attributes of the health-care market render everyone active in the market and give

\begin{itemize}
  \item \textsuperscript{103} See supra note 98 and accompanying text.
  \item \textsuperscript{104} See \textit{NFIB}, 132 S.Ct. at 2621 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting in part) (“In any event, the Chief Justice’s limitation of the commerce power to regulation of those actively engaged in commerce finds no home in the text of the Constitution and our decisions. Article I, § 8, of the Constitution grants Congress the power “[t]o regulate Commerce… among the several States.”).
  \item \textsuperscript{105} See \textit{id}. (“Nor does our case law toe the activity versus inactivity line. In \textit{Wickard}. For example, we upheld the penalty imposed upon a farmer who grew too much wheat, even though the regulation had the effect of compelling farmers to purchase in the open market.”) (citation omitted).
  \item \textsuperscript{106} See \textit{NFIB}, 132 S.Ct. at 2589 (“While Congress’ authority under the Commerce Clause has of course expanded with the growth of the national economy, our cases have ‘always recognized that the power to regulate commerce, though broad indeed, has limits’…The Government’s theory would erode those limits, permitting Congress reaching beyond the natural extent of its authority, ‘everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.’”) (citations omitted).
  \item \textsuperscript{107} See also \textit{NFIB} at 2646 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (If Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power, or in Hamilton’s words, ‘the hideous monster whose devouring jaws…spare neither sex, nor age, nor high nor low, nor sacred nor profane.’) (citation omitted).
  \item \textsuperscript{108} See \textit{NFIB}, 132 S.Ct. at 2623 (Ginsburg, J., concurring in part, concurring in the Judgment in part, and dissenting in part) (“Underlying the Chief Justice’s view that the Commerce Clause must be confined to the regulation of active participants in a commercial market is a fear that the commerce power would otherwise know no limits.”) (citations omitted).
\end{itemize}
rise to a significant free-riding problem that does not occur in other markets.”¹⁰⁸ She then notes that, under existing law, “Congress would remain unable to regulate noneconomic conduct that has only an attenuated effect on interstate commerce and is traditionally left to state law.”¹⁰⁹ These counterarguments convince neither the Chief Justice nor the four joint dissenters, who do not see things here as Justice Ginsburg does. They do not even see their own perspectives in the same way she does (and neither does she). Both sides inflate and exaggerate the dimensions of the opposing perspective in ways that are not merely rhetorical, but instead one sincerely held. The five conservative justices, for example, see Justice Ginsburg’s perspective as freeing Congress from any meaningful limitation,¹¹⁰ despite her listing of preexisting formal limits¹¹¹ and mention of political limits on congressional legislation.¹¹²

Justice Ginsburg, in turn, calls the Chief Justice’s reading of the Commerce Clause “crabbed” and “stunningly retrogressive,”¹¹³ saying that his opinion “bears a disquieting resemblance to…long overruled decisions”¹¹⁴ such as *Carter v. Carter Coal Co.*,¹¹⁵ *Hammer v. Dagenhart*,¹¹⁶ and *Lochner v. New York*.¹¹⁷ In Justice Ginsburg’s view, the resemblance between the Chief Justice’s opinion and these three “long overruled

¹⁰⁸ *Id.*
¹⁰⁹ *Id.*
¹¹⁰ *See supra* notes 106 and 107.
¹¹¹ *See supra* note 108.
¹¹² *See NFIB*, 132 S.Ct. at 2624 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“Supplementing these legal restraints is a formidable check on congressional power: the democratic process.”).
¹¹³ *Id.* at 2609.
¹¹⁴ *Id.* at 2629.
¹¹⁶ 247 U.S. 251 (1918) (holding the Keating-Owen Act of 1916 regulating child labor unconstitutional as beyond Congress’ commerce power).
¹¹⁷ 198 U.S. 45 (1905) (holding New York’s Bakershop Act of 1895 to be a violation of the liberty of contract implicit in the Due Process Clause of the Fourteenth Amendment).
decisions” lies in its use of formal distinctions to prevent the recognition of the otherwise unlimited exercise of legislative power in the first two cases by Congress and in the third by a state legislature. Justice Ginsburg, in contrast, tells us, “Since 1937, our precedent has recognized Congress’ large authority to set the nation’s course in the economic and social welfare realm…and…that ‘regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.’” 118 She rejects the formalistic distinctions that earlier Courts used (and which she contends the five conservative justices would use in NFIB) to limit Congress’ commerce power. She does not explicitly say that congressional power here is without limits, only that the scope of “Congress’ authority under the Commerce Clause is dependent upon ‘practical’ considerations, including ‘actual experience.’” 119

The conservatives here see their perspective as founded on original public meaning and protective of the principle of limited and enumerated governmental powers. They see the liberal perspective as departing from that original meaning and, worse yet, eschewing formal limits on Congress’ commerce power, thereby, it fears, effectively granting Congress a general police power such that “the idea of limited government is at an end.” 120 The liberals see their perspective as practical, based upon experience, sensitive to the needs of a modern economy and based upon the commerce power doctrine followed by the Court since 1937 (the New Deal Settlement). They see the conservatives as seeking to overthrow the New Deal Settlement and turn the clock back to the bad old days of cases like Carter, Hammer, and Lochner.

119 Id. at 2616.
120 NFIB, 132 S.Ct. at 2648 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).
B. INSIDE AND OUTSIDE

One thing that is clear here is that we get two very different and contrasting sets of perspectives depending on whether we define them as their possessors see them or if, instead, we measure them as others (i.e., those on the other side of the issue) perceive them. There are two questions this situation prompts. The first is how and why do these starkly different views arise? The second is which of the two possible vantage points should we privilege in our analysis, or to put it another way, which perspective on perspectives should we take? I have already discussed different standards of reasonableness, scope and space in alternative perspectives and now close this section with the notion that different perspectives assign different weight and application.

This account draws upon and generalizes from Ronald Dworkin’s celebrated distinction between rules and principles in law. In that account, rules either both apply and control their subject matter or they do neither—there is no middle position. Principles, by way of contrast, possess weight rather than all-or-nothing applicability and, so must be balanced against each other. While Dworkin in his work is primarily concerned with drawing and emphasizing this distinction between rules and principles, my account here of perspectives seeks instead to draw attention to a feature which they share—the fact that they

121 See DWORKIN, supra note 24 (“Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.”).

122 See id. at 26 (“Principles have a dimension that rules do not—the dimension of weight or importance. When principles intersect…one who must resolve the conflict has to take into account the relative weight of each.”).
both are variable and so may have different weights and application conditions in different perspectives.

Compare, for example, the weight or importance accorded to the principle of limited and enumerated powers in the conservative and liberal commerce powers perspectives. In the conservative perspective, this principle is clearly foundational. For example, in one of the leading New Federalism cases, *United States v. Lopez*, Chief Justice Rehnquist begins his discussion of constitutional doctrine in the case with this declaration, “We start with first principles. The Constitution creates a federal government of enumerated powers. See Art. I, § 8.” As we have seen above, the five conservative justices in *NFIB* accord the same importance and priority to the notion of limited government and the need to preserve it as Chief Justice Rehnquist does in *Lopez*.

Justice Ginsburg, writing for the four liberal justices in *NFIB*, does deny not explicitly this principle, but reduces its importance. In fact she notes this consideration and even lists several existing limits on the commerce power in her opinion. But she neither calls it a first principle nor treats it like one. In her view, the priority of place given to the to the principle of limited and enumerated powers in the conservative perspective goes instead to the notion of practical, rather than formal, factors in the liberal commerce power perspective. Now, the conservatives also praise practicality, but they do not value it as highly or make it as doctrinally central as do the liberals. They stop far short of making the determination of the scope of Congress’ commerce power merely a practical consideration.

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124 See supra notes 107-109, 111-112 and accompanying text.
125 See supra note 119 and accompanying text.
126 In arguing in favor of the activity/inactivity distinction and against economists who might argue that they both have effects, Chief Justice Roberts counters that, “the distinction between doing something and doing nothing would not have been lost on the Framers, who were ‘practical statesmen,’ not metaphysical philosophers.” *NFIB*, 132 S.Ct. 2586, 2589 (2012).
These (and other) constitutional values are reversed in importance in the two perspectives under discussion here, but they are nevertheless usually present in both perspectives. From this observation, a more general point relevant to law and legal theory can be made. Ronald Dworkin has introduced the notion of “theoretical disagreement” into jurisprudential discourse. He distinguishes this sort of disagreement from ordinary factual and legal disagreement and describes it as what occurs when we “disagree about the grounds of law, about which other kinds of propositions, when true, make a particular proposition of law true.”\textsuperscript{127} Dworkin believes it to be a scandal that this problem thus far has not been more adequately treated by legal theorists.\textsuperscript{128} This failure has occurred, Dworkin argues, because of the influence of what he calls “the plain fact view” of law, which holds that when lawyers and judges “appear to be disagreeing in the theoretical way about what the law is, they are really disagreeing about what it should be.”\textsuperscript{129}

The notion of perspectives employed in this article both blurs the distinction Dworkin seeks to draw between the plain fact view and his theory and explains why we have no plausible theory of theoretical disagreement. Start with the question, “Do the two sides in the individual mandate debate disagree about the grounds of (constitutional) law in the case?” The answer to this question must be both yes and no. No, because they recognize much the same grounds of law.\textsuperscript{130} But, the answer must be yes, too. This is the case because the two sides here define and weigh these grounds very differently.

Follow this with a second question, “Are the two sides here disagreeing about what the law is or merely about what it should be?” Once again, no clear, clearly correct

\textsuperscript{127} RONALD DWORON, LAW’S EMPIRE 5 (1986).
\textsuperscript{128} Id. at 6 (“Incredibly, our jurisprudence has no plausible theory of theoretical disagreement in law.”).
\textsuperscript{129} Id. at 7.
\textsuperscript{130} See supra notes 7 and 8 and accompanying text.
and unqualified answer can be given for either alternative, in this case because each side’s answers to this question are perspective-relative and combine both alternatives presented in the question (thus denying that they are true alternatives). Certainly, both sides see their positions as stating what the law is. Conservatives see their view as based on the original meaning of the constitutional text, basic underlying constitutional principles and controlling precedent, while they see the liberal view here as inconsistent with the first principle of limited and enumerated powers. Likewise, the liberal view sees its take on the individual mandate as flowing from the New Deal Settlement, the understanding of the scope of federal power the Court has followed since 1937 and the meaning of the constitutional text. It criticizes the conservative understanding of the law as retrogressive, a turning of the constitutional clock back to before 1937.

This seeming contradictions raises yet a third question—“How can two conflicting positions each state what the law is rather than what it should be?” The short answer to this question is that contested concepts combine what is and what should be. The apparent conflict here arises because the question draws too bright a line between what the law is and what it should be. The law is always in the process of becoming what it is; a statement about what the law is also suggests what it should be in cases yet to arise. This is the upshot of Dworkin’s interpretive theory of law which he exemplifies in his account of the chain novel, 131 his model for “the chain of law.” In fact, it is this forward-looking aspect that most significantly divides conservative and liberal perspectives on the individual mandate and the commerce power.

131 See Minow, supra note 7, at 229 (“In this enterprise a group of novelists write a novel seriatim; each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on.”).
Lawrence Solum, for example, contrasts two different gestalts of the New Deal Settlement, one (the liberal perspective) dynamic and the other (the conservative perspective) frozen. He tells us that, “The core idea of the [dynamic] gestalt was that Congress had plenary and virtually unlimited legislative power—subject of course to the limits imposed by the individual rights provisions of the Constitution.” In contrast, the frozen gestalt “can be summarized as a slogan, ‘This far, but no further.’” The two perspectives are divided over what the law will be, which is contains aspects both of what the law is and what it should be, although it is not identical with either one.

IV. ACTIVITY AND INACTIVITY

A. DECISIONS AND ACTIVITY

Up to this point, this article has focused on the meaning of the word “regulate” in the Commerce Clause as it is involved in the individual mandate debate and the NFIB decision. From here on, the focus shifts away from the word “regulate” itself and turns instead to the activity/inactivity distinction and the words “mandate” and “commandeer, which all play their own roles in this debate. We start with the topic of decisions as mental activity.

\[132\] See Solum, supra note 5, at 22-24.
\[133\] See id. at 24-25.
\[134\] Id. at 22.
\[135\] Id. at 24.
Most commerce power arguments made by defenders of the individual mandate reject the definition of regulate advanced by the conservative justices in NFIB. But they do make one argument that accepts the conservative assertion that regulation is of activity and, so, would save the mandate even if the conservative commerce power argument is otherwise fully conceded. This is the argument that the mandate regulates decisions (i.e., mental activity) concerning healthcare, health insurance and their purchase by those individuals subject to the mandate. This argument is made in lower Court decisions as well as in the Supreme Court’s NFIB decision.

In her opinion in NFIB, Justice Ginsburg sets out this argument, saying, “Given these far-reaching effects on interstate commerce, the decision to forgo insurance is hardly inconsequential or equivalent to ‘doing nothing’...it is, instead, an economic decision Congress has authority to address under the Commerce Clause.” This assertion is also sometimes phrased as a decision by the relevant individuals to self-insure, to pay their healthcare costs out of pocket. These descriptions define, or should I say redefine, the failure to purchase health insurance as the product of deliberate mental activity resulting in a decision by a covered individual to self-insure against healthcare costs.

The first problem raised by this redefinition of mental decisions as activity is that of novelty, which need not be fatal, but leaves it unclear whether it falls within

136 See supra notes 12-19 and accompanying text.
137 See, e.g., Mead v. Holder, 766 F. Supp. 2d 16, 36 (D.D.C. 2011) (“It is pure semantics to argue that an individual who makes a choice to forego health insurance health insurance is not ‘acting,’ especially the severe economic and health-related consequences to every individual of that choice. Making a choice is an affirmative action, whether one decides to do something or not to do something. They are two sides of the same coin. To pretend otherwise is to ignore reality.”).
139 See, e.g., Thomas More LawCtr. v. Obama, 651 F.3d 529, 543 (6th Cir.2011) (“Thus, set against the Act’s broader statutory scheme, the minimum coverage provision reveals itself as a regulation on the activity of participating in the national market for health care delivery, and specifically the act of self-insuring for the cost of these services.”).
Congress’ commerce power. The answer to this problem depends, once again, on one’s perspective on the individual mandate and on Congress’ commerce power. There is no literature I know of on the meaning of “activity” in this debate, but based on the existing discussion concerning the meaning of “regulate” and “commerce” in the Commerce Clause, it is not difficult to see what a debate over the meaning of “activity” might look like and what positions the two sides we have talked about so far might take in that debate.

The conservative perspective would define “activity” here narrowly and possessing a single, restricted meaning, as it has before with “regulate” and “commerce.” The liberal perspective would assign “activity” a wider logical space and more than one meaning, including a lesser meaning that is crucial in the individual mandate context. Decisions or mental activities serve the same role in arguing about the meaning of the word “activity” in the individual mandate debate that “to require action” serves for Justice Ginsburg regarding the meaning of “regulate” in her NFIB opinion. Although, the conservative perspective has no positive opposing formulation of the word “activity,” its denials make its view of “activity” clear enough. The conservative “this far, but no further” view takes activity to consist of discrete, voluntary physical and intentional actions by individuals which are confined in space and brief in time. Decisions or mental activities fail to meet this definition on several counts. Most obviously, they are not physical actions. Nor

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140 See, e.g., Mead, 766 F. Supp. 2d at 36 (“As previous Commerce clause cases have all involved physical activity as opposed to mental activity, e.g., decision-making, there is little judicial guidance on whether the latter falls within Congress’ power.”).
141 See supra notes 13-18 and accompanying text.
142 See supra notes 19-23 and accompanying text.
143 Justice Ginsburg does this, for example, with the word “regulate” when she notes that “[a]t the time the Constitution was [framed], to ‘regulate’ meant, among other things ‘to require action.’” NFIB, 132 S.Ct. at 2621 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citation omitted).

But see Florida v. United States HHS, 780 F. Supp. 2d 1256, 1294 (N.D. Fla. 2011) (“The important distinction is that ‘economic decisions’ are a much broader and far-reaching category than are activities that ‘substantially affect interstate commerce.’”) (Citations omitted).
are they clearly discrete, confined in space and brief in time. They may be, but there is no outward, objective way of confirming that they are.

Moreover, where there is no observable physical activity corresponding to the purported decision, as is the case with those failing to buy health insurance in the individual mandate situation, one cannot even be sure that decisions or mental activities have, in fact, occurred. Failure to do some things may be seen as based upon deliberate, rational decisions by economists or social scientists,\(^{144}\) but the failure would not be seen in this way by “the Framers, who were ‘practical statesmen.’”\(^{145}\) So even if decisions or mental activities qualify as activities for commerce power purposes, there is nothing in the ACA or in the cases and secondary literature relating to it that can tell us when a failure to purchase health insurance is the result of a deliberate decision by an individual and when it is not. Surely, not all failures to perform an activity are due to a decision not to perform that act. There are, for one, simply too many activities that we are not, at a given moment, engaging in for all these non-engagements to be the results of independent, deliberate decisions we have made. The assumption made here by the ACA’s individual mandate provision is not merely unsupported by the facts, it also presumes decision making power well beyond our normal mental capacities. Worse yet, this false assumption undermines a crucial jurisdictional support for the ACA and the mandate. The mental activity assumption in this

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\(^{144}\) This assumption is also sometimes made even by individual mandate opponents. See, e.g., Ilya Somin, *Why the Individual Health Care Mandate is Unconstitutional*, THE JURIST (May 4, 2011), [http://jurist.org/forum/2011/05/ilya-somin-mandate-is-unconstitutional.php](http://jurist.org/forum/2011/05/ilya-somin-mandate-is-unconstitutional.php) (“Far from engaging in ‘economic activity,’ people who decide not to purchase health insurance are actually *refraining* from doing so.”) (emphasis in original).

Somin’s “refraining” here implies a conscious consideration and decision not to do something. He would make his point more effectively (and avoid falling into his opponents’ trap) if he said instead that the group of people he discusses here simply have not purchased health insurance because they have decided not to do so, because they are still pondering the question, because they have never thought about it or for any other reason.

\(^{145}\) See supra note 126.
argument provides the necessary constitutionally-required nexus between the mandate and interstate commerce for the individual mandate defender. Without this nexus, the mandate is no longer a regulation of interstate commerce, but the unconstitutional exercise of a general police power by Congress. This would demand even less than the "minimal nexus requirement" set out in cases like *Scarborough v. United States*.\(^{146}\) Without a commerce nexus, the individual mandate becomes a congressional exercise of a general police power, just the sort of power that it does not legitimately have, but which mandate opponents accuse it of seeking with the enactment of the ACA.\(^{147}\)

### B. TIME AND ACTIVITY

The case for the individual mandate can survive the failure of the mental activity contention, which never was, in truth, the main argument for the constitutionality of the mandate, anyway. Serious assertions have been made, after all, that regulation of activity is not even a constitutional requirement for commerce power applicability.\(^ {148}\) Leaving the mental activity argument to one side, then, this section of the article discusses questions of time and timing as they relate to the notion of activity in the individual mandate debate. I have already set out the implicit picture of activity from the conservative perspective as

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\(^{146}\) *See* *Scarborough v. United States*, 431 U.S. 563, 575 (1977) ("[W]e see no indication that Congress intended to require any more than the minimal nexus that the firearm have been, at some time, in interstate commerce.").

\(^{147}\) *See*, e.g., *NFIB* 132 S.Ct. at 2578 ("This case concerns two powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to a police power.").

\(^{148}\) *See* The Constitutionality of the Affordable Care Act: Hearing on S.216 Before the Senate Committee on the Judiciary, 112th Cong.105 (2011) (testimony of Charles Fried, Beneficial Professor of Law, Harvard Law School), available at http://judiciary.senate.gov ("That the rule speaks to inactivity as much as activity—which may or may not be true—is in any event irrelevant. Nothing in the constitutional text or doctrine limits Congress to the regulation of an activity, although many—maybe all—examples of past regulation may in fact be characterized as regulations of activity.").
brief, local and intentional physical action. The liberal view, in contrast, even when it does not take activity to include decisions and mental activity, gives it a wider scope in terms of both space and time than does the conservative view. One way this is done in liberal defenses of the mandate is to assume that regulation can precede activity, while from the conservative perspective, regulation can only be of preexisting activity. Another liberal move here is to cast individual commercial activity in terms of general market participation rather than in narrower terms of discrete individual transactions.

Can activity be constitutionally regulated before it has even taken place? Of course it can, despite conservative assertions to the contrary.\(^{149}\) No constitutional barrier exists to applying already enacted regulations of commerce to commercial activity voluntarily entered into thereafter. The conservative insistence (to refine the assertion I made in the last paragraph) is that the regulation not precede the activity only in the sense that it not compel the activity to be regulated to be performed in the first place. The activity/inactivity distinction does not convey this point clearly enough. So, mandate opponents have added modifiers and used terms such as “clear and inarguable inactivity”\(^{150}\) and “passive inactivity”\(^{151}\) to describe more exactly what it is that they believe Congress may not regulate, but these phrases do not quite work either. Persons subject to the individual mandate are not visibly inert or completely passive. They are typically no less

\(^{149}\) See, e.g., Florida v. United States HHS, 780 F. Supp. 2d 1256, 1286 (N.D. Fla. 2011) (“It would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause. If it has the power to compel an otherwise passive individual into a commercial transaction with a third party merely by asserting—as was done in the Act—that compelling the actual transaction is itself ‘commercial and economic in nature, and substantially affects interstate commerce,’ it is not hyperbolizing to suggest that Congress could do almost anything it wanted.”).

\(^{150}\) See id., at 1256 (“In every one of the cases—in both the contractive and expansive—there has always been clear and inarguable activity, from exerting control over and using navigable waters (Gibbons) to growing or consuming marijuana (Raich).”).

\(^{151}\) See id. at 1286 (“In every Supreme Court case decided thus far, Congress was seeking to regulate under its commerce power something that could even arguably be said to be ‘passive inactivity.’”).
active, in the sense of engaging in as much voluntary physical motion, as persons subject to valid commerce regulations other than the individual mandate. They are not just “doing nothing.” Some other explanation is needed to distinguish regulating inactivity from compelling commercial transactions.

Fortunately, we already have the core of this desired explanation in the founding era dictionary definitions given in the NFIB opinions. Several of the definitions noted by the four joint dissenters, for example, define “regulate” as “adjust by rule.” Adjustment assumes an existing activity and, more relevantly here, it involves alteration to or change in the underlying activity being regulated. The “passively inactive” subject of the individual mandate may be performing many other activities at the time in question, but the requirement of the mandate is not an adjustment of any of those activities, so that the subject is inactive with respect to the mandated activity. If the subject were active in this way, NFIB would not be a controversial case raising many claims of novelty; his or her activity would, instead, fall under the many cases and doctrines regulating already existing commercial activity.

In response to the founding era definitions just mentioned and just before she asserts that in the founding era “regulate” meant “to require action,” Justice Ginsburg asserts that, “Nothing in this language implies that Congress’ commerce power is limited to regulating those actively engaged in commercial transactions.” I have argued that this

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152 See, e.g., NFIB, 132 S.Ct. 2566, 2587 (2012) (“Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority.”) (emphasis in original).
153 For a judicial opinion that fails to adequately distinguish the two, see supra note 147.
154 See supra notes 13-16 and accompanying text.
155 See supra notes 19-23 and accompanying text.
156 NFIB, 132 S.Ct. at 2621 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).
claim is incorrect or at least in need of clarification or qualification. That clarification will relate to what is meant by being “actively engaged.” Consider three possible clarifications here—two which describe clear and opposed situations and the third which corresponds to an ambiguous situation which lies in the middle, between the two extremes. At one extreme, if one is currently performing a commercial transaction, one is clearly actively engaged in commerce and the activity can be regulated under the Commerce Clause. At the other extreme, if one has never engaged in commercial transactions (at least of the type sought to be regulated) and is unlikely ever to do so in the future, then one is not actively engaged in commerce or commercial transactions and so what one is doing is beyond Congress’ commerce power. These two cases are, I contend, clear cases.

But there is also a middle case, one which is a closer factual fit with the individual mandate situation than the two clear cases and which presents a closer question on commerce power applicability than they do. This is where one is not currently performing a commercial transaction of the sort sought to be regulated and perhaps has not ever done so in the past, but is likely, even certain, to do so, at some unknown time or times in the future.157 The two perspectives on the commerce power (the frozen and dynamic New Deal Settlement gestalts) differ sharply as to whether or not this sort of fact situation falls within Congress’ commerce power. Mandate opponents (i.e., those with the frozen gestalt) deny that this case involves present commerce and, so, conclude that it does not fall within congressional regulatory power. Moreover, any contrary holding, this

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157 See, e.g., Mead v. Holder, 766 F. Supp. 2d 16, 37 (D.D.C. 2011) (“Thus, as inevitable participants in the health care market, individuals cannot be considered ‘inactive’ or ‘passive’ in choosing to forgo health insurance.”).
perspective fears, would greatly, and wrongly, expand Congress’ legislative power in this area.  

The difference between the two perspectives here is, in Solicitor General Verilli’s, words, a matter of timing.159 General Verilli’s position is that it is within Congress’ regulatory power to require payment before health care is sought or consumed.160 Chief Justice Roberts, in contrast, views someone in this situation as “doing nothing,”161 and, so, as not engaging in a commercial transaction, the constitutional prerequisite for congressional regulatory authority. Both men here are looking at and attempting to describe the same phenomena, but they see these phenomena in different ways. The difference between them arises, in large part, from differences in the time frame used to perceive, define and analyze the (in)activities in question. The choice of time frame used to define action or activity in the individual mandate debate here plays a crucial role in determining the perceived (un)constitutionality of the mandate, but unfortunately, neither side spends much time or argument explaining or defending their choice of time frames utilized in their definitions or used in their concepts. They barely even seem to recognize the differing underlying assumptions they have made, perhaps because these assumptions seem natural and intuitive to them given the (opposed) perspectives they inhabit.

158 See, e.g., NFIB, 132 S.Ct. at 2591 (“The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the states.”).

159 See Transcript of Oral Argument March 27, 2012 at 23-24, U.S. Dept of Health & Human Servs. v. Florida, __S.Ct.__ (No. 11-398) (“I do think, Justice Kagan, that the point of difference between my friends on the other side and the United States is about one of timing. They’ve agreed that Congress has Article I authority to impose an insurance requirement or other—or other penalty at point of sale, and they have agreed that Congress has the authority to do that to achieve the same objectives that the minimum coverage provision in the Affordable Care Act is designed to achieve.”).

160 See id. at 42. (“And this is just a question of timing and whether Congress’s—whether the necessary and proper authority gives Congress, because of the peculiar features of the market, the ability to impose the—the insurance, the need for insurance, the maintenance of insurance before you show up to get health care, rather than at the moment you get up to—show up to get health care.”).

161 See supra note 152 and accompanying text.
Choice of time frame is an important, but under-theorized aspect of legal and philosophical questions concerning action. One writer who has sought to analyze this problem is Mark Kelman, who a generation ago wrote on the topic of the choice of time frame constructions in criminal law. Although his focus there was on a particular choice, the choice between intentionalist and determinist (i.e., voluntary and involuntary) constructions of acts in criminal law and theory, a topic which is not directly relevant to the discussion here, his more general comments on time frame choice are quite relevant to the subject matter of this article. Professor Kelman talks in his article of a choice that is political, rather than rational, between narrow and broad time frames. Broad time frames, he notes, can more readily include prior and/or later acts and events in the constructions employed, while narrow time frames can more easily exclude prior and later events and/or acts. And in both cases, time frame construction can do this with a minimum of argument, or even notice, by merely positing one favored construct as the most natural or common sense construct.

In the individual mandate debate and litigation the primary time frame construct choice is whether the basic unit of analysis should be the individual commercial transaction (the view of the frozen gestalt) or that of the market participation (the dynamic gestalt position). The effects of this choice can be seen in the arguments and epithets discussed in

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163 See id. at 594 (“Most often, though not invariably, the arational choice between narrow and broad time frames keeps us from having to deal with more explicit political questions arising from [other] interpretive construct[s].”).
164 See id. at 611 (“Broad time framing…also occurs in other areas…[t]he time frame can be opened up to account for events both prior and subsequent to the…incident.”).
165 See id. at 664 (“Choosing a time frame is critical for a number of reasons. Most critically, the interpreter’s to convince himself of the legitimacy, or better, the necessity of a narrow focus eliminates the more obvious political tensions inherent in the choice of [another] account. Narrow time-framing simply excludes all the potentially explanatory background data.”).
166 Once again, this is only “natural” in the contexts of particular perspectives.
last several pages of this article. That which mandate opponents see as inactivity, 167 mandate defenders instead view as just a matter of timing. 168 The differing attitudes the two perspectives take towards the same phenomena are a function of the breadth (or narrowness) of the basic time frame construct they have chosen to employ. If the basic unit is the individual transaction, as is the case from the anti-mandate perspective, then that which occurs outside of that unit (i.e., before or after the transaction’s occurrence) cannot be regulated by Congress under the commerce power. On the other hand, if the basic unit is that of market participation, as is the case with mandate defenders, then the wider time frame employed there permits an insurance requirement to fall within the time frame being regulated.

This time frame construct difference explains, for example, why mandate defenders are unconcerned about whether or not what is being regulated is activity or inactivity—both fall within the market participation time frame construct. It also explains why mandate opponents emphasize the activity/inactivity distinction and why they show little patience with market participation arguments in favor of the mandate. 169 What we have here, then, is a disagreement concerning matters of “constitutional significance.”

C. INDIVIDUALS AND ACTIVITIES

167 See, e.g., notes 149, 151, 152 and accompanying text.
168 See, e.g., notes 159, 160 and accompanying text.
169 See, e.g., NFIB 132 S.Ct. 2566, 2590 (2012) (“The Government repeats the phrase ‘active in the market for health care’ throughout its brief…, but the concept has no constitutional significance. An individual who bought a car two years ago and may buy another in the future is not ‘active in the car market’ in any pertinent sense. The phrase ‘active in the market’ cannot obscure the fact that most of those regulated by the individual mandate are not currently engaged in any commercial activity involving health care, and that fact is fatal to the Government’s effort to ‘regulate the uninsured as a class.’…Our precedents recognize Congress’ power to regulate ‘class[es] of activities’…,not classes of individuals, apart from any activity in which they are engaged[,]” (emphasis in original).
As Chief Justice Roberts’ diatribe against the phrase “active in the market for health care” shows, the dynamic gestalt’s expansion of the operative time frame of analysis in the commerce power context from individual transactions to wider market participation turns a previously merely quantitative difference (about the width of a time frame) into a qualitative difference—the regulation of classes of activities as opposed to regulation of classes of individuals. The frame has gone from that of activity, even over a long period of time, to regulation of individuals, i.e., from the regulation of market participation to the regulation of market participants. He insists here that, “The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions.”

Is the Chief Justice’s position consistent with established commerce power doctrine? It is. Consider the general assertions concerning congressional commerce power that the Court sets out in United States v. Lopez. It begins by announcing that, “[W]e have identified three broad categories of activity that Congress may regulate under its commerce power.” Under the first, “Congress may regulate the use of the channels of interstate commerce.” Although channels of interstate commerce are things rather than activities, the use of those channels is activity. In any case, a person cannot be a channel of interstate commerce. The third category states that, “Congress’ commerce power includes the power to regulate those activities having a substantial relation to interstate

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170 Id. at 2591.
172 Id. at 558.
173 Id.
commerce. “This category explicitly connects Congress’ power to activities rather than individuals.

Only the second category that Congress may regulate presents an arguably closer question. Pursuant to that category, “Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.” This category mentions persons as well as instrumentalities and things, but only while they are in interstate commerce. Some have argued for the notion of a *per se* instrumentality of interstate commerce. Such an instrumentality would be an instrumentality of interstate commerce because of its very nature and not because of any activity or movement it has undergone. But the Supreme Court has never recognized the concept of a *per se* instrumentality of interstate commerce and the courts that have considered the question have backed away from recognizing a thing that is an instrumentality of interstate commerce simply because of its nature. Just as in the case of a minimal nexus to interstate commerce, however, the Court has so far only minimized the activity requirement without eliminating it

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174 *Id.* at 558-59 (citation omitted).
175 *Id.* at 558 (citation omitted).
176 It is not clear whether or not there are any instrumentalities of interstate commerce other than persons and things. *See e.g.*, Garcia v. Vanguard Car Rental USA, Inc., 540 F.3d 1242, 1249 (11th Cir. 2008) (“And *United States v. Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005)] arguably suggests, without explicitly stating, that persons and things moving in interstate commerce is the full extent of the instrumentalities category.”).
177 *See e.g.*, Garcia v. Vanguard Car Rental USA, Inc., 540 F.3d 1242, 1249 (11th Cir. 2008) (“But there is also some authority for the proposition that methods of interstate transportation and communication are per se instrumentalities of commerce, regardless of whether the car (or the like) at issue in a particular case has crossed state boundaries or is otherwise engaged in interstate commerce.”).
178 *See id.* at 1250 (“Moreover, there is sensible authority that channels and instrumentalities of commerce refer only to ‘the ingredients of interstate commerce itself.’”) (quoting Gonzales v. Raich, 545 U.S. 1, 34 (2005) (Scalia, J., concurring in the judgment)).
179 *See supra* note 146 and accompanying text.
altogether. The mandate defenders would take an unprecedented and unjustified step too far by eliminating it altogether.

V. MANDATE AND COMMANDEER

A. MANDATE

In this last section, we turn our attention to two lesser terms which have so far played only a supporting role for the activity/inactivity distinction in the individual mandate debate (and in this article, for that matter); these two terms are “mandate” and “commandeer.” We start with “mandate,” a word which, of course, occurs most commonly in this debate in the phrase “individual mandate,” and ask if this term provides us a clearer, better and more effective analytic tool than the contentious, but more common, activity/inactivity distinction, that is, if it gives off more light and less heat than does that distinction. My contention is that it does, mainly because it is narrower and less confusing. Despite the extensive use of this distinction in the discourse, no clear consensus has ever developed as to exactly what inactivity is, how it is to be distinguished from activity and how it is to be defined. This unfortunate fact alone has caused some to reject the argument against the individual mandate out of hand. For without a concrete definition of “inactivity” or a clear line between it and “activity,” the distinction cannot properly perform

\footnote{See, e.g., Liberty Univ., Inc. v. Geithner, 671 F.3d 391, 422 (4th Cir. 2011) (Wynn, J., concurring) (“[Appellant] cannot even provide a sufficiently concrete definition of ‘activity’ and ‘inactivity’ to allow the courts to reliably apply their distinction. Because I find the individual mandate to be within the bounds of the commerce power defined by Wickard, Lopez, Morrison and Raich, I would reject appellant’s Commerce Clause challenge.”).}
the function it was intended to perform—to separate that which Congress can regulate pursuant to its commerce power from that which it cannot so regulate. “I know when I see it” will not do as a substitute test or selection device here, especially when the ability to see it is perspective dependent. The line between activity and inactivity must be made sufficiently clear, workable and meaningful to proponents as well as opponents in the individual mandate debate if it is to deserve or achieve a prominent role in commerce power doctrine.

When the Supreme Court rejected the government’s commerce power arguments in *NFIB*, this decision was trumpeted by individual mandate opponents as an acceptance by the Court of the activity/inactivity distinction, but this claim was undercut even in its very assertion. Consider, for example, Ilya Somin’s reaction to the decision, “The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to become active in commerce, by purchasing a product, on the ground that their failure to do so affects interstate commerce.”\(^{181}\) Somin’s reference here to “existing commercial activity” echoes statements by Chief Justice Roberts and the four joint dissenters in the *NFIB* decision itself.\(^{182}\) But the assertion here by Professor Somin and the Chief Justice of a preexisting economic activity requirement in commerce power doctrine is, in an important way, factually false, or at least ill-formulated, because it seriously misdescribes the very decision they announce. The relevant factor here is not preexisting economic activity—virtually all statutes, including those adopted pursuant to

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\(^{182}\) See, e.g., *NFIB* 132 S.Ct. 2566, 2590 (2012) (“But we have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce. Each one of our cases, including those cited by Justice Ginsburg...involved preexisting economic activity.”) (citations omitted).
Congress’ commerce power, regulate subsequent activity rather than preexisting activity. This is the nature of legislation. All the economic activity regulated in the cases cited by the Chief Justice, for example, occurred after the adoption of the laws in question, not before adoption.

A similar problem arises with the “active in commerce” phrase that Somin uses. Most, if not all, of the individuals affected by the individual mandate were currently or had been active in commerce in some way, or both, when the mandate was enacted. Most had also participated in the markets for healthcare and health insurance prior to the passage of the ACA. And even under an “active in the market for health care” test, presumably neither Professor Somin nor the Chief Justice would have complained if the ACA had made the individual mandate only an individual option instead of a mandate. What motivates their complaint of a constitutional problem here, from the perspective that they both share, is more the compulsion involved in the individual mandate than it is the existence or timing of the economic activity concerned. But the activity/inactivity distinction does not convey or explain this compulsion requirement well, if at all.

“Mandate,” at least, does a better job of conveying the compulsion aspect which mandate opponents find constitutionally objectionable in the individual mandate. Now, one cannot find the word “mandate” in Samuel Johnson’s dictionary, but Webster today defines it as “an authoritative command” (as a noun) and as “to officially require” (as a verb). This definition is narrower and clearer than the definitions floated of the activity/inactivity

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183 For Chief Justice Roberts’ strong complaints against the extensive use of the phrase “active in the market for health care” by the United States in the NFIB litigation, see supra notes 169, 170 and accompanying text.
distinction; it is also more effective in conveying the gravamen of the opponents’ case against the individual mandate. But it is still not good enough.

What the anti-individual mandate case needs here is a term that contrasts with “regulate” and has no overlap with “regulate,” so that the individual mandate critic can say, “In the individual mandate, Congress is not regulating activity, but Xing activity.” “Mandate” is not quite that term because “mandate” can sometimes apply to regulations and adjustments of commerce. This meaning overlap undermines the argument advanced by individual opponents that economic mandates are unconstitutional because they go beyond Congress’ power to regulate interstate commerce. They do not go beyond congressional power if mandates are, in fact, a type of regulation of commerce. And if mandates are sometimes, but not always, regulations, an explanation of the dividing line between them is required and some better term than “mandate” is required as a replacement term in the commerce power lexicon.

The simplest, most straightforward way to illustrate and demonstrate this assertion is, perhaps, to examine Einer Elhauge’s introduction of the subject of founding era mandates into the individual mandate discussion in the academic blogosphere and the reaction it caused there. The provocative nature of Elhauge’s intervention in the discourse is apparent even from the title of his first salvo on the topic—If Health Insurance Mandates Are Unconstitutional, Why Did the Founding Fathers Back Them? He starts with the arguable contention that “nothing in the text or history of the Constitution’s Commerce Clause indicates that Congress cannot mandate commercial purchases.” He describes the


186 Id.
reply to his assertion in this way, “The framers, challengers have claimed, thought a constitutional ban on purchase mandates was too ‘obvious’ to mention. Their core basis for this claim is that purchase mandates are unprecedented, which they say would not be the case if it was understood this power existed.”187 Having set his opponents up in this way, Elhauge follows with the haymaker--“But there’s a major problem with this line of argument: It just isn’t true. The founding fathers, it turns out, passed several mandates of their own.”188 In the 1790’s, Congress passed, and Presidents Washington and Adams signed, three laws which required that “ship owners buy medical insurance for their seaman,” “all able-bodied men…buy firearms” and “seamen buy hospital insurance for themselves.”189 Most of the framers then in Congress voted in favor of these measures and “there is no evidence that any of the few framers who voted against these mandates ever objected on constitutional grounds.”190

Reaction to Elhauge’s claims was vociferous and (predictably) divided along perspective lines. Akhil Reed Amar explained why this is the case in one of these articles when he observed, “As you know, a lot of this is a frame game.”191 Once again, the tenor of the reactions to Elhauge’s piece can be easily gleaned from the article titles of the replies themselves.192 Individual mandate opponents raised counterarguments. Philip Hamburger, for example, said that, “The relevant provisions, however, apparently arose under

187 Id.
188 Id.
189 Id.
190 Id.
191 Ezra Klein, Amar: ‘The most important limit, the one we fought the Revolutionary War for, is that the people doing this to you are the people you elect, WASH. POST—WONKBLOG March 28, 2012, 5:36 PM) http://www.washingtonpost.com/blogs/wonkblog/post/amar-the-most-important-limit-the-one-we-fought-the-revolutionary-war-for-is-that-the-people-doing-this-to-you-are-the-people-you-elect/2012/03/28/gIQARJUDhS_blog.html (quoting Akhil Reed Amar).
Congress’ military powers.”

Countering Elhauge’s argument on the seamen’s insurance example, Randy Barnett responded that “it is a garden variety regulation of how commerce...is to be conducted...To be subjected to this regulation, you first have to engage in the commercial activity of shipping[.]”

In answer to the militia arms purchase requirement, Barnett replied that “this was an exercise of Congress’ militia power, and the militia duty traditionally required members to provide their own weapons.” He also argues that various civic duties, including jury duty, filing tax returns, and filling out the census as well as this militia duty to purchase firearms, “can be considered essential to the very existence of government, not merely convenient to the regulation of commerce.”

My main concern is not with the finer points of the argument here, but with a major truth about Elhauge’s main claim. Even if Hamburger and Barnett are completely correct in their responses to Elhauge, their contentions are beside the point in an important way—they do not refute his larger claim that the founders recognized the constitutionality of economic mandates in the form of purchase requirements. It may be true that some of these mandates involve civic duties rather than regulation of interstate commerce and that the other mandates concern how commerce is conducted rather than whether or not it is to be conducted at all, but in terms of the meaning of the word, these are still mandates. This does not mean that the individual mandate is constitutional, only that the word “mandate” is not up to the task of clearly expressing the constitutional defect in therein.

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195 Id.

B. COMMANDEER

The term “mandate,” although less problematic than the activity/inactivity distinction, is, at best, an imperfect vehicle for the clear and effective statement (i.e., one that can cross the divide between perspectives) of the constitutional defect opponents find in the individual mandate. Hope fades for a bulletproof argument if there is no better alternative at hand. But there may be better alternatives available in the word “commandeer” and related terms such as “conscript” and “impress.” These words are narrower in meaning than the terms and distinctions considered thus far in this article. Moreover, they do not overlap in meaning with “regulate.” For this reason, they avoid unnecessary confusion or weakness in the anti-individual mandate argument and perspective such as the ambiguity exploited by Elhauge which is discussed above.

More importantly, these terms single out and emphasize the aspect of compulsion, which I argue is needed in anti-individual mandate rhetoric.\(^{197}\) They even go beyond this to also include an element of forcible seizure in their meaning. Finally, these are terms that have sufficiently clear meanings, in large part derived from military contexts, to constitute a manageable enforcement standard. These terms have sometimes been used

by individual mandate opponents, but far less frequently than the activity/inactivity distinction and the word “mandate.” And the meaning of these terms has not been much used to explain and argue for the impropriety of the individual mandate. Instead, they have played a supporting role in the service of themes such as the activity/inactivity distinction and the principle of limited and enumerated powers.

These three terms do, however, express a justified and workable limit to the commerce power; this fact has already been demonstrated in the anti-commandeering cases involving federal regulation of the states under the commerce power. One of those cases says, “As an initial matter, Congress may not simply ‘commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’” The federal power to regulate does not include the power to compel states to act. The states retain a residual sovereignty. But, state sovereignty does not convey state immunity from garden variety congressional regulation. The line here is between constitutional regulation of the states and unconstitutional commandeering of the states.

My argument here is in favor of applying this same regulation/commandeering line to limit congressional power over individuals. Of course, persons are not states. And

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198 See, e.g., NFIB, 132 S.Ct. 2566, 2646 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (“Here, however, Congress has impressed into service third parties, healthy individuals who could be but are not customers of the relevant industry, to offset the undesirable consequences of the regulation.”).
199 See id. (“If Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power[.]”).
201 See id. at 166 (“We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power to directly compel the States to require or prohibit those acts.”).
203 See, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985) (“[W]e perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision.”).
the anti-commandeering cases recognize congressional authority over individuals. But the authority recognized is the authority to regulate, not the authority to commandeer or conscript. Now, even if this individual anti-commandeering right is intelligible, it still requires a constitutional justification or space. This is provided by a combination of the anti-commandeering cases and the Bond case. Bond tells us that “States are not the sole intended beneficiaries of federalism.” On the contrary, “Federalism secures the freedom of the individual.” The anti-commandeering cases recognize an anti-commandeering immunity under the Tenth Amendment. Bond stands for the proposition that the Tenth Amendment protects the rights of individuals as well as the rights of states. Putting the two together yields an individual anti-commandeering right.

But this right is convincing only if one perceives a constitutional “space” for this right to fit into the Tenth Amendment. The frozen New Deal Settlement gestalt sees such a space, just as it saw a space for the state anti-commandeering principle in the anti-commandeering cases, but the dynamic gestalt sees no such space. To the contrary, it believes that, “The amendment states nothing but a truism that all is retained which has not been surrendered.” From this perspective, the Tenth Amendment is merely a declaratory statement and creates substantive rights for neither states nor individuals. The price for

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204 See, e.g., New York v. United States, 505 U.S. at 166 (“In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.”).
205 Bond v. United States, 564 U.S. __, 131 S.Ct. 2355 (2011) (holding that individuals as well as states can bring Tenth Amendment challenges to the constitutionality of federal statutes).
206 Id. at 2364.
207 Id.
208 United States v. Darby, 312 U.S. 100, 124 (1941).
209 See id. (“There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment[.]”).
seeing things this way, however, is an inability to assimilate the doctrine and holdings of *Bond* and the anti-commandeering cases to a larger understanding of federal power.

VI. CONCLUSION

The debate and litigation over the individual mandate since the ACA was enacted in 2010 has brought into clearer relief the opposing perspectives on the limits and scope of the federal commerce power which fuel the argument. This article has not tried to resolve the conflict, for the two sides do not share enough fundamental assumptions to do that. It has instead sought to use the debate to further illuminate the two perspectives and, at the same time, to use the two perspectives to evaluate and critique a basic distinction (the activity/inactivity distinction) and some basic terms (‘regulate,’ ‘commerce,’ ‘mandate’ and ‘commandeer’) from that debate. The goal is a reciprocal understanding of the nature and interaction of both.