REGULATE/MANDATE:
TWO PERSPECTIVES

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“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.’”

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I. INTRODUCTION

If nothing else, the debate and litigation over the constitutionality of the “individual mandate”2 of the Patient Protection and Affordable Care Act of 20103 (ACA) 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, they cannot agree on the meaning and scope of the word regulate in the Commerce Clause4 and whether that word gives Congress the power to enact economic mandates.5 Several prominent writers recently argued that this lack of agreement arose because the two sides of the debate 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,6 visions,7 or worldviews.8 Regardless of

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1 LEWIS CARROLL, ALICE’S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS 171 (Schocken Books 1979) (1865).

2 26 U.S.C. § 5000A(a) (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 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .”).

5 See infra Part VI.A.

the metaphor, the point is that 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 and underlying principles and purposes of the Constitution.

This Article asks where this situation leaves the country and seeks to determine the effect of these competing perspectives on the wrangle over—in particular—the individual mandate and—in general—on constitutional argument and theory. 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 the issue. After all, the two sides do share the same constitutional text and precedent.9 However, they do not share the same constitutional doctrines, purposes, and underlying principles. They even weigh and interpret quite differently that which they do share, thus leading to opposition.10 This situation is not completely negative, but is rather a mixed blessing because, while it makes disagreement inevitable, it also makes argument possible. 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.11

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

7 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 . . . .” (footnote omitted)).

8 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.”).

9 See id. at 122 (“These differences in view do not reflect reliance on different sources; both opinions used the same texts and decisions.”).

10 See id.

11 See infra Part II.B.1.
some important definitions, terms, and distinctions from the individual mandate debate. These include the definition of “regulate” in the Commerce Clause, the activity–inactivity distinction that individual mandate critics proposed, and the words “mandate” and “commandeer” 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 through the contest of constitutional worldviews in order to better understand and evaluate these terms and their interplay with larger constitutional perspectives. This Article aims 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. In this way, this Article seeks to take constitutional theory from its usual goal of Newtonian objectivity to an appreciation of its relativistic side too. The meaning and salience of terms and distinctions are not simply functions of the perspectives because the relation explored here is reciprocal rather than one-directional. They also help to constitute and shape these very perspectives. Examining 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 when taken holistically and practically.

12 See infra Part II.
13 Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB), 132 S. Ct. 2566, 2587 (2012) (opinion of Roberts, C.J.) (“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. 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.”).
14 Id. at 2593 (“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.”).
15 New York v. United States, 505 U.S. 144, 161 (1992) (“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.” (alteration in original) (quoting Hodel v. Va. Surface Mining & Reclamation Ass’n, 452 U.S. 264, 288 (1981))).
16 See infra Parts IV–VI.
17 See infra Part II.B.
II. DUAL DEFINITIONS, DUELING PERSPECTIVES

A. Dual Definitions

1. Two Ways to Read a Dictionary

The several opinions in the healthcare case—National Federation of Independent Business v. Sebelius 18 (NFIB)—go back to basics, which is to say back to the original public meaning to define the word *regulate* in the Commerce Clause. The opinions start out by offering founding-era dictionary definitions of the word.19 The four joint dissenters, for example, examine four dictionaries. The first dictionary they looked at—Webster’s 20—defines *regulate* as “[t]o adjust by rule, method or established mode.”21 They also found similar definitions in dictionaries by Samuel Johnson,22 John Ash,23 and Thomas Dyche and William Pardon.24 From these definitions of *regulate*, the four joint dissenters concluded that “[i]t can mean to direct the manner of something but not to direct that something come into being.”25 In his opinion, Chief Justice Roberts likewise concluded that “[t]he power to *regulate* commerce presupposes the existence of commercial activity to be regulated.”26

In response to these takes on the meaning of *regulate*, Justice Ginsburg countered, “Indeed, as the D.C. Circuit observed, ‘[a]t the time the Constitution was [framed], to ‘regulate’ meant,’ among other things, ‘to require action.’”27 Here, however, Justice Ginsburg compressed things a

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19 See NFIB, 132 S. Ct. at 2586–87 n.4 (opinion of Roberts, C.J.); id. at 2621 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); id. at 2644 (joint dissent).
20 See id. at 2644 (joint dissent).
21 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 54 (1828).
22 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (7th ed. 1785) (“To adjust by rule or method.”).
23 2 JOHN ASH, NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775) (“To adjust, to direct according to rule.”).
24 THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (16th ed. 1777) (“[T]o put in order, set to rights, govern or keep in order.”).
25NFIB, 132 S. Ct. at 2644 (joint dissent).
26 Id. at 2586 (opinion of Roberts, C.J.).
27 Id. at 2621 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (alterations in original) (quoting Seven-Sky v. Holder, 661 F.3d 1, 16 (D.C. Cir. 2011)).
little bit too much. In Seven-Sky, Judge Silberman did say “to ‘regulate’
can mean to require action,” but he could only use that definition by
eliding a step. First, he cited Samuel Johnson’s definition of regulate as
“[t]o adjust by rule or method,” as well as “[t]o direct.” Then, he stated,
again citing Johnson, that “[t]o 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
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 dissents seem to have the
advantage over Justice Ginsburg in the contest of founding-era dictionary
definitions of regulate. Their definitions were primary rather than
secondary, and they also provided numerous definitions of regulate instead
of direct or some other word. Yet, this is not the whole story; it resolves
the issue only if the current meaning of a constitutional term is solely a
function of its founding-era dictionary definition and if that definition
comprises only the first or primary given definition and not any secondary
definitions. Neither of these assumptions is self-evident because they are
at least debatable. A term’s founding-era dictionary definition may be
only one aspect of a larger, more complex determination.

28 Seven-Sky, 661 F.3d at 16.
29 Id. (alterations in original) (quoting 2 Samuel Johnson, Dictionary of the
English Language 1619 (4th ed. 1773)).
30 Id. (alterations in original) (quoting 2 Johnson, supra note 29, at 514).
31 See NFIB, 132 S. Ct. at 2586 n.4 (opinion of Roberts, C.J.) (“But to reach this
conclusion, the case cited by Justice Ginsburg relied on a 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.’” (alteration in original) (citation
omitted)).
32 Compare id. at 2586–87 n.4 (quoting 2 Johnson, supra note 29), and id. at 2644
(joint dissent) (quoting 2 Webster, supra note 21; 2 Johnson, supra note 22; 2 Ash, supra
note 23; Dyche & Pardon, supra note 24), with id. at 2621 (Ginsburg, J., concurring in
part, concurring in the judgment in part, and dissenting in part) (quoting Seven-Sky, 661
F.3d at 16).
33 Caleb Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519, 519
(2003) (“What originalists think of as a law’s ‘original meaning,’ though, does not depend
(continued)
not at all clear that Justice Ginsburg took the disagreement over dictionaries here as seriously as did the five conservatives with whom she argued. She may have only used a conservative device or author to mock conservative arguments, as she did elsewhere in her opinion when she quoted Judge Frank Easterbrook on the line between activity and inactivity\textsuperscript{34} and Robert Bork on slippery slopes.\textsuperscript{35}

Unfortunately for the commerce arguments of the five conservative justices in \textit{NFIB}, the assumption that \textit{regulate} or any other constitutional term must have one and only one meaning is contradicted by the founding-era dictionaries on which they rely. These dictionaries give multiple definitions for \textit{regulate} and many other words.\textsuperscript{36} It should not be surprising that a word like \textit{regulate} has more than one definition. Many words in dictionaries today and in the eighteenth century have multiple definitions, some broader than others and some figurative extensions of more basic definitions.\textsuperscript{37} Perhaps unsurprisingly, none of the justices proffering founding-era dictionary definitions of \textit{regulate} also provide a nontendentious explanation of why one definition should be preferred to the alternatives. The result, then, is not just law office history, but also law office lexicography.

When taking a closer look at these definitions, they do not quite do the work the justices claimed they do. This should not be surprising because the eighteenth-century dictionary lexicographers did not craft the definitions with the individual mandate dispute in mind. Chief Justice Roberts and the joint dissenters asserted that regulation presupposes already-existing commercial activity, which 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

\textsuperscript{34} \textit{NFIB}, 132 S. Ct. at 2622 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“[I]t is possible to restate most actions as corresponding inactions with the same effect . . . .” (quoting Archie v. Racine, 847 F.2d 1211, 1213 (7th Cir. 1988) (en banc))).

\textsuperscript{35} \textit{Id.} at 2625 (“‘Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom.’” (quoting \textsc{Robert Bork}, \textsc{The Tempting of America} 169 (1990))).

\textsuperscript{36} See \textsc{Dych\& Pardon, supra} note 24; \textsc{Johnson, supra} note 29; \textsc{Webster, supra} note 21.

\textsuperscript{37} See, \textit{e.g.}, \textsc{Dych\& Pardon, supra} note 24; \textsc{The American Heritage College Dictionary} 1150 (3d ed. 1993).
does, while the four liberals do not. However, a founding-era dictionary, which equates regulation with adjustment, does not clearly or convincingly demonstrate this point. 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 that the machine is already on or the process is ongoing, but one would not be perplexed, 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 Ginsburg would have it do—permit the legislature to order the underlying commercial action that will, in turn, be regulated.

One problem and source of confusion here is the largely undisussed difficulty of individuating actions in a natural, nontendentious way. Just as inaction may be redescribed as action (as Justice Ginsburg noted elsewhere in her opinion), two actions may be redescribed as one (and one action described as two), thus blurring the distinction Chief Justice Roberts and the four joint dissenters seek to make clear. The counterargument may be made that one description is more natural or common than the other, but

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38 *NFIB*, 132 S. Ct. at 2591 (opinion of Roberts, C.J.) (“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.’”); *id.* at 2648 (joint dissent) (“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.”).

39 *Id.* at 2621 (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’[s] commerce power is limited to regulating those actively engaged in commercial transactions.” (first alteration in original)).

40 *Id.* at 2644 (joint dissent).

41 *Id.* at 2622 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“The minimum coverage provision could therefore be described as regulating activists in the self-insurance market.”).
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 theorist 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.

2. “It’s Déjà Vu All over Again”

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 disputes involved three
of the following issues: the question of whether commerce also includes
navigation, which was raised in the landmark Marshall Court case of
Gibbons v. Ogden; the issue of whether the congressional power to
regulate commerce comprehends the complementary power to prohibit
commerce, as raised in the Lottery Case; and the issue as to the meaning
of the word commerce in the Commerce Clause, which has been the
subject of a recent academic wrangle between Jack Balkin and Randy
Barnett.

Gibbons was one of the Supreme Court’s first Commerce Clause cases
and, like many later cases, it was concerned with the definition and limits
of the commerce power. In Gibbons, the possessor of a conflicting state-
granted ferry monopoly between the states of New York and New Jersey
sued a party who possessed a license pursuant to a federal coasting
statute. To undercut the force of the federal coasting statute, Ogden
argued that the coasting statute exceeded the constitutional scope of
Congress’s commerce power because navigation was not part of

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3, 2014).
43 NFIB, 132 S. Ct. at 2677 (Thomas, J., dissenting).
44 22 U.S. (9 Wheat.) 1 (1824) (holding that Congress’s commerce power includes the
power to regulate navigation).
45 188 U.S. 321 (1903) (holding that Congress’s commerce power included the power to
prohibit the interstate transportation of lottery tickets).
46 See infra notes 64–79 and accompanying text.
47 See Gibbons, 22 U.S. at 1.
48 Id.
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 only definition of regulate in the Commerce Clause, “restrict a general term, applicable to many objects, to one of its significations” in violation of Chief Justice Marshall’s rejoinder to Ogden’s counsel in Gibbons. The opinions also go against Chief Justice Marshall’s description of “our constitution being . . . one of enumeration, and not of definition.” A definitional argument over the meaning of regulate that, like this one, sides with Ogden and against Chief Justice Marshall, is wrong from the start. At the very least, it should justify its method, which it does not. In Gibbons, Chief Justice Marshall placed the burden of persuasion on the proponent of this argument.

The second commerce dispute exacerbated this methodological difficulty. This dispute, found in the Lottery Case, was whether Congress’s constitutional power to regulate commerce covers the power to prohibit commerce. The Court concluded that “regulation may sometimes appropriately assume the form of prohibition . . . .” This assertion states current doctrine too, but it conflicts with 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 go qualitatively beyond regulation to something further.

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49 See id. at 189 (“The counsel for [Ogden] would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation.”).
50 Id.
51 This includes Justice Ginsburg’s opinion, at least to that extent that it employs founding-era dictionary definitions seriously and not merely to mock the conservatives.
52 Gibbons, 22 U.S. at 189.
53 Id.
54 Id.
55 Id. at 189–91.
56 See Champion v. Ames (The Lottery Case), 188 U.S. 321, 321 (1903). 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.” Id. at 327.
57 Id. at 358.
58 See NFIB, 132 S. Ct. at 2642–44 (joint dissent).
In the individual mandate debate, Mark Hall makes just this sort of argument, citing statements by individual mandate opponent Randy Barnett. 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 *regulation* of commerce just as much as a *prohibition* of commerce.” Neither the five conservative justices nor their academic defenders provide an effective explanation as to why the original public (i.e., founding-era dictionary) meaning should control concerning commercial mandates, but may be overlooked when it comes to prohibitions of commerce. There are similar, symmetrical difficulties in fitting both prohibitions and mandates within the founding-era dictionary definitions of *adjustment* 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).

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59 See Mark A. Hall, *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 only to modulate or ‘make regular’ but not the power to ban or mandate commerce.”).

60 See Randy E. Barnett, *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 . . . .”).

61 Hall, supra note 59, at 1834.

62 See NFIB, 132 S. Ct. at 2642 (joint dissent).

63 See supra Part II.A.

64 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.”).

65 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.”).

66 See id. at 143–51 (collecting founding-era sources on the original meaning of commerce).

67 See id. at 149 (“Samuel Johnson’s dictionary, roughly contemporaneous with the founding, defines ‘commerce’ as ‘Intercourse; exchange of one thing for another, (continued)
Barnett, also using sources from that time period, defines *commerce* more narrowly as “trade” or “exchange.”68 He too quotes the definition of *commerce* in Samuel Johnson’s dictionary;69 yet, his is not to equate it with intercourse or interaction, but rather to distinguish it from agriculture and manufacture, thereby narrowing the meaning of *commerce.*70 In an attempt to prevail in his definitional conflict with Balkin and others who broadly interpret *commerce*, Barnett also investigates eighteenth-century general usage of the word, analyzing the 1,594 appearances of *commerce* between 1728 and 1800 in *The Pennsylvania Gazette*, a major Philadelphia newspaper of the time.71 As a result of his investigation, Barnett shows that his definition was, by far, more common in that day than the broader definition Balkin favors.72 While this at least recognizes that the problem of multiple original meanings of terms such as *regulate* and *commerce* exists, it is not decisive in resolving the debate. The determination of original public meaning is not simply a popularity contest. There may be more than one original meaning of a word, and nonoriginalist factors may also influence the determination of a current meaning.

Post-founding-era cases perpetuate, rather than dispel, the meaning disagreement here. For example, in *Gibbons v. Ogden*, the Marshall Court’s most relevant case, Chief Justice Marshall stated that the power to regulate is the power “to prescribe the rule by which commerce is to be governed.”73 This definition is close to the founding-era dictionary definitions proffered by the four joint dissenters in the healthcare case.74 Like them, the definition is helpful to the establishment of the activity-inactivity distinction, but it is not decisive. In Justice Johnson’s concurrence in *Gibbons*, which is more helpful, he stated “[t]he power of a sovereign state over commerce, therefore, amounts to nothing more...” (quoting 1 Samuel Johnson, A Dictionary of the English Language (9th ed. 1805)).

69 Id. at 280.
70 See id.
71 See id. at 289–91.
72 See id. at 290 (“[T]he term ‘commerce’ was routinely used to refer to trade or exchange, including shipping.”).
73 22 U.S. (9 Wheat.) 1, 196 (1824).
74 See NFIB, 132 S. Ct. at 2644 (joint dissent).
than a power to limit or restrain it at pleasure.”75 This definition combines the power to adjust and prohibit and excludes the power to mandate activity. However, one consideration today should prevent making too much of the differences among these earlier definitions, such as the definitions given by Marshall and Johnson—the earlier writers did not note and probably did not intend these sharp differences of meaning now noted.76 The differences only came into clear focus as they came to assume greater relevance and importance in the context of the recent dispute over the constitutionality of the individual mandate—as challengers brought suit, they brought the differences from the perspectival background of commerce power discourse to the foreground by shifting considerations and attentions.

Yet, even these additional quotations will not forestall those seeking a broader meaning for the word *regulate*. Starting with Chief Justice 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.”77

The country does not need more definitions and distinctions to resolve this constitutional dispute at this point. They will not be effective in persuading either side in this disagreement. Balkin and Barnett demonstrated that opponents can even 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’s commerce power.78 Yet another definition will not help very much. Instead, the country needs an explanation of why this seemingly intractable disagreement occurred and how to proceed productively in the face of it. This requires going beyond the conflicting definitions and other disputes to discover their interrelation with background features that do not necessarily receive direct attention in the argument. The next Parts of this Article attempt to do so through a discussion of constitutional perspectives and the individual mandate debate.79

75 *Gibbons*, 22 U.S. at 227 (Johnson, J., concurring).
76 Compare id. at 196 (majority opinion) with id. at 227 (Johnson, J., concurring).
78 See infra notes 80–90 and accompanying text.
79 See infra Part II.B.
B. Dueling Perspectives

1. And Now for Something Completely Different

Perspectives are the conceptual constructs that best explain and illuminate the similarities and differences between the two sides in the individual mandate debate. Perspectives will help get past the seemingly closed loop of argument here and overcome the persistence and repetition of the same sorts of flawed arguments and the resistance to correction or alteration in the current individual mandate discourse. One important, initial difficulty is that perspectives have no obvious place in the customary, contemporary, and analytic of the three divisions of legal norms. The three classes of legal norms—rules, standards, and principles—do not include the perspectives. That is because perspectives, instead of fitting into one of these three classifications, stand above and apart from them. The trick, however, will be to explain how this is so in a nonmetaphorical way.

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, a rule can be “a bright-line rule, a standard that is in the form of a balancing test, or even an abstract

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80 This was the title of a 1971 Monty Python movie made up of classic sketches from the eponymous television show. AND NOW FOR SOMETHING COMPLETELY DIFFERENT (Columbia Pictures 1971); AND NOW FOR SOMETHING COMPLETELY DIFFERENT, IMDB, http://www.imdb.com/title/tt0066765/ (last visited Mar. 3, 2014). “And now for something completely different” was the slogan they used as a non-segue segue between bits. See AND NOW FOR SOMETHING COMPLETELY DIFFERENT, supra; AND NOW FOR SOMETHING COMPLETELY DIFFERENT: Quotes, IMDB, http://www.imdb.com/title/tt0066765/quotes?ref_=tt ql_3 (last visited Mar. 3, 2014). This is the slogan used here to highlight the difference between perspectival constitutional argument and standard doctrinal debate.

81 Perspective is the term used here to generally stand in for the gestalts, visions, and worldviews used by writers, such as Lawrence Solum, Gillian Metzger, and Martha Minow, who use these terms in this debate. See supra Part I.


83 See Solum, supra note 6 (manuscript at 35) (“Constitutional gestalts operate at a level of abstraction that floats above doctrines, theories, and narratives.”).

84 Id. (manuscript at 33).
principle.”85 The main problem with this description is that it suggests a formal, explicit classification system like the periodic table of elements in chemistry. However, this would not be correct. A perspective stands apart from legal and constitutional norms not as a more abstract, general classification system, but as a background that provides context, place, interconnection, and meaning for terms. Solum is closer to the mark when he says that gestalts provide “the big picture” and “organize our perceptions of particulars.”86 These particulars do not exist in splendid isolation from one another, but in changeable relationships to innumerable other particulars within the perspective.87 For this reason, both perspectives and particulars are subject to change in both intended and unintended ways.

If perspectives are not formal systems of classification, how can they perform this organizing function? They do it in the same way that individuals’ mental worldviews provide commonsense ways of organizing, understanding, and reacting to the everyday world. Perspectives provide an unstated, perhaps unnoticed, mental background that enables the classification and interpretation of what persons perceive and encounter.88 Perspectives are holistic, implicit as much as explicit, and unconscious as much as deliberately constructed.89 They are the way persons “fill in” the content suggested by discrete, conscious perceptions and deliberate constructions (and are all the more strongly, perhaps stubbornly, held because of it) based on preexisting patterns and understandings already formed.90

Just as a person 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, a more limited object than the everyday worldview and, for that reason, a significantly smaller number of interested and involved people may hold it. Still, in both cases, it is the perspective that organizes and evaluates perceptions and other inputs. Perspective is a preconception in the literal sense—it is formed in advance and is a bias or

85 Solum, supra note 82.
86 Solum, supra note 6 (manuscript at 35).
87 Id. (manuscript at 36).
88 See RONALD DWORKIN, LAW’S EMPIRE 87–88 (1986) (discussing how a judge’s interpretive theories are grounded in the judge’s own convictions).
90 See DWORKIN, supra note 88, at 87–88.
prejudice (in a nonpejorative sense).\textsuperscript{91} It is a way of seeing and conceptualizing the world and is typically shared with others.\textsuperscript{92} It is a general idea and not a complete and detailed account that 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).\textsuperscript{93} Perspective is not permanent or fixed either, but is quite open to change and shift (both consciously and unconsciously) in highly unpredictable ways.\textsuperscript{94}

The boundaries of a perspective are unclear and its outer limits are not bright lines. Perspectives comprehend tendencies rather than fixed, always-repeated formulas,\textsuperscript{95} further adding to their “for the most part” nature. Yet, they usually tell persons how to proceed in a practice or activity, such as constitutional interpretation, when they encounter new cases and situations. Due to the fact that perspectives are of an object or practice, there can be (and often is) more than one perspective—way of seeing or conceptualizing—of that object or practice. When there is more than one perspective of an object, the perspectives necessarily conflict in important ways.\textsuperscript{96} Due to all of this, a person often only can realize or say after forming, shifting, or dissolving a perspective. Nonetheless, 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.

2. 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, the next few pages will compare and contrast two better-known accounts of similar concepts. The first is the account offered by Lawrence Solum and others of virtue jurisprudence.97 The second is Jack Balkin’s account of nested oppositions in law and deconstructive theory.98 All three concepts seek to explain and accommodate the conflict and contradiction between formalism and realism where other concepts and techniques failed. This does not, of course, make them identical. Their differences will be as important as their similarities for the purposes of this Article.

Although Professor Solum does not make the connection himself, his account of constitutional gestalts bears more than a passing resemblance to his earlier and better-known account of virtue jurisprudence.99 A comparison with the better-known theory of virtue jurisprudence may aid in the understanding of the nature and function of constitutional gestalts because Solum did not fully develop his explanation of constitutional gestalts, Professor Metzger only briefly set out her notion of constitutional visions, and Dean Minow quickly laid out her account of constitutional worldviews.100

The notions of both virtue jurisprudence and constitutional gestalts have Aristotelian roots.101 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.103 Virtue jurisprudence itself developed from virtue ethics, which Elizabeth Anscombe revived from its centuries-old slumber in 1958, to deal with the

97 See VIRTUE JURISPRUDENCE (Colin Farrelly & Lawrence B. Solum eds., 2008).
99 For a leading survey of and introduction to virtue jurisprudence, see VIRTUE JURISPRUDENCE, supra note 97.
100 See Solum, supra note 6; Metzger, supra note 7; Minow, supra note 8.
102 Colin Farrelly & Lawrence B. Solum, An Introduction to Aretaic Theories of Law, in VIRTUE JURISPRUDENCE, supra note 97, at 1, 6.
103 See id. at 4–5.
conflict between consequentialism and deontology in ethical theory.\textsuperscript{104} Virtue jurisprudence, like virtue ethics from which it grew, is a way of dealing with and explaining antinomies in law and ethics in which two things can appear to be true or necessary and, yet, at the same time seemingly be incompatible or contradictory.\textsuperscript{105} 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.\textsuperscript{106} As Farrelly and Solum describe it, when it comes to realism and formalism, legal theory wants to “have its cake and eat it too”\textsuperscript{107}—to employ both realist and formalist techniques and yet somehow avoid the conflict between them. The approaches discussed here seek to allow it to do so. On one hand, legal theory uses realist arguments for critique\textsuperscript{108} and, on the other hand, legal theory finds places where formalism is easier and more natural to employ.\textsuperscript{109} Virtue jurisprudence seeks to explain how this peaceful coexistence can be accomplished and how realism and formalism can be accommodated in law generally.\textsuperscript{110} Constitutional gestalts illustrate how the tension between the two appears 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; thus, the assignment will vary on a topic-by-topic and case-by-case basis.

\textsuperscript{104} See id. at 3–4.
\textsuperscript{105} See id. at 6–7.
\textsuperscript{106} 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 which I will call formalism and realism. . . . [E]ach approach does have a central tendency that distinguishes it sharply from the other.”).
\textsuperscript{107} See Farrelly & Solum, supra note 102, at 5 (“Contemporary legal theory is of two minds about realism and formalism.”).
\textsuperscript{108} See id. (“The practitioners of legal theory have incorporated the standard realist moves into the conceptual toolbox.”).
\textsuperscript{109} 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 decision making, it is rarely radically indeterminate.”).
\textsuperscript{110} See id.
Still, 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”\textsuperscript{111} 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 they employ. The difference occurs at points of conflict and disagreement, but it is argued 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.\textsuperscript{112}

In explaining and defending deconstruction in legal theory, Jack Balkin employs the concept of nested oppositions to show how concepts can, in different manners, contain their opposites.\textsuperscript{113} Deconstruction uses nested oppositions to deal with questions of similarity and difference.\textsuperscript{114} He notes that “[m]any of the arguments made by feminists and by members of the Critical Legal Studies movement rely upon demonstrating a nested opposition between legal concepts traditionally thought separate and distinct.”\textsuperscript{115} The nested opposition allows for the “postulating [of] a

\textsuperscript{111} See id.

\textsuperscript{112} Stewart, supra note 106, 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.”).

\textsuperscript{113} Balkin, supra note 98, at 1676 (“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.”).

\textsuperscript{114} 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.”).

\textsuperscript{115} Id. at 1687.
countervision of politics or law"116 and, thus, to see that change can flow from another way of talking about the text, practice, or institution in question.117 Balkin’s description of nested oppositions is similar to that given by Thomas Boswell about 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.”118

Like nested oppositions, perspectives deal with the occurrence of conceptual oppositions. While deconstruction is more focused on “teasing out the hidden antinomies in our language and thought,”119 the use of perspectives in this Article is motivated by a desire to explain and navigate antinomies that are in plain sight120 and that other theories and approaches cannot explain and accommodate. This Article proffers deconstructive nested oppositions to counter established hierarchies and orthodoxies,121 and it uses perspectives to understand and negotiate opposing viewpoints that contest for superiority and authority.122

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 analysis and, in turn, “conceptual analysis proceeds on the basis of our intuitions.”123 However, “we” do not always share intuitions, even on fundamental matters; to put it another way, there can be more than one “we.”124 Many basic

116 Id. at 1689.
117 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.”).
120 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.
121 See Balkin, supra note 119, at 746.
122 Id.
123 SHAPIRO, supra note 89, at 17.
124 As previously argued, a practice like constitutional law can have more than one perspective. See supra notes 91–94 and accompanying text. Whether it can have more than one concept is another question—one that would go beyond the scope of this Article. (continued)
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 persons 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 be attempted next.

III. PERSPECTIVES ON REGULATION

A. NFIB and Regulation

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 NFIB over founding-era dictionary definitions of regulate and commerce 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) of perspectives on regulate and commerce. The first aspect is how perspective indicates the textual constitutional readings and interpretations that seem reasonable or natural. The second aspect is the way in which perspective affects and determines the scope and singularity or multiplicity of 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 W.B. Gallie, Essentially Contested Concepts, in 56 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 167, 168 (1956). The concept-or-conception distinction entered legal theory mainly through the writings of Ronald Dworkin in the 1970s and 1980s. See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134–36 (1978) (applying the distinction to a discussion of the notion of fairness).

125 In the headnote to a 1987 article on deconstruction and legal theory, for example, Balkin quotes Psalms. See Balkin, supra note 119, at 743 (quoting Psalms 118:22) (“The stone that the builders rejected has become the chief cornerstone.”).

126 See supra Part II.A.1.
of the meaning of terms. The third aspect is the constitutional “space” formed by perspectives. The fourth, and last, aspect 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 ACA, and NFIB by quoting from Justice Story’s constitutional commentaries on the need for and nature of reasonable interpretation of the constitutional text.\textsuperscript{127} Justice Story’s advice is beyond criticism, as it is 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 will attempt to do just this. The difficulty will come in successfully applying this method in a case like NFIB, where there is sharp disagreement over the meaning of “the apparent objects and intent of the constitution,”\textsuperscript{128} even though both sides accept the text and important precedent.\textsuperscript{129}

Conflicting objects and intent appear to each side as a result of 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. Of course, one side might be wrong, but there is no single agreed-upon standard to determine the rightness or wrongness of the two conflicting perspectives. One side 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 this is simply an ideological disagreement—that something more than “interpretive methodologies, constitutional doctrines, and neutral principles”\textsuperscript{130} are involved in the NFIB case and that

\begin{itemize}
  \item \textsuperscript{127} Minow, supra note 8, at 117 (“The constitution of the United States is to receive a reasonable interpretation of its language, and its powers, keeping in view the objects and purposes, for which those powers were 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 . . . .” (alteration in original) (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 404 (1833))).
  \item \textsuperscript{128} Id.
  \item \textsuperscript{129} See id. at 122.
  \item \textsuperscript{130} Erwin Chemerinsky, Political Ideology and Constitutional Decisionmaking: The Coming Example of the Affordable Care Act, 75 LAW & CONTEMP. PROBS. 1, 13 (2012).
\end{itemize}
ideology has infected the decision. There are, however, two problems
with this statement. One problem 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
constitutional argument and decision making 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; this is mainly because
these oppositions are nested and, thus, not readily separable. Second, it is
insufficient to say that doctrine supports one’s own side, while only
ideology supports the other side, 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” is as much a social fact as it is a reasoned or logical

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131 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
the larger ideological orientation on the issue in society.”).

132 See id. at 2 (“As a matter of constitutional law, under existing doctrines, [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.”
(footnote omitted)).

133 The distinction between off-the-wall and on-the-wall constitutional arguments is
described by Jack Balkin in this way: “Off-the-wall arguments are those 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, ATLANTIC (June 4, 2012, 2:55 PM),
http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how
-themandate-challenge-went-mainstream/258040/.

134 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 thought beyond the pale is not crazy at all, but is
actually a pretty good legal argument.”).
The notion of ideology that Dean Chemerinsky and others use has similarities to this Article’s 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—“the framework of ideas and beliefs that give meaning to legal concepts and shape legal thought and discourse”\textsuperscript{135}—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 partisan in contrast to precedent and doctrine,\textsuperscript{136} adds a pejorative note to the term\textsuperscript{137} that perspective lacks.

We see assertions of reasonableness and nonreasonableness in the NFIB opinion itself.\textsuperscript{138} Both sides in the case believed they were interpreting the Constitution reasonably and the other side was not. Chief Justice Roberts, for example, stated that “[t]he language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated.”\textsuperscript{139} He then asserted that Justice Ginsburg’s definition of \textit{regulate}\textsuperscript{140} did not reflect this sort of understanding, but instead reflected obscure and unlikely meanings.\textsuperscript{141} Justice Ginsburg responded by saying that “[t]he Chief Justice’s crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress’[s] efforts to regulate the national economy . . . .”\textsuperscript{142}

Although the Chief Justice’s approach to the definition of the word \textit{regulate} has the advantage over Justice Ginsburg’s approach when it


\textsuperscript{136} See, e.g., Chemerinsky, supra note 130, at 12.


\textsuperscript{138} See, e.g., NFIB, 132 S. Ct. at 2593 (opinion of Roberts, C.J.).

\textsuperscript{139} Id. at 2586. Chief Justice Roberts then cited Chief Justice John Marshall for authority. \textit{See id.} (citing 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 have said.”).

\textsuperscript{140} See id. at 2621 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

\textsuperscript{141} See id. at 2586 n.4 (opinion of Roberts, C.J.).

\textsuperscript{142} Id. at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).
comes to the original public meaning of the word, that does not resolve the
issue of constitutional meaning. This is because other factors may also be
involved in determining the current meaning of the constitutional text, such
as the post-1937 constitutional doctrine changes adverted to by Justice
Ginsburg. Chief Justice Roberts here assumed (but did not establish)
that words like *regulate* should be treated as if they have a single
meaning—their primary dictionary definition. Yet, if the framers
“intended what they have said” and they used a word with more than
one meaning, may they have intended 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 that 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 these definitions, is actually determined by other, more general
aspects of his constitutional perspective rather than the reverse. The same
is also true of the definitions presented by Justice Ginsburg and the four
joint dissenters in *NFIB*. As Justice Story stated, 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.” However, giving meaning to those objects and intents is,
in turn, a function of the particular constitutional perspective one takes.
On the commerce power issue in *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

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143 See id.
144 Id. at 2586 (opinion of Roberts, C.J.) (quoting *Gibbons*, 22 U.S. at 188).
145 See Minow, *supra* note 8, at 117 (quoting 1 *STORY*, *supra* note 127).
146 See *NFIB*, 132 S. Ct. at 2586–87 (opinion of Roberts, C.J.); id. at 2644 (joint
dissent).
definitions and broader meanings of the term. Persons may not have frequently used all of these meanings in the framing era, but, like dark matter in the universe, the progressives would argue that they have been there the whole time until needed and noticed today.

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 gave, the Chief Justice continued 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 served 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 Chief Justice Roberts’s presupposition that his definition occupies all the logical space of the word *regulate* in the Commerce Clause, thereby excluding the propriety of regulating inactivity. This 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 did not deny that *regulate* includes the congressional power to regulate activity, but she did not accept the Chief Justice’s assertion that this is all that it does. She viewed his reading of the clause as “crabbed” and outdated. She saw more legislative space in the clause than the Chief Justice and the four joint dissenters did. How much more? She avoided line-drawing and eschewed formal limits on the

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147 Id. at 2621 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).
148 See id. at 2586 (opinion of Roberts, C.J.).
149 Id. at 2587.
150 Id.
151 See id. at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).
152 See id.
153 Id.
154 Id. at 2621.
power. She made the unassailable point that there is no activity-inactivity distinction in prior doctrine or precedent. For example, she argued that the Wickard Court upheld compelled commercial activity.

Justice Ginsburg went beyond particular definitional quibbles to take on the central underlying, motivating fear of the Chief Justice and the joint dissenters: upholding the individual mandate on commerce power would give Congress unlimited regulatory power. She noted this worry and then strove 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-inactivity distinction. She first explained that “the unique attributes of the health-care market render everyone active in that market and give rise to a significant free-riding problem that does not occur in other markets.” She then noted that, under existing law,

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155 Id.

156 Id. (“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 or our decisions. Article I, § 8, of the Constitution grants Congress the power ‘[t]o regulate Commerce . . . among the several States.’”).

157 See id. (“Nor does our case law toe the activity versus inactivity line. In Wickard, for example, we upheld the penalty imposed on a farmer who grew too much wheat, even though the regulation had the effect of compelling farmers to purchase wheat in the open market.”).

158 See id. at 2589 (opinion of Roberts, C.J.) (“While Congress’s 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 to reach beyond the natural extent of its authority, ‘everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.’” (quoting Maryland v. Wirtz, 392 U.S. 183, 196 (1968))).

159 See also id. at 2646 (joint dissent) (“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.’” (quoting THE FEDERALIST NO. 33, at 202 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

160 See id. 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.”).
“Congress would remain unable to regulate noneconomic conduct that has only an attenuated effect on interstate commerce and is traditionally left to state law.” Still, these counterarguments convinced neither the Chief Justice nor the four joint dissenters, who did not see things here as Justice Ginsburg did. The dissenters did not even see their own perspectives in the same way she did, and she did not see her perspective the way the four dissenters did. Both sides inflate and exaggerate the dimensions of the opposing perspective in ways that are not merely rhetorical, but instead sincerely held. The five conservative justices, for example, saw Justice Ginsburg’s perspective as freeing Congress from any meaningful limitation, despite her listing of preexisting formal limits and mention of political limits on congressional legislation.

Justice Ginsburg, in turn, called the Chief Justice’s reading of the Commerce Clause “crabbed” and “stunningly retrogressive,” saying that his opinion “bear[s] a disquieting resemblance to . . . long overruled decisions,” such as *Carter v. Carter Coal Co.*, *Hammer v. Dagenhart*, and *Lochner v. New York*. In Justice Ginsburg’s view, the resemblance between the Chief Justice’s opinion and these three “long overruled decisions” lies in the 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

161 Id.
162 See id. at 2587 (opinion of Roberts, C.J.); id. at 2649–50 (joint dissent).
163 See id. at 2586 (opinion of Roberts, C.J.); id. at 2646 (joint dissent).
164 See id. at 2623–25 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).
165 See id. at 2624 (“Supplementing these legal restraints is a formidable check on congressional power: the democratic process.”).
166 Id. at 2609.
167 Id. at 2629.
169 247 U.S. 251, 276–77 (1918) (holding the Keating-Owen Act of 1916, which regulated child labor, unconstitutional as beyond Congress’s commerce power).
170 198 U.S. 45, 64 (1905) (holding the New York Bakeshop Act of 1895 to be a violation of the liberty of contract implicit in the Due Process Clause of the Fourteenth Amendment).
171 NFIB, 132 S. Ct. at 2629 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).
172 Id. at 2622.
Ginsburg, in contrast, stated, “Since 1937, our precedent has recognized Congress’[s] large authority to set the Nation’s course in the economic and social welfare realm. [A]nd recognizing that ‘regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.’”\textsuperscript{173} She rejected the formalistic distinctions that earlier Courts used (and which she contended the five conservative justices used in \textit{NFIB}) to limit Congress’s commerce power.\textsuperscript{174} She did not explicitly say that congressional power here is without limits, but only that the scope of “Congress’[s] authority under the Commerce Clause is dependent upon ‘practical’ considerations, including ‘actual experience.’”\textsuperscript{175}

The conservatives here saw their perspective as founded on original public meaning and protective of the principle of limited and enumerated governmental powers. They saw the liberal perspective as departing from that original meaning and, worse yet, eschewing formal limits on Congress’s commerce power. Therefore, the conservatives feared that the liberal perspective would effectively grant Congress a general police power such that “the idea of limited Government power is at an end.”\textsuperscript{176} The liberals saw 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 saw the conservatives as seeking to overthrow the New Deal Settlement and turn the clock back to the days of cases like \textit{Carter}, \textit{Hammer}, and \textit{Lochner}.

\textbf{B. Inside and Outside}

One clear thing here is that there are two very different and contrasting sets of perspectives. The perspectives depend on defining them as their possessors see them or as others (i.e., those on the other side of the issue) perceive them. This situation prompts two questions. The first is how and why do these starkly different views arise? The second is which of the two possible vantage points should the analysis privilege—or, to put it another way, which perspective on perspectives is the correct one to take? This Article already discussed different standards of reasonableness, scope, and

\textsuperscript{173} Id. at 2609 (citations omitted).
\textsuperscript{174} Id. at 2622.
\textsuperscript{175} Id. at 2616 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41–42 (1937)).
\textsuperscript{176} NFIB, 132 S. Ct. at 2648 (joint dissent).
space in alternative perspectives\textsuperscript{177} and now closes this Part 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.\textsuperscript{178} In that account, rules either both apply and control their subject matter or they do neither—that is, there is no middle position.\textsuperscript{179} Principles, by way of contrast, possess weight rather than all-or-nothing applicability\textsuperscript{180} and must be balanced against each other. While Dworkin is primarily concerned with drawing and emphasizing this distinction between rules and principles,\textsuperscript{181} the account here of perspectives instead seeks to draw attention to a feature they share—the fact that they 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, \textit{United States v. Lopez},\textsuperscript{182} Chief Justice Rehnquist began 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.”\textsuperscript{183} As this Article previously discussed, the five conservative justices in \textit{NFIB}\textsuperscript{181} accorded the same importance and priority to the notion of limited government and the need to preserve it as Chief Justice Rehnquist did in \textit{Lopez}.

Justice Ginsburg, writing for the four liberal justices in \textit{NFIB}, did not deny explicitly this principle, but reduced its importance.\textsuperscript{184} In fact, she noted this consideration and even listed several existing limits on the

\begin{itemize}
\item \textsuperscript{177} See \textit{supra} Part III.A.
\item \textsuperscript{178} See \textit{DWORKIN, supra} note 124, at 24–26.
\item \textsuperscript{179} See \textit{id. at} 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.”).
\item \textsuperscript{180} See \textit{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.”).
\item \textsuperscript{181} See \textit{id. at} 23.
\item \textsuperscript{182} 514 U.S. 549 (1995).
\item \textsuperscript{183} \textit{Id. at} 552 (citing U.S. \textit{CONST.} art. I, § 8).
\item \textsuperscript{184} \textit{NFIB}, 132 S. Ct. at 2623 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).
\end{itemize}
commerce power in her opinion. Yet, she neither called it a first principle nor treated it like one. In her view, the priority given 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. The conservatives stop far short of making the determination of the scope of Congress’s commerce power merely a practical consideration.

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 introduced the notion of “theoretical disagreement” into jurisprudential discourse. He distinguished this sort of disagreement from ordinary factual and legal disagreement and described 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.” Dworkin believed it to be a scandal that legal theorists have not adequately addressed this problem thus far. This failure has occurred, Dworkin argued, because of the influence of what he called “the ‘plain fact’ view” of law. The plain-fact view 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.”

The notion of perspectives in this Article blurs the distinction Dworkin seeks to draw between the plain-fact view and his theory, and it explains why there is no plausible theory of theoretical disagreement. Start with the

185 See id. at 2623–25.
186 See id. at 2616.
187 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.” Id. at 2589 (opinion of Roberts, C.J.) (quoting Indus. Union Dep’t v. Am. Petroleum Inst., 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring in the judgment)).
188 See DWORKIN, supra note 88, at 5.
189 Id.
190 Id. at 6 (“Incredibly, our jurisprudence has no plausible theory of theoretical disagreement in law.”).
191 Id. at 7.
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. The answer is no because they recognize much the same grounds of law. However, the answer also must be yes because the two sides 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, neither side can give a clearly correct and unqualified answer for either alternative in this case because each side’s answers 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 the law correctly. Conservatives see their view as based on the original meaning of the constitutional text, basic underlying constitutional principles, and controlling precedent. Further, conservatives see the liberal view 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. The liberal view criticizes the conservative understanding of the law as retrogressive—a turning of the constitutional clock back to before 1937.

This seeming contradiction 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—his model for “[t]he

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192 See generally NFIB, 132 S. Ct. 2566.
193 See Solum, supra note 6 (manuscript at 42).
195 See DWORKIN, supra note 88, at 229 (“In this enterprise a group of novelists writes 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.”).
In fact, it is this forward-looking aspect that most significantly divides conservative and liberal perspectives on the individual mandate and the commerce power.

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 stated that “[t]he 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, and no farther.’” The two perspectives divide over what the law will be, which contains aspects of both what the law is and what it should be, although the law 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 involved in the individual mandate debate and the NFIB decision. From here on, the focus shifts away from the word regulate and turns instead to the activity-inactivity distinction and the words mandate and commandeer, which all play their own roles in this debate. This Part starts with the topic of decisions as mental activity.

Most defenders of the individual mandate make commerce power arguments that reject the definition of regulate advanced by the conservative justices in NFIB. Yet, they do make one argument that accepts the conservative assertion that regulation is of activity and, thus, would save the mandate even if they fully concede the conservative commerce power argument. This is the argument that the mandate regulates decisions (i.e., mental activity) concerning healthcare, health insurance, and their purchase by individuals subject to the mandate. Lower

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196 See id. at 228.
197 See Solum, supra note 6 (manuscript at 38–40).
198 See id. (manuscript at 40–42).
199 Id. (manuscript at 39).
200 Id. (manuscript at 41).
201 See supra Part II.A.1.
court decisions as well as in the Supreme Court’s NFIB decision present this argument.

In her opinion in NFIB, Justice Ginsburg set out this argument: “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 the authority to address under the Commerce Clause.” At times, some phrase this assertion as a decision by the relevant individuals to self-insure—to pay their healthcare costs out of pocket. These descriptions define—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 Congress’s commerce power. The answer to this problem depends, once again, on one’s perspective on the individual mandate and on Congress’s commerce power. While there is no known literature on the meaning of activity in this debate, 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 might take in that debate.

202 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 is not ‘acting,’ especially the serious 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 do something. They are two sides of the same coin. To pretend otherwise is to ignore reality.”).

203 NFIB, 132 S. Ct. at 2589 (opinion of Roberts, C.J.).

204 Id. at 2617 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citation omitted).

205 See, e.g., Thomas More Law Ctr. 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 activity of self-insuring for the cost of these services.”).

206 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, i.e. decision-making, there is little judicial guidance on whether the latter falls within Congress’s power.”).

207 See supra Part II.
The conservative perspective would define *activity* here narrowly and with 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-farther view takes *activity* to consist of individuals' discrete, voluntary physical and intentional actions 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 are they clearly discrete, confined in space, and brief in time. They may be, but there is no outward, objective way of confirming so.

Moreover, when 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 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, but the failure would not be seen in this

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208 See *NFIB*, 132 S. Ct. at 2586–89 (opinion of Roberts, C.J.).
210 Justice Ginsburg did this, for example, with the word *regulate* when she noted 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) (alterations in original) (citation omitted).
211 But see *Florida v. U.S. Dep’t of Health & Human Servs.*, 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.’”).
212 Solum, supra note 6 (manuscript at 41).
213 *Id.* at 2587–89 (opinion of Roberts, C.J.).
way by “the Framers, who were ‘practical statesmen.’” Thus, even if
decisions or mental activities qualify as activities for commerce power
purposes, there is nothing in the ACA, or in cases and secondary literature
relating to it, that can demonstrate 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
persons do not engage in at a given moment for all these nonengagements
to be the results of independent, deliberate decisions. The facts do not
merely fail to support the assumption made here by the ACA’s individual
mandate provision, but the assumption also presumes decision-making
power well beyond 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 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.218 Without a commerce
nexus, the individual mandate becomes a congressional exercise of a
general police power, which is just the sort of power it does not

unconstitutional.php (“Far from engaging in ‘economic activity,’ people who decide not to
purchase health insurance are actually refraining from doing so.”).

Here, Somin’s refraining 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 he discusses simply has not purchased
health insurance because the group decided not to do so, is still pondering the question,
ever thought about it, or has any other reason to not have purchased it.

215 NFIB, 132 S. Ct at 2589 (opinion of Roberts, C.J.).
216 See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119
218 431 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.”).
legitimately have, but which mandate opponents accuse it of seeking with the enactment of the ACA.219

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. Some have made serious assertions, after all, that regulation of activity is not even a constitutional requirement for commerce power applicability.220 Leaving the mental activity argument to one side, then, this Part of the Article discusses questions of time and timing as they relate to the notion of activity in the individual mandate debate. This Article set out the implicit picture of activity from the conservative perspective as 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 liberal defenses of the mandate do this is to assume that regulation can precede activity,221 while from the conservative perspective, regulation can only be of preexisting activity.222 Another liberal stance 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.223

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219 See, e.g., NFIB, 132 S. Ct. at 2578 (opinion of Roberts, C.J.) (“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 the police power.”).

220 See The Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. on the Judiciary, 112th Cong. 1–5 (2011) (statement of Charles Fried, Beneficial Professor of Law, Harvard Law School), available at http://www.judiciary.senate.gov/resources/transcripts/112transcripts.cfm (“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 regulations may in fact be characterized as regulations of activity.” Id. at 5.).

221 NFIB, 132 S. Ct. at 2618–19 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

222 Id. at 2642–43 (joint dissent).

223 See, e.g., Florida v. U.S. Dep’t of Health & Human Servs., 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 (continued)
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 in the last paragraph) is that the regulation cannot precede the activity only in the sense that it cannot compel the activity to be performed in the first place.\(^{224}\) The activity-inactivity distinction does not convey this point clearly enough. As a result, mandate opponents have added modifiers and used terms such as *clear and inarguable inactivity*\(^{225}\) and *passive inactivity*\(^{226}\) 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 active, in the sense of engaging in as much voluntary physical motion, than persons subject to valid commerce regulations other than the individual mandate. They are not just “doing nothing.”\(^{227}\) Opponents need to provide some other explanation to distinguish regulating inactivity from compelling commercial transactions. Fortunately, the core of this desired explanation exists in the founding-era dictionary definitions in the *NFIB* opinions. For example, several of the definitions noted by the four joint dissenters define *regulate* as “adjust by rule.”\(^{228}\) 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 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.” (citation omitted)).

\(^{224}\) *NFIB*, 132 S. Ct. at 2642–43 (joint dissent).

\(^{225}\) See U.S. Dep’t of Health & Human Servs., 780 F. Supp. 2d at 1285 (“[I]n 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).”).

\(^{226}\) See id. at 1286 (“In every Supreme Court case decided thus far, Congress was not seeking to regulate under its commerce power something that could even arguably be said to be ‘passive inactivity.’”).

\(^{227}\) Cf. *NFIB*, 132 S. Ct. at 2587 (opinion of Roberts, C.J.) (“ 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.”).

\(^{228}\) Id. at 2644 (joint dissent).
adjustment of any of those activities. Thus, 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 that raised many claims of novelty; instead, the subject’s activity would fall under the many cases and doctrines regulating already existing commercial activity.229

Before mentioning that the founding-era regulate meant “to require action,”230 Justice Ginsburg asserted that “[n]othing in this language implies that Congress'[s] commerce power is limited to regulating those actively engaged in commercial transactions.”231 This Article previously argued that this claim is incorrect or, at least, in need of clarification or qualification.232 That clarification would relate to what is meant by being “actively engaged.”233 Consider three possible clarifications here—two of which describe clear and opposed situations; the third corresponds to an ambiguous situation, which lies in the middle between the two extremes. At one extreme, if a person is currently performing a commercial transaction, then the person is clearly actively engaged in commerce and the activity can be regulated under the Commerce Clause. At the other extreme, if a person 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 the person is not actively engaged in commerce or commercial transactions. In such a case, what the person is doing is beyond Congress’s commerce power. These two cases are quite clear.

However, there is also a middle case—one that is a closer factual fit with the individual mandate situation than the two clear cases and presents a closer question on commerce power applicability than they do. This middle case is where a person 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

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230 NFIB, 132 S. Ct. at 2621 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).
231 Id.
232 See supra Part IV.A.
233 NFIB, 132 S. Ct. at 2621 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).
times in the future. The two perspectives on the commerce power (the frozen and dynamic New Deal Settlement gestalts) differ sharply as to whether this sort of fact situation falls within Congress’s commerce power. Mandate opponents (i.e., those with the frozen gestalt) deny that this case involves present commerce and, therefore, conclude that it does not fall within congressional regulatory power. Moreover, this perspective fears any contrary holding would greatly and wrongly expand Congress’s legislative power in this area.

The difference between the two perspectives here is, in Solicitor General Verilli’s words, a matter of timing. General Verilli’s position was that it is within Congress’s regulatory power to require payment before a person seeks or consumes healthcare. In contrast, Chief Justice Roberts viewed someone in this situation as “doing nothing” and, thus, not engaging in a commercial transaction—the constitutional prerequisite for congressional regulatory authority. Here, both men looked at and attempted to describe the same phenomena, but they saw these phenomena in different ways. The difference between them arises, in large part, from differences in the timeframe used to perceive, define, and analyze the activities and inactivities in question. The choice of timeframe used to

234 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.”).

235 See Solum, supra note 6 (manuscript at 38–42).

236 See, e.g., NFIB, 132 S. Ct. at 2591 (opinion of Roberts, C.J.) (“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.”).

237 See Transcript of Oral Argument at 24–25, U.S. Dep’t of Health & Human Servs. v. Florida, 132 S. Ct. 2566 (2012) (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 the 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.”).

238 See id. at 43 (“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 this 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.”).

239 NFIB, 132 S. Ct. at 2587 (opinion of Roberts, C.J.).

240 Id.
define action or activity in the individual mandate debate plays a crucial role in determining the perceived constitutionality or unconstitutionality of the mandate. Unfortunately, neither side spends much time or argument explaining or defending their choice of timeframes utilized in their definitions or concepts. They barely seem to recognize the differing underlying assumptions they made, perhaps because these assumptions seem natural and intuitive to them given the (opposed) perspectives they inhabit.

Choice of timeframe is an important but undertheorized aspect of legal and philosophical questions concerning action. One writer who sought to analyze this problem is Mark Kelman, who, a generation ago, wrote on the topic of the choice of timeframe constructions in criminal law. However, 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 not directly relevant to the discussion here. His more general comments on timeframe choice are quite relevant to the subject matter of this Article. In his article, Professor Kelman discussed a choice between narrow and broad timeframes—a choice that is political rather than rational. Broad timeframes, he noted, can more readily include prior and later acts and events in the constructions employed, while narrow timeframes can more easily exclude prior and later events and acts. In both cases, timeframe construction can do this with a minimum argument, or even

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241 Id. at 2590; id. at 2642–52 (joint dissent).
243 Id. at 594.
244 Id. (“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] . . . .”).
245 See id. at 611 (“Broad time-framing . . . also occurs in other areas . . . . The time frame can be opened up to account for events both prior and subsequent to the . . . incident.”).
246 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.”).
notice, by merely positing one favored construct as the most natural or commonsense construct.  

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

When mandate opponents see this effect as inactivity, then the mandate defenders view this effect as just a matter of timing.  These differing perspectives toward the same phenomena are a function of the breadth (or narrowness) of the basic timeframe construct they choose to employ. If the basic unit is the individual transaction (as is the case from the anti-mandate perspective) and it occurs outside of that unit (i.e., before or after the transaction’s occurrence), then Congress cannot regulate the transaction 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 timeframe employed permits an insurance requirement to fall within the timeframe being regulated.  

This timeframe construct difference explains, for example, why mandate defenders are unconcerned with whether what is regulated is activity or inactivity—both fall within the market participation timeframe construct. This difference 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.  

Here, then, is a disagreement concerning matters of constitutional significance.

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247 See supra Part II.A.1 (explaining natural in the contexts of particular perspectives).
248 See infra Part V.
249 See supra Part III.A.
251 See, e.g., NFIB, 132 S. Ct. at 2590 (opinion of Roberts, C.J.) (“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’s power to regulate ‘class[es] of activities,’ not classes of individuals, apart from any activity in which they are engaged.”) (alteration in original) (citations omitted)).
V. INDIVIDUALS AND ACTIVITIES

As Chief Justice Roberts’s diatribe against the phrase “active in the market for healthcare”\textsuperscript{252} shows, the dynamic gestalt expands the operative timeframe of analysis in the commerce power context from individual transactions to wider market participation. The gestalt’s expansion turns a previously quantitative difference (about the width of a timeframe) into a qualitative difference—the regulation of classes of activities as opposed to regulation of classes of individuals. The frame went from that of activity, even over a long period of time, to regulation of individuals—from the regulation of market participation to the regulation of market participants. Chief Justice Roberts insisted here that “[t]he Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions.”\textsuperscript{253}

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 set out in \textit{United States v. Lopez}\.\textsuperscript{254} The Court began by announcing that “we have identified three broad categories of activity that Congress may regulate under its commerce power.”\textsuperscript{255} Under the first category, “Congress may regulate the use of the channels of interstate commerce.”\textsuperscript{256} 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.\textsuperscript{257} The third category states “Congress’[s] commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . .”\textsuperscript{258} This category explicitly connects Congress’s 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

\textsuperscript{252} Id.
\textsuperscript{253} Id. at 2591.
\textsuperscript{255} Id. at 558.
\textsuperscript{256} Id.
\textsuperscript{257} See id. (finding that people are an entirely different category of interstate commerce).
\textsuperscript{258} Id. at 558–59.
threat may come only from intrastate activities.”\textsuperscript{259} This category mentions persons as well as instrumentalities and things,\textsuperscript{260} but only while they are in interstate commerce.\textsuperscript{261} Some have argued for the notion of a per se instrumentality of interstate commerce.\textsuperscript{262} 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.\textsuperscript{263} However, 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.\textsuperscript{264} Just as in the case of a minimal nexus to interstate commerce,\textsuperscript{265} however, the Court has so far only minimized the activity requirement without eliminating it altogether.\textsuperscript{266} The mandate defenders would take an unprecedented and unjustified step too far by eliminating it altogether.

VI. MANDATE AND COMMANDER

A. Mandate

In this last Part, the focus is on two lesser terms that have so far played only a supporting role for the activity-inactivity distinction in the

\textsuperscript{259} Id. at 558.

\textsuperscript{260} Id. It is not clear whether 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 Ballinger arguably suggests, without explicitly stating, that persons and things moving in interstate commerce is the full extent of the instrumentalities category.” (citing United States v. Ballinger, 395 F.3d 1218, 1226 (11th Cir. 2005))).

\textsuperscript{261} See, e.g., Garcia, 540 F.3d at 1249.

\textsuperscript{262} See, e.g., id. (“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.”).

\textsuperscript{263} See, e.g., id. (“If cars are per se instrumentalities of commerce, even when not employed in interstate commerce, this is an easy case.”).

\textsuperscript{264} 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))).

\textsuperscript{265} See supra notes 218–19 and accompanying text.

\textsuperscript{266} See NFIB, 132 S. Ct. at 2621–22 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).
individual mandate debate (and in this Article, for that matter). These two terms are mandate and commandeer. This Part starts with mandate, which is a word that occurs most commonly in this debate in the phrase individual mandate. An issue is whether this term provides a clearer, better, and more effective analytic tool than the contentious, but more common, activity-inactivity distinction. This Article contends that it does, mainly because it is narrower and less confusing. Despite the extensive use of this distinction in the discourse, no clear consensus ever developed as to exactly what inactivity is, how to distinguish it from activity, and how to define it. This unfortunate fact alone has caused some to reject the argument against the individual mandate without any thought. Without a concrete definition of inactivity or a clear line between it and activity, the distinction cannot properly perform its intended function—to separate that which Congress can regulate pursuant to its commerce power from that which it cannot so regulate. "I know it 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, individual mandate opponents trumpeted the decision as an acceptance by the Court of the activity-inactivity distinction, but even the claim’s very assertion undercut it. For example, consider 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.”

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267 See, e.g., Liberty Univ., Inc. v. Geithner, 671 F.3d 391, 448 (4th Cir. 2011) (Davis, J., dissenting) (“[Liberty University and the other appellants] cannot even provide a sufficiently concrete definition of ‘activity’ and ‘inactivity’ to allow courts to reliably apply their distinction. Because I find the individual mandate to be within the bounds of Congress’s commerce power defined by Wickard, Lopez, Morrison, and Raich, I would reject appellants’ Commerce Clause challenge.”), vacated, 133 S. Ct. 679 (2012).

268 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (providing a test for obscenity based on seeing the material).

“existing commercial activity” echoes statements by Chief Justice Roberts and the four joint dissenters in the *NFIB* decision. Still, 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 fails to accurately describe the very decision they announced. The relevant factor here is not preexisting economic activity—virtually all statutes, including those adopted pursuant to Congress’s 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 Congress enacted the mandate. Most had also participated in the markets for healthcare and health insurance prior to the passage of the ACA. Also, even under an active-in-the-market-for-healthcare 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 the

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270 Id.

271 See, e.g., *NFIB*, 132 S. Ct. at 2590 (opinion of Roberts, C.J.) (“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)).


273 For Chief Justice Roberts’s strong complaints against the extensive use of the phrase “active in the market for healthcare” by the United States in the *NFIB* litigation, see *supra* note 251 and accompanying text.
existence or timing of the economic activity concerned. However, 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 make mandatory” (as a verb). This definition is narrower and clearer than the definitions in the activity-inactivity distinction; it is also more effective in conveying the gravamen of the opponents’ case against the individual mandate. Still, it is 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 it can sometimes apply to regulations and adjustments of commerce. This meaning overlap undermines the argument individual opponents advance that economic mandates are unconstitutional because they go beyond Congress’s power to regulate interstate commerce. They do not go beyond congressional power if mandates are, in fact, a type of regulation of commerce. Additionally, 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. 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

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274 *See NFIB, 132 S. Ct. at 2587–88; see also Somin, supra note 269.*


commercial purchases. He describes the 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.” 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.” In the 1790s, Congress passed, and Presidents Washington and Adams signed, three laws that required “ship owners [to] buy medical insurance for their seamen,” “all able-bodied men to buy firearms,” and “seamen to buy hospital insurance for themselves.” 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.”

Reaction to Elhauge’s claims was vociferous and (predictably) divided along perspective lines. Professor 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.” Once again, a person can easily glean the tenor of the reactions to Elhauge’s piece from the article titles of the replies themselves. Individual mandate opponents raised counterarguments. Professor Philip Hamburger, for example, said that “[t]he relevant provisions, however, apparently arose under Congress’s military

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277 Id.
278 Id.
279 Id.
280 Id.
281 Id.
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 . . . .”\(^{285}\) In answer to the militia-arms-purchase requirement, Barnett replied that “this was an exercise of Congress’s militia power, and the militia duty traditionally required members to provide their own weapons.”\(^{286}\) He also argued 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 the government, not merely convenient to the regulation of commerce.”\(^{287}\)

This Article’s 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 it is to be conducted at all. However, in terms of the meaning of the word, these are still mandates. This does not mean that the individual mandate is constitutional, but only that the word mandate is not up to the task of clearly expressing the constitutional defect therein.

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


\(^{286}\) Id.

mandate. Hope fades for a bulletproof argument if there is no better alternative at hand. 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 this Article already considered. 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 Elhauge exploited, which this Article previously discussed.

More importantly, these terms single out and emphasize the aspect of compulsion, which this Article argues is needed in anti-individual mandate rhetoric. 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*. Also, opponents have not used the meaning of these terms much to explain and argue for the impropriety of the individual mandate. Instead, these terms have played a supporting role in the service of themes, such as the activity-inactivity distinction and the principle of limited and enumerated powers.

However, these three terms express a justified and workable limit to the commerce power. The anti-commandeering cases involving federal regulation of the states under the commerce power already demonstrated this fact. One of those cases noted, “As an initial matter, Congress may not simply ‘commandeer’ the legislative processes of the [s]tates by

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288 See supra Part II.
289 See supra Part VI.A.
290 See, e.g., RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 410 (2d ed. 1987) (“[C]ommandeer. 1. to order or force into active military service. 2. to seize (private property) for military or other public use . . . . 3. to seize arbitrarily. (emphasis added)); id. at 433 (“[C]onscript. 1. to draft for military or naval service. 2. to compel into service. 3. a recruit obtained by conscription. 4. enrolled or formed by conscription; drafted.”).
291 See, e.g., NFIB, 132 S. Ct. at 2546 (joint dissent) (“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.”).
292 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 . . . .”).
directly compelling them to enact and enforce a federal regulatory program.”294 The federal power to regulate does not include the power to compel states to act.295 The states retain a residual sovereignty.296 Still, state sovereignty does not convey state immunity from garden-variety congressional regulation.297 The line here is between constitutional regulation of the states and unconstitutional commandeering of the states.

This Article’s argument here is in favor of applying this same regulation-commandeering line to limit congressional power over individuals. Of course, persons are not states. Additionally, the anti-commandeering cases recognize congressional authority over individuals.298 However, the authority the Court 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. A combination of the anti-commandeering cases and the Bond case provide this.299 Bond stated, “States are not the sole intended beneficiaries of federalism.”300 On the contrary, “[f]ederalism secures the freedom of the individual.”301 The anti-commandeering cases recognize an anti-commandeering immunity under the Tenth Amendment.302 Bond stands for the proposition that the Tenth Amendment provides that immunity.

294 Id. at 161 (alteration in original) (quoting Hodel v. Va. Surface Mining & Reclamation Ass’n, 452 U.S. 264, 288 (1981)).
295 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 directly to compel the States to require or prohibit those acts.”).
297 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.”).
298 See, e.g., New York, 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.”).
299 Bond v. United States, 131 S. Ct. 2355 (2011) (holding that individuals as well as states can bring Tenth Amendment challenges to the constitutionality of federal statutes).
300 Id. at 2364.
301 Id.
302 U.S. CONST. amend. X.
Amendment protects the rights of individuals as well as the rights of states. Putting the two together yields an individual anti-commandeering right.

Yet, 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, the dynamic gestalt believes that “[t]he amendment states but a truism that all is retained which has not been surrendered.”303 From this perspective, the Tenth Amendment is merely a declaratory statement304 and creates substantive rights for neither states nor individuals. The price for 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.

VII. CONCLUSION

The debate and litigation over the individual mandate since Congress enacted the ACA in 2010 brought into clearer relief the opposing perspectives on the limits and scope of the federal commerce power that fuel the argument. This Article has not tried to resolve the conflict because the two sides do not share enough fundamental assumptions to do that. Instead, it 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.

303 United States v. Darby, 312 U.S. 100, 124 (1941).
304 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 . . . .”).