Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity

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Judging from the text of the Commerce Clause, one might expect and conclude that the words “regulate commerce” must have the same meaning throughout the Clause.\textsuperscript{1} Whatever the meaning of “commerce,” it presumably has the same meaning whether that commerce takes place “among the states” or occurs “with foreign nations.” Likewise, the power to “regulate” commerce among the states presumptively is the same power that Congress has to “regulate” commerce with Indian tribes. Indeed, one might say that there is only one power—the power to regulate commerce—that applies to three situations.

This “unified commerce clause theory” builds upon an appealing and intuitive norm: Absent some reason to the contrary, we should conclude that a word found in more than one place in a document has the same meaning throughout the document. In the past, the Supreme Court has applied this presumption in statutory interpretation.\textsuperscript{2} More recently, Professor Amar attached a name to this presumption—“intragetualism.”\textsuperscript{3} In particular, Professor Amar argued that readers of the Constitution ought to pay more attention to intratextualism as a means of squeezing meaning from the Constitution. While Professors Vermeule and Young have criticized various aspects of Amar’s claims, particularly Amar’s views on the coherence of the Con-

\textsuperscript{*} Copyright © 2003 Saikrishna Prakash. University of San Diego School of Law. Thanks to Larry Alexander, Steve Sheppard, and Adrian Vermeule for rather helpful conversations. My good friend, Professor Adrian Vermeule, has written a spirited commentary that follows this piece. \textit{See} Adrian Vermeule, \textit{Three Commerce Clauses? No Problem}, 55 ARK. L. REV. 1175 (2003). I commend it to everyone interested in the subject matter, particularly those who might share his sense that at least some of my conclusions are woefully wrong.

1. U.S. CONST. art. I, § 8, cl. 3 (Congress shall have power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ”).


stitution, they also subscribe to a rather weak presumption in favor of intratextual uniformity.\footnote{Adrian Vermeule & Ernest A. Young, Hercules, Herbert, and Amar: The Trouble with Intratextualism, 113 HARV. L. REV. 730, 734 & n.18 (observing that they are not opposed to intratextualism as a weak tie-breaker).}

Whatever the precise weight to be attached to the presumption of intratextual uniformity, the unified commerce clause theory seems to be grounded on a more appealing and intuitive norm of intrasentence uniformity. Absent some very strong reason to the contrary, we should conclude that a word or phrase in a particular clause or sentence has the same meaning throughout the clause or sentence. As a matter of conventional English usage, it seems far more likely that a word or phrase has the same meaning throughout a single clause or sentence than that a word or phrase used in two or more different contexts in a document has the same meaning in each context. Given this rather robust presumption, it would be the rare case where a word or phrase actually had multiple meanings within a single sentence.

Notwithstanding the supposed strength and appeal of the presumption of intrasentence uniformity, the courts do not subscribe to the unified commerce clause theory. In fact, the courts view each subpart of the Commerce Clause as if it were its own separately phrased clause. Indeed, one might even go so far as to say the courts act as if there are three commerce clauses. In so doing, the courts rarely comment on how the Commerce Clause might yield such different readings. They certainly do not pause long enough to adequately justify the differences (at least if one believes in the presumption of intrasentence uniformity).

This piece defends a presumption of intrasentence uniformity in constitutional, statutory, and regulatory interpretation. It also applies that presumption to the Commerce Clause and concludes that there is very little originalist evidence that could overcome the presumption of a uniform meaning for “regulate commerce.” In particular, Section I defends the presumption of intrasentence uniformity in general terms. Section II applies the presumption to the Commerce Clause and concludes that there is not enough textual or historical evidence to overcome the presumption that “regulate commerce” has a uniform meaning.
throughout the Commerce Clause. Section III suggests that under current judicial doctrine, congressional power differs as to all three Commerce Clause subparts. Section III also reveals that the powers retained by the states as to all three subparts of the Commerce Clause vary as well. That is to say, the dormant aspect of the Commerce Clause applies differently to each subpart.

Just to be clear, I do not contend that intrasentence uniformity must always triumph. I merely defend a very strong presumption of intrasentence uniformity that can be overcome by textual and historical evidence. I thus disassociate myself from Edward Corwin’s forceful assertion “that a word should have two quite different meanings in a single short sentence in which it occurs but once, is certainly a novelty to the science of hermeneutics and probably to that of linguistics as well.”\(^5\) In his zeal to champion a unified and broad Commerce Clause, Corwin went too far. A word can have two or more different meanings even in a short sentence in which the word occurs but once. Nonetheless, to my mind, the intuition underlying his overblown claim has undeniable appeal.

I. THE PRESUMPTION OF INTRASENTE UNIFORMITY

An interpretive presumption might arise in at least one of two ways. First, a presumption might arise because either the writer or the reader unilaterally announces a presumption, applies it in the future, and the other side acquiesces. For example, the judiciary has created some of the more well-known presumptions, such as the Chevron presumption about statutory construction.\(^6\) Congress then legislates against the background of the Chevron presumption when it drafts administrative statutes. Likewise, Congress might codify a presumption. The courts will then apply the presumption in construing the relevant statutes. In either case, both parties understand and adapt to the created presumption.

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Alternatively, a presumption might arise because prior practice created a norm. In this case neither writer nor reader formally establishes a presumption where none previously existed. Instead, writer and reader both operate against the backdrop of an existing convention. For instance, Americans understand that they ordinarily should read federal statutes as if they are in English, even though (to my knowledge) no court or legislature has ever expressed the presumption. That is because prior practice sensibly leads Americans to expect that federal statutes will be in English.

If there is a presumption in favor of intrasentence uniformity, it most likely reflects a linguistic convention. In the vast majority of sentences, each word typically has only one meaning. Understanding this to be the case from their own experience, readers ordinarily understand a word as having only one meaning in a particular sentence. Likewise, authors compose with the knowledge that most readers will treat each word as having a uniform meaning throughout a sentence. The more readers construe sentences consistent with intrasentence uniformity, the more writers will consider the presumption when writing. And the more readers believe that legislatures are aware of and attached to the presumption, the more the readers are likely to adhere to the presumption in understanding provisions.7

The presumption of intrasentence uniformity seems especially appropriate and powerful when compared to the largely

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7. As I have done nothing to test the presumption’s existence empirically, I rely upon the time-honored professorial license that enables law professors (at least) to confidently make empirical claims in the absence of a firm empirical basis. If one were inclined, one might test the presumption of intrasentence uniformity by canvassing the views of numerous individuals about the meaning of hundreds of sentences raising the intrasentence uniformity question. Do most readers assume that a word has but one meaning in a sentence? One also might test the presumption by asking authors to compose individual sentences where a particular word is to have multiple meanings. Given a choice between using a word in multiple ways in a sentence and using two separate words to convey the different meanings, what will authors choose?

For curiosity’s sake, one might apply such tests to the Commerce Clause. For instance, when presented with the Commerce Clause, people can be queried about whether, in their view, the Clause indicates that the “regulate Commerce” power varies across all three subparts. Drafters also might be told that they are to draft a provision or provisions in which Congress is granted power to regulate commerce between the states, and that Congress’s power ought to differ as to each subpart.
accepted presumption of intratextual uniformity. As compared to the plausibility of coherence across a text, uniformity seems much more likely in the context of one clause or sentence. When dealing with just one sentence, a writer is more likely to be aware of the potential for confusion. If a writer intends that a word have more than one meaning throughout a sentence, she can structure the sentence to overcome or avoid the presumption of intrasentence uniformity. A writer consciously employs intrasentence nonuniformity at her own peril, for there is a reasonable chance that future readers will interpret the clause “incorrectly,” i.e., inconsistent with the author’s intent. In contrast, when words are found in different sections of a long document, it seems less likely that a writer will be aware of the potential for disuniformity. This decreased awareness makes it more likely that the writer will intend different definitions for the same word. Knowing that it is more likely that the author intended different meanings for the same word used in different contexts, the reader will feel more free to ascribe different meanings, at least when compared to potential instances of intrasentence uniformity.

Interestingly enough, the Supreme Court has recently endorsed the presumption of intrasentence uniformity in the context of statutory interpretation. In *Reno v. Bossier Parish School Board*, the Supreme Court “refused to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending upon which object it is modifying.” There, the Supreme Court considered § 5 of the Voting Rights Act which provides that in order to “preclear” a proposed change in voting practices, a jurisdiction subject to the Act must

8. One might even conclude that the force or weight of the presumption of uniformity ought to vary inversely with the size of the relevant text. As noted earlier, people may find it more difficult to keep in mind different uses of a word when there is a greater mass of text. As drafters become less likely aware of the potentially different uses of a word appearing in multiple places in a document, the intertextual presumption ought to decrease in force. But attempting to calibrate the presumption in this way might introduce too many complications to what ought to be a simple presumption. Indeed, a skeptic of the presumption of intrasentence uniformity might make the same charge. By positing a more powerful presumption of intratextual uniformity, perhaps I have taken an entirely sensible presumption of intratextual uniformity and unnecessarily complicated matters.

10. 528 U.S. 320.
11. *Id.* at 329.
demonstrate that the proposal "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 12 Hoping to circumvent a narrow construction of "abridging the right to vote" that the Court had rendered in a case involving the "effect" prong, 13 the appellants argued that "abridging the right to vote" meant something different where "purpose" was concerned. In other words, "abridging the right to vote" meant two different things in the same sentence.

Though the Supreme Court did not speak of a "presumption" or note that its conclusion was based on a "rule of construction," the Court seemed to be applying an iron-clad rule when it rebuffed the attempt to introduce multiple meanings for "abridging the right to vote" in § 5. 14 Such a construction was, in the words of Justice Scalia writing for the Court, an "untenable construction of the text." 15 Indeed, the Court went on to de-rive the appellant's reading as a "muscular construction" 16 that had "no support in the language of section 5." 17 To say that there was "no support" for concluding that "abridging the right to vote" had more than one meaning is to come close to suggesting that a word or phrase can never have multiple meanings in construing a single sentence.

While the dissenters sought to give an expansive meaning to "abridging the right to vote," they never directly quarreled with the notion that this phrase ought to have a single meaning throughout the statute. Instead, they seemed to question the correctness of the prior decision that had given that phrase a narrow meaning in the context of the "effect" prong. 18 Hence, everyone on the Court seemed to agree that a word ought to be understood as having a uniform meaning in a sentence, with the majority going much further.

Such arguments in favor of a presumption of intrasentence uniformity might not persuade an originalist trying to discern the

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12. Id. at 328 (citing 42 U.S.C. § 1973c (1994)).
15. Id. at 329.
16. Id. at 331.
17. Id. at 336.
18. Id. at 363-64 (Souter, J., dissenting).
Constitution's meaning. The interpretive presumptions that would matter to originalists are those extant at the enactment of the relevant provision. Whatever presumptions currently exist might be modern conventions not relevant to discerning the original understanding of a document written at an earlier time. To gauge whether the presumption of intrasentence uniformity ought to apply, the originalist might want to examine legal writers of the founding era that discussed legal presumptions and rules of construction. If legal theorists embraced the intrasentence uniformity presumption, that might be a sound basis for concluding that the Constitution was drafted and ratified against that background rule.

From an originalist perspective, I have found no evidence of the existence of an intrasentence presumption at the Constitution's founding. Though there are discussions of presumptions and rules of construction in founding era documents and in the writings of founding era legal theorists, I have come across nothing even discussing the intrasentence uniformity presumption. Yet the apparent lack of founding era discussions of the presumption of intrasentence uniformity should not lead originalists to reject it.

When dealing with originalist inquiries, it seems quite proper to adopt a presumption that conventions and presumptions currently valid were likely valid in the past as well. Indeed, originalists unwittingly rely upon this presumption of continuity all the time. When considering statutory or constitutional provisions, originalists (and the occasional non-originalist wishing to make some historical claim) typically attempt to ferret out the original meaning of a few contested words in the relevant provisions. For the (seemingly) uncontroversial words, there is typically little originalist analysis because all sides to the issue implicitly assume that these words had the same meaning in the past that they do in the present. That is to say, those searching for original meaning routinely adopt a continuity presumption that certain words have the same original and present-day meaning.\(^{19}\)

\(^{19}\) It might seem odd for "originalists" to deploy a continuity presumption when originalists purport to be searching for the original meaning of a phrase or sentence rather than its contemporary meaning. Hence, one might reject the presumption of continuity typically and implicitly adopted by originalists. A rejection of the continuity presumption,
Given the apparent reasonableness of the presumption in favor of continuity of meanings, it seems fair to presume (in the absence of evidence to the contrary) that presumptions and rules of constructions extant today also would have applied in the past. Though languages and their conventions change over time, I know of no particular reason why the presumption of intrasentence uniformity might not have existed over two centuries ago. Indeed, there might be good reason to think that the presumption of intrasentence uniformity was even stronger at the founding. With the passage of time and the proliferation of dictionaries, words are more likely to have multiple meanings now than in 1787, thus making it easier (and hence more likely) for a word to enjoy more than one meaning in a sentence. If this claim is true, the norm of intrasentence uniformity was likely more powerful in the past than it is today. Accordingly, if one believes in the current validity of the presumption of intrasentence uniformity, one can reasonably presume that the presumption applied at the founding.

As mentioned earlier, the presumption of intrasentence uniformity is just a presumption and, as such, can be overcome. To defeat the presumption, I believe that one would need rather compelling evidence that the text itself led to the conclusion that a word had a nonuniform meaning. Alternatively, one would want evidence that readers and/or writers from the relevant era actually believed that a particular word had more than one meaning in a word or phrase in a sentence. Though this undoubtedly poses a high hurdle it seems appropriate when trying to overcome such an intuitively appealing presumption. To accept less evidence would be to give too little weight to what ought to be a rather powerful presumption. If a word in a sentence is only rarely understood as having multiple meanings however, would require inquiry into the original meaning of each and every word in a document from a prior era. Not an insurmountable task, but surely a more time-consuming one.

20. Amar, supra note 3, at 759-62. Professor Amar apparently relied upon this presumption in concluding that intratextualism applied in the context of the Constitution. Id. Professor Amar never sought to show that the Founders actually subscribed to the intratextual presumption. Id. Instead, he discussed a norm with intuitive appeal today and then applied it to various constitutional provisions written in the past. Id. Like Professor Amar, I am arguing for a presumption that current interpretive presumptions existed in the past, including at the founding.
within that sentence, one ought to require a good deal of evidence that people originally understood a particular word as having multiple meanings in a sentence before one overcomes the presumption of intrasentence uniformity.

As suggested above, infrequently the text alone makes fairly clear that a word probably has more than one meaning. For instance, most readers will conclude that the following sentence employs multiple meanings for the verb “spun”: “Ram spun the media, tops, and yarn.” Even though Ram has “spun” all three, most will conclude that he has done something different to each. 21 A more relevant example: “Ram regulated the palace’s temperature and the commerce of his Kingdom.” Most would recognize that “regulate” means something different in the two contexts.

The text also might make it obvious that a noun has multiple meanings in a single sentence. Consider the sentence, “He taught tricks to magicians and dogs.” Even though one could read the sentence as if a man instructed magicians and dogs in the art of prestidigitation, more likely one would read the sentence as referring to two different types of tricks, magic tricks and canine tricks. Once again, a more pertinent example: “She engaged in commerce with virile men and with the merchants of England.” Here commerce likely means something quite different with respect to the virile men than it does with respect to the English merchants.

More often than not, however, the text alone will not be enough to lead the reader to conclude that a word has multiple meanings in a sentence. Sometimes one might need to know something about the intent of the writer. The literary device of “double entendre” is an example of where a word or phrase has more than one meaning in a single sentence. But whether people will understand a sentence as containing a double entendre probably depends upon the writer. Though a sentence might have a double entendre, we are not likely to view the sentence as having a double entendre if the writer is naive and innocent. On the other hand, if the writer is a punster or a poet, double enten-

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21. Of course, it is possible that the writer intended “spun” to mean the same thing throughout the sentence. But most readers would probably treat “spun” as if it meant different things as to the media, tops, and yarn. The objects are sufficiently different that the presumption is overcome by their differences.
dres become more expected. In these situations, ordinary conventions and presumptions are regularly overcome or even temporarily suspended. We do not expect double entendres from children; we expect them in a poet’s bawdy limerick.

These examples of intrasentence nonuniformity from the previous paragraphs seem rather unusual, to say the least. They serve as relatively rare examples of where the text and context indicate a lack of intrasentence uniformity. Nonetheless, it seems likely that either text and/or context overcame an initial presumption in favor of intrasentence uniformity. That is to say, these examples do not refute the presumption, but instead are exceptional instances in which the text managed to overwhelm it. Indeed, that we have created a term of art—double entendre—to reflect the unusual situation where a word or phrase has more than one meaning, and that we seem to lack a word akin to “single entendre” suggests that multiple meanings are the exception rather than the rule.

Just as context might help overcome or temporarily weaken the presumption of intrasentence uniformity, context also might strengthen the presumption. The strongest presumption of intrasentence uniformity might apply in the context of interpreting regulatory, statutory, and constitutional provisions. Given the obvious significance of regulatory, statutory, and constitutional interpretation, the careful drafter likely will try to avoid the ambiguity inherent in double entendres and words which not only have multiple meanings, but actually bear those multiple meanings in but one sentence. Cognizant of the presumption of intrasentence uniformity, if the drafter wishes a single word to have multiple meanings, that drafter likely will use different words to convey the various meanings. Hence, while we might expect an occasional but infrequent instance where a word has multiple meanings in a sentence in ordinary usage, we probably do not expect such license when it comes to statutes or constitutions. We certainly do not expect double entendres (bawdy or otherwise) in the Constitution.

The presumption of intrasentence uniformity is hardly natural or inevitable. We can easily imagine a language where speakers quite often used a word in a sentence to convey two or more different meanings. Indeed, we can even imagine speaking or writing English in this manner. If we lived under these
alternative circumstances, there would be no presumption in favor of intrasentence uniformity. In fact, under the right circumstances, we might adopt a presumption against intrasentence uniformity. Yet, as mentioned earlier, I doubt whether such claims can be made about English as it is practiced in America today and as it was practiced at the founding. Whatever might be true of a hypothetical usage of English, we do not typically mean words to have more than one meaning in a single sentence. Sentences are often ambiguous enough without introducing another layer of unnecessary ambiguity.

As noted, I believe that the presumption of intrasentence uniformity properly applies today and properly applied at the founding. In the next section, I consider whether there is sufficient originalist evidence to overcome the presumption of intrasentence uniformity in the context of the Commerce Clause.

II. APPLICATION OF THE PRESUMPTION TO THE COMMERCE CLAUSE

The Constitution is replete with clauses where a word or phrase has the potential to mean different things in a single provision. Perhaps the Commander-in-Chief has different control vis-à-vis the Army, Navy, and the militia. 22 Maybe the judicial power of the United States means something different for the Supreme Court than it does for the lower federal courts that Congress might create. 23 Conceivably, Congress might have different regulatory power over foreign coin than domestic, 24 and different authority over land than naval forces. 25 Yet the most important context for considering the intrasentence question is the Commerce Clause. 26 This is true both because of the evident contemporary significance of the Clause and also be-

22. U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States . . . ").
23. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").
24. U.S. CONST. art. I, § 8, cl. 5 (Congress shall have power to "coin Money, regulate the Value thereof, and of foreign Coin . . . ").
25. U.S. CONST. art. I, § 8, cl. 14 (Congress shall have power to "make Rules for the Government and Regulation of the land and naval Forces . . . ").
cause of the history of academic and judicial treatment of the intrasentence question in the context of the Commerce Clause.

In my view, though the phrase "regulate commerce" clearly is capable of conveying multiple meanings in the Commerce Clause, the presumption of intrasentence uniformity wins out. The presumption trumps because nothing in the Commerce Clause's text or original understanding actually suggests that the Founders understood "regulate commerce" as having multiple meanings. 27

By itself, the text of the Commerce Clause arguably does not overcome the presumption of intrasentence uniformity. The Clause seems akin to the following sentence: "My parents may regulate the conduct of their three minor children." Despite the fact that the children have different aptitudes, attitudes, and traits, the children are sufficiently alike that we are likely to view the power to regulate behavior as uniform across all three. Likewise, though one can distinguish, in all sorts of ways, the states from Indian tribes from foreign nations, the three subparts of the Commerce Clause seem rather similar in nature. Each subpart refers to a set of sovereigns, suggesting a uniform meaning for "regulate commerce" throughout all three subparts. Despite their real differences, the sets of sovereigns share much more in common. 28

In contrast, the Commerce Clause seems far removed from the following sentence: "My parents may regulate the behavior of Raja the dog, their minor children, and their guests." Here it seems fairly clear that the regulatory power ought to be understood quite differently as to the distinct subparts. My parents probably can punish Raja the dog in ways wholly inappropriate for children. Likewise, one expects far greater freedom to con-

28. Once again, my claim is not that the Commerce Clause cannot be read as if the power to "regulate commerce" meant different things for each subpart. Instead, my claim is that the text alone does not overcome the presumption of intrasentence uniformity. So although the states and Indian tribes are not complete sovereigns and foreign countries typically are, to my mind such differences do not suggest the existence of more than one power to "regulate commerce" across the three groups of sovereigns. Nor does the importance of the states in constitutional structure suggest a different scope for "regulate commerce" where interstate commerce is concerned. Congress's ability to regulate international and Indian commerce represents federal displacement of state power, regardless of whether that congressional ability represents a mere potential for displacement or whether the Commerce Clause itself preempts state commercial regulation.
strain children than guests. Here, each object is sufficiently dissimilar that it seems more appropriate to read the power to regulate behavior differently as to all three subparts. 29

Consistent with my claim about the Commerce Clause’s text, I am aware of no Founder who contemporaneously read “regulate commerce” as if it meant something different as to the three subparts. Nor am I aware of anyone who even explicitly acknowledged that there were multiple meanings for “regulate commerce.” For instance, no one seems to have suggested that “regulate commerce” might mean something different for Indian commerce than for foreign commerce. Nor did anyone apparently argue that any dormant effects stemming from the phrase “regulate commerce” somehow differed across subparts.

In the particular context of whether Congress could prohibit interstate commerce like it might bar foreign commerce, I likewise know of no evidence suggesting different meanings for “regulate commerce.” To the contrary, just as many understood that Congress could prohibit foreign commercial activity, 30 so too did people understand that Congress might greatly constrain (and perhaps bar) interstate commerce. For instance, many in the founding era understood that Congress might grant commercial monopolies in the guise of regulating commerce. 31 Although the grant of a commercial monopoly is not the same as a

29. This example may be a bit misleading. When we speak of Congress having the power to regulate commerce in the context of the Constitution, we do not normally envision many external constraints operating to constrain the exercise of that power. On the other hand, whenever we speak of the powers of private entities, we necessarily have to consider the legal restrictions placed on the private entities. One reason why my parents’ power to regulate guests is different from the power to regulate the behavior of Raja the dog is because the law quite obviously limits the power more strictly in one instance than in the other. Absent such different background constraints, there arguably would be no difference in the power across the three subparts of this hypothetical sentence. Hence, at least part of the reason we would read this sentence differently is some external understanding of how parents can regulate. Arguably, such external constraints on how Congress might regulate commerce are not present in a Constitution granting such authority.

30. I believe that the prohibition against Congress banning the slave trade prior to 1808 reflected the understanding that Congress could ban at least foreign commerce under the Commerce Clause. See U.S. Const. art. I, § 9, cl. 1. The provision was not enacted out of abundance of caution, because there would be no need to mention a specific year if the Drafters did not recognize that Congress could generally ban foreign commerce in the first instance.

31. See Corwin, supra note 5, at 57 (citing Wilson, Mason, Gerry, and five state conventions for belief that Congress would enjoy power to grant monopolies).
ban on commerce, the authority to grant monopolies is barely distinct from the more general power to ban commerce. In other words, when the grant of the power to regulate interstate commerce is understood to grant the authority to cede a monopoly privilege (which is the power to constrain trade), it is quite likely that the power to regulate interstate commerce ought to be understood as conveying the power to ban interstate commerce as well.

Recognizing the weakness of the textual case against the unified commerce clause theory, when people have argued against intrasentence uniformity, they typically have eschewed the text and relied upon the Founders' intentions or upon first principles of federalism. For instance, Madison, writing in 1829, admitted that if the Clause was "taken literally," it likely would mean that the power over foreign and interstate commerce would have the same scope. 32 Yet it was "very certain" that the interstate commerce subpart was intended to prevent injustices committed by the states against each other, rather than as a grant of positive power for the Federal Government. 33 Accordingly, Madison concluded that we ought to treat the grant of power over interstate commerce as if it were narrower than the grant over foreign commerce. 34

Most agree that the Founders sought each subpart of the Commerce Clause for separate reasons. 35 For instance, the power to regulate interstate commerce was granted to Congress to prevent states from burdening the commerce that took place between the states. In other words, Congress was to regulate commerce by unburdening interstate commerce of harmful state regulation. One might even go further and claim that the Framers would not have wanted Congress to throw up barriers to the very interstate commerce that the Founders wanted unencum-

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32. Letter from James Madison to J.C. Cabell (Feb. 13, 1829), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON (1867).
33. Id.
34. See id.; see also Hammer v. Dagenhart, 247 U.S. 251, 274-76 (1918) (citing principles of local control to justify a non-unified commerce clause theory and concluding that Congress cannot have the power to prohibit commerce except where harmful/dangerous articles of commerce are concerned).
35. Even someone as hostile to the notion of a non-unified Commerce Clause as Corwin admits that the interstate and foreign subparts of the Commerce Clause were animated by two different "immediate objectives." CORWIN, supra note 5, at 23.
bered. In contrast, the Framers granted Congress power over foreign commerce to either open up foreign markets to U.S. goods or to protect U.S. manufacturers and farmers from foreign competition. To open up foreign markets, Congress might need to negotiate with foreign countries from a position of unity and strength. In particular, this might mean that Congress could enact high tariffs or barriers to trade to create a situation favorable to the joint or multilateral reduction in trade barriers. Alternatively, Congress might want to protect infant industries (and some not so young) from foreign competitors.

Yet the well-known differences in motivation and in the expected uses of the power to regulate commerce across the three subparts hardly prove the existence of two or three different meanings for “regulate commerce.” As is well understood even where intrasentence uniformity is not an issue, whatever the particular motivation for granting authority, the textual grant may go beyond the particular concern sought to be addressed. Hence, that there were different reasons for enacting the Commerce Clause subparts would seem an insufficient basis for concluding that the power to regulate commerce was of different scope across the subparts. Moreover, that the Founders may have expected that certain powers would be exercised in some ways and not in others does not mean that Congress lacks the authority to exercise powers in a manner inconsistent with the Framers’ expectations. Notwithstanding the expectation that Congress would not erect barriers to interstate trade, the Commerce Clause might permit Congress to do just that.

Hence, while the Founders’ motivations and expectations are probably relevant evidence of what the Constitution’s words meant at a minimum, they do not necessarily establish the breadth of the meanings, especially where there is an issue of intrasentence uniformity. Indeed, when you have different motivations and expectations as to subparts of a sentence, these different motivations and expectations for each subpart make it possible to read all three subparts with the expectations and mo-

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36. While the motivations and expectations of the legislators might not limit the meaning of a clause, the clause most likely encompasses at least these motivations and expectations. For instance, if the Founders thought that the Commerce Clause allowed Congress to set rules governing shipping, we are likely to accept such a reading because the text is clearly capable of supporting this reading.
tivations underlying the individual clauses. Accordingly, the differing motivations and expectations behind the subparts of the Commerce Clause do not seem sufficient to overcome the presumption of intrasentence uniformity. Instead, the differing motivations and expectations become the basis for reading each subpart rather broadly pursuant to the presumption of intrasentence uniformity.

Such is the strength of the presumption of intrasentence uniformity that were we to draft a new constitution, I doubt whether one out of a hundred modern drafters would copy the Commerce Clause verbatim if they wanted to convey different powers to Congress and/or withdraw different powers from the states.\footnote{37} Given the presumption of intrasentence uniformity, future readers likely will misapprehend what the drafter meant to convey. And if it makes sense to apply the presumption of continuity to the presumption of intrasentence uniformity, I doubt whether one out of the fifty-five delegates to the Constitutional Convention in Philadelphia would have drafted the Commerce Clause found in the Constitution had the intent been to grant different powers to Congress and withhold different authority from the states.\footnote{38}

One rarely reaches unequivocal conclusions about the meaning of the Constitution’s words, especially when one seeks the Constitution’s original meaning. Nonetheless, I would conclude that there is insufficient founding era evidence that the founding era endorsed the non-unified commerce clause theory. Indeed, one might reasonably conclude that even absent the pre-

\footnote{37. Those making constitutional arguments often declare that had the Founders desired a particular end or purpose, they would have made their intent crystal clear by drafting an entirely different provision. Although such claims are made perhaps too often, if this form of argument is of any use, it presumably would apply to the Commerce Clause and the presumption of intrasentence uniformity. Had the Founders consciously desired to convey different powers over interstate, foreign, and Indian commerce, they would have drafted the Commerce Clause in a manner that made that desire manifest. Likewise, had the Founders wished to withhold different powers from the states relating to interstate, foreign, and Indian commerce, they would have enacted a radically different Commerce Clause.}

\footnote{38. Of course such a claim benefits from hindsight. Having found many ambiguities and vague terms in the Constitution, it is easy for scholars to imagine how we would avoid some of these problems. It is far easier to correct existing problems than to identify and solve problems arising from truly new text.}
sumption of intrasentence uniformity, there is very little or no originalist evidence of a non-unified Commerce Clause.

III. COMMERCE CLAUSE DOCTRINE

Though the Commerce Clause raises several intrasentence uniformity questions, the most famous one arises out of the supposed differences between the interstate and foreign commerce subparts. Early on in the nation’s history, defenders of state prerogatives regarded intrasentence nonuniformity in the context of the Commerce Clause as a means of restraining federal power. In particular, some of those who believed that Congress could ban foreign commerce also thought that Congress could not ban articles of interstate commerce. As recounted by Corwin, Madison was the first to claim that federal authority over interstate commerce was more circumscribed than federal power over foreign commerce.\(^{39}\) Thereafter, Supreme Court Justices\(^ {40}\) and treatise writers\(^ {41}\) followed Madison’s lead by championing similar nonuniform readings of the Commerce Clause. Presumably, these defenders of state authority thought that “regulate commerce” meant something different for interstate and foreign commerce.

This section briefly considers how the courts currently treat the different parts of the Commerce Clause. So far as judicial doctrine is concerned, the champions of intrasentence nonuniformity have won the day, though not with the results that they might have expected. The courts apparently treat each subpart of the Commerce Clause as if it were differently phrased. In particular, case law suggests that federal power differs as to all three subparts. Just as significant, the commerce powers retained by the states also differ across all three subparts.

Yet nonuniformity has hardly worked to cabin federal power. In particular, though the courts may have accepted the claim that the foreign commerce power is broader than the interstate commerce power, this has not helped curtail federal power

\(^{39}\) See Corwin, supra note 5, at 59-60.

\(^{40}\) See, e.g., Dooley v. United States, 183 U.S. 151, 171-72 (1901) (Fuller, C.J., dissenting).

because the courts have read the interstate commerce power so expansively. In the context of the Indian commerce subpart, the courts have concluded that the Commerce Clause grants Congress plenary power over Indian affairs. Rather than restraining federal power over the states, nonuniform readings of the Commerce Clause have led to more power over foreign commerce and Indian tribes.42

A. The Scope of Federal Power

The scope of federal power relating to interstate commerce will provide a useful starting point. As is well-known, in United States v. Lopez,43 the Court announced a three-part test for how it would measure the limits of federal power over interstate commerce.44 First, Congress may regulate the use of the channels of interstate commerce.45 Second, Congress may regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.46 Third, Congress’s commerce authority includes the power to regulate those activities that substantially affect interstate commerce.47

Apparently, the Supreme Court has never discussed the applicability of the three-part Lopez test to gauging the limits of the foreign commerce power. Presumably, the Commerce Clause’s foreign commerce subpart provides Congress at least as much power as the interstate commerce subpart. Indeed, at least one lower federal court has applied the Lopez test to measure the constitutionality of foreign commerce statutes.48

42. Of course, one might say that nonuniformity has constrained Congress in some sense. If one views the judiciary’s treatment of the Indian and the foreign commerce subparts as the more appropriate baselines, federal power over interstate commerce is narrower than it otherwise would be under a nonuniform reading. In other words, if forced to supply a uniform reading to the three subparts of the Commerce Clause, courts might well supply such readings by increasing federal authority over interstate commerce to the level of power over foreign commerce or over Indian tribes.
44. Id. at 559-63.
45. Id.
46. Id.
47. Id.
48. See United States v. Cummings, 281 F.3d 1046, 1049 n.1 (9th Cir. 2002) (applying the Lopez framework to gauge limits of federal foreign commerce power).
Yet there is reason to think that the Court might treat the foreign commerce subpart as if it granted greater power to Congress than the interstate commerce subpart. In particular, in a case prior to Lopez, the Court suggested that the foreign commerce subpart might grant broader power to the Federal Government. In Japan Line Ltd. v. Los Angeles, the Court noted that

Although the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce ‘with foreign Nations’ and ‘among the several States’ in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater. Cases of this Court, stressing the need for uniformity in treating with other nations, echo this distinction.

One should not make too much of this case. After all, this case was decided prior to the retraction in Lopez, in a case involving the Dormant Commerce Clause, and in an era where federal power over interstate commerce knew no practical limits. Still, at least one circuit court has read Japan Line as standing for the proposition that federal power over foreign commerce is broader than authority over interstate commerce.

One might expect that the Indian commerce subpart would be read in a similar manner as its counterparts. Alternatively, given the judiciary’s acceptance of nonuniform readings of the Commerce Clause, perhaps federal power over Indian commerce might vary slightly from its interstate or foreign counterparts. But those who know something about Federal Indian law know how wrong such expectations are. The judiciary treats the Indian commerce subpart as the source of a plenary federal power over Indian tribes. Thus, Congress can regulate any aspect of an Indian tribe—including its government, its laws, and every other aspect of life within its borders.

The Court is well aware that its reading of the Indian commerce subpart differs drastically from its interpretation of the interstate commerce subpart. In Cotton Petroleum Corp. v. New

50. 441 U.S. 434.
51. Id. at 448.
52. See Cummings, 281 F.3d at 1049 n.1 (concluding, post-Lopez, that federal power is broader in foreign commerce arena).
Mexico, the Court sought to justify the different readings, claiming that it was well established that the Interstate Commerce and Indian Commerce Clauses have very different applications. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.

Well established it may be, but only by judicial fiat. The Court has never explained how the Commerce Clause could be the source of a plenary federal power over Indian tribes. Indeed, when the Court first considered a similar but more narrow assertion—that the Federal Government could enact general criminal statutes for Indian tribes under the cover of the Commerce Clause—it dismissed it as a “very strained construction” of the Commerce Clause. Nor has the Court ever explained how the Commerce Clause can grant plenary power over some sovereigns (Indian tribes) but not others (the states and foreign nations).

B. The Scope of Power Retained by the States

Nothing in the text of the Commerce Clause suggests that the Clause, by itself, displaces any state authority. Instead, the Clause merely grants Congress the power to regulate commerce and there is nothing about such authority that logically necessitates that only one sovereign—the Federal Government—may

54. Id. at 192. The Supreme Court has sometimes jointly cited the commerce and the treaty powers as the source of a plenary power over Indians. See, e.g., Morton v. Mancari, 417 U.S. 535, 551-52 (1974). Yet it can hardly be the case that all recognized Indian tribes have ceded the Federal Government plenary authority. And if the nation has no such treaties with many Indian tribes, the treaty power cannot amplify the Indian commerce power to ensure plenary federal power over all tribes.

More generally, the simple power to make treaties, even in conjunction with the commerce power, cannot justify plenary federal power over Indian tribes. Indeed, no one would make the parallel claim with respect to foreign nations. Because Congress has the power to regulate commerce with foreign nations, and the executive branch has the power to make treaties with foreign nations, could it be the case that Congress, therefore, has plenary power over foreign nations? With good reason, no one has ever made such a claim.

exercise that power. With the Supremacy Clause and ample federal authority in place, there arguably is no need for constitutional preemption of state regulation of interstate, foreign, or Indian commerce.

Yet, it is well-known that the courts have interpreted the Commerce Clause as if it, on occasion, precludes state regulation of commerce, even where Congress has not statutorily precluded state commercial regulation. The resulting Dormant Commerce Clause jurisprudence (so-called because the Commerce Clause itself is said to have a “dormant” feature that automatically preempts state laws) is very complicated and byzantine.

As with the affirmative grant of commerce power to Congress, the courts have treated the dormant aspects of the Commerce Clause subparts differently. The dormant aspect of the foreign commerce subpart is more powerful than the dormancy of the interstate commerce subpart. In other words, the courts are more likely to preempt state statutes in the foreign commerce context. Moreover, though one might expect preemption of state laws to be broader still in the Indian law context (so as to parallel the greater federal power over Indian tribes), the opposite is the case. Though the courts preempt state law on the basis of the foreign and interstate subparts of the Commerce Clause, and though they preempt state law relating to Indians for other reasons, the judiciary does not preempt any state regulation of Indian tribes on Commerce Clause grounds.

When judging the validity of state burdens on interstate commerce, the courts generally ask whether the state act facially discriminates against interstate commerce or has substantial discriminatory effects.\textsuperscript{56} Usually, preemption under the foreign commerce subpart consists of an antidiscrimination analysis similar to dormant preemption under the domestic commerce subpart. But in its application to state taxation of foreign commerce, the dormant foreign commerce subpart requires consideration of two additional factors not considered in the domestic context.

\textsuperscript{56} I will not spend too much time laying out the minutiae of the Dormant Commerce Clause doctrine. Instead, I will discuss court doctrine when relevant to highlight differences in the Dormant Commerce Clause.
Complete Auto Transit v. Brady laid out the test for judging the constitutionality of interstate taxation: If the state tax "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State," there is no impermissible burden on interstate commerce. The Japan Line case discussed earlier stated that in addition to these tests, courts must also apply two others to state taxation of the instrumentalities of foreign commerce. A court must also inquire whether the tax creates a substantial risk of international multiple taxation, and whether the tax prevents the Federal Government from "speaking with one voice when regulating commercial relations with foreign governments. If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause."

Formally, the existence of these extra hurdles to state taxation of foreign commerce should have the effect of making it more difficult for states to tax foreign commerce. Hence, the Supreme Court might leave intact a tax as applied to interstate commerce, but void that very same tax as applied to foreign commerce either because it impairs the nation’s ability "to speak with one voice" or creates a substantial risk of multiple taxation.

As noted, given that Congress enjoys plenary federal power over Indian tribes arising out of the Commerce Clause, one might suspect the dormant aspects of the Indian commerce subpart to be broader than its interstate and foreign commerce subparts. Indeed, in Worcester v. Georgia, Chief Justice Marshall laid out principles that suggested the entire field of Indian relations rested with the Federal Government such that the states

58. Id. at 279.
59. 441 U.S. at 451.
60. Id.
61. See Peter J. Spiro, The States and Immigration in an Era of Demi-Sovereignties, 35 VA. J. INT’L L. 121, 164-65 (1994) (citing Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298 (1994)). Some have questioned the continued vitality of these two extra tests. Yet in Barclays, the Court did not wholly abandon the additional two tests to apply when determining whether a state tax violates the dormant foreign commerce subpart. After all, they actually spent a good deal of time discussing the applicability of the tests. See 512 U.S. at 316-31. More accurately, the Court seems to have “watered-down” the tests.
had no role in regulating Indian tribes on their territory.\textsuperscript{63} He noted that the Cherokee nation was “a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force.”\textsuperscript{64} In other words, whether or not interstate commerce was at issue, states could not legislate “extraterritorially” over Indian territory.

Today, the courts show far more solicitude for state authority and far less concern for Indian tribes. There is no longer anything even approaching a general preemption of state law relating to Indian territory arising out of the Constitution itself. Instead, any preemption of state law as applied to Indian territory or property arises from two other sources. Preemption of state regulation of Indian tribes occurs when federal statutes or treaties conflict with state law and when state regulation would interfere with the tribe’s exercise of sovereign functions.\textsuperscript{65} Conspicuously absent from the list of the types of “Indian” preemption is the Commerce Clause.

At one time, the Court noted that the Indian commerce subpart “may have a more limited role to play” in preventing burdens on Indian commerce, and thereby suggested that there might be some role for the Indian commerce subpart.\textsuperscript{66} Yet shortly thereafter, the Court explicitly rejected the importation of the Dormant Commerce Clause doctrine. In \textit{Ramah Navajo School Board v. Bureau of Revenue},\textsuperscript{67} the Court rejected a suggestion from the Solicitor General that the courts employ the Dormant Commerce Clause doctrine to judge when state law ought to be preempted.\textsuperscript{68} The Court concluded that this “new

\textsuperscript{63} For a discussion of this aspect of \textit{Worcester}, see FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 259-61 (1982 ed.). Ironically, state power seemed totally preempted at a time when the judiciary did not recognize a plenary federal power over Indian tribes. See \textit{id}. Hence, because there was no plenary federal power over Indian tribes and because the Court deemed state law relating to Indian tribal territory preempted, the Indian tribes appear to have enjoyed a measure of exclusive sovereignty. See \textit{id}.

\textsuperscript{64} \textit{Worcester}, 31 U.S. (6 Pet.) at 561.

\textsuperscript{65} Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832, 837 (1982) (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980)) (citing “two ‘independent but related’ barriers to the exercise of state authority over commercial activity on an Indian reservation: state authority may be preempted by federal law, or it may interfere with the tribe’s ability to exercise its sovereign functions”).


\textsuperscript{67} 458 U.S. 832.

\textsuperscript{68} \textit{Id}. at 845-46.
approach” was unnecessary because the preemption framework discussed above was sufficient to meet the Solicitor General’s concerns.⁶⁹

Once again, the notion that the subparts of the Commerce Clause ought to be understood differently has triumphed notwithstanding the intuition that all three subparts ought to be read the same way. Whatever one thinks of the validity of the Dormant Commerce Clause doctrine, as a textual matter one might look askance at claims that each Commerce Clause subpart preempts differently or to a different degree.

IV. CONCLUSION

In my view, Americans are too plain spoken to regularly ascribe multiple meanings for a single word or phrase in a sentence. It is the rare case where a reader will construe a word in a sentence as if that word had more than one meaning in the sentence. It is just as uncommon for an author to choose to use a word to convey two or more meanings in a single sentence. We especially avoid such readings and such drafting techniques in the context of constitutions and statutes, where clarity is usually prized. It is far better to use two different words in a sentence when we mean to convey two different meanings. Hence, in the interpretation of legal documents (including the Constitution) we ought to apply a very strong presumption in favor of inrasentence uniformity.

Does the presumption of intrasentence uniformity apply to the Commerce Clause? In the most celebrated of the early Commerce Clause cases, Chief Justice Marshall (and the Court) clearly thought so.⁷⁰ After having proved that the foreign commerce power included the power to regulate foreign navigation, the Chief Justice insisted that commerce “must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.”⁷¹ In other words, because the foreign commerce power included power over navigation, the domestic and Indian commerce powers

⁶⁹. Id. at 846.
⁷¹. Id. at 194.
“must carry the same meaning” unless there was some “plain and intelligible cause” which indicated otherwise.

Like Chief Justice Marshall, I know of no textual or historical “plain and intelligible cause” indicating that the phrase “regulate commerce” has different meanings throughout the Commerce Clause. Accordingly, if one accepts my claim that current doctrine contemplates that the phrase “regulate commerce” has multiple meanings throughout the Commerce Clause, the doctrine is flawed because there is no appropriate reason to depart from the natural and powerful intuition that words within a sentence only have one meaning within that sentence. In practice, we have three different Commerce Clauses when text and history indicate that we ought to have but one.