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By Erin M. Hawley



THE FEDERALIST SOCIETY

MARCH
2015

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This paper is not intended as legal advice or to substitute for a formal consultation with a licensed attorney.



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I. INTRODUCTION

The genius of the United States Constitution lies in its separation of power: first, between the three branches of Federal Government, and second, between the States and the Federal Government. Uniquely designed, the checks and balances of our federal system reside not only in the three separate federal branches but also in the different spheres of federal and state authority.

The Founders' experience under the Articles of Confederation convinced them that the regulation of interstate commerce was a proper—indeed, vital—exercise of federal power.¹ The Articles of Confederation left individual States free to burden interstate commerce by imposing draconian taxes—a crippling defect.² It was “commonplace” for seaboard States “to derive revenue to defray the costs of state and local governments by imposing taxes on imported goods destined for customers in other States.”³ This burden on interstate commerce was one of the primary reasons the States called the Constitutional Convention, with the result that the Framers agreed to delegate authority over interstate commerce to Congress as an enumerated power.⁴

The purpose of that commerce power was dual: to prevent States from enacting discriminatory measures and to empower Congress to take affirmative steps

to promote a single, national economic market. As a result, the Supreme Court has often held invalid discriminatory state taxes—even absent congressional action—under the Dormant Commerce Clause.

Of course, Congress may do more than prevent activity that is unconstitutional under the Dormant Commerce Clause. As the Supreme Court has said, the Commerce clause “is an affirmative power commensurate with the national needs.”⁵

Congress routinely acts to secure a national marketplace. It has used the commerce power to forbid deceptive trade practices,⁶ fraudulent security transactions,⁷ discrimination against shippers,⁸ and to protect small business from price cutting.⁹

The commerce power is at its zenith when Congress regulates the transportation industry. It is thus unsurprising that one area in which Congress has been particularly active is the preemption of state and local taxation that discriminates against modes of transportation like rental cars, buses, trucks, and railroads. For example, Congress used its commerce authority to enact the Airport Development Acceleration Act of 1973 specifically to prevent the “proliferation of local taxes [that] burdened interstate air transportation.”¹⁰ Similarly, Congress has exercised its commerce power to preempt state and local laws that levy discriminatory taxes on the railroad industry.¹¹ And it enacted the Interstate Commerce Commission Termination Act of 1995 to overturn a Supreme Court decision that allowed states and localities to burden interstate travel by taxing bus tickets.¹² More recently,

5 N. Am. Co. v. Sec. & Exch. Comm'n, 327 U.S. 686, 705-06 (1946).

6 Federal Trade Comm. v. Mandel Bros., Inc., 359 U.S. 385 (1959).

7 Securities & Exchange Comm. v. Ralston Purina Co., 346 U.S. 119 (1953).

8 United States v. Baltimore & Ohio R. Co., 333 U.S. 169 (1948).

9 Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954).

10 Aloha Airlines, Inc. v. Dir. of Taxation of Hawaii, 464 U.S. 7, 9-10 (1983).

11 See Railroad Revitalization and Regulatory Reform Act of 1976.

12 See S. Rep. No. 104-176, at 48 (1995).

1 See THE FEDERALIST NO. 42 (James Madison) (J. Cooke ed. 1961) [hereinafter THE FEDERALIST].

2 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 259, at 184 (Melville Madison Bigelow, 5th ed., photo. reprint 1994) (1891) [hereinafter STORY ON THE CONSTITUTION].

3 Michelin Tire Corp v. Wages, 423 U.S. 276, 283 (1976).

4 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 478 (Max Farrand ed. 1937) [hereinafter 3 FARRAND'S RECORDS] (Commerce Clause “grew out of the abuse” of the taxation power by the confederation States).

discussions in this area have centered on Congressional authority to preempt similar discriminatory state or local efforts to use car rentals as a way of taxing customers from other states.

In sum, when Congress acts to preempt local laws that discriminate against interstate commerce it is on strong constitutional footing—indeed, such legislation gives effect to the Framers’ vision of a fair and uniform national economic market.

II. THE FEDERAL COMMERCE POWER

Ours is a system of limited federal government. As James Madison explained in the Federalist Papers: “The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.”¹³ The Tenth Amendment confirms the structural promise of the original document: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹⁴

Under what the Supreme Court has sometimes called “Our Federalism,” the States retain “a residuary and inviolable sovereignty.”¹⁵ The Framers intended for the State’s power to extend over “all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.”¹⁶ This division of authority meant that, in times of peace, state governments “generally would be more important than the Federal Government.”¹⁷

But for the Framers, state sovereignty was not the panacea one might expect. Life under the Articles of Confederation had convinced the Founders that a strong, representative national government—counterbalanced by robust state prerogatives—was necessary.

13 THE FEDERALIST, *supra* note 1, No. 45 (James Madison).

14 U.S. CONST. amend. X.

15 THE FEDERALIST, *supra* note 1, No. 39, at 245 (James Madison); *see also* Alden v. Maine, 527 U.S. 706, 715 (1999).

16 THE FEDERALIST, *supra* note 1, No. 45, at 313 (James Madison).

17 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 571 (1985) (Powell, J., dissenting) (citing THE FEDERALIST, *supra* note 1, No. 45 (James Madison)).

The Framers thus crafted a Constitution that provides for the common defense, for the raising of revenue, and for speaking in one voice regarding foreign commerce. It also limited the ability of States to retreat into the economic isolation “that had plagued relations among the Colonies and later among the States under the Articles of Confederation.”¹⁸ Enter the federal Commerce Clause.

An enumerated power under Article One, the Commerce Clause grants Congress the authority “[t]o regulate Commerce . . . among the several States.”¹⁹ In enacting this provision, the Framers recognized that federal authority should exist to regulate “that which the States themselves lacked the practical capability to regulate.”²⁰

The lack of a federal power of interstate commerce was a devastating flaw in the Articles of Confederation.²¹ Indeed, the Commerce Clause “reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.”²²

A. Life Under the Articles of Confederation

Under the Articles of Confederation, “each State would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view.”²³ Commercial regulations in one state would be often defeated by retaliatory

18 Hughes v. Oklahoma, 441 U.S. 322, 325 (1979).

19 U.S. CONST. art. I, § 8, cl. 3.

20 Garcia, 469 U.S. at 572 (Powell, J., dissenting) (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 478 (Max Farrand ed. 1937)).

21 STORY ON THE CONSTITUTION, *supra* note 2, § 259, at 184.

22 Wardair Canada, Inc. v. Florida Dept. of Revenue, 477 U.S. 1, 7 (1986) (quoting Hughes v. Oklahoma, 441 U.S. 322, 325-326 (1979)); *see also* THE FEDERALIST, *supra* note 1, No. 42 (James Madison), Nos. 7, 11 (Alexander Hamilton)).

23 STORY ON THE CONSTITUTION, *supra* note 2, § 259, at 185.

and self-interested enactments of other states.²⁴ These conflicting regulations were a “perpetual source of irritation and jealousy” and gave rise to “serious dissensions among the States themselves.”²⁵ As Justice Story explains, “[r]eal or imaginary grievances were multiplied in every direction; and thus State animosities and local prejudices were fostered to a high degree so as to threaten at once the peace and safety of the Union.”²⁶

Under the Articles of Confederation, the different States began “to make commercial war upon one another.”²⁷ The States with ports “taxed and irritated the adjoining States.”²⁸ Meanwhile, other States retaliated.²⁹ Connecticut, for example, taxed imports from Massachusetts at a higher rate than imports from Great Britain.³⁰ And Pennsylvania discriminated against goods from Delaware.³¹ Other “sundry” tactics included classifying the citizens of other States as aliens for commercial purposes, as did the laws of New York, New Jersey, Pennsylvania, and Maryland.³²

New York, in particular, took advantage of its geographic position. Historian John Fiske describes one instance in colorful detail.

The City of New York, with its population of 30,000 souls, had long been supplied with firewood from Connecticut, and with butter and cheese, chicken and garden vegetables from the thrifty farms of New Jersey. This trade, it was observed, carried thousands of dollars out of the City and into the pockets of detested Yankees and despised Jerseymen. It was ruinous to domestic

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ JOHN FISKE, *THE CRITICAL PERIOD OF AMERICAN HISTORY, 1783-1789* 145 (London, MacMillan & Co. 1894) [hereinafter FISKE].

²⁸ 3 FARRAND’S RECORDS, *supra* note 4, at 548.

²⁹ *Id.*; see also David Ramsay Speech to the Continental Congress (Jan. 27, 1783), in 25 JOURNALS OF THE CONTINENTAL CONGRESS, 1784–1789, 869 (Gaillard Hunt ed., 1922) (“rivalships relative to trade . . . impede a regular impost”).

³⁰ *Id.*

³¹ FISKE, *supra* note 27, at 146.

³² 3 FARRAND’S RECORDS, *supra* note 4, at 548.

industry, said the men of New York. It must be stopped by those effective remedies of the Sangrado school of economic doctors, a navigation act and a protective tariff. Acts were accordingly passed, obliging every Yankee sloop which came down through Hell Gate, and every Jersey market boat which was rowed across from Paulus Hook to Corlandt Street, to pay entrance fees and obtain clearance at the custom house, just as was done by ships from London or Hamburg; and not a cart-load of Connecticut firewood could be delivered at the backdoor of a country-house in Beekman Street until it should have paid a heavy duty.³³

New York’s high tariffs and taxes prompted swift retaliation. The New Jersey Legislature responded by laying an exorbitant tax of \$1,800 per year on New York City’s Sandy Hook lighthouse.³⁴ In Connecticut, at a meeting of businessmen, every merchant agreed, under penalty of \$250, to suspend all commercial dealings with New York for an entire year.³⁵ Not a single item was to cross state lines in interstate commerce.³⁶

Such economic warfare bore a startling resemblance to the actions that had precipitated war with Britain.³⁷ As James Madison put it: “want of a general power over Commerce led to an exercise of this power separately, by the States, which not only proved abortive, but engendered rival, conflicting and angry regulations.”³⁸

B. Founders Provide for a Federal Commerce Power

For the Framers, the need for a federal commerce power was both obvious and virtually undisputed.³⁹ As the Supreme Court put it, “No other federal power was

³³ FISKE, *supra* note 27, at 146–47.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ 3 FARRAND’S RECORDS, *supra* note 4, at 547.

³⁹ See THE FEDERALIST, *supra* note 1, No. 22 (Alexander Hamilton) (noting the “universal conviction” that a federal commerce power was needed); *id.* No. 45 (James Madison) (“The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained.”).

so universally assumed to be necessary.”⁴⁰

By 1785, ten States had willingly relinquished an interstate commerce power to the Federal Government, enacting legislation granting to Congress the power to regulate such commerce.⁴¹ Indeed, Virginia began the process that became the Constitutional Convention in order “to take into consideration the trade of the United States; to examine the relative situations and trade of the said states; to consider how far a uniform system in their commercial regulation may be necessary to their common interest and their permanent harmony.”⁴²

The want of a federal power to regulate interstate commerce also featured in the debates. Convention delegates described the untoward taxing practices of port-States and the rivalries and impediments to trade that the unfair levies provoked.⁴³

James Madison, in his Preface to Debates in the Convention of 1787, provides an indictment of the Confederation’s inability to regulate interstate commerce and his reasons for supporting a federal Commerce Clause:

The other source of dissatisfaction was the peculiar situation of some of the States, which having no convenient ports for foreign commerce, were subject to be taxed by their neighbors, thro whose ports, their commerce was carried on. New Jersey, placed between Phila. & N. York, was likened to a Cask tapped at both ends: and N. Carolina between Virga. & S. Carolina to a patient bleeding at both Arms. The Articles of Confederation provided

40 H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 534 (1949).

41 FISKE, *supra* note 27, at 144.

42 DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF AMERICAN STATES, 12 H.R. DOCS., 69th Cong., 1st Sess., 38 (1927).

43 See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 307 (Max Farrand ed. 1937) (James Madison’s Notes of James Wilson’s Speech at the Federal Convention, (Aug. 16, 1787)) (noting the injustice of leaving “N[ew] Jersey [and] Connecticut . . . any longer subject to the exactions of their commercial neighbours”); see also 3 FARRAND’S RECORDS, *supra* note 4, at 547-48; David Ramsay Speech to the Continental Congress (Jan. 27, 1783), in 25 JOURNALS OF THE CONTINENTAL CONGRESS, 1784-1789, 869 (Gaillard Hunt ed., 1922) (“rivalships relative to trade . . . impede a regular impost”).

no remedy for the complaint: which produced a strong protest on the part of N. Jersey; and never ceased to be a source of dissatisfaction & discord, until the new Constitution, superseded the old.⁴⁴

The Federalist Papers, too, document the Framers intent to vest Congress with the authority to regulate commerce between the States.

In The Federalist No. 42, James Madison writes of the need for “a superintending authority over the reciprocal trade of confederated States.”⁴⁵ The “defect of power” under the Articles of Confederacy “to regulate the commerce between its several members . . . [had] been clearly pointed out by experience.”⁴⁶ To permit continued interference with interstate commerce, “would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquillity.”⁴⁷ Accordingly, the federal Commerce Clause was necessary to “provide for the harmony and proper intercourse among the States.”⁴⁸

For his part, Alexander Hamilton worried that, without a federal Commerce Clause, “[t]he competitions of commerce would be another fruitful source of contention.”⁴⁹

The States less favorably circumstanced would be desirous of escaping from the disadvantages of local situation, and of sharing in the advantages of their more fortunate neighbors. Each State, or separate confederacy, would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent.⁵⁰

Without a federal power, Hamilton explained, the States might enact discriminatory economic policies to secure exclusive benefits to their own citizens.⁵¹ Other states would be loath to follow those regulations, and

44 3 FARRAND’S RECORDS, *supra* note 4, at 542.

45 THE FEDERALIST, *supra* note 1, No. 42 (James Madison).

46 *Id.*

47 *Id.*

48 *Id.*

49 THE FEDERALIST, *supra* note 1, No. 7 (Alexander Hamilton).

50 *Id.*

51 *Id.*

the subsequent infractions “would naturally lead to outrages, and these to reprisals and wars.”⁵² Hamilton cited the above-mentioned example of New York’s taxation of goods from Connecticut and New Jersey. Then, in a series of questions, he demonstrated the need for a federal commerce power:

- Would Connecticut and New Jersey long submit to be taxed by New York for her exclusive benefit?
- Should we be long permitted to remain in the quiet and undisturbed enjoyment of a metropolis, from the possession of which we derived an advantage so odious to our neighbors, and, in their opinion, so oppressive?
- Should we be able to preserve it against the incumbent weight of Connecticut on the one side, and the co-operating pressure of New Jersey on the other?⁵³

New York was not a one-off example, and Hamilton feared that “interfering and unneighborly regulations of some States . . . if not restrained by a national control” would become a serious impediment to national life.⁵⁴ He believed that the absence of a federal power to regulate commerce had rendered the Articles of Confederation “altogether unfit for the administration of the affairs of the Union.”⁵⁵

In addition, the Framers believed the interstate Commerce Clause necessary to effectuate the foreign Commerce Clause. Without the power to regulate commerce among the States, Madison argued, “the great and essential power of regulating foreign commerce would have been incomplete and ineffectual.”⁵⁶ Alexander Hamilton agreed. He noted that the want of a federal power “ha[d] already operated as a bar to the formation of beneficial treaties with foreign powers, and ha[d] given occasions of dissatisfaction between the States.”⁵⁷

52 *Id.*

53 *Id.*

54 THE FEDERALIST, *supra* note 1, No. 22 (Alexander Hamilton).

55 *Id.*

56 THE FEDERALIST, *supra* note 1, No. 42 (James Madison).

57 THE FEDERALIST, *supra* note 1, No. 22 (Alexander

As a result of their experience under the Articles of Confederation, the States adopted the new Constitution and granted to Congress the affirmative power “[t]o regulate Commerce . . . among the several States.”⁵⁸

C. *Appropriate Uses of the Commerce Power*

Under the Commerce Clause, Congress is authorized to secure a unitary national market by preventing the States from enacting discriminatory legislation. While “the Commerce Clause is more than an affirmative grant of power”—under Supreme Court precedent it has a negative scope as well—it is at its most basic the power to oversee interstate commerce.⁵⁹ Thus, Congress may do more than prevent activity that is unconstitutional under the Dormant Commerce Clause. It may affirmatively regulate interstate commerce to promote a unitary market.⁶⁰ Indeed, the power to foster a national market resides most properly with the legislative branches, not the courts. In short:

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them.⁶¹

III. CONCLUSION

The sovereign States have broad authority to protect their citizens from perils to health or safety and to lay nondiscriminatory taxes on goods and services. The division of power brokered by the Constitution, however, authorizes Congress to protect the nation as a whole from the economic balkanization that would

Hamilton).

58 U.S. CONST. art. I, § 8, cl. 3.

59 *Quill Corp. v. N. Dakota By & Through Heitkamp*, 504 U.S. 298, 309 (1992).

60 *See Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979); *N. Am. Co. v. Sec. & Exch. Comm’n*, 327 U.S. 686, 705-06 (1946) (Commerce clause “is an affirmative power commensurate with the national needs”).

61 *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949).

result from a State promoting its own economic advantages by burdening interstate commerce. The Constitution “was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”⁶² The Commerce Clause gives Congress the authority to enact legislation promoting those ends.

⁶² Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).
