

The Modest Original Meaning of the Commerce Clause

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The third power listed on the Constitution's description of federal powers gives Congress the power to regulate commerce with foreign nations, with Indian tribes and among the states.¹ Commentators now describe the commerce clause as "plenary"² and as "the single most important source of national power."³ In the 1930's, the Supreme Court turned from a narrow, restricting interpretation of "commerce" to a loose and permissive interpretation, and in that debate, and its current reiterations, the commerce clause has been treated as the broadest general power of the federal government and the frontier most likely to mark the outer boundaries of federal jurisdiction.⁴ The commerce clause is also now described as a "strong impetus for calling the Constitutional Convention."⁵ Contemporaries listed regulation of commerce as one of the

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¹ U.S. CONST. art. I, § 8, cl. 3.

² BERNARD SCHWARTZ, *CONSTITUTIONAL LAW: A TEXTBOOK* 105 (2d ed. 1979)

³ Robert J. Steamer, *Commerce Power* in OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 167 (Kermit Hall, ed., 1992); *accord*, SCHWARTZ, *supra* note 2, at 105 (The commerce clause is the "source of the most important powers that the Federal Government exercises.")

⁴ *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833, 867 (1976) (Brennan, J. dissenting) (saying that "it may have been the eventual abandonment of that overly restrictive construction of the commerce power that spelled defeat for the Court-packing plan, and preserved the integrity of this institution, ... but my Brethren today are transparently trying to cut back on that recognition of the scope of the commerce power"). For a recent review of the judicial history of the scope of the commerce clause, see, e.g., Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1100-1113 (2000).

⁵ Robert J. Steamer, *supra* note 5, at 167.

Constitution's major purposes. Washington's cover letter transmitting the Convention's draft of the Constitution to the old Congress listed five new powers, saying that the desire is that that national government would have the power "to make war, peace, and treaties, levy money and to regulate commerce."⁶ Anti-Federalist Richard Henry Lee listed tax to pay the war debts and the commerce power as the purposes of the Constitution.⁷ If the commerce clause was even a contributory cause of the constitutional revolution, it is important.

This review of the constitutional debates, however, strongly indicates that the power to "regulate commerce" does not have much weight to explain why the Constitution was adopted. This review reinforces the conclusion, reached by a quite old but superb article, that the commerce clause was originally "a modest little power."⁸ The Commerce Clause has grown to be important only by evolution and the passage of

⁶ Letter from [George Washington] the President of the Federal Convention to the President of Congress (Sept. 17, 1787), in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 1003 (Charles C. Tansill, ed. 1927).

⁷ Anti-Federalist Richard Henry Lee treated the commerce power as the motivation for the Constitution in his letter to George Mason of May 15, 1787, 3 THE PAPERS OF GEORGE MASON 1725-1792, at 876 (Robert A. Rutland, ed. 1970)(hereinafter GEORGE MASON PAPERS):

The present causes of complaint seem to be, that Congress cannot command the money necessary for the just purposes of paying debts, or for supporting the federal government; and that they cannot make treaties of commerce, unless power unlimited, of regulating trade be given.

See also Letter from James Madison to Thomas Jefferson (Mar. 18, 1786), in 8 MADISON PAPERS 500, 501 (saying that "most of our political evils may be traced to our commercial ones.")

⁸ Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 481 (1941).

time. If we are to be bound by the original meaning of the commerce clause in strict historical context, there is nothing within the power to regulate commerce that has any importance.

“Regulation of commerce” was most importantly a cover of words for the program of nationalizing the state “imposts” or taxes on imports. Under the mercantilist economics then dominant, any restriction on imports would preserve precious specie and serve the national welfare. Revenue was also critical to the Founders to restore the public credit. But revenue was adequately described as a tax measure, authorized by other provisions, so that commerce clause was not needed for tax issues.

“Regulation of commerce” was also used as a reference for three restrictive mercantilist programs that never had enough political strength behind them to be seriously considered: (1) an American Navigation Act, giving Northern shippers a monopoly on the export of Southern commodities, (2) a retribitional impost against the British to induce them to open up the West Indies ports to American ships and (3) port preferences requiring that all dealings with foreigners be conducted through preferred ports. None of the three ever amounted to anything and indeed port preferences were banned by the Philadelphia Convention itself. Notwithstanding the word cover used, programs without genuine political support can not be used to explain the Constitutional revolution.

Finally, this review shows that interstate commerce was not at issue in the debates. The Founders cared a lot about fairness between the states, but their concerns were focused almost entirely in various provisions outside the commerce clause. Interstate tolls and discriminatory regulations were already banned by the articles of

confederation and interstate tolls were not a realistic threat. The Constitution was not needed to ban them.

“Regulation of commerce” was given to the national government to accomplish specific programs the Framers desired. To determine the meaning of the words in strict historical context, one must strip away the cover of words and look at the programs underneath. Words do have a penumbra beyond the programs that they were trying to accomplish, but the words of any historical document are always actions attempting to find allies to accomplish a program, and to understand even the penumbra of words one must first understand the core programs.⁹ “Regulation of Commerce” is a vague, umbrella phrase that might cover a very wide range of grievances, but it is possible from the sample to decipher “regulation of commerce” into the specific programs that the advocates of the Constitution wanted.

To determine what was meant by “regulation of commerce,” this article collects and categorizes 157 uses of the phrase “regulation of commerce” or the word “commerce” in the debates over the Constitution. One hundred thirty-six of those uses are associated with a specific goal or program and it is those 136 uses that forms the 100% used as a baseline to measure the relative weight of the programs, as percentage of sampled quotes. The samples come from both sides of the debate and the sampling was intended to be omnivorous.¹⁰ Usually the meaning of “regulation of commerce” comes

⁹ See, e.g., Quentin Skinner, *Meaning and Understanding the History of Ideas* in MEANING AND UNDERSTANDING: QUENTIN SKINNER AND HIS CRITICS 3, 55-65, 260 (James Tully, ed., 1988).

¹⁰ As many of the cites as possible were picked up electronically by searching the following web data bases: PHILIP KURLAND & RALPH LERNER, THE FOUNDERS’ CONSTITUTION, <http://press-pubs.uchicago.edu/founders/>; MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787,

as an unintended by-product of the speaker's vigorous argument and usually the speakers do not seem to be manipulating the meaning of "regulation of commerce" to stretch or contract the definition of "commerce." One must generally be suspicious that speeches in the ratification are insincere. The proponents of the Constitution understated the meaning of the Constitution to get it passed and the opponents exaggerated its impact to get it defeated. Still, when the debaters were spinning out some other argument, the definition of "commerce" they assumed is more reliable.¹¹ It is the main argument and not the assumed side definition of regulation of commerce that the speaker is spinning.

<http://memory.loc.gov/ammem/amlaw/lwfr.html>, JAMES MADISON, ALEXANDER HAMILTON & JOHN JAY, THE FEDERALIST PAPERS, <http://www.yale.edu/lawweb/avalon/federal/fed.htm>, and JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, <http://memory.loc.gov/ammem/amlaw/lwed.html>.

¹¹ There is at least one exchange in which the debaters seem to be spinning the definition of "regulation of commerce." On September 14, 1787 at the Philadelphia Convention, George Mason was plausibly trying to move the definition of regulation of commerce. James Wilson had just said that "regulation of commerce" gives Congress the power to grant monopolies and corporate charters. Mason opposed monopolies and said, I think insincerely, they were not included in the power to regulate commerce. James Wilson, George Mason, Speeches before the Federal Convention (Sept. 14, 1787), in 2 FARRAND'S RECORDS 639-640. Mason, the next day, proposed an amendment to require a two-thirds majority for Navigation Acts, to prevent Congress from giving shippers a monopoly that might allow them to set their price for Southern crops and reduce their value by "perhaps 50 Per Ct" (2 FARRAND'S RECORDS 631), and a Navigation Act that Mason opposed was a monopoly on shipping. If Mason was right on September 14 that regulation of commerce did not include navigation act monopolies, he would not have needed the two-thirds restriction on the Navigation Act that he proposed on September 15. Mason would later come to conclude that even as construed by the proponents of the Constitution, Congress could "grant monopolies in trade and commerce." George Mason, Objections to the Proposed Constitution, in 1 ELLIOT'S DEBATES

The sampling did not pick up dictionary definitions.¹² Dictionaries are, at best, a sampling of usages from some time or place. There is very considerable danger in using dictionary definitions to smuggle quotes out of context and from unrelated controversies into the Constitutional text. A dictionary definition seems like the best way to infect the archeological site with artifacts from another place and time. All of the samples here are from debates related broadly to the formulation or adoption of the Constitution. On another day, the samples might have been organized with different categories and some quotes might have been put into different bins, but the quibbles at the margin do not materially lower the validity of the conclusions.

The table immediately following summarizes the results of the sampling. “Commerce” in the constitutional debates referred primarily, at 82% of the program-associated quotes, to Atlantic Ocean shipping. The most important issues within

496. *Accord*, Elbridge Gerry, Debate at the Federal Convention (Sept. 15, 1787), in 2F ARRAND’S RECORDS 635 (Rufus King notes)(also objecting to the Constitution because it would allow the Legislature to create companies and monopolies.) Granting commercial monopolies and franchises would have been an ordinary government instrument of the mercantilist times. See, e.g., Jacob Viner, *Economic Thought: Mercantilist Thought*, 4 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 440 (David L. Sills, ed. 1968)(listing granting monopolies to private companies as a typical tool of mercantilism.)

¹² Other scholars have used dictionaries and collected uses quite far removed from the Constitutional debate. Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause*, 85 IOWA L. REV. 1, 14-19 (British usage), 17-21 (American usage)(1999); WALTON H. HAMILTON & DOUGLASS ADAIR, THE POWER TO GOVERN: THE CONSTITUTION—THEN AND NOW 42-63 (1937); WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 50-292 (1953)(citing English and American dictionaries, newspapers, pamphlets, correspondences, treatises, legislative debates and other historical records for the proposition that “to regulate commerce” means to govern all gainful activity.)

“regulation of commerce” were tax issues: “to regulate commerce” meant “to tax it” (26% of program-associated quotes), and tax was adequately covered by clauses outside of the commerce clause. The remainder of the actively-proposed programs under “regulation of commerce,” besides tax, were restrictions on foreign trade, consistent with the then-dominant economic philosophy of mercantilism. Proponents of the Constitution advocated retribitional tariffs against the British to punish the British for excluding American ships from the British West Indies (28%) and they advocated giving American ships a monopoly on the export of American commodities (22%). None of the mercantile restrictions amounted to much, however, even after the Constitution was ratified. “Commerce” was also used as a justification for restrictions on the states to protect out-of-state citizens (17%), but the remedies are mostly specified outside of the commerce clause. The language of the commerce clause also covers trade with the Indians and commerce among the states, but there were no active debates or proposals that show up in the 157 samples under either trade with the Indians or among the states.

Sample of 157 cites for “Commerce” categorized

			Percent of references to programs (136 total)
1. Deep water shipping		112	82%
a. Regulation of commerce means taxation	35		26%
b. Retribution to open foreign ports	38		28%
c. Restrictions on U.S. ports.	30		22%
d. Other foreign shipping	9		
2. U.S. Border Land Issues	1	1	1%
3. Equity between States		23	17%
a. Interstate Commerce	13		10%
b. Fairness of one state to another reflected in other clauses.	10		
Sum of reference to programs	136		100%
4. Words without Controversies		21	
a. Commerce apart from manufacture and agriculture	15		
c. Too vague to categorize	6		

A. Deep Water Shipping

For 82% of the cites, “regulation of commerce” relates to Atlantic Ocean shipping. Gordon Wood has argued that “commerce” usually referred to international trade in the eighteenth century¹³ and the sample confirms that description. The four most important programs mentioned in the Constitutional debates related to international trade: (1) nationalization of the state imposts, (2) retaliation against the British for restrictions on West Indies shipping; (3) port preferences, and (4) an American Navigation Act. All were all deep-water shipping issues and within the then-dominant economic philosophy of mercantilism.

1. The Impost

¹³ GORDON WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 316 (1992). Wood argues that “commerce” and did not begin to refer domestic trades until the nineteenth century, which is beyond the borders of the time period sampled here.

The most important “commerce” issue in the ratification debate was the state imposts. The core grievance was the 2-1/2% impost that New York State imposed on imports coming in through New York harbor.¹⁴ For thirty-two cites, regulation of commerce means federalizing the state imposts, chiefly New York’s, so as to allow the federal government to get the revenue from tax on foreign imports.¹⁵ Closely related is

¹⁴ See, e.g., 1784 N.Y. Laws 12 (Nov. 18, 1784): The 2-1/2% rate was the default rate; for listed goods, e.g., Madeira wine, a specific amount was set per case in shillings or pence.

¹⁵ (1) David Ramsey (So. Carolina), Speech to the Continental Congress (Jan. 27, 1783) *in* 25 JCC 869 (saying that states could not pay the revolutionary debts because “rivalships relative to trade wd. impede a regular impost”); (2) James Madison, Address to the States, by the United States in Congress Assembled (Apr. 26, 1783), *in* 24 JCC 277, 278 (advocating state ratification of 5% federal impost to pay the debts of the Revolutionary War because impost can not be used without concerted uniformity, properly achieved through Congress, because of the position of more commercial states); (3) Report of a Committee of Spraight, Monroe, et. al. to Continental Congress, (March 3, 1786), *reprinted in* 1 ELLIOT’S DEBATES 111 (reporting proposal to allow Congress to lay such imposts and duties on imports and exports as may be necessary to regulate the trade of the states with foreign nations and with each other); (4) “Z,” Philadelphia Freeman’s J., May 16, 1787, 13 DOCUMENTARY HISTORY 99 (“It has been seen that the States individually cannot, with any success pretend to regulate trade. The duties and restrictions which one State imposes, the neighbouring States enable the merchant to evade.”); (5) Edmund Randolph, Speech to the Federal Convention (May 29, 1787) 1 FARRAND’S RECORDS 19 (Madison notes) (saying that that there were many advantages, which the U.S. could not attain under the confederation “such as a productive impost-- counteraction of the commercial regulations of other nations -- pushing of commerce ad libitum-- &c “&c.”); (6) Roger Sherman, Speech before the Federal Convention (June 6, 1787), *in* 1F ARRAND’S RECORDS 143 (referring to “powers to regulate comerce & draw therefrom a revenue”); (7) Nathaniel Gorham, Speech before the Federal Convention (July 23, 1787), *in* 2 FARRAND’S RECORDS 90 (saying that New York is much attached to her present advantage “of taxing her neighbours by the regulation of her trade”); (8) Edmund Randolph, Draft of the Constitution for Committee on Detail, July 1787, 2 FARRAND’S RECORDS 142 (categorizing “regulation of commerce both foreign and domestic” as fifth subdivision under congressional power to tax); (9) James Wilson, Speech at the Federal Convention (Aug. 16, 1787), *in* 2 FARRAND’S RECORDS 306 (dwelling on the injustice of leaving “N. Jersey Connecticut &c any longer subject to the exactions of their *commercial* neighbours”) (emphasis added) ; (10) John Mercer (Maryland), Speech at the Federal Convention (Aug. 16, 1787) *in* 2F ARRAND’S RECORDS 307 (opposing giving Congress power to tax exports because the States now a right to tax both imports and exports of their

uncommercial neighbours and [i]t was enough for them to sacrifice one half of it”) (emphasis added); (11) Roger Sherman, Speech at the Federal Convention (Aug. 16, 1787) *in* 2 FARRAND’S RECORDS 308 (saying that “[t]he oppression of the uncommercial States was guarded agst. by [Congress’s] power to regulate trade between the States”); (12) Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 MADISON PAPERS 205, 211 (saying that there was no definable distinction between the power of regulating trade and that of drawing revenue from it.); (13) THE FEDERALIST NO. 7, at 40 (Nov. 7, 1787) (Alexander Hamilton) (citing as a need for the Constitution, the opportunities which some states including New York “have of rendering others tributary to them, by commercial regulations”); (14) HUGH WILLIAMSON, SPEECH AT EDENTON, NORTH CAROLINA (NOV. 8, 1787) *reprinted in* 2 DEBATE ON THE CONSTITUTION 231 (saying that by imposts and other regulations of commerce, it will be in the power of government to collect a vast revenue for the general benefit of the nation); (15) THE FEDERALIST NO. 12, at 72 (Nov. 17, 1787) (Alexander Hamilton) (saying that a general union will be conducive to the interests of commerce and extend the revenue to be drawn from it); (16) James Wilson, Speech to the Pennsylvania Ratification Convention, Nov. 24, 1787, *in* 3 FARRAND’S RECORDS 141 (“Devoid of power, we could neither prevent the excessive importations which lately deluged the country, nor even raise from that excess a contribution to the public revenue”); (17) THE FEDERALIST NO. 12, at 78 (Alexander Hamilton) (Nov. 27, 1787) (saying that the “single article of ardent spirits, under federal *regulation*, might be made to furnish a considerable revenue”) (emphasis added); (18) Landowner IX, Connecticut Courant, Dec. 31, 1787 *reprinted in* 15 DOCUMENTARY HISTORY 192 (saying that New York impost draws 40,000 pounds from Connecticut and ruins our foreign trade); (19) Charles Pinckney, South Carolina House of Representatives (Jan. 16, 1788), *in* 4 Elliot’s Debates 253-54 (saying that loss of credit and inability in our citizens to pay taxes were the result of the “destruction of our commerce, caused by other nations’ restrictions that the general government could not counteract”); (20) Rawlins Lowndes, Debate in the South Carolina Legislature (Jan. 16, 1788), *in* 2 DEBATE ON THE CONSTITUTION 22 (saying that Congress by the 1783 Impost proposal asked for the power to regulate commerce for only a limited time and opposing the Constitution because it gave Congress the power to regulate commerce *ad infinitum*); (21) THE FEDERALIST NO. 40, at 262 (Jan. 18, 1788) (James Madison) (asking “was it not an acknowledged object ... that the regulation of trade should be submitted to the general government in such a form as would render it an immediate source of general revenue?”); (22) Thomas Dawes, Massachusetts Ratification Convention (Jan. 21, 1788), *in* 2 ELLIOT’S DEBATES 58 (saying that state imposts drive the trade to neighboring states making the states rely on taxes on land to satisfy requisitions, and objecting to different systems of duties in different states); (23) THE FEDERALIST NO. 42, at 283 (Jan. 22, 1788) (James Madison) (saying that the object of the power of regulating commerce was the “...relief of the States which import and export through other States, from the improper contributions levied on them by the latter.”); (24) THE FEDERALIST NO. 44, at 301 (Jan. 25, 1788) (James Madison) (saying that the prohibition of state taxes on imports and exports is proven by the necessity of “submitting regulation of trade to foederal councils”); (25) Charles Pinckney, Speech in the House of Representatives, 2 ANNALS OF CONGRESS, 16th Cong., 1st Sess. 1318 (Feb. 14, 1820) (arguing that

the prohibition the Constitution adopted on states laying taxes on exports, again to prevent the “commercial states” with deep-water harbors from abusing their uncommercial neighbors by taxing shipments of goods produced by their neighbors for export (3 cites).¹⁶

Congress could not prohibit movement of slaves to territories because power over inter-state commerce by water between the states was given to prevent port preferences and the obligations of paying duties on commerce to another state); (26) “A Farmer,” Philadelphia Freeman’s J., April 23, 1788 *reprinted in* 17 DOCUMENTARY HISTORY 139 (saying that power of regulating commerce ought to belong to the general government and that the burden of debt incurred by the revolution has rendered a general revenue necessary, so that imposts upon importations present themselves, not only as a source of revenue, but as revenue for which the governments of the particular states are incompetent); (27) “A Plebian,” An Address to the People of New York, April 17, 1788, *reprinted in* 17 DOCUMENTARY HISTORY 160 (not objecting to granting the general government power to regulate trade and lay imposts for that purpose, as well as raising revenue, but saying that the hopes from the change will never realized because the country buys more than it sells and because there are too many merchants); (28) “To Be or Not to Be? Is the Question, New Hampshire Gazette, April 18, 1788, in 2 DEBATES ON THE CONSTITUTION 404 (Bernard Bailyn, ed., 1992) (“an increased revenue from a proper and universal regulation of trade will render needless so large a dry tax as we have been subject to); (29) Letter from James Madison to J.C. Cabell (Sept. 18, 1828), *reprinted in* 3 FARRAND’S RECORDS 477 (encouragement of manufacturing was an object of the power to regulate trade, as indicated that Framers and Ant-Federalist in the first Congress had proposed duties and even prohibitions of articles that competed with domestic production); (30) Letter from James Madison to Joseph C. Cabell (Feb. 18, 1828), *reprinted in* @@ FOUNDERS’ CONSTITUTION @@ (saying that power to lay imposts is included in the power to regulate trade, even though tax is expressed separately); (31) Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), *reprinted in* 3 FARRAND’S RECORDS 477 (saying that federal power over interstate commerce “grew out of the abuse of the power by the importing States in taxing the non-importing”); (32) Madison, Preface To Debates in the Convention of 1787 (c. 1830), in 3 FARRAND’S RECORDS 547 (saying that want of a general congressional power over commerce led to an exercise of this power separately by the States, engendered undercutting rivalry and “vain attempts to supply their respective treasuries by imposts”).

¹⁶ (1) James Wilson, Debate in the Federal Convention (Aug. 21, 1781), in 1E LLIOT’S DEBATES 455 (saying that to deny the federal government the power to tax exports is “is to take from the common government half the regulation of trade”); (2) Roger Sherman, Speech at the Federal Convention (Aug. 16,

New York had vetoed the 1783 proposal to give the general government the revenue from an impost. New York's motivation was to retain the revenue from the New York harbor impost for exclusive New York needs.¹⁷ Under the Articles of Confederation, one state could veto any amendment and so New York's vote was sufficient to defeat the federal impost.¹⁸ Madison later wrote that New York refused the 5% impost "for the urgent debt of the Revolution," just so as "to tax the consumption of her neighbours."¹⁹ When New York vetoed the 1783 impost, it bears repeating, every "liberal good man [wished] New York in Hell."²⁰

New York was expected to repeat its veto of nationalization of the impost if again given the chance under the unanimity requirements of the Articles of Confederation. New York was too much attached to "taxing her neighbours by the regulation of her

1787), in 2 FARRAND'S RECORDS 308 (supporting prohibition of tax on exports, but saying that the "oppression of the uncommercial States [by commercial states] was guarded agst. by the power to regulate trade between the States"); (3) Gouverneur Morris, Speech in the Federal Convention (Aug. 21, 1787), in 2 FARRAND'S RECORDS 360 (arguing that without prohibition, "exporting States will tax the produce of their uncommercial neighbours.").

¹⁷ JOHN P. KAMINSKI, GEORGE CLINTON YEOMAN POLITICIAN OF THE NEW REPUBLIC 89-96 (1993). New York, in form, merely set new conditions on approval, including a New York state officer being appointed to collect the revenue and New York paper money being accepted for the tax, but the conditions were understood on both sides to be tantamount to veto. New York paper would not help pay Dutch or French or Pennsylvania creditors.

¹⁸ Articles of Confederation, art. XIII, 19 JCC 221.

¹⁹ James Madison, Unsent letter to John Tyler (1833), in 3 FARRAND'S RECORDS 530-531.

²⁰ Letter from Henry Jackson to Henry Knox (Apr. 23, 1786), quoted in Robert A. Freer, *Shay's Rebellion and the Constitution: A Study in Causation*, 42 NEW ENG. Q. 388, 398 (1969).

trade.”²¹ “Much opposition is expected in New York,” Timothy Pickering wrote home.²² “That state has long been acting a disingenuous part. They refused the impost to Congress—because half of New Jersey, a great part of Connecticut, the western part of Massachusetts and Vermont, received their imported goods through New York, who put into her own treasury all the duties arising on the goods consumed in [these] states.”²³

New York exclusive use of the revenue from shipping through New York harbor was not a program with any attraction out of state. Connecticut and New Jersey were outraged by the New York impost.²⁴ In Connecticut, the proponents of the Constitution warned that those “gentlemen in New York who receive large salaries ... know that their offices will be more insecure ... when the expenses of government shall be paid by their

²¹ Mr. Nathaniel Gorham, Speech at the Federal Convention (July 23, 1787), *in* 2F ARRAND’S RECORDS 90.

²² Letter from Timothy Pickering to John Pickering (Dec. 29, 1787), *in* 15 DOCUMENTARY HISTORY 177.

²³ *Id.*

²⁴ *See, e.g.*, Oliver Ellsworth, Connecticut Ratifying Convention (Jan. 7, 1788), *in* 2 ELLIOT’S DEBATES 190-197 (saying that the people of Connecticut, pay annually into the treasury of New York more than fifty thousand dollars by reason of the impost on New York harbor traffic); EDITORIAL, NEW ENGLAND CONNECTICUT COURANT (Dec. 24, 1787), *reprinted in* 15 DOCUMENTARY HISTORY 80, 82 (saying that “those gentlemen in New York who receive large salaries ... know that their offices will be more insecure ... when the expenses of government shall be paid by their constituents, than while paid by us.”) In 1786 New Jersey announced she would contribute no more by way of requisitions given that the taxes she had paid to New York by way of the New York impost were enough. VOTES AND PROCEEDING OF THE GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY 12, Sess. 10, 2d sitting (1786). FORREST McDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION 126,141 (1958) attributes the quick and overwhelming ratification of the Constitution by Connecticut and New Jersey to the New York harbor impost controversy.

constituents, than while paid by us.”²⁵ The New York impost undermined requisitions as well. New Jersey repudiated the 1786 requisition based on the argument that New Jersey had paid enough tax already because it received its imports through New York and Philadelphia.²⁶ New Jersey, placed between Philadelphia and New York, was “a Cask tapped at both ends.”²⁷ New Jersey and Connecticut ratified the Constitution quickly and overwhelmingly to nationalize the New York harbor taxes.²⁸

Rogue Island shared New York’s villainy. Rhode Island had vetoed a similar proposal in 1781 to give Congress a 5% impost.²⁹ “Rhode Island, as a weak State,” Madison told Congress in 1783, “[is against the] General revenue as tending ... to deprive her of the advantage afforded by her situation of taxing the commerce of the

²⁵ EDITORIAL, NEW ENGLAND CONNECTICUT COURANT (Dec. 24, 1787), *reprinted in* 15 DOCUMENTARY HISTORY 80, 82.

²⁶ VOTES AND PROCEEDING OF THE GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY 12, Sess. 10, 2d sitting (1786). *See* RUTH BOGIN, ABRAHAM CLARK AND THE QUEST FOR EQUALITY IN THE REVOLUTIONARY ERA, 1774-1794, at 127-131 (1982).

²⁷ James Madison, Preface to Debates in the Convention of 1787 (c. 1830), *in* 3 FARRAND’S RECORDS 539, 542.

²⁸ McDONALD, *supra* note 24, at 126,141. *Accord, see* James Madison, Notes to Speech to the Continental Congress (Feb. 26, 1783), *in* 25 JCC 913 (saying that both Connecticut and New Jersey favored general revenue to protect their commerce against New York tax.)

²⁹ Letter from the Rhode Island Speaker of the Assembly, (Nov. 30, 1782), *in* 23 JCC 788-789 (Dec. 12, 1782) (announcing that Rhode Island refused the 1781 impost because the impost would be hardest on commercial states, would introduce foreign collectors into Rhode Island and would give Congress funding independent of its constituents).

contiguous States.”³⁰ When Rhode Island vetoed the impost, Rhode Island thereafter became the “evil genius” whose veto “injured the United States more than the worth of that whole state.”³¹ Rhode Island was “shameful” and this “perverse sister,”³² this “Cursed State, [which] ought to be erased out of Confederation, and ... out of the earth, if any worse place could be found for them.”³³

The Founders also generalized their condemnation beyond New York and Rhode Island. In North Carolina, Hugh Williamson called for ratification of the Constitution to end the Virginia and South Carolina taxes on goods imported into North Carolina.³⁴ “Publius” said that the object of the Constitution’s giving Congress the power to regulate commerce was relief for the “[s]tates which import and export through other States from

³⁰ James Madison, Notes to a Speech to the Continental Congress (Feb. 26, 1783), *in* 25 JCC 913. *Accord*, Alexander Hamilton, Speech to the Continental Congress (Feb. 13, 1783) (James Madison, Notes of Debates in the Continental Congress), *in* 25 JCC 902 (saying that “the true objection on the part of R. I. was the interference of the impost with the opportunity afforded by their situation of levying contributions on Cont., &c, which recd. foreign supplies through the ports of R. I.”).

³¹ State Gazette of South-Carolina (Charleston), June 1, 1786 and “A Fable,” Exchange Adviser (Boston), February 11, 1786 both quoted in IRVIN H. POLISHOOK, RHODE ISLAND AND THE UNION, 1774-1795, at 96 (1969).

³² James Madison to Edmund Randolph, November 19, 1783, 5 MADISON PAPERS 289.

³³ John Montgomery to Edward Hand, July 26, 1784, 6 LETTERS OF THE MEMBERS OF THE CONTINENTAL CONGRESS 575 (Edmund C. Burnett, ed. 1921-1936).

³⁴ HUGH WILLIAMSON, REMARKS ON THE NEW PLAN OF GOVERNMENT TO THE FREEMEN OF EDENTON, NORTH CAROLINA, DAILY ADVERTISER, NEW YORK (Feb. 25-27, 1788), *reprinted in* 16 DOCUMENTARY HISTORY 201, 207.

the *improper* contributions levied on them by the latter.”³⁵ Publius also said that under the Articles some states have the opportunity of rendering others “tributary” to them by laying duties on her importations.³⁶ Hamilton, in his own exposed public role, argued that “uncommercial” states would never be able to bear the quota assigned under the ordinary rules of apportioning requisitions because they had borne imposts as well.³⁷ The uncommercial states would fail in paying their quota, Hamilton argued, their example would be followed, and the Union would then inevitably dissolve.³⁸ For the Federalists, the state imposts levied by states with good harbors was a prime example of an immoral state willing to abuse its neighbors.

Revenue from foreign imports also required a uniform policy along the whole coast. If one state tried to raise rates, a neighboring state would destroy the revenue by undercutting the tax rates to channel commerce in her direction. The general government would regulate commerce with a uniform impost and so make commerce productive of general revenue.³⁹

³⁵ THE FEDERALIST NO. 42, at 283 (James Madison)(first published January 22, 1788) (emphasis added).

³⁶ THE FEDERALIST NO. 7, at 40 (Alexander Hamilton)(first published Nov. 17, 1787).

³⁷ Alexander Hamilton, Speech to the Federal Convention (June 18, 1787), in 1 FARRAND’S RECORDS 286 (Madison’s Notes).

³⁸ *Id.*

³⁹ See, e.g., Thomas Dawes, Massachusetts Ratification Convention (Jan. 21, 1788), in 2 ELLIOT’S DEBATES 58 (saying that state imposts drive the trade to neighboring states); “Z,” Philadelphia Freeman’s J., May 16, 1787, 13 DOCUMENTARY HISTORY 99 (“It has been seen that the States individually cannot, with any success pretend to regulate trade. The duties and restrictions which one State imposes, the neighbouring States enable the merchant to evade.”); Madison, Preface To Debates in the Convention of 1787 (c. 1830), in 3F ARRAND’S RECORDS 547 (saying that want of a general congressional power over commerce led to an exercise of this power separately by the States, engendered undercutting rivalry and “vain attempts to supply their respective treasuries by imposts”).

The revenue aspects of the imposts was very important to the adoption of the Constitution, but the equity aspects of fight over the New York impost is probably properly viewed, as Merrill Jensen put it, as a “tempest in a teapot.”⁴⁰ The New York tax at 2-1/2% was probably not even worth smuggling around. The New York deep-water harbor and established docks were probably worth many times that 2-1/2% amount. It was hard to unload a deep water ship without a deep water harbor.⁴¹

From 1784 through 1787 New York exempted from its impost goods held for re-export, provided they were kept in their original package.⁴² To the extent that New York was acting as a wholesaler or middleman, breaking up and distributing imported goods for the Vermont, New Jersey and Connecticut countryside, the “original package” requirement would have prevented the exemption from applying. The exemption was

⁴⁰ MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781-1789*, at 339 (1950); J. ALBERT GIESECKE, *AMERICAN COMMERCIAL LEGISLATION BEFORE 1789*, at 135 (1910). Merrill Jensen is a historian with not much sympathy for the Federalist proponents of the Constitution, and his characterization can be understood as a jab at the Framers, but no jab at the framers is intended here in agreeing with Jensen’s conclusion as to the importance of the New York impost.

⁴¹ James Madison, Letter to James Monroe (June 21, 1785), in 8 *MADISON PAPERS* 306, 307 complains that prices on Baltimore and Philadelphia docks for Virginia exports were 15-20% higher than on Virginia rivers. If we attribute that entirely to the advantage of good deep water docks versus shallow river docks, then the value of deep water facilities would be six to eight times what New York was charging in tax for their use.

⁴² *Laws of New York*, 8th Sess., 2d Meeting, at 12 (Nov. 18, 1784); *Laws of New York*, 10th Sess., at 513 (Apr. 11, 1787). South Carolina, Massachusetts and Virginia had similar exemptions for re-exports kept in the original package. Edward Kitch, *Regulation and the American Common Market*, in *REGULATION, FEDERALISM AND INTERSTATE COMMERCE* 9, 17-19 (A. Dan Tarlock, ed. 1981).

narrowed dramatically, however, in April 1787 to apply only if the goods were not landed in New York. The captain of the ship had to take an oath that the exempted goods were not intended to be landed or put on shore in New York nor brought back into New York. After April 1787, importers could not use the New York harbor wharves to ship through New York in the original package without paying the 2-1/2% tax.⁴³ In any event, the considerable non-tax advantages of using New York harbor and docks to land cargo and break up the package probably meant the exemption was not much used. New York's neighbors complained about the 2-1/2% tax, but they got enough value out of the harbor and docks to pay it.

Federalizing the imposts was the feature of the commerce clause which generated almost universal assent, outside of New York and Rhode Island.⁴⁴ Revenue could be collected from imports at all only if the states did not undercut each other. Only the "foederal head with full authority [could prevent] State Schemes ... pursued with Surreptitious views against each other, which must eventually destroy a source of Revenue that might be immensely valuable to the Union."⁴⁵ Hamilton argued that imposts by the individual states would be difficult to enforce, because the bays, rivers and long borders between the states made smuggling too easy. On the federal level, however, there was only one side to guard—the Atlantic.⁴⁶ The "impost" was the least objectionable federal tax because it could be collected without interfering with the "internal police" of

⁴³ Laws of New York, 10th Sess., at 513 (Apr. 11, 1787). In the 1784 version, a shipper had 60 days to re-export goods after a landing. Laws of New York, 8th Sess., 2d Meeting, at 14 (Nov. 18, 1784).

⁴⁴ Abel, *supra* note 8, at 451, 446-451.

⁴⁵ Letter from Edmund Carrington to Gov. Edmund Randolph (April 2, 1787) in 9 MADISON PAPERS 362.

⁴⁶ THE FEDERALIST NO. 12, at 77 (Alexander Hamilton)(first published Nov. 27, 1787).

the states.⁴⁷ It had been approved by the overwhelming majority of the states in 1781 and 1783 defeated by selfish New York in 1783 and “obdurate” Rhode Island in 1781.⁴⁸ The Anti-Federalists, while opposing the power of Congress to lay general internal or dry-land taxes except by requisition upon the states, nonetheless *generally* conceded that Congress could be given the power to lay “external taxes” by the impost.⁴⁹

⁴⁷ Oliver Ellsworth, Debates in the Connecticut Convention on Ratification (Jan. 7, 1788), *in* 3 DOCUMENTARY HISTORY 547, 549, 550.

⁴⁸ After Rhode Island vetoed the 1781 Impost proposal, Virginia withdrew her prior ratification on the ground that a federal tax was inconsistent with Virginia sovereignty. XI Statutes of Virginia 171 (William Waller Hening, ed., Oct. 1782). Madison was appalled. See Letter from James Madison to Edmund Randolph, January 22, 1783, 6 MADISON PAPERS 55-56 (saying that “Virginia could never have cut off this source of public relief at a more unlucky crises”). New York and Rhode Island, however, bore the brunt of the angry rhetoric.

⁴⁹ FEDERAL FARMER, LETTERS TO THE REPUBLICAN, LETTER III, NEW YORK JOURNAL (Oct. 10, 1787), *reprinted in* 14 DOCUMENTARY HISTORY 30, 35-36 (saying that impost may be collected by a few officers in seaport towns, but opposing internal taxes); CATO UTICENSIS, TO THE FREEMEN OF VIRGINIA, VIRGINIA INDEPENDENT CHRONICLE (Oct. 17, 1787), *reprinted in* 8D DOCUMENTARY HISTORY 70, 73 (conceding impost and allowing requisitions if imposts are not sufficient); AN OLD WHIG, LETTER VI, PHILADELPHIA INDEPENDENT GAZETTEER (Nov. 24, 1787), *reprinted in* 14 DOCUMENTARY HISTORY 215, 218; BRUTUS V, NEW YORK JOURNAL (Dec. 13, 1787), *reprinted in* 14 DOCUMENTARY HISTORY 422, 426-27; Letter from James Madison to Edmund Randolph (Dec. 2, 1787), *in* 14 DOCUMENTARY HISTORY 332 (saying that the power of taxing any thing but imports appears to be the most popular topic among the adversaries). Two examples of Anti-Federalist opposition to a federal impost are James Wadsworth, Speech to the Connecticut Convention (Jan. 7, 1788), *in* 15 DOCUMENTARY HISTORY 547 (arguing that impost is not a proper mode of taxation) and John Smilie, Debates in the Pennsylvania Ratifying Convention (Nov. 28, 1788), *in* 2D DOCUMENTARY HISTORY 407, 408-409 (saying “[i]f they have unlimited power to drain the

The important aspect of the controversy over New York impost was that the revenue was needed to pay off the Revolutionary war debts, and not just for New York State needs. It was known that when the Constitution was ratified, Congress was going to impose the 5% federal impost, denied to it by the one-state veto rule in 1781 and 1783. “[W]as it not an acknowledged object of the Convention,” Madison asked, “and the universal expectation of the people, that the regulation of trade should be submitted to the general government in such a form as would render it an immediate source of general revenue?”⁵⁰

New York Governor George Clinton was said, as the ratification debate got serious, to have offered New Jersey to give up the impost and refund collections if New Jersey would just refuse to ratify the Constitution.⁵¹ New York’s giving revenue to New Jersey, however, would not have improved the fiscal health of the federal government.

The rhetorical unfairness arguments seem to be just make-weights, almost a sweetener to convince Connecticut and New Jersey to support the federal fiscal needs. When the Constitution became final, Connecticut and New Jersey could expect a

wealth of the people, *whether by imposts or by direct levies*, then the system is too formidable for states to break”)(emphasis added).

⁵⁰ THE FEDERALIST NO. 40, at 262 (James Madison)(first published Jan. 18, 1788).

⁵¹ Deposition of Adam Boyd, Feb. 1789, BRUNSWICK GAZETTE (Feb. 10, 1789), DOCUMENTARY HISTORY: MICROFICHE SUPPL. N.J. 170 (saying that Abraham Clark had thought New Jersey had ratified too precipitously and that New York would have made concession including giving up the impost and refunding prior collections if New Jersey would decline); PENNSYLVANIA JOURNAL (Nov. 19, 1787), *cited in* KAMINSKI, *supra* note 17, at 136 (reporting that Clinton was trying to defeat the Constitution by offering a “person of considerable weight” (probably Abraham Clark) that New Jersey could have half of the New York state impost if New Jersey would refuse to ratify.)

doubling of the then current 2-1/2% impost on New York shipping up to the federal 5% and there would be no possibility of exemption from the new doubled rate impost for goods not landed or broken down in New York harbor.

The controversy over nationalizing the New York and other state imposts was commonly called a “regulation of commerce” issue in the debates over the Constitution. “Regulation of commerce” was often a synonym for taxation of commerce.⁵² In modern usage, however, the impost is better called a revenue issue. Section 8 of Article 1 also gives Congress the power to raise taxes on its own, including imposts, and section 10 prohibits state imposts. Thus the revenue issues were adequately covered elsewhere and did not need the commerce clause.

2. Retaliation Against the British.

The largest number of the sampled cites to “regulation of commerce,” at thirty-eight cites and 28%, refer to attempts to open up foreign ports to U.S.–owned ships by imposing or threatening a retaliatory impost or embargo on foreign ships coming into American ports.⁵³ The core grievance was that Great Britain, under the British

⁵² Of the sample of 32 quotes on regulation of commerce being a reference to the federalizing the impost in *supra* note 15, nine of them use “regulation of commerce” to mean taxation.

⁵³ (1) Report of a Committee of the Continental Congress of Gerry, Reed, Williamson, Chase and Jefferson (Apr. 30, 1784), *in* 26 JCC 313 (proposing that the legislatures of the States give Congress the power for 15 years to prohibit imports in a ship of a country without a commercial treaty with the United States); (2) Letter from James Monroe to James Madison (July 26, 1785), *in* 8 MADISON PAPERS 329 (Virginia congressional delegate explains that Congress has proposed to be granted the power to regulate commerce to obtain reciprocity from other nations); (3) Letter from James Madison to James Monroe (Aug. 7, 1785), *in* 8 MADISON PAPERS 334-335 (saying “should G. B. persist in the machinations which distress

us and seven or eight of the States be hindered by the others from obtaining relief by federal means, ... I tremble at the anti-federal experiments into which the former may be drawn”); (4) Letter from James Madison to Thomas Jefferson (Aug. 20, 1785), *in* 8M ADISON PAPERS 500, 502 (saying that “if anything should reconcile Virga. to the idea of giving Cong. a power over her trade, it will be that this power is likely to annoy Great Br. against who the animosities of our Citizens is still strong[.]”); (5) James Madison, Motion in the Virginia House of Delegates (Nov. 30, 1785), *in* 1 ELLIOT’S DEBATES 114 (proposing to allow Congress to embargo or tax any foreign vessel to obtain privileges in foreign ports for U.S. vessels); (6) Letter from James Madison to Thomas Jefferson (Mar. 18, 1786), *in* 8 MADISON PAPERS 500, 502 (saying that if the Annapolis Convention should come to nothing, it will “confirm G.B. and all the world in the belief that we are not to be respected, not apprehended as a nation in matters of commerce”); (7) Edmund Randolph, Speech before the Federal Convention (May 29, 1787), *in* 1 FARRAND’S RECORDS 19 (Madison Notes)(saying that among the advantages that the U. S. might acquire are “counteraction of the commercial regulations of other nations—pushing of commerce ad libitum—&c &c[.]”); (8) Letter from Philippe Andre’ Joseph de Letombe to Comte de la Luzerne (June 26, 1787), *in* 18 DOCUMENTARY HISTORY 197 (saying that adoption of the Constitution will unite the states and facilitate the desirable Reciprocity of Commerce between U.S. and France); (9) Letter from James Bowdoin to George Erving (Aug. 12, 1787), *in* 18 DOCUMENTARY HISTORY 324 (saying that Great Britain’s system of commerce will be altered when “congress under the new Constitution will have the power of regulating it within the Ports of the United States”); (10) John Rutledge, Speech at the Federal Convention (Aug. 29, 1787), *in* 2 FARRAND’S RECORDS 452 (saying that gaining access to the West Indies is the “great object” of regulating commerce); (11) Letter from Andrew Allen to Tench Coxe (Sept. 8, 1787), *in* 18 DOCUMENTARY HISTORY 362 (arguing that Advocates of the Constitution are too sanguine in assuming adoption will immediately extend Commerce or open new Channels of Trade); (12) JOHN JAY, ADDRESS TO THE PEOPLE OF THE STATE OF NEW YORK 7 (Sept. 17, 1787), *reprinted in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES (Paul Leicester Ford, ed. 1888) (hereinafter PAMPHLETS ON THE CONSTITUTION)(saying that “other nations taking advantage of [our] imbecility, are daily multiplying commercial restraints upon us” and that there is “not one English, French or a Spanish island or port in the West-Indies to which an American vessel can carry a cargo of flour for sale”); (13) SOCIAL COMPACT, NEW HAVEN GAZETTE (Oct. 4, 1787), *reprinted in*

3 DOCUMENTARY HISTORY 356 (regretting the begging situation to which our commerce is reduced in every part of the globe, the heavy duties and the exclusions from British ports); (14) MARCUS, DAILY ADVERTISER, NEW YORK (Oct. 15, 1787), *reprinted in* 1 DEBATE ON THE CONSTITUTION 127 (arguing that when commerce is a national object, nations will form treaties with us); (15) A LANDHOLDER I, CONNECTICUT COURANT (Nov. 5-12 1787), *reprinted in* 3 DOCUMENTARY HISTORY 399-400 (arguing that until the Constitution is effected, our commerce may be “insulted by every overgrown merchant in Europe”); (16) THE FEDERALIST NO. 11, at 67 (Alexander Hamilton) (first published November 24, 1787) (advocating a government in America, capable of excluding Great Britain from all ports); (17) James Wilson, Speech before the Pennsylvania Ratification Convention (Nov. 24, 1787), *in* 2D OCUMENTARY HISTORY 339, 360 (saying that being devoid of importance, we were unable to command a sale for commodities in a foreign market); (18) A LANDHOLDER V, CONNECTICUT COURANT (Nov. 25 – Dec. 3, 1787), *reprinted in* 3D OCUMENTARY HISTORY 480 (arguing that without the Constitution “your commerce, the price of your commodities, your riches, and your safety will be the sport of every foreign adventurer”); (19) CANDIDUS I, (BOSTON) INDEPENDENT CHRONICLE (Dec. 6, 1787), *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST 128 (Herbert Storing, ed. 1981)(hereinafter THE COMPLETE ANTI-FEDERALIST) (saying that “those nations laid these duties to promote their own fishery, &c. and ... will pursue their own politicks respecting our imports and exports, unless we can check them by some *commercial* regulations”); (20) THE FEDERALIST NO. 22, at 136 (Alexander Hamilton) (first published December 14, 1787) (saying that the want of a power to regulate commerce operated as a bar to the formation of beneficial treaties with foreign powers); (21) Address of the Dissent of the minority of the Pennsylvania Convention (Dec. 18, 1987), *in* 15 DOCUMENTARY HISTORY 7, 14 (Anti-Federalists regretting that “we are suffering from the restrictions of foreign nations, who had shackled our commerce, while we were unable to retaliate”); (22) CENTINEL VI , PENNSYLVANIA PACKET (Dec. 25, 1787), *reprinted in* 15 DOCUMENTARY HISTORY 98, 99 (an Anti-Federalist opponent nonetheless finding considerable benefit in strengthening the hands of Congress, so as to enable them to regulate commerce and counteract the adverse restrictions of other nations); (23) Edmund Randolph, Reasons for not Signing the Constitution, Richmond, Virginia (Dec. 27, 1787), *in* 8 DOCUMENTARY HISTORY 260, 265 (saying that the states can not organize retaliation against foreign nations and what is needed is “exclusion ...opposed to exclusion, and restriction

to restriction”); (24) Charles Pinckney, South Carolina House of Representatives (Jan. 16, 1788), *in* 4 ELLIOT’S DEBATES 253-54 (saying that the first great inconvenience of the Confederation was the “destruction of our commerce, occasioned by the restrictions of other nations, whose policy it was not in the power of the general government to counteract”); (25) Edward Rutledge, Debate in the South Carolina Legislature (Jan. 16, 1788), *in* 2D EBATE ON THE CONSTITUTION 23 (asking “could [the Articles] obtain security for our commerce in any part of the world?”); (26) James Bowdoin, Massachusetts Ratification Convention (Jan. 23, 1788), *in* 2 ELLIOT’S DEBATES 83 (saying that trade is in a miserable state because other nations can prohibit our vessels from entering their ports or lay heavy duties on our exports, and we can not prevent it because Congress has no retaliating or regulating power over their vessels and exports); (27) Nathaniel Gorham, Massachusetts Ratification Convention (Jan. 25, 1788), *in* 2E LLIOT’S DEBATES 106 (saying that Great Britain “prohibit[s] our oil, fish, lumber, [etc.] from being imported into their territories, in order to favor Nova Scotia, for they know we cannot make general retaliating laws”); (28) Letter from Gaspard Joseph Amand Ducher to Comte de la Luzerne (Feb. 2, 1788), *in* 16 DOCUMENTARY HISTORY 13 (saying that “the navigation acts of the states of Newhampshire and Massachusetts had been suspended because the other states did not wish to proclaim similar ones, designed to punish England for its strictness against american commerce’); (29) “THE FABRICK OF FREEDOM,” A SONG BY JONATHAN WILLIAMS, JR., PHILADELPHIA FEDERAL GAZETTE (Mar. 8, 13, 1788), *reprinted in* 16 DOCUMENTARY HISTORY 361 (saying in part, “See Commerce with extended hand/ Flies the restraint of kings/ And foreign riches to this land/ From ev’ry climate brings”); (30) JOHN JAY, AN ADDRESS TO THE PEOPLE OF THE STATE OF NEW YORK (Spring 1788), *in* 3 ELLIOT’S DEBATES 501 (saying we should not continue “our present humiliating condition, to give other nations further time to perfect their restrictive systems of commerce, . . .and strengthen them by all those regulations and contrivances in which a jealous policy is ever fruitful”); (31) “TO BE OR NOT TO BE? IS THE QUESTION,” NEW HAMPSHIRE GAZETTE (PORTSMOUTH) (Apr. 16, 1788), *reprinted in* 2 DEBATE ON THE CONSTITUTION 407 (saying that the inconvenience that foreign powers must suffer from a proper regulation of commerce by congress will oblige them to open ports); (32) Letter from Comte de Moustier to Comte de Montmorin (May 29, 1788), *in* 18 DOCUMENTARY HISTORY 145 (arguing that Americans are indignant that John Adams failed to get treaty of commerce so that their flag is excluded from trading in the West Indies); (33) DAVID RAMSAY, ORATION, CHARLESTON

Navigation Act, granted a monopoly to its own vessels for entry into its West Indies possessions in an attempt to capture the profits of shipping for its own nationals. Great Britain also wanted to stimulate a strong merchant fleet that could train British seamen for the Navy and could serve as auxiliary vessels in war. When the American states were still colonies, the purpose of giving incentives to British shipping included especially stimulating American shipping, and there was a very active trade between the West

COLUMBIAN HERALD (June 5, 1787), *reprinted in* 18 DOCUMENTARY HISTORY 163 (saying that “[o]ur protected commerce will open new channels for our native commodities, and give additional value to the soil, by increasing the demand for its productions”); (34) James Monroe, Speech to Virginia Ratification Convention (June 10, 1788), *in* 4 ELLIOT’S DEBATES 213 (Anti-Federalist saying that commercial treaties would be no advantage because there is no probability of opening the West or East Indies to U.S. ships); (35) Letter from George Washington to Marquis de Lafayette (June 18, 1788), *in* 18 DOCUMENTARY HISTORY 184 (referring to time “when foreign nations shall be disposed to give us equal advantages in commerce from dread of retaliation[.]”); (36) NEW JERSEY JOURNAL (June 18, 1788), *reprinted in* 18 DOCUMENTARY HISTORY 185 (saying that “[t]he moment the English know we can retaliate, that moment they will relax in their restrictions on our commerce—and that moment will never arrive until our *union* is *consolidated*”); (37) William R. Davie, North Carolina Ratification Convention (July 24, 1788), *in* 4 ELLIOT’S DEBATES 18 (arguing that the United States should be empowered to compel foreign nations into commercial regulations and counter British insults); (38) James Madison, Preface To Debates in the Convention of 1787 (c. 1830), *in* 3 FARRAND’S RECORDS 547 (describing the reasons for the Constitution to include “the want of authority in Congress to regulate Commerce, [which] had produced in Foreign nations particularly G.B. a monopolizing policy injurious to the trade of the U.S. and destructive to their navigation.”)

Indies and American ports. When America achieved independence, however, Britain decided that there was no reason to let American vessels into its West Indian ports.⁵⁴

The grievance, however, was generalized to include the power to retaliate against France and Spain for similar exclusions. All great trading nations were said to have tried “to secure to themselves the advantages of their carrying trade.”⁵⁵ John Jay complained that because of our “imbecility,” all the empires were imposing “commercial restraints upon us” so that there is “not one English, French or a Spanish island or port in the West-Indies to which an American vessel can carry a cargo of flour for sale.”⁵⁶ Without a Constitution, proponents argued, our commerce would be “insulted by every overgrown merchant in Europe”⁵⁷ and “your commerce, the price of your commodities, your riches, and your safety will be the sport of every foreign adventurer.”⁵⁸ Britain’s system of commerce will be altered, former Governor James Bowdoin told the Massachusetts Ratification Convention, only when “congress under the new Constitution will have the

⁵⁴ LORD SHEFFIELD, OBSERVATIONS ON THE COMMERCE OF THE UNITED STATES 264-265 (6th ed. 1784), *described in* JOHN E. CROWLEY, THE PRIVILEGES OF INDEPENDENCE: NEOMERCANTILISM AND THE AMERICAN REVOLUTION 81-83 (1993) and STANLEY ELKINS & ERIC MCKITRICK: THE AGE OF FEDERALISM 69 (1993).

⁵⁵ Thomas Russell, Speech to the Massachusetts Ratification Convention (Feb. 1, 1788), *in* 2E LLIOT’S DEBATES 139.

⁵⁶ JOHN JAY, ADDRESS TO THE PEOPLE OF THE STATE OF NEW YORK 7 (Sept. 17, 1787), *reprinted in* PAMPHLETS ON THE CONSTITUTION.

⁵⁷ A LANDHOLDER I, CONNECTICUT COURANT (Nov. 5-12 1787), *reprinted in* 3D OCUMENTARY HISTORY 399-400.

⁵⁸ A LANDHOLDER V, CONNECTICUT COURANT (Nov. 25 – Dec. 3, 1787), *reprinted in* 3D OCUMENTARY HISTORY 480.

power of regulating it within the Ports of the United States.”⁵⁹ What was needed, said Edmund Randolph, is “exclusion . . . opposed to exclusion, and restriction to restriction.”⁶⁰ Even the threat of retaliation, Washington wrote, would induce foreign powers to give the United States beneficial commercial treaties.⁶¹

A retaliatory impost or embargo required a uniform national policy for all American ports. When Massachusetts had tried to impose a penalty tax on British ships to force open the ports of the British West Indies, other states had undercut her by welcoming British ships into their ports.⁶² For an embargo or impost to be effective, it

⁵⁹ Letter from James Bowdoin to George Erving (Aug. 12, 1787), *in* 18 DOCUMENTARY HISTORY 324.

⁶⁰ Edmund Randolph, Reasons for not Signing the Constitution (Dec. 27, 1787), *in* 8D OCUMENTARY HISTORY 260, 265.

⁶¹ Letter from George Washington to Marquis de Lafayette (June 18, 1788), *in* 18 DOCUMENTARY HISTORY 184 (saying that “when foreign nations shall be disposed to give us equal advantages in commerce from dread of retaliation.”); Letter from Philippe Andre’ Joseph de Letombe to Comte de la Luzerne (June 26, 1787), *in* 18 DOCUMENTARY HISTORY 197 (saying that adoption of Constitution will unite the states and facilitate the desirable Reciprocity of Commerce between U.S. and France); MARCUS, DAILY ADVERTISER, NEW YORK (Oct. 15, 1787), *reprinted in* 1 DEBATE ON THE CONSTITUTION 127 (arguing that when commerce is a national object, nations will form treaties with us); James Wilson, Speech to the Pennsylvania Ratification Convention (Nov. 26, 1787), *in* 2 ELLIOT’S DEBATES 431 (saying that “[d]evoid of national importance, we could not procure, for our exports a tolerable sale at foreign markets”); THE FEDERALIST NO. 22, at 136 (Alexander Hamilton)(first published December 14, 1787) (saying that the want of a power to regulate commerce operated as a bar to the formation of beneficial treaties with foreign powers).

⁶² Letter from Gaspard Joseph Amand Ducher to Comte de la Luzerne (Feb. 2, 1788), *in* 16 DOCUMENTARY HISTORY 13 (saying that Massachusetts and New Hampshire had both attempted an exclusion of British ships to punish Britain for its strictness against American commerce, but had

could not be open to an easy and free end run through a neighboring state. New York had tried to impose a discriminatory impost on foreign goods brought in from New Jersey or Connecticut in order to try to enforce New York's retaliatory exclusions against the British.⁶³ The states would clearly have to present a united front.

Retaliation against the British exclusions was even sometimes said to be the primary purpose of the Constitution. Charles Pinckney argued to the South Carolina House of Representatives that the first great inconvenience of the Confederation was the destruction of our commerce because the general government could not counteract the restrictions of other nations.⁶⁴ Shortly before the Annapolis Convention, Madison wrote to Jefferson that "if anything should reconcile Virga. to the idea of giving Cong. a power over her trade, it will be that this power is likely to annoy G.B. against whom the animosities of our Citizens are still strong."⁶⁵ Even staunch Anti-Federalists endorsed the

suspended the attempt because the competing ports in other states would not join the embargo and so got the advantage of British ships newly attracted to their ports.)

⁶³ JENSEN, *supra* note 40, at 339. Jensen also says that the Anti-New Jersey and Connecticut imposts did not mean very much, however, because neither Connecticut nor New Jersey had reasonable deep water ports, so that running around the New York harbor was highly inconvenient.

⁶⁴ Charles Pinckney, South Carolina House of Representatives (Jan. 16, 1788), in 4E LLIOT'S DEBATES 253-54. Consistently, Professor John Crowley has said that "[i]n the name of seeking power to regulate commerce, Congress really only sought authority for retaliatory Navigation Acts." CROWLEY, *supra* note 54, at 94.

⁶⁵ Letter from James Madison to Thomas Jefferson (Aug. 20, 1785), in 8M ADISON PAPERS 344. See also Letter from James Madison to Thomas Jefferson (Mar. 18, 1786), in 8 MADISON PAPERS 500, 502 (saying that "if [the Annapolis Conference] should come to nothing, it will I fear confirm G.B. and all the world in the belief that we are not to be respected, nor apprehended as a nation in matters of commerce").

idea that the new government should be empowered to impose a retaliatory impost to open up the British West Indies to American ships.⁶⁶

Whatever the perceived importance of the power to retaliate against the British, however, the proposal to retaliate came to nothing. On the first working day of the Congress under the new Constitution, Madison introduced his proposal for an impost. His bill would raise federal revenue, but it also would have discriminated against British ships. “The union by the establishment of a more effective government ,” Madison said, “[has] recovered from [its] state of [impotence and] imbecility, that ... prevented a performance of its duties.”⁶⁷ Discrimination, that is, a higher impost on British ships, might give Great Britain a motive to enter into a commercial treaty, but even if Great

While retaliation against the British was not the only purpose for the Constitution, it does seem to have been the primary focus for the Annapolis Convention, which was an important stepping stone to the Philadelphia convention. JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 32 (1996); NORMAN K. RISJORD, *CHESAPEAKE POLITICS, 1781-1800*, at 257-266 (1978). See also RISJORD, at 251-266 for a discussion of how giving Congress the power over commerce contributed to the Constitutional movement in Virginia.

⁶⁶ Address of the Dissent of the Minority of the Pennsylvania Convention (Dec. 18, 1787), *in* 15 *DOCUMENTARY HISTORY* 7, 14 (regretting that “we are suffering from the restrictions of foreign nations, who had shackled our commerce, while we were unable to retaliate[.]”); *CENTINEL VI (ANTI-FEDERALIST)*, *PENNSYLVANIA PACKET* (Dec. 25, 1787), *reprinted in* 15 *DOCUMENTARY HISTORY* 98, 99 (finding considerable benefit in strengthening the hands of Congress, so as to counteract the adverse restrictions of other nations.)

⁶⁷ James Madison, Speech Before the House of Representative (Apr. 8, 1789), *in* 1A *NNALS OF CONGRESS* 107. See also Speech before the House of Representatives (Apr. 21, 1787), *in* 1A *NNALS OF CONGRESS* 193 (arguing we will not give Great Britain a motive for entering into a treaty unless we discriminate against them.)

Britain did not respond, Madison hoped, the discriminatory impost would move American commerce away from Britain into its more “natural channels,” for instance, France.⁶⁸

The Senate, however, lead by the New York delegation, stripped the anti-British discrimination features from the 1789 impost bill.⁶⁹ Great Britain allowed American ships into the British home ports without restriction or discrimination and opponents of retaliation feared that Britain might retaliate in turn if faced with American port restrictions.⁷⁰ The House acceded to the Senate and Madison’s plan for discrimination against the British failed to be part of the enacted impost.⁷¹ As Stanley Elkins and Eric McKittrick put it, “Madison hardly pictured himself as a spokesman for the interests of

⁶⁸ Speeches before the House of Representatives (Apr. 21, 1789), in 1 ANNALS OF CONGRESS 191, 193 (trade with Britain is an “artificial channel” larger than natural.)

⁶⁹ ELKINS & MCKITRICK, *supra* note 54, at 766, n. 66 collects the evidence for the New York merchants opposing discrimination. While there was no specifically anti-British discriminations, there were differentials in whether goods were imported in American ships, discussed in text accompanying *infra* notes 138-140.

⁷⁰ *Editorial note*, in 12 MADISON PAPERS 55; *Editorial note*, in 12 JEFFERSON PAPERS 521-526. Cf. John Laurence, Speech in the House of Representatives (Apr. 21, 1789), in 1A NNALS OF CONGRESS 192 (arguing that England does not now discriminate against American vessels coming into England.)

⁷¹ An Act for Laying Duties on Goods, Wares and Merchandise Imported in the United States, July 4, 1789, 1 STAT. 24-27. May 16 and May 26, 1789, in 1A NNALS OF CONGRESS 365-66, 409 (5% impost passes but discrimination defeated.)

American merchants. Indeed, when merchants objected to his plan, he turned his hostility upon them, charging that they were unduly subservient to British influence.”⁷²

A retaliatory impost against British shipping probably never was a good idea. The British were intransigent on the subject. After independence they reviewed their policy and decided that allowing American ships into the British West Indies would just enrich a rival shipper and encourage more American ships. Britain also rightly considered that it had the best and cheapest manufactured goods and gave the best credit on the globe so that it need not worry about Americans trying to cut off access to British exports, whatever their desires.⁷³ There were also not very many British ships coming into American ports against which to retaliate because American shipping was on its way to monopolizing transatlantic shipping. By 1796, American ships, by successful competition and American oak, were carrying over 90% of the transatlantic commerce.⁷⁴

⁷² ELKINS & MCKITRICK, *supra* note 54, at 88. *See also id.*, at 432 (referring to the “ideological liability, that of Madison’s stubborn commitment to a system of coercive legislation against the commerce of Great Britain.”)

⁷³ SHEFFIELD, at 264-265, *described in* ELKINS & MCKITRICK, *supra* note 54, at 69-71. *Consistently, see* Letter from Andrew Allen to Tench Coxe (Sept. 8, 1787), *in* 18 DOCUMENTARY HISTORY 362 (arguing that proponents of the Constitution are “too sanguine in assuming adoption will immediately extend commerce or open new channels of trade.”); ROBERT B. MORRIS, *THE FORGING OF THE UNION, 1781-1789*, at 194 (1987)(citing a British merchant who responded to the threat of American sanctions by saying “Pish”). Madison, by contrast, argued that America could retaliate against Britain, because in the case of a war of commercial relations between the two nations, the loss to Great Britain’s commerce and manufactures would be severe. James Madison, Speech to the House of Representatives, June 25, 1790, 13 MADISON PAPERS 255, 256.

⁷⁴ ELKINS & MCKITRICK, *supra* note 54, at 414 (93%).

A penalty against British ships would not have been much of an economic stick, even if it extinguished the last of them. Penalties would also have angered the British, perhaps into retaliation against American ships going into British ports. American transatlantic shipping into Great Britain was important to the commercial states and America could not afford a prohibitory trade war with Great Britain. The British West Indies prohibitions on American ships, moreover, were porous; the islands themselves were happy to evade the prohibitions on American trade and encourage smuggling.⁷⁵ For Virginia, finally, leaving American vessels as the only bidders for the shipping of Virginia crops by excluding British ships from American ports would have raised shipping costs or lowered crop prices, both to the detriment of Virginia.⁷⁶ Madison's discriminatory impost is probably best understood as driven by ideological hatred of Britain, more than by any reasonable view of American self interest.⁷⁷

⁷⁵ See, e.g., *id.*, at 131 (finding a treaty opening West Indies would just confirm what was already accessible informally.)

⁷⁶ But see Letter from James Madison to Thomas Jefferson (Aug. 20, 1784), in 8M ADISON PAPERS 102-104 (saying that he wanted regulation of trade only to reduce the trade of Great Britain to an equality with other nations and not to make a mercantile element rich.)

⁷⁷ See the discussion in ELKINS & MCKITRICK, *supra* note 54, at 131, 375-387, 432 (arguing that Madison seeking the retribitional impost in both 1789 and 1794 was relying on "exploded dogmas and bad economics" and that Madison had an "ideological liability," i.e., a "stubborn commitment to a system of coercive legislation against the commerce of Great Britain.")

Madison and Jefferson did see retribution against the British differently. Madison believed that the British would have to cave in because "the farmer can live better without the shop-keeper than the shop-keeper without the farmer." James Madison, Speech to the House of Representatives on Navigation and Trade (May 13, 1790), in 13 MADISON PAPERS 211, 213. For Jefferson in Paris, the failure of the

The punitive impost cannot be given much weight to explain the Constitution, notwithstanding how prominently it shows up in the Constitutional debates. The failure of Congress to endorse the proposal in 1789 serves as a deliberative poll of the sentiment of the nation, about as close to the adoption as the Constitution as we can ask for, and the poll was unfavorable to the retribution. The country, when asked, did not want the remedy. The retaliatory impost was plausibly a part of Madison's thinking, and that alone makes it part of the cause of the Constitution, but Madison could not get a majority for retaliation, over opposition both in Virginia and in the shipping states. A proposal that failed to pass even after it was allowable under the ratified Constitution cannot be used as a strong explanation of why the Constitutional revolution was needed or adopted.

3. American Mercantilism.

While the Framers objected to British restrictions requiring that only British ships could supply the British West Indies, they simultaneously wanted to require that American products could be carried only in American ships. The commerce clause gave Congress the power to imitate the same British Navigation Act exclusions, objected to

retribitional impost of British shipping hurt France, which had "spent money and blood" for the American cause and helped Britain, which had "moved heaven, earth and hell to exterminate us." Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 364, 366-367 (Julian P. Boyd, ed. 1950)(hereinafter JEFFERSON PAPERS). For descriptions of the issue more sympathetic to Jefferson and Madison views on anti-British discrimination see Drew R. McCoy, *Republicanism and American Foreign Policy: James Madison and the Political Economy of Commercial Discrimination, 1789 to 1794*, 31 WM. & MARY Q. 633 (3d series 1974) and Julian Boyd, editorial note, 8 MADISON PAPERS 64.

above, so as to give United States vessels exclusive monopolies on shipping American commodities out of United States ports (30 cites and 22%).⁷⁸

⁷⁸ (1) Alexander Hamilton, *Continentalist V* (Apr. 18, 1782), in 3P APERS OF ALEXANDER HAMILTON 75, 78 (Harold C. Syrett, ed. 1961-1987)(hereinafter HAMILTON PAPERS)(arguing that Dutch commercial regulations “are more rigid and numerous, than those of any other country; and it is by a judicious and unremitting vigilance of government, that they have been able to extend their traffic to a degree so much beyond their natural and comparative advantages”); (2) Richard Henry Lee to — (Oct. 10, 1785), 2 Letters 389, in 2 THE FOUNDERS' CONSTITUTION 482 (Philip B. Kurland & Ralph Lerner, eds. 1987)(hereinafter THE FOUNDERS' CONSTITUTION)(arguing that the Northern and Southern states are so different that “the Staple States should oppose the plan of vesting powers for the restraint & regulation of Commerce in Congress ... whose Constituents are very differently circumstanced”); (3) Gouverneur Morris, Debate at the Federal Convention (Aug. 29, 1787), in 2F FARRAND'S RECORDS 451 (Madison Notes)(opposing requiring two-thirds vote for the regulation of commerce because encouraging American ships and seamen would reduce Southern produce costs and improve security); (4) Mr. Williamson (Aug. 29, 1787), in *id.* (saying that if “Northern States should push their regulations [of commerce] too far, the S. States would build ships for themselves”); (5) Charles Pinkney, Speech in the Federal Convention (Aug. 29, 1787), in 2 FARRAND'S RECORDS 449 (saying that the interests of the Southern states were against regulation of commerce; but that he thought it proper to allow power of making commercial regulations because of the concessions that the North had made); (6) James Wilson, Speech before the Federal Convention (Sept. 14, 1787), in 2 FARRAND'S RECORDS 616 (Madison Notes)(saying that power to grant monopolies and corporations was included in the power to regulate commerce); (7) George Mason, Speech before the Federal Convention (Sept. 14, 1787), in 2 FARRAND'S RECORDS 616 (Madison Notes)(opposing monopolies and arguing that the power to regulate commerce does not include the power to give incorporation); (8) Eldridge Gerry, Speech before the Federal Convention (Sept. 15, 1787), in 2 FARRAND'S RECORDS 635 (Rufus King Notes)(opposing giving Congress power to regulate commerce because it will enable it to “create corporations and monopolies”); (9) George Mason, Speech before the Federal Convention (Sept. 15, 1787), in 2F FARRAND'S RECORDS 639 (Madison Notes), 635 (King

Notes)(asking for a two-thirds majority for the adoption of Navigation Acts to prevent “a few rich merchants” in New York, Philadelphia and Boston from monopolizing shipping and reducing the value of southern crops by perhaps one-half); (11) U.S. CONST. art. I, sec. 9, cl. 6 (providing that no “Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another”); (12) Letter from North Carolina Delegates to Gov. Richard Caswell (Sept. 18, 1787), *in* 13 DOCUMENTARY HISTORY 215, 216 (saying that “[a] navigation Act or the Power to regulate Commerce in the Hands of the National Government by which American Ships and Seamen may be fully employed is the desirable weight that is thrown into the Northern Scale”); (13) Alexander Hamilton, Conjectures About the New Constitution (Sept. 1787), *in* 1 DEBATE ON THE CONSTITUTION 9 (saying the good will of the commercial interests throughout the states will give all its efforts to the Constitution to establish a government capable of regulating, protecting and extending commerce); (14) Letter from Richard Henry Lee to George Mason (Oct. 1, 1787), *in* 13 DOCUMENTARY HISTORY 28 (saying that the “Commercial plunder of the South stimulates the rapacious Trader”); (15) George Mason: Objections to the Constitution (Oct. 7, 1787), *in* 13 DOCUMENTARY HISTORY 346, 350 (saying that by requiring only a majority to make all “Commercial & Navigation Laws, the five Southern States ... will be ruined; [because laws] may be made as will enable the Merchants of the Northern & Eastern States not only to demand an exorbitant Freight, but to monopolize the Purchase of the Commodities at their own Price”); (16) THE LANDHOLDER VI, CONNECTICUT COURANT (Dec. 10, 1787), *reprinted in* 3 FARRAND’S RECORDS 164 (arguing that Mason opposed the Constitution because “a navigation act might otherwise be passed excluding foreign bottoms from carrying American produce to market, and throw a monopoly of the carrying business into the hands of the eastern states who attend to navigation”); (17) AGRIPPA VI, MASSACHUSETTS GAZETTE (Dec. 14, 1787), *reprinted in* 4 DOCUMENTARY HISTORY 426, 428 (opposing Congressional power to grant exclusive charters because they would be “injurious to ... commerce, by enhancing prices and destroying ... rivalry”); (18) THE FEDERALIST NO. 12, at 73 (Alexander Hamilton) (first published Nov. 27, 1787) (praising the fostering of commerce so as to increase the circulation of precious metals, invigorate the channels of industry and boost government revenue); (19) AGRIPPA XIV, MASSACHUSETTS GAZETTE (Jan. 25 1788), *reprinted in* 5 DOCUMENTARY HISTORY 821 (saying that while a system of commerce established by national authority would be beneficial in some respects, still most governments establish companies that

have ill effects on trade and that “as we are situated at one extreme of the empire, two or three such companies would annihilate the importance of our seaports, by transferring the trade to Philadelphia”); (20) Thomas Dawes, Massachusetts Ratification Convention (Jan. 21, 1788), *in* 2 ELLIOT’S DEBATES 58 (objecting that without the Constitution’s regulation of commerce, “a vessel from Roseway or Halifax finds as hearty a welcome with its fish and whalebone at the southern ports, as though it was built, navigated, and freighted from Salem or Boston”); (21) James Bowdoin, Speech in the Massachusetts Ratification Convention (Feb. 1, 1788), *in* 2E LLIOT’S DEBATES 129 (arguing that well being of trade depends upon the proper regulation of it and unregulated trade has ruined rather than enriched those who carry it on); (22) Thomas Russell, Speech in the Massachusetts Ratification Convention (Feb. 1, 1788), *in* 2E LLIOT’S DEBATES 139 (arguing that Congress should confine shipping to American vessels, just as all the great trading nations have benefited “from securing to themselves the advantages of their carrying trade”); (23) Amendments to the Constitution Recommended by the Massachusetts Ratification Convention (Feb. 6, 1788), *in* 2E LLIOT’S DEBATES 177 (recommending that Congress erect no company of merchants with exclusive advantages of commerce); (24) HUGH WILLIAMSON, SPEECH AT EDENTON, NORTH CAROLINA, NOVEMBER 8, 1787, PRINTED IN THE DAILY ADVERTISER (NEW YORK) (Feb. 25 – 27, 1788), *reprinted in* 2 DEBATE ON THE CONSTITUTION 227, 231 (saying that “[b]y the sundry regulations of commerce, it will be in the power of Government not only to collect a vast revenue for the general benefit of the nation, but to secure the carrying trade in the hands of citizens in preference to strangers”); (25) Letter from John Howard to George Thatcher (Feb. 27, 1788), *in* 16 DOCUMENTARY HISTORY 230 (saying that wise commercial regulations will reduce imports of foreign luxuries in foreign ships to one-tenth and end the current situation where “our own vessels are rotting in the docks, our seamen strolling the streets, and our merchants daily becoming bankrupt”); (26) NORFOLK AND PORTSMOUTH JOURNAL (Mar. 12, 1788), *reprinted in* 16 DOCUMENTARY HISTORY 380 (saying that gentlemen of Virginia opposing the Constitution “fear, that a majority of the states may establish regulations of commerce which will give great advantage to the carrying trade of America and be a means of encouraging New England vessels rather than old England”); (27) Letter from Pierce Butler to Weedon Butler (May 5, 1788), *in* 3 FARRAND’S RECORDS 303 (saying that “Southern or Staple States accommodated to the Northern states by allowing a Navigation Act giving them exclusive carrying of commodities, although Southern States would of course have lower

The Constitution was written long before Adam Smith, laissez faire and free trade came to dominate economic philosophy.⁷⁹ It is not uncommon to find descriptions of the Constitutional document as “a part of the liberal, free trade tradition,”⁸⁰ but those descriptions have to be understood as solely aspirational.

Both Hamilton and Madison were mercantilists, by their participation in the serious thinking of the times. Mercantilism focused on stimulating foreign exports and discourage foreign imports so as to maximize the domestic supply of specie.

Mercantilism assumed that government should actively stimulate exports by giving

freight costs if ships of every Nation may come into their ports”); (28) Letter from Richard Henry Lee to Edmund Pendleton (May 26, 1788), *in* 2 DEBATE ON THE CONSTITUTION 465 (saying that the danger of monopolized trade may be avoided by requiring three-fourths of the states to approve regulations of commerce); (29) Alexander Hamilton, Debate in New York Ratification Convention (June 20, 1788), *in* 2 ELLIOT’S DEBATES 236 (saying that it was in the interest of the Northern States that “they should have full power, by a majority in Congress, to make commercial regulations in favor of their own, and in restraint of the navigation of foreigners”); (30) John Lansing, Resolution in New York Ratification Convention (July 2, 1788), *in* 2 ELLIOT’S DEBATES 407 (moving that “nothing in the Constitution contained shall be construed to authorize Congress to grant monopolies, or erect any company with exclusive advantages of commerce.”)

⁷⁹ *See, e.g.*, DOUGLAS IRWIN, *AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE* 80 (1996)(Adam Smith’s free trade ideas did not begin to get cited as orthodoxy among economists until at least a quarter century after they were published in 1776); CROWLEY, *supra* note 54, at *xi* (saying that a book about the influence of Smith on the American revolutionary generation would be “very short.”)

⁸⁰ *See, e.g.*, John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 527 (2000)(describing the Madisonian Constitution as very much a part of the liberal, free trade tradition).

monopolies and bounties, and should also discourage imports by taxes and restriction.⁸¹

Hamilton's argument, in Federalist 12, that stimulation of foreign trade would contribute to the wealth of the whole nation is a fine example of mercantilist philosophy:

The prosperity of commerce [i.e., foreign trade] is now perceived and acknowledged, by all enlightened statesmen, to be the most useful as well as the most productive source of national wealth; and has accordingly become a primary object of their political cares. By multiplying the means of gratification, by promoting the introduction and circulation of the precious metals, those darling objects of human avarice and enterprise, [foreign trade] serves to vivify and invigorate the channels of industry, and to make them flow with greater activity and copiousness... .

It has been found in various countries, that in proportion as [foreign trade] has flourished, land has risen in value... . The ability of a country to pay taxes must always be proportioned, in a great degree, to the quantity of money in circulation, and to the celerity with which it circulates. Commerce [foreign trade], contributing to both these objects, must of necessity render the payment of taxes easier, and facilitate the requisite supplies to the treasury. The hereditary dominions of the Emperor of Germany contain a great extent of fertile, cultivated and populous territory, a large proportion of which is situated in mild and luxuriant climates. In some parts of this territory are to be found the best gold and silver mines in Europe. And yet, from the want of the fostering influence of commerce [foreign trade], that monarch can boast but slender revenues.⁸²

Mercantilism as a philosophy disapproved of imports, in part because they caused the outflow of the precious specie that would stimulate internal exchanges. For example, "Honestus," in New York in 1785 blamed New York's economic problems on the unfavorable balance of trade that drew gold and silver out of New York. Merchants were the "bane and pest" of the Country, Honestus claimed, because without them, luxuries would not be imported in such huge volume.⁸³ The Constitutional debates are also filled

⁸¹ See, e.g. CROWLEY, *supra* note 54. at 28 (tracing the ideas back to the 14th century.)

⁸² THE FEDERALIST NO. 12, at 73-5 (Alexander Hamilton)(first published Nov. 27, 1787).

⁸³ HONESTUS, NEW YORK PACKET (Mar. 27, 1785), *quoted in* KAMINSKI, *supra* note 17, at 99.

with moral condemnation of imported luxuries. Federalist Tench Coxe condemned the “ineffectual” federal government under the Articles for its inability to control the “wonton consumption” of imported luxuries.⁸⁴ “Devoid of national power,” James Wilson regretted to Pennsylvania, “we could not prohibit the extravagance of our importations nor could we derive a revenue from their excess.”⁸⁵ “Wise commercial regulations,” said Federalist John Howard, “will reduce imports of foreign luxuries in foreign ships to one-tenth.”⁸⁶ We need a controlling Union government to regulate commerce, George Washington wrote, to balance against the “luxury, effeminacy and corruption” introduced by foreign trade.⁸⁷ On his inauguration in 1789, Washington was to wear “a great rarity” – “a suit made from cloth woven in the United States.”⁸⁸

Anti-Federalist opponents of the Constitution were no friendlier to imported luxuries. In the Philadelphia Convention, George Mason had “descanted,” Madison tells

⁸⁴ TENCH COXE, AN ENQUIRY INTO PRINCIPLES ON WHICH A COMMERCIAL SYSTEM SHOULD BE FOUNDED (1787)(regretting that “ineffectual and disjointed” federal government should not be able to overcome the “wonton” consumption of imported luxuries.)

⁸⁵ James Wilson, Speech before the Pennsylvania Ratification Convention (Nov. 26, 1787), in 2 ELLIOT’S DEBATES 431.

⁸⁶ Letter from John Howard to George Thatcher (Feb. 27, 1788), in 16 DOCUMENTARY HISTORY 230.

⁸⁷ See, e.g., Letter from George Washington to James Warren (Oct. 7, 1785), in 3P PAPERS OF GW: CONFEDERATION SERIES 298, 299-300 (W. Abbott, ed. 1994)(hereinafter PAPERS OF GW: CS)(arguing for the necessity of a centralized controlling power over commerce to balance against the luxury, effeminacy and corruption introduced by foreign trade).

⁸⁸ JAMES THOMAS FLEXNER, WASHINGTON: THE INDISPENSABLE MAN 214 (1969).

us, on the necessity of restricting the “excessive consumption of foreign superfluities.”⁸⁹ Patrick Henry argued to Virginia that we buy too much and make too little and that a mere change in government would not cure the causes.⁹⁰ John Lansing opened the Anti-Federalist opposition in the New York Ratification debate with a fine mercantilist diagnosis, arguing that the cause of current embarrassments is want of money arising, because “[o]n the termination of war, ... we launched into every species of extravagance, and imported European goods to an amount far beyond our ability to pay.”⁹¹ The French Counsel reported home that the New York opponents of Constitution wanted fewer commercial ties with Europe, which only furnishes them with “luxuries that they must do without to live in the simplicity that befits a newborn State.”⁹² The wearing of British machine-woven woolens was considered immoral: “How many thousands are daily wearing the manufactures of Europe, when, by a little industry and frugality, they might wear those of their own country,” Anti-Federalist John Williams complained to New York.⁹³ Mercantilism’s general espousal of frugality and disapproval of imported

⁸⁹ George Mason, Debate in the Federal Convention (Sept. 13, 1787), *in* 2F ARRAND’S RECORDS 539 (Madison notes).

⁹⁰ Patrick Henry, Speech before the Virginia Ratification Convention (June 9, 1788), *in* 3 ELLIOT’S DEBATES 157.

⁹¹ John Lansing, Speech before the New York Ratification Convention (June 20, 1787), *in* 2E LLIOT’S DEBATES 218.

⁹² Letter from Comte de Moustier to Comte de Montmorin (June 25, 1787), *in* 18 DOCUMENTARY HISTORY 190.

⁹³ John Williams, Speech before the New York Ratification Convention (June 21, 1788), *in* 2E LLIOT’S DEBATES 240 (calling for abandoning all the foreign commodities that “have deluged our country, which loaded us with debt”); *See also* “A CITIZEN OF DUTCHESS COUNTY”, NEW YORK PACKET (Mar. 27, 1785),

luxuries can, indeed, be traced back for at least the prior hundred years.⁹⁴ The participants in the ratification debates all approved of restricting imports and keeping specie at home, whether they were for or against the Constitution.

Regulations of commerce included subsidies as well as restrictions. Even Anti-Federalists believed, in the spirit of their times, that trade “cannot flourish, unless a power is somewhere vested, to cherish those Branches of Commercial Intercourse which are favorable to the Nation, and to check those of a contrary tendency.”⁹⁵ Hamilton as early as 1781 had argued that the Congress needed the “Power of Regulating Trade, comprehending a right of giving bounties and premiums by way of encouragement.”⁹⁶

Mercantilism also praised government restrictions in general. In 1782, Hamilton, thinking as a mercantilist, had argued in favor of active government regulation of commerce. Dutch commercial regulations, he said, “are more rigid and numerous, than those of any other country; and it is by a judicious and unremitting vigilance of government, that they have been able to extend their traffic to a degree so much beyond

quoted in KAMINSKI, *supra* note 17, at 99 (suggesting New York should prohibit importation of all foreign articles that might be made among us and impose high imposts on all imported luxuries); George Mason (Sept. 13, 1787), *in* 2 FARRAND’S RECORDS 606 (Madison’s Notes)(advocating regulation of commerce to discourage foreign superfluities and to encourage American economy, frugality and manufactures). *Cf.* Rebecca Starr, *Political Mobilization, 1765-1776*, *in* JACK GREEN & J.R. POLE, THE BLACKWELL ENCYCLOPEDIA OF THE AMERICAN REVOLUTION 231, 238 (1991)(saying that pledge to use homespun cloth was a symbolic display of loyalty to the Revolutionary cause at the outset of the War.)

⁹⁴ *See, e.g.*, DOUGLAS IRWIN, AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE 37 (1996).

⁹⁵ Samuel Osgood and Arthur Lee, An Address from the United States in Congress Assembled, to the Legislatures of the several States (Aug. 31, 1786), *in* 31 JCC 613, 618.

⁹⁶ Alexander Hamilton, Continentalist IV (Aug. 30, 1781), *in* 2 HAMILTON PAPERS 669, 670.

their natural and comparative advantages.”⁹⁷ James Bowdoin argued before the Massachusetts Ratification Convention, consistently, that the well being of trade depends upon the proper regulation of it and that unregulated trade would ruin rather than enrich those who carry it on.⁹⁸ George Washington argued that “it behoves us to place [commerce] in its most convenient channels, under proper regulation – freed as much as possible from those veins which luxury ... naturally produces.”⁹⁹ Hamilton denounced the argument that trade would regulate itself as a “wild speculative paradox[] ... contrary to the sense of the most enlightened nations.”¹⁰⁰ Madison joined in the enthusiasm, denouncing those who were “decoying the people into a belief that trade ought to be left to regulate itself.”¹⁰¹

In true mercantilist terms, James Madison seems to have explained the whole destitution of the federal level and state encroachments upon federal rights in terms of an absence of regulation of foreign commerce and an unfavorable balance of trade:

Another unhappy effect of the present anarchy of our commerce will be a continuance of the unfavorable balance on it, which by draining us of our metals furnishes pretexts for the pernicious substitution of paper money, for indulgence to debtors and for postponement of taxes. In fact, most of our political errors may be traced up to our commercial ones, and most of moral [errors] may to our political [errors].”¹⁰²

⁹⁷ Alexander Hamilton, *Continentalist V* (Apr. 18, 1782), in 3H AMILTON PAPERS 75, 78.

⁹⁸ Debate in the Massachusetts Ratification Convention (Feb. 1, 1788), in 2 ELLIOT’S DEBATES 129.

⁹⁹ Letter from George Washington to Thomas Jefferson (Mar. 29, 1784), in 1 PAPERS OF GW: CS 239.

¹⁰⁰ Alexander Hamilton, *Continentalist V* (Apr. 18, 1782), in 3H AMILTON PAPERS 75, 76.

¹⁰¹ Letter from James Madison to James Monroe (Aug. 20, 1785), in 8 MADISON PAPERS 102.

¹⁰² Letter from James Madison to Thomas Jefferson (Mar. 18, 1786), in 8 MADISON PAPERS 500, 501. In the passage just before the quoted one, Madison makes clear that he is complaining about the failure of the states to unify to achieve an enforceable embargo or retribitional impost against the British.

Even federalization of the state imposts can be explained in mercantilist terms, as allowing for a better suppression of imports. The states undercut each other on impost tax rates to draw ships to their own ports. Only the federal government could enforce a uniform rate that would produce significant revenue that would regulate imports and suppress them. James Wilson, for example, told the Pennsylvania ratification convention the Articles of Confederation needed to be replaced because “[d]evoid of power, we could neither prevent the excessive importations which lately deluged the country, nor even raise from that excess a contribution to the public revenue.”¹⁰³ Only high taxes on imports could suppress the corruption of wonton luxurious consumption that imports represented.

The federal government was prohibited from taxing exports¹⁰⁴ and that is best explained by mercantilism. A ban on federal tax of exports is not explained by fear of the discriminatory abuse by New York (and other commercial states) monopolizing the taxes from its deep water harbor at the expense of its neighbors. Arguably, the ban on export taxes was just favoritism toward the South, which had the most commodities for export. Still, mercantilism favored exports because they would bring specie into the country, and a tax on exports would suppress them. Thus the Constitutional scheme, a federal tax on imports, but not on exports, was consistent with the dominant economics even without any favoritism.

In 1789 in the new Congress, James Madison professed to be “the friend to a very free system of commerce” and also said that “if industry and labour are left to take their

¹⁰³ Speech to the Pennsylvania Ratification Convention, Nov. 24, 1787, *in* 3 FARRAND’S RECORDS 141

¹⁰⁴ U.S. Const. art. I, sec. 9, cl. 5.

own course, they will generally be directed to those objects which are the most productive.”¹⁰⁵ He promptly listed as necessary exceptions, however, every program then even vaguely contemplated to restrict the free flow: Congress should impose regulatory imposts to induce foreign ports not to exclude American ships, to encourage American shipping, to foster local manufacturing, to discourage consumption of disfavored goods, to embargo in time of war, to encourage domestic war supplies independent of foreign sources, and to obtain revenue.¹⁰⁶ By the time he had finished his list, the exceptions had swallowed the free trade. Indeed, given that Madison had condemned those who were “decoying the people into a belief that trade ought to be left to regulate itself”¹⁰⁷ and had traced most of our political and moral errors to the imports that drained us of our precious metals,¹⁰⁸ the surprising, the insincere part of Madison’s 1789 address to the House was the opening claim that he was “friend to every free system of commerce.”

Once free trade replaced mercantilism as an economic philosophy, thanks mostly to the work of Adam Smith, importing British woolens and other manufactured goods came to be seen as a wise decision to buy the highest quality goods at the best price abroad, rather than wasting resources doing an inferior job more expensively at home. If there is one truth that economists across the political spectrum now agree on it is that the wealth of the nation cannot be generally improved by banning imports.¹⁰⁹ When Adam

¹⁰⁵ James Madison, Speech to the House of Representatives (Apr. 9, 1789), in 12 MADISON PAPERS 69, 71.

¹⁰⁶ *Id.*, at 73.

¹⁰⁷ Letter from James Madison to James Monroe (Aug. 20, 1785), in 8 MADISON PAPERS 102.

¹⁰⁸ Letter from James Madison to Thomas Jefferson (Mar. 18, 1786), in 8 MADISON PAPERS 500, 501.

¹⁰⁹ PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 686 (15th ed. 1995) (“[T]he theory of comparative advantage is one of the deepest truths in all of economics.”) For a recent review of the

Smith took hold, importing machine-woven woolen clothing no longer looked like such a moral sin.

Madison and the other proponents of the Constitution had also advocated specific programs in the ratification debates that were inconsistent with free trade.

a. Port Preferences. In 1784, Madison, in the spirit of mercantilism, had sponsored a port bill in the Virginia Assembly, which would have required that all trade between Virginians and foreign parts had to be conducted out of a single Virginia port. By giving a monopoly or franchise to one Virginia port, Madison wanted to establish a Baltimore or Philadelphia in Virginia. Madison complained that prices for Virginia export tobacco were 15-20% higher on the Philadelphia wharves than in Virginia.¹¹⁰ The Port monopoly would capture the premium for Virginians and encourage development of Virginian port facilities. Port monopolies had been actively used by Britain to protect its industry and subsidize its ports.¹¹¹ The port preferences have been said to be the economic “centerpiece” of the Madison’s coalition out of which the Constitutional

literature saying that while free trade and comparative advantage arguments are “not passe, [they] have lost their innocence,” see Paul. R. Krugman, *Is Free Trade Passe?*, 1 J. ECON. PERSP. 131 (1987). See also DOUGLAS IRWIN, *supra* note 94, which includes discussions of where exceptions to free trade might be justified.

¹¹⁰ Letter from James Madison to James Monroe (June 21, 1785), in 8M ADISON PAPERS 306, 307.

¹¹¹ See ALBERT A. GIESECKE, AMERICAN COMMERCIAL LEGISLATION BEFORE 1789 at 77-78, 100-106 (1910)(stating that American iron exports had been required to go first to the port of London, while Carolina rice exports were allowed to by-pass Britain entirely.)

movement arose.¹¹² Both Thomas Jefferson¹¹³ and George Washington¹¹⁴ supported the port monopoly idea.

As the Virginia legislature considered Madison's bill, the ports included within the monopoly were expanded to two, Alexandria and Norfolk, and then to four, adding Bermuda's Hundred (below Richmond on the James River) and Tappahannock (below Fredericksburg on the Rappahannock River). By 1786, the monopoly had been diluted to include 17 listed Virginia ports.¹¹⁵ The Virginia legislature also exempted Virginia-owned ships from the port restrictions.¹¹⁶

Madison denied that he meant to sacrifice the "conveniency" of planters to provide incentives for merchants,¹¹⁷ but the monopoly nonetheless seems motivated by

¹¹² BRUCE A. RAGSDALE, *A PLANTERS' REPUBLIC: THE SEARCH FOR ECONOMIC INDEPENDENCE IN REVOLUTIONARY VIRGINIA* 269 (1996).

¹¹³ Letter from Thomas Jefferson to James Madison (Nov. 11, 1784), *in* 8M ADISON PAPERS 127.

¹¹⁴ RAGSDALE, *supra* note 112, at 149.

¹¹⁵ Bill Restricting Foreign Vessels to Certain Ports, June 8, 1784, and editorial note, *in* 8M ADISON PAPERS 64. See RAGSDALE, *supra* note 112, at 269-272; RISJORD, *supra* note **Error! Bookmark not defined.**, at 136-137.

¹¹⁶ RAGSDALE, *supra* note 112, at 270. Giving Virginia-owned ships an exemption from the port preference, while leaving other U.S.-owned ships subject to it, was a violation of the Articles of Confederation prohibition on a state's imposing any tax or restriction on an out-of-state U.S. citizen that was not imposed on its own citizens (ARTICLES OF CONFEDERATION, art. IV,) and Madison told Monroe that that was an "*erratum*" that "will no doubt be rectified." Letter from James Madison to James Monroe (Aug. 20, 1785), *in* 8M ADISON PAPERS 102. Virginia ownership of deep-water ships would not have been material at the time, however.

¹¹⁷ Letter from James Madison to James Monroe (Aug. 20, 1785), *in* 8 MADISON PAPERS 102, 103.

allowing the listed ports to charge a premium for shipping Virginia crops. Plausibly, Virginia as a whole would not be helped by the port monopoly even if it succeeded: The 15-20% premium for tobacco on Philadelphia wharves was probably a price buyers were willing to pay for the convenience of using the well-developed wharves of a well-protected, deep-water port. If so, then buyers would not pay the premium for less convenient Virginia shallow-water docks. Any premium available for the Virginia ports would then just reduce the sale price available to the planters. Madison's port preference, as Professor Risjord describes it, "was solidly grounded in mercantilist thought, if not common sense."¹¹⁸ Madison also had an anti-British motive: he was afraid of re-establishment of the colonial trade ties between Britain and the planters if British ships were to dock at the bottom of each planter's dock¹¹⁹ and, once again, anti-British ideology seems as important as Virginia self-interest.

George Mason hated the Virginia port restrictions. Mason likened the port bill to putting a chain across the channel of Virginia's finest rivers at just sufficient depth that deep-water ships could not pass over it.¹²⁰ To use a current analogy, the port bill was like throwing a very large rock into the river at the bottom of each planter's wharf.¹²¹ Mason had been an ally of Madison's on enforcement of the British debts and he argued that giving foreign merchants speedy justice and honest payment of our debts would be "a

¹¹⁸ *Id.*, at 137. CROWLEY, *supra* note 54, at 100 describes Madison's approach to the port bills a bit more sympathetically as a "provincial mercantilist" who was trying to provide commercial incentives.

¹¹⁹ Letter from James Madison to James Monroe (Aug. 20, 1785), in 8 MADISON PAPERS 102, 103.

¹²⁰ Protest by a "Private Citizen" against the Port Bill (Nov.-Dec.(?) 1786), in 2P APERS OF GM 859.

¹²¹ *See, eg.*, Lawrence Summers, Speech before U.S. Chamber of Commerce (Nov. 10, 1999), in Federal Document Clearing House (saying that removing rocks from the harbor would be a good thing.)

more effectual means of inviting foreigners to trade with us” than the port monopoly. Mason was not consistently laissez faire: he was in favor of high, protectionist imposts to subsidize industry¹²² and grants and bounties to subsidize industry,¹²³ but Mason was right in being against port preferences.

Mason’s views prevailed in the Constitutional Convention. The Constitutional text, as adopted, prohibits preferences “given by any Regulation of Commerce or Revenue to the Ports of one State over those of another.”¹²⁴ Madison was sorry that port preferences lost. The prohibition, he told Pendleton, was “dictated by the jealousy of some particular States, and was inserted pretty late in the Session.”¹²⁵ The Constitution thus prohibited what had been a “centerpiece” or least a core concrete example of what Madison had in mind in the Virginia legislature under regulation of commerce. While giving port preferences was a purpose for the Constitutional movement in Virginia, it was not a purpose that survived into the Constitutional document itself.

b. An American Navigation Act. The proponents of the Constitution objected to the British excluding American ships from the British West Indies, under the British

¹²² George Mason, Debate in the Federal Convention (Aug. 28, 1787), in 2F ARRAND’S RECORDS 441 (arguing for allowing states to impose imposts with the consent of the Congress so as to protect local manufacturing.)

¹²³ George Mason (Sept. 13, 1787), in 2 FARRAND’S RECORDS 606 (Madison notes)(advocating association to discourage foreign superfluties and to encourage American economy, frugality and manufactures.)

¹²⁴ U.S. CONST. art. I, sec. 9, cl. 6. See Mssrs. Caroll and Luther Martin (Aug. 25, 1787), in 2F ARRAND’S RECORDS 417 (Madison Notes)(arguing that Congress might enact port preferences, requiring “vessels belonging or bound to Baltimore, to enter and clear at Norfolk [Virginia].”)

¹²⁵ Letter from James Madison to Edmund Pendleton (Oct. 28, 1787), in 10 MADISON PAPERS 223.

Navigation Act, but they simultaneously wanted an American Navigation Act to exclude British ships in American ports and to give American vessels a monopoly on carrying American commodities. In the Massachusetts ratification convention, for example, Thomas Russell argued all the great trading nations had benefited “from securing to themselves the advantages of their carrying trade” and he argued that Congress should confine American shipping to American vessels.¹²⁶ Rhode Island was Anti-Federal, stingy in giving revenue to the federal government, but it was also a shipping state and so it had no trouble giving Congress the power to prohibit the importation of all foreign goods in any but American Vessels.¹²⁷ In North Carolina, Hugh Williamson argued that regulation of commerce would allow the Government “to secure the carrying trade in the hands of citizens in preference to strangers.”¹²⁸ Gouverneur Morris of Pennsylvania argued to the Philadelphia Convention that an American Navigation Act, requiring only American vessels for American exports and imports, would encourage American ships and American seamen, and that that would ultimately reduce costs of transporting Southern produce and improve security.¹²⁹

¹²⁶ Thomas Russell, Speech in the Massachusetts Ratification Convention (Feb. 1, 1788), *in* 2 ELLIOT’S DEBATES 139.

¹²⁷ Report of the Secretary of the Congress, January 3, 1786, *in* 30 JCC 8, 10 (Rhode Island ratifies the 1783 impost subject to a substantial list of self-serving conditions, but agrees to ratify any Article empowering Congress “to regulate, restrain, or prohibit the importation of all foreign goods in any but American Vessels”).

¹²⁸ HUGH WILLIAMSON, SPEECH AT EDENTON, NORTH CAROLINA (NOV. 8, 1787), REPRINTED IN THE DAILY ADVERTISER (NEW YORK) (Feb. 25 – 27, 1788), *reprinted in* 2 DEBATE ON THE CONSTITUTION 231.

¹²⁹ Gouverneur Morris, Debate at the Federal Convention (Aug. 29, 1787), *in* 2 FARRAND’S RECORDS 450. *See also* Letter from North Carolina Delegates to Gov. Richard Caswell (Sept. 18, 1787), *in* 13

Going back into the Revolutionary War period, the British Navigation Act restrictions on trade had actually been quite popular in America, when American suppliers were beneficiaries inside the monopoly restrictions.¹³⁰ In 1774 as the War drew nearer, the Continental Congress had denied that the British had the right to raise revenue from the Colonies, without the consent of the Colonies, but the Congress had simultaneously “cheerfully consented” that Parliament could secure the benefits of regulating commerce for both the mother country and colonies, including by taxes that channeled commerce.¹³¹ The Framers were, apparently, not against a Navigation Act in principle, but only against being outside the protection and excluded from the West Indies by the monopoly of the British Navigation Act.

In the Philadelphia Convention, George Mason opposed giving Congress the power to enact commercial or navigation restrictions by simple majority vote. Mason argued that with a Navigation Act, “a few rich merchants” in New York, Philadelphia and Boston could monopolize shipping and reduce the value of southern crops by perhaps

DOCUMENTARY HISTORY 215, 216 (saying that “[a] navigation Act or the Power to regulate Commerce in the Hands of the National Government by which American Ships and Seamen may be fully employed is the desirable weight that is thrown into the Northern Scale.”)

¹³⁰ OLIVER M. DICKERSON, *THE NAVIGATION ACTS and the American Revolution* 290-300 (1951)(saying that the Navigation Act was not the cause of the Revolution and was even quite popular).

Larry Sawers, *The Navigation Acts Revisited*, 45 *Econ. HISTORY REV.* 262 (1992) reviews the economic history literature finding Navigation Act had trivial adverse impact and argues, contrarily, that Navigation Act was going to hurt key American industries substantially after 1774. The Continental Congress’ “cheerful consent” to the British Navigation Act, thus, might have hidden some darker future clouds.

¹³¹ October 14, 1774, *in* 1 JCC 69.

one-half.¹³² The Southern states would be ruined, Mason would argue, because commercial laws would enable “the Merchants of the Northern & Eastern States not only to demand an exorbitant Freight, but to monopolize the Purchase of the Commodities at their own Price.”¹³³ The French Consul in Wilmington, North Carolina reported home the view, fair to Mason’s viewpoint, that the new constitution was all to the advantage of the northern shipping states because they could raise shipping prices.¹³⁴ Both Edmund Randolph and George Mason came out of the Convention citing the possibility of a navigation act as a reason why they refused to sign the Constitution.¹³⁵ Soon after the Convention broke, Richard Henry Lee had complained that the “Commercial plunder of

¹³² George Mason, Speech before the Federal Convention (Sept. 15, 1787), *in* 2F FARRAND’S RECORDS 631 (Madison notes). Charles Cotesworth Pinckney of South Carolina had proposed in the Convention that Congress should have to have a two-thirds majority for any regulation of commerce or navigation act, but his motion was defeated, four states in favor and seven against. August 29, 1787, *in* 2F FARRAND’S RECORDS 450, 453. The Committee of Detail, chaired by John Rutledge of South Carolina had also required a two-thirds majority for a navigation act (2 FARRAND’S RECORDS 183 (Article VII, section 6 of the Committee of Detail draft)), but that provision both appeared and disappeared without an explanation.

¹³³ George Mason: Objections to the Constitution (Oct. 7, 1787), *in* 13 DOCUMENTARY HISTORY 346, 350.

¹³⁴ Letter from Gaspard Joseph Amand Ducher to Comte de la Luzerne (Feb. 2, 1788), *in* 16 DOCUMENTARY HISTORY 13.

¹³⁵ Letter from Edmund Randolph to the Speaker Of The Virginia House Of Delegates (Oct. 10, 1787), *in* 3 FARRAND’S RECORDS 127 (citing the power to regulate commerce without two-thirds majority as reason not to sign); George Mason (Sept. 10, 1787), *in* 2 FARRAND’S RECORDS 639-640 (Mason Notes)(majority vote allows Northern merchants to demand exorbitant rate, but two-thirds vote requirement will produce mutual moderation.)

the South stimulates the rapacious Trader.”¹³⁶ Opposition to “corporations and monopolies,” more generally, was a recurring theme among Anti-Federalist opponents to the Constitution.¹³⁷

The demand for a two thirds vote requirement for the regulation of commerce did not succeed and the opposition to commercial monopolies did not prevent ratification, but, on the other side of the coin, nothing much came of the suggestion for adoption of an American Navigation Act either. The Constitution itself cut the heart out of the idea for an American Navigation act by prohibiting Congress from imposing any tax on exports.¹³⁸ The prohibition on export tax meant that Congress could not give a differential tax advantage to American ships in the carrying of Southern commodities.

¹³⁶ Letter from Richard Henry Lee to George Mason (Oct. 1, 1787), *in* 13 DOCUMENTARY HISTORY 28.

¹³⁷ *See, e.g.*, Eldridge Gerry, Speech before the Federal Convention (Sept. 15, 1787), *in* 2 FARRAND’S RECORDS 635 (Rufus King Notes) (opposing giving Congress power to regulate commerce because it will enable it “create corporations and monopolies”); AGRIPPA VI, MASSACHUSETTS GAZETTE (Dec. 14, 1787), *reprinted in* 4 DOCUMENTARY HISTORY 428 (opposing Congressional power to grant exclusive charters because they would be injurious to commerce, by enhancing prices and destroying rivalry); AGRIPPA XIV, MASSACHUSETTS GAZETTE (Jan. 25 1788), *reprinted in* 5 DOCUMENTARY HISTORY 821 (saying that two or three monopoly charters in navigation would annihilate the importance of our seaports, by transferring the trade to Philadelphia.”); John Lansing, Resolution in New York Ratification Convention (July 2, 1788), *in* 2 ELLIOT’S DEBATES 407 (moving that “nothing in the Constitution contained shall be construed to authorize Congress to grant monopolies, or erect any company with exclusive advantages of commerce.”) *See also* NORFOLK AND PORTSMOUTH JOURNAL (Mar. 12, 1788), *reprinted in* 16 DOCUMENTARY HISTORY 380 (saying that gentlemen of Virginia opposing the Constitution “fear, that a majority of the states may establish regulations of commerce which will give great advantage to the carrying trade of America and be a means of encouraging New England vessels rather than old England.”)

¹³⁸ U.S. CONST. art. I, sec. 9 cl. 5.

Congress would have had to take the far more radical step of banning foreign ships from carrying U.S. exports entirely and Congress never seriously considered a complete prohibition.

On the import side, where tax was allowed, Congress did discriminate some against imports on foreign ships. The first tonnage fees imposed a tax of 6 cents per ton on U.S.-owned ships, but 50 cents per ton on foreign-owned ships.¹³⁹ In 1790, Congress adopted a discriminatory 10% tax rate on imports coming in on foreign ships, while allowing a base line tax at only 5% for imports coming in on United States ships.¹⁴⁰ The discrimination was gutted by the Jay Treaty of 1786 with Great Britain, however, which obligated the United States and Great Britain to stop putting higher taxes on each other's ships,¹⁴¹ and it seems to have been ended generally in 1799 when general impost rates were raised to 10%.¹⁴²

¹³⁹ An Act for imposing duties on tonnage, 1st Cong., 1st Sess. ch. 3, 1 Stat. 27 (July 20, 1789) renewed, An Act imposing duties on the tonnage of ships or vessels, ch. 30, 1 Stat. 135 (July 30, 1790).

¹⁴⁰ Where scheduled taxes, e.g., on Madeira, exceeded 10%, the tax on foreign-ship imports did not add on to the impost. An Act for the future provision for the payment of the debt of the United States, ch. 34, §2, 1st Cong., 2d Sess., 1 Stat. 181 (Aug. 10, 1790). *See also* An Act for laying a Duty on Goods, Wares and Merchandise imported into the United States, ch. 2, §5, 1st Cong., 1st Sess., 1 Stat. 27 (July 4, 1789) (reducing tax by one-tenth, generally from 5% to 4-1/2%, tax on imports if the imports were carried in on U.S. ships).

¹⁴¹ Treaty of Amity, Commerce and Navigation [Jay Treaty], Art. III, XV (concluded Nov. 124, 1794, ratified Feb. 1795, and promulgated Feb. 29, 1796), *in* SAMUEL FLAGG BEMIS, *JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY* 333-34 (1921).

¹⁴² An Act to regulate the collection of duties on imports and tonnage, ch. 22, §61 (March 2, 1799)(imposing tax of 10% of cost). Imports from beyond the Cape of Good Hope were taxed at 20% of

The discriminatory tonnage fees and the extra 5% tax on imports in foreign owned ships from 1789-1799 are not nothing, but they are much less than what the Federalists were calling for in advocating the Constitution. Without tax on exports, the restriction on non-U.S. ships for American commodities had to be a total ban or nothing and given the options, the country ultimately chose nothing as to the American commodities. The call for monopoly turned out, after deliberation, not to have majority support. Giving a monopoly to American-owned vessels probably would have induced Britain and, indeed France as well, to reciprocate with exclusions of American ships from their home ports and that would have been disastrous for American shipping that was supposed to be the beneficiary of an American Navigation Act. Again, the argument seems overwhelming that proposals that came to naught after deliberation by reason of insufficient support, even once permitted, do not provide significant help in explaining why we had the Constitutional revolution.

4. Miscellaneous Deep Water Shipping.

There are also nine other uses of “commerce” or “regulation of commerce” where deep water shipping is the clear reference, but with a completely different kind of remedy or with no remedy specified.¹⁴³ A writer named “Philadelphiensis,” for instance, argued

cost (*id.*), presumably because they would have a far larger mark up than imports, e.g., from Europe, and the statute was using cost as an estimate of value.

¹⁴³ (1) Francis Hopkinson: An Ode, Philadelphia (July 4 1787), in 18 DOCUMENTARY HISTORY 247, (“*Commerce* her pond’rous anchor weigh/ Wide spread her sails/And in far distant seas her flag display”); (2) James Madison, Speech at the Federal Convention (Sept. 15, 1787), in 2F ARRAND’S RECORDS 625 (saying that whether states were to be denied power to lay harbor taxes called “tonnage” depends on scope of power to regulate commerce); (3) PHILADELPHIENSIS VII, PHILADELPHIA INDEPENDENT GAZETTEER

that “if we mean to be a commercial people, we must endeavor to have a navy.”¹⁴⁴

Edmund Randolph told Virginia that if the state failed to ratify the Constitution, then France to collect its debt would seize ships and lay waste to Virginia’s shores, destroying what little “commerce” Virginia had.¹⁴⁵ In two cites “commerce” is defined as what “merchants” do,¹⁴⁶ and “merchants” seems to refer to only the deep-water importers, and

(Jan. 10 1788), *reprinted in* 15 DOCUMENTARY HISTORY 338 (saying that “if we mean to be a commercial people, we must endeavor to have a navy”); (4) Edmund Randolph, Speech to the Virginia Ratification Convention (June 6, 1788), *in* 3 ELLIOT’S DEBATES 74 (arguing that that if Virginia failed to join the Constitution, then France to collect its debts could destroy what little commerce Virginia had, seizing ships and laying waste to Virginia shores); (5) Alexander Hamilton, Debate in the New York Ratification Convention (June 25, 1788), *in* 2 ELLIOT’S DEBATES 350 (saying that the objects of the federal government include “the regulation of commerce, — that is, the whole system of foreign intercourse”); (6) James Madison, Debate in Virginia Ratifying Convention (June 11, 1788), *in* 3 ELLIOT’S DEBATES 250 (saying that if America can solve its present impotence, it could profit from carrying the commerce of nations at war); (7) Letter from Comte de Moustier to Comte de Montmorin (June 25, 1788), *in* 18 DOCUMENTARY HISTORY 190 (saying that New York Antifederalists do not want to involve themselves in commercial ties with Europe, “which only furnish them with luxuries that they must do without to live in simplicity.”).

Cites (8) and (9) are found in *infra* note 146

¹⁴⁴ PHILADELPHIENSIS VII, PHILADELPHIA INDEPENDENT GAZETTEER (Jan. 10 1788), *reprinted in* 15 DOCUMENTARY HISTORY 338.

¹⁴⁵ Edmund Randolph, Speech to the Virginia Ratification Convention (June 6, 1788), *in* 3 ELLIOT’S DEBATES 74.

¹⁴⁶ (8) THE FEDERALIST NO. 35, at 217 (Alexander Hamilton) (first published January 5, 1788) (saying that in a country of small commercial capital, a merchant is often under a necessity of keeping prices down, in order to effect a more expeditious sale); (9) Amendments to the Constitution Recommended by the Massachusetts Ratification Convention (Feb. 6, 1788), *in* 2 ELLIOT’S DEBATES 177 (recommending that Congress erect no company of merchants with exclusive advantages of commerce).

not to the country or retail storekeepers.¹⁴⁷ When tax issues (35 cites), mercantilist restrictions (68 cites) and miscellaneous (9 cites) are combined, deep-water shipping is the reference in 112 or 82% of the cites. “Commerce” within the Constitutional debates referred primarily to Atlantic Ocean shipping.

There is one odd-man-out quote, on land but at the border, referring to the border fur trade. The French consulate wrote home in French saying that the Constitution would induce the British to leave the frontier posts, in conformity with the Treaty of Paris, and that would leave commerce in furs almost exclusively to the United States.¹⁴⁸ The reference might be to the trapping of furs, akin to manufacturing, or to trade with the Indians. It seems also to reflect an especially French perspective given that French North American empire had been active in fur trading. The reference, however, is surely is not a reference to deep water shipping.

B. Fairness between States.

¹⁴⁷ See, e.g., Robert Morris, Report of the Office of Finance, July 29, 1782, in 22 JCC 432 (Aug. 5, 1782)(saying that this country has always worked off of credit: “The Merchants in Europe trusted those of America. The American Merchants trusted the Country Storekeepers, and they the People at large.”); George Mason, Speech before the Federal Convention (Sept. 10, 1787), in 2F ARRAND’S RECORDS 639-640 (Mason Notes)(saying that two-thirds vote requirement will produce mutual moderation between North and South). Accord, GORDON WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 66 (1992)(arguing that in colonial times “merchants” were only the big importers). Country storekeepers might keep “merchandise” under these definitions but they are not “merchants.”

¹⁴⁸ Letter from Comte de Moustier to Comte de Montmorin (May 29, 1788), in 18 DOCUMENTARY HISTORY 145

Coastal shipping or other trade between the states shows up in only 23 or 17% of the sampled quotes, and for many of those there is no remedy attached.¹⁴⁹ A subset of 13 uses of “commerce” refers to trading between the states¹⁵⁰ and a subset of 10 justifies other enumerated restrictions on state abuses by calling them “commerce issues.”

¹⁴⁹ The percentages within the sample have only a suggestive power as to how important the issues were relative to each other. Number of cites is not an indication of intensity of feeling, as indicated for instance by the fact that three of the four most mentioned programs never got close to enactment.

¹⁵⁰ (1) MASSACHUSETTS GAZETTE (July 8, 1787), *reprinted in* 18 DOCUMENTARY HISTORY 391 (saying that when the government can pay its debts “[e]ven the circulation of the interest may become a national blessing, by increasing the means for commerce”); (2) Letter from Roger Sherman & Oliver Ellsworth to Governor Huntington (Sept. 26, 1787), *in* 3 DOCUMENTARY HISTORY 352 (arguing that restrictions on state debtor relief legislation was thought necessary as a security to commerce, in which the interest of foreigners as well as the citizens of different states may be affected); (3) James Wilson, Pennsylvania Ratification Convention (Dec. 7, 1787), *in* 2E LLIOY’S DEBATES 497 (complaining that merchants will tell you that they can trust their correspondents without law; but they cannot trust the laws of the state in which their correspondents live); (4) THE FEDERALIST NO. 22, at 137 (Alexander Hamilton)(first published December 14, 1787) (arguing that if the Constitution is not ratified, states will impose tolls on inter-state transportation as the German states do on their rivers); (5) AGRIPPA VIII, MASSACHUSETTS GAZETTE (Dec. 25, 1787), *reprinted in* 5D OCUMENTARY HISTORY 515, 516 (saying that commerce between diverse states is “the bond of union” among the states); (6) Governor Edmund Randolph’s Reasons for not Signing the Constitution, Richmond, Virginia (Dec. 27, 1787), *in* 1 DEBATE ON THE CONSTITUTION 602 (saying that general government needs to the supreme arbiter for adjusting contention among the states, especially in commerce, which probably creates greatest discord); (7) THE FEDERALIST NO. 35, at 217 (Alexander Hamilton) (first published January 5, 1788) (saying that in a country of small commercial capital, a merchant is often under a necessity of keeping prices down, in order to effect a more expeditious sale); (8) THE FEDERALIST NO. 42, at 283 (James Madison) (first published January 22, 1788) (saying that a defect of power in the existing Confederacy is the power to regulate the commerce between its several members); (9)

1. Tolls on Interstate Commerce?

It has been said that creation of a common market allowing free trade within the states was *the* purpose or at least a primary cause of the Constitution. In 1824, Justice William Johnson argued that “[i]f there was any one object riding over every other in the adoption of the constitution, it was to keep commercial intercourse among the states free from all invidious and partial restraints.”¹⁵¹ To this day it is commonly echoed that the

NEWPORT HERALD (Feb. 7, 1788), *reprinted in* 16 DOCUMENTARY HISTORY 512 (complaining that Virginia’s January 1788 impost imposed prohibitive rates on *American* goods and commodities); (10) PUBLICOLA: ADDRESS TO THE FREEMEN OF NORTH CAROLINA, STATE GAZETTE OF NORTH CAROLINA (Mar. 27, 1788), *reprinted in* 16 DOCUMENTARY HISTORY 495 (saying that if North Carolina does not ratify, the United States will treat us as foreigners, and will preclude us from all commerce with them and annihilate our trade); (11) Edmund Randolph, Virginia Ratification Convention (June 6, 1788), *in* 9 DOCUMENTARY HISTORY 985 (saying that the commercial regulations between us and Maryland have prevented reprisals on each other); (12) PHOCION, UNITED STATES CHRONICLE (PROVIDENCE, R.I.) (July 17, 1788), *reprinted in* 2 DEBATE ON THE CONSTITUTION 529 (saying that if we should join the new Confederacy, our former inland commerce will be restored); (13) James Madison, “Preface To Debates in the Convention of 1787” (circa 1830s), *in* 3F ARRAND’S RECORDS 548 (saying that Connecticut has taxed imports from Massachusetts higher than imports from Great Britain and some states’ Navigation laws have “treated the Citizens of other States as aliens.”)

¹⁵¹ *Gibbons v. Ogden*, 22 U.S. (8 Wheat) 1, 231 (1824)(William Johnson, J. concurring). Justice Johnson also described the regulation of commerce as the “immediate cause of the Constitution.” *Id.*, at 224. Many of Justice Johnson’s cites are to arguments surrounding the Articles of Confederation, which included a mandate that states not discriminate against out-of-state Americans. As noted in the text that follows, Justice Johnson’s comments are not a fair description of the effect of the Constitution, but they are a fair description of a movement for nationalization and against balkanization of the states, which includes the adoption of the Articles.

major purpose of the Constitution was to prevent protectionist economic policies among the states and to establish a common market with free trade across state borders.¹⁵²

Reducing barriers on inter-state trade, however, was not an important part of the Constitutional debates. The major reason why not is that the goal had already been mostly achieved and was not challenged. The Articles of Confederation had already prohibited any state from imposing a “duty, imposition or restriction” on any out-of-state

¹⁵² H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533, 535 (1949)(saying that a “chief occasion” of the commerce clause was “the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation” and that the *sole* purpose for which Virginia initiated the movement which ultimately produced the Constitution was to allow Congress to examine the trade of the states and consider a uniform system of commercial regulation); C&A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677, 1698 (1994) (Souter, J., dissenting)(describing the dormant commerce clause as patrolling an American “common market” premised on the economic interdependence of the states); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980) (same); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350 (1977) (same); *see* Patrick Garry, *Commerce Power*, OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 167 (Kermit Hall, ed. 1992) (saying that a “strong impetus for calling the Constitutional Convention of 1787 was the need for national controls over the nation’s commerce which had become chaotic as many states had erected barriers to interstate trade in an effect to protect business enterprise for its own citizens); Winkfield F. Twyman, Jr., *Justice Scalia and Facial Discrimination: Some Notes on Legal Reasoning*, 18 VA. TAX REV. 103, 108 (1998) (arguing that the Articles of Confederation had been unable to stem disruptive protectionism among the several states, thus threatening the life of the infant republic); Jim Chen & Daniel J. Gifford, *Law as Industrial Policy: Economic Analysis of Law in a New Key*, 25 U. MEM. L. REV. 1315, 1323-24 (1995) (describing the desire to break down interstate trade barriers as the impetus to political union created by the Constitution)..

citizens that it did not impose on its own inhabitants.¹⁵³ The states seem to have followed the norm well enough that the issue did not make it among the issues the debaters were most concerned about. Protecting out-of-state individuals against abuse or discrimination was an established and important norm in the debates, but the norm shows up almost entirely in issues other than inter-state barriers. As one superb review of the evidence put it, “the thing that strikes one’s attention in seeking reference to interstate commerce is their paucity.”¹⁵⁴

Consistently, when Madison recorded the Convention’s agreeing to the commerce clause, without discussion or opposition, on August 16, 1787, he described the clause as the “[c]ause for regulating commerce with foreign nation and &c.” Regulation of commerce among the states shows up only within the “&c.”

In retrospect over 40 years later, moreover, Madison said that the “power to regulate commerce among the several States” arose solely to prevent the commercial deep-water-harbor states (e.g., New York) from abusing their power by taxing the non-commercial states (e.g., Connecticut and New Jersey).¹⁵⁵ Federalization of the impost is not the only issue that shows up under inter-state commerce in the original debates, but since none of the mercantilist restrictions were adopted, the impost is the only issue with any continuing importance. If regulation of commerce is (mostly) synonymous with

¹⁵³ ARTICLES OF CONFEDERATION, art. IV (providing that the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein “all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively”).

¹⁵⁴ Abel, *supra* note 8, at 470.

¹⁵⁵ Letter from James Madison to Joseph C. Cabell (Feb. 13, 1829), *in* 3 FARRAND’S RECORDS 478.

federalization of the state imposts, then there is no (significant) room in it for programs addressing tolls or trade barriers between the states.

The Federalists did use the specter of trade barriers to scare voters toward ratification of the Constitution. There are two cites in the sample arguing that if the Constitution is not ratified, then duties will arise on interstate commerce: In Federalist No. 22, Hamilton argued that if the Constitution were not ratified, the various states would impose multiple duties on inter-state transportation, much as the separate German states imposed tolls on the great rivers that flow through Germany.¹⁵⁶ “Publicola” speaking in North Carolina argued that if North Carolina did not ratify, then the other states would “treat us as foreigners” and preclude commerce with them or impose imposts that would annihilate our trade.¹⁵⁷ Rhode Island ratified the Constitution in 1790 in large part in reaction to the very real threat of facing an impost or embargo on goods going from Rhode Island to any of the states of the Union.¹⁵⁸ The impetus of the complaints, however, is not to the barriers under the Articles, but rather as a threat of what might happen if the unity of the United States falls apart. Hamilton’s example of

¹⁵⁶ THE FEDERALIST NO. 22, at 137 (Alexander Hamilton) (first published December 14, 1787).

¹⁵⁷ PUBLICOLA: ADDRESS TO THE FREEMEN OF NORTH CAROLINA, STATE GAZETTE OF NORTH CAROLINA (Mar. 27, 1788), reprinted in 16 DOCUMENTARY HISTORY 495.

¹⁵⁸ Bruce Ackerman & Neal Kumar Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 538 (1995) (attributing Rhode Island’s ratification heavily to Senate passed bill that would prohibit Rhode Island ships in American harbors and American ships in Rhode Island harbors); John Page (Va. Federalist later Republican); John P. Kaminski, *Rhode Island: Protecting State Interests*, in RATIFYING THE CONSTITUTION at 385 (Michael Allen Gillespie & Michael Lienesch, eds. 1989)(same); Speech to the House of Representatives (May 26, 1790), in 1 ANNALS OF CONGRESS 1673 (opposing Senate passed bill that would embargo all goods coming from Rhode Island).

inter-state barriers came from the German empire, not here.¹⁵⁹ Tolls on inter-state commerce would require not just a failure to ratify the Constitution, under Hamilton’s argument, but also a repeal of the Articles of Confederation prohibition on interstate barriers, as well as an over-riding of the “genius of the American people.”

Consistent with the norm and with the mandate of the Articles, the state imposts seem almost always to have exempted American source goods from tax.¹⁶⁰ The New York impost that was a major irritant to its neighbors exempted goods and merchandise of the growth and manufacture of the United States.¹⁶¹ The Pennsylvania impost, which also drained New Jersey, also had an exemption for goods of the “growth, produce or manufacture of the United States or any of them.”¹⁶² The Massachusetts impost did the same.¹⁶³

There were violations of the norm. Before 1788, Virginia had had a 1% impost on goods from “any port or place whatsoever.”¹⁶⁴ Virginia also did not exempt vessels

¹⁵⁹ THE FEDERALIST NO. 22, at 137 (Alexander Hamilton) (first published December 14, 1787).

¹⁶⁰ FORREST McDONALD, *NOUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 18 (1985)(saying sister states were exempted from restrictions against foreigners); Kitch, *supra* note 42, at 18-19 (saying the only example of a discriminatory state tax was New York’s attempt to prevent end runs around its anti-British tax); William Frank Zarnow, *New York Tariff Policies, 1775-1789*, 37 *New York History: Proceedings of the New York Historical Association* 40, 47 (1956)(New York exemptions).

¹⁶¹ 1 *Laws of the State of NY (1774-84)*, March 22, 1784, p. 599, ch x, II.

¹⁶² Act of December 23, 1780, ch. 190, section 21, *First Laws of the Commonwealth of Pennsylvania* 427 (1984).

¹⁶³ Act and Laws of the Commonwealth of Massachusetts, 1783, ch. 12, p. 17.

¹⁶⁴ 11 *HENNINGS STATUTES AT LARGE OF VIRGINIA*, ch. 38, §14 p. 70 (1781).

from other states from its tonnage fees—the user fee’s for the harbor maintenance.¹⁶⁵ In 1788, Virginia was shamed into adopting the usual exemption for American-source goods, and it also raised the rate of tax to 3% at the same time.¹⁶⁶ A Rhode Island newspaper complained that Virginia’s impost imposed prohibitive rates on American goods,¹⁶⁷ although by the time of the report, Virginia had both tripled her impost from 1% to 3% and given all goods of American growth or manufacture an exemption. Prior to the 1788 revision, the Virginia 1% tax is a violation of the normal rule that goods of American growth or manufacturer should not bear state impost, and it seems to be the most serious violation.

New York had tried to prevent end-runs around its impost on foreign imports by imposing tax, at four times the normal rate, on foreign-source goods coming into New York from Connecticut and New Jersey.¹⁶⁸ The target is smuggled foreign imports, however, and not goods grown or made in Connecticut or New Jersey. New York had the normal exemption for American source goods. Since neither neighbor had a deep-water port, the tax at issue would have affected smugglers who unloaded the deep water vessels offshore onto small boats. Given that it was only a 2-1/2% impost that was being avoided, and that New York harbor was very convenient, the New York penalty tax (at

¹⁶⁵ 11 HENNING'S STATUTES AT LARGE OF VIRGINIA, ch. 8, §8 p. 121-122 (1781).

¹⁶⁶ 12 HENNING'S STATUTES AT LARGE OF VIRGINIA, ch. 1, §5 p. 416 (1788).

¹⁶⁷ NEWPORT HERALD (Feb. 7, 1788), *reprinted in* 16 DOCUMENTARY HISTORY 512 (complaining that Virginia’s January 1788 impost imposed prohibitive rates on *American* goods and commodities.)

¹⁶⁸ 1 Laws of the State of NY (1774-84), March 22, 1784, p. 599, ch x, II. See Kitch, *supra* note 42, at 18-19 for a description of the controversy.

10%) on foreign goods coming in from its neighbors could not have been very important. Most shippers would have used the New York docks and paid its fees.

Madison in the 1830s said that he understood that Connecticut taxed imports from Massachusetts higher than imports from Great Britain and that some states' Navigation laws have treated the Citizens of other states as aliens,¹⁶⁹ but if so, there is no evidence of it in the 1787 contemporaneous debates.

Still, all of the violations of nondiscrimination seem to be not very important exceptions. The 1% Virginia pre-1788 impost seems to be as bad as they get. Even today, moreover, state discrimination against out of state citizens remains a considerable problem. State legislators are always looking for ways to protect the in-state citizens who elect them and to tax or restrict the out-of-state citizens who do not.¹⁷⁰ The pre-Constitution situation, thus, should not be judged from the norm of perfect nondiscrimination. Albert Abel's conclusion that there is a "paucity" of references to

¹⁶⁹ James Madison, "Preface To Debates in the Convention of 1787" (circa 1830s), in 3 FARRAND'S RECORDS 547.

¹⁷⁰ For a review of the legal literature on restraining state discrimination against out-of-state citizens, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §6-2, 1029-1043 (3d ed. 2000). Compare Richard Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43 (1988) (defending the need of the course to prevent discrimination and to protect economic union) with Luisa Heimzeling, *The Commercial Clause*, 1995 SUP. CRT. REV. 217, 22 (expressing skepticism that the dormant commerce clause serves efficiency, democracy or national union) and Kitch, *supra* note 42 (arguing that the states bluff and posture and try to improve their position but in the long run free trade policies would inevitably have triumphed by negotiation by the states and without the warping interference from the federal government).

interstate trade in the Constitutional debates he looked at holds true in this 168 cite sample.

2. Fairness to Out-of -State Citizens Reflected Outside the Commerce Clause

Condemnation of a state’s discrimination against out-of-state citizens was strongly felt at the time, but the norm shows up in the constitutional debates mostly on issues besides the (phantom) tolls on inter-state commerce. The anti-discrimination norm was commonly used to justify goals, accomplished in the text of the Constitution outside of the commerce clause. The Constitution nationalized the state imposts, for example, relying in part on the argument that the state imposts under the Confederation allowed the states with good deep water harbors—and especially New York—to tax their uncommercial neighbors.¹⁷¹ The Constitution, similarly, prohibited export taxes to

¹⁷¹ THE FEDERALIST NO. 7, at 40 (Alexander Hamilton) (first published Nov. 17, 1787) (saying that some states—e.g. New York—have the opportunity of rendering others—Connecticut and New Jersey—tributary to them through commercial regulations by laying duties on importations); Letter from Timothy Pickering to John Pickering (Dec. 29, 1787), *in* 15 DOCUMENTARY HISTORY 177 (attacking New York because it put into her own treasury all the duties arising on the goods consumed in Connecticut, New Jersey, Vermont and western Massachusetts); THE FEDERALIST NO. 42, at 283 (James Madison) (first published January 22, 1788) (saying that power to regulate commerce between the states was adopted to prevent commercial states from collecting improper and unfair contributions from their noncommercial neighbors); Letter from James Madison to J.C. Cabell (Feb. 13, 1829), *in* 3 FARRAND’S RECORDS 478 (saying that power to regulate commerce grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as preventative provision against injustice among the States themselves); James Madison, “Preface to Debates in the Convention of 1787” (circa 1830), *in* 3 FARRAND’S RECORDS 542 (listing as cause of the Constitution that some of the States had no convenient ports for foreign commerce, were subject to be taxed by their neighbors, through whose ports, their commerce was carried on. “New Jersey,

prevent the deep-water-harbor “commercial” states from taxing export goods produced in neighboring “uncommercial” states.¹⁷² The Constitution prohibits “preference to the ports of one state over those of another,”¹⁷³ because such port preferences would affect the States unevenly.¹⁷⁴

Consistently, the Constitution’s adoption of protection for creditors’ rights was justified in part in terms of justice across state lines. The Constitution, in article I, section 9, prohibits states from impairing contracts and from issuing paper money, and in the Constitutional debates, those prohibitions were said to be necessary to prevent

placed between Philadelphia and New York, was likened to a Cask tapped at both ends.”); *id.*, at 547 (saying that Rhode Island was well known to have been swayed by “an obdurate adherence to an advantage which her position gave her of taxing her neighbors through their consumption of imported supplies.”)

¹⁷² Gouverneur Morris, Speech in the Federal Convention (Aug. 21, 1787), *in* 2 FARRAND’S RECORDS 360 (Madison Notes)(arguing that without prohibition on state export taxes, deep-water harbor States will tax the produce of their uncommercial neighbors); James Wilson, Speech to the Federal Convention (Aug. 16, 1787), *in* 2 FARRAND’S RECORDS 307 (Madison Notes)(opposing prohibition on tax on exports but dwelling on the “injustice and impolicy of leaving N. Jersey Connecticut &c any longer subject to the exactions of their commercial neighbours”); Roger Sherman, Speech at the Federal Convention (Aug. 16, 1787), *in* 2 FARRAND’S RECORDS 308 (Madison Notes)(supporting prohibition of tax on exports, but saying that the oppression of the uncommercial States by commercial states was guarded against by the power to regulate trade between the States.)

¹⁷³ U.S. CONST. art. I, sec. 9, cl. 6.

¹⁷⁴ Charles Pinckney, Speech in the House of Representatives, 2 ANNALS OF CONGRESS, 16th Cong., 1st Sess. 1318 (Feb. 14, 1820) (arguing that congressional power over inter-state commerce by water between the states was given to prevent, among other things, port preferences).

aggressions on the rights of other States”¹⁷⁵ and “injury to the citizens of other States.”¹⁷⁶ Commerce in North Carolina, William Davie claimed, has been ruined by iniquitous laws that discourage industry by legalizing “the payment of just debts by paper, which represents nothing, or property of very trivial value.”¹⁷⁷ Wicked Rhode Island had attempted to require out-of-state creditors to accept Rhode Island dollars, worth twenty cents on the dollar, as if they were worth face value.¹⁷⁸ Paper money was a trick, Gouverneur Morris explained, “by which Citizens of other States may be affected.”¹⁷⁹

Other prohibitions on state debtor relief were similarly thought necessary as a security to commerce against abuse by the states, stated Roger Sherman and Oliver Ellsworth, in that the “interest of citizens of different states may be effected.”¹⁸⁰ Merchants could trust their local correspondents in other states, James Wilson told Pennsylvania, but they could not trust their property to the laws of the state in which their

¹⁷⁵ James Madison, Vices of the Political System of the United States (Apr. 1787), *in* 9 MADISON PAPERS 350.

¹⁷⁶ THE FEDERALIST NO. 44, at 301 (James Madison) (first published January 25, 1788) (arguing if states were given the power to issue money “the intercourse among them would be impeded; retrospective alterations in its value might be made, and thus the citizens of other States be injured; and animosities kindled among the States themselves”).

¹⁷⁷ William R. Davie, North Carolina Ratification Convention (July 24, 1788), *in* 4 ELLIOT’S DEBATES 20.

¹⁷⁸ IRVING POLISHOOK, RHODE ISLAND AND THE UNION, 1774-1795, at 179 (1969).

¹⁷⁹ Gouverneur Morris (July 17, 1787), *in* 2F ARRAND’S RECORDS 26 (Madison Notes).

¹⁸⁰ Letter from Roger Sherman & Oliver Ellsworth to Governor Huntington (Sept. 26, 1787), *in* 3 DOCUMENTARY HISTORY 352.

correspondents live.¹⁸¹ Similarly, federal courts were given judicial power over suits between citizens of different states, Madison told Virginia, to favor the commercial states by allowing creditors to avoid state courts, where the creditor remedies might be “imaginary and nominal.”¹⁸²

“Commerce” between or within the states was also used to justify other federal powers enumerated in the Constitution’s description of federal powers. In the Ratification debates, for instance, *The Federalist* referred to the coining of money and to federal bankruptcy law¹⁸³ as “commerce” issues. Hamilton said that the Coinage and regulation of weights and measures, allowed by clause 4 of Article I, section 8, were appropriate federal powers, just as the King of England had such powers as the “arbiter of commerce.”¹⁸⁴ For the national powers allowed elsewhere, however, the commerce clause is not carrying any extra weight.

The norm of justice among the states was also cited in failed attempts to defeat provisions that the Constitution in fact adopted. The Constitution allows Congress to

¹⁸¹ James Wilson, Speech to the Pennsylvania Ratification Convention (Dec. 7, 1787), in 2 ELLIOT’S DEBATES 492.

¹⁸² James Madison, Debate in the Virginia Ratification Convention (June 20 1788), in 3 ELLIOT’S DEBATES 534, 535.

¹⁸³ THE FEDERALIST NO. 42, at 287 (James Madison) (first published January 22, 1788) (saying that “[t]he power of establishing uniform laws of bankruptcy [is properly federal because it] is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States... .”)

¹⁸⁴ THE FEDERALIST NO. 69, at 470 (Alexander Hamilton) (first published March 14, 1788) (saying that the King of England in his capacity as “the arbiter of commerce” can establish markets and fairs, regulate weights and measures, coin money, and authorize or prohibit the circulation of foreign coin).

enact an American Navigation Act, giving United States vessels a monopoly on shipping American commodities by simple majority vote of the Congress. Opponents wanted to require a two-thirds vote for a Navigation Act so that a “few rich merchants” from New York, Philadelphia and Boston could not “plunder the South.”¹⁸⁵

Sometimes the norm against discrimination lead to over-reaction. The Framers worried that “tonnage fees”—imposed on ships according to their weight to pay for the upkeep of the harbor, wharves and lighthouses—might be used to discriminate against out-of-staters. The Constitution prohibits states from imposing tonnage, in absence of Congressional approval.¹⁸⁶ Some discrimination makes sense because the tonnage rates appropriate for vessels carrying full cargoes across the Atlantic that visited no more than twice a year would be far too high for local or short-haul vessels that were in and out of the harbor with half cargoes many times a week. The states, moreover, would be expected to dredge the harbors, erect the light houses and keep up the piers and wharves by state taxes alone and tonnage was a fine way to get the users to pay for the state’s services.¹⁸⁷ The prohibition on tonnage was thus probably an overreaction, driven by the

¹⁸⁵ George Mason, Speech before the Federal Convention (Sept. 15, 1787), *in* 2F ARRAND’S RECORDS (Madison Notes). *Cf.* Letter from Richard Henry Lee to George Mason (Oct. 1, 1787), *in* 13 DOCUMENTARY HISTORY 28 (“Whilst the Commercial plunder of the South stimulates the rapacious Trader.”)

¹⁸⁶ U.S. CONST. art. I, sec. 10. *See* James Madison, Speech at the Federal Convention (Sept. 15, 1787), *in* 2 FARRAND’S RECORDS 625 (arguing that he was convinced that the regulation of Commerce was in its nature indivisible and ought to be wholly under one authority).

¹⁸⁷ *See* James McHenry, Notes of the Federal Convention (Sept. 4, 1787), *in* 2F ARRAND’S RECORDS 504 (McHenry notes)(saying that it “does not appear that the national legislature can erect light houses or clean

strong norms of nondiscrimination and anger at the rogue states who could be expected to misbehave if allowed to. In sum, the norm that states had to respect the rights of citizens of other states was strong in the Constitutional debates, but in these illustrations, it shows up as an argument for or against other provisions and not as an attack on any existing interstate tolls or restrictions.

As the Constitution was developing, Madison himself seems to have considered his mercantilist port preferences project to be more important than the anti-discrimination rule. When Virginia passed its port restrictions in 1784, it added an exemption for Virginia-owned ships, which could dock anywhere they wanted. Madison confessed to Monroe that applying the port restriction to out-of-state citizens, but not to Virginia citizens, was a violation of the Articles of Confederation, an “*erratum*”, which “will no doubt be rectified.”¹⁸⁸ The comment is just cavalier enough about the violation of the Articles to show that in Madison’s mind, the restrictive, port preference project was more important than the anti-discrimination norm.

The Constitutional document, in fact, arguably does some harm to a barrier free market because it failed to bring over the Articles’ express prohibition on discrimination. The norm against trade barriers was strong through the period, and was not in contention, but apparently the very lack of contention meant that the Constitutional drafters did not repeat the Articles’ prohibition of discrimination. The Articles of Confederation,¹⁸⁹ but

out or preserve the navigation of harbours”)(emphasis omitted). *See also* McHenry and Carrol (Sept. 15, 1787), *in* 2F ARRAND’S RECORDS 625 (Madison notes)(moving unsuccessfully that “no State shall be restrained from laying duties of tonnage for the purpose of clearing harbours and erecting light-houses.”)

¹⁸⁸ Letter from James Madison to James Monroe (Aug. 20, 1785), *in* 8 MADISON PAPERS 102.

¹⁸⁹ ARTICLES OF CONFEDERATION, art. IV.

not the Constitutional text, prohibit a states' imposing a tax or restriction on an out-of-state citizen it is unwilling to impose on its citizen. Arguably the omission did little harm. The Courts have actively developed what is called the "dormant commerce clause" to prevent discrimination directed toward out-of-staters.¹⁹⁰ Some commentators have, however, opposed application of an anti-discrimination norm, at least in its strongest versions, on the ground that the Constitution did not include it in its text.¹⁹¹ Congress can act to regulate commerce between the states, because the specific words of clause 3, the commerce clause, gives Congress the power, but the dormant commerce clause, giving the judiciary the responsibility of enforcing nondiscrimination by the states in absence of federal legislation, must rest on norms that were well expressed in the Articles but not in the Constitution.¹⁹²

¹⁹⁰ See reviews cited at *supra* note 170.

¹⁹¹ Justices Scalia and Thomas would be willing to roll back the dormant commerce clause to reach only discriminations on the face of a state statute, in part because there is no authority for anti-discrimination in the text. *Oklahoma Tax Commission v. Jefferson Lines Inc*, 115 S.Ct. 1131, 1246 (1995); *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 94-95 (1987). See also Lino Graglia, *The Supreme Court and the American Common Market*, in *REGULATION, FEDERALISM AND INTERSTATE COMMERCE* 67, 70 (A. Dan Tarlock, ed. 1981)(arguing that in absence of text, policing discrimination against out of staters is a function the Court should not perform); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and Constitutional Balance of Federalism*, 1987 *DUKE L. J.* 569, 570-571 (*accord*, dormant commerce clause without basis in text or structure).

¹⁹² Mark Gergen, *The Selfish State and The Market*, 66 *TEX. L. REV.* 1097, 1117-1118 (1988) would find the prohibition against discrimination in the Article IV, section 2 language that "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States," but the language needs to be

C. Words without Controversies

There are also 21 quotes within the sample which are not attached to any remedy or in which the reference is too vague to ascertain what is meant. These quotes are not included in the 136 cites or 100%, used to determine what percentage any one advocated program represents. Indeed the quotes without controversies are undercollected, since I increasingly passed over quotes without a clear reference to a program as time went. Nonetheless, this sample gives some indication of what is out there, outside of the references to programs that I use as the baseline 100%.

Fifteen quotes in the sample, without any program attached, contrast “commerce” with either “manufacturing” or “agriculture,” at least to the extent of listing commerce separately.¹⁹³ Some of the quotes show that the Founders worried about too much

stretched to reach corporations as well as individual citizens, to reach goods as well as citizens and to focus on accomplishing an economic union, more than preserving individual “rights.”

¹⁹³ (1) James Madison, Vices of the Political System of the United States (Apr. 1787), in 9M ADISON PAPERS 351 (calling for new Constitution to fix defects of commercial affairs blocked by perverseness of particular States, including law of naturalization and of copyright, incorporations for national purposes, the providing of national universities and the building of “canals and other works of general utility”); (1) PENNSYLVANIA MERCURY (June 28, 1787), reprinted in 18 DOCUMENTARY HISTORY 210 (saying that “agriculture, manufactures and commerce, shall impart their blessings, and enrich our country”); (2) NORWICH PACKET (July 1, 1787), reprinted in 13 DOCUMENTARY HISTORY 167 (“Commerce must take the lead, agriculture next follow, and manufactures should bring up the rear”); (3) PENNSYLVANIA GAZETTE (Aug. 1, 1787), reprinted in 13 DOCUMENTARY HISTORY 182 (means of wealth are agriculture and manufactures; wealth has no business with commerce, 'till she derives it from the products of the earth, or from her own arts); (4) James Madison, Debate at the Federal Convention (Aug. 29, 1787), in 2 FARRAND’S RECORDS 452 (saying that Connecticut and New Jersey were “agricultural, not commercial States”); (5)

Elbridge Gerry, Debate at the Federal Convention (Sept. 15, 1787), *in* 2F ARRAND'S RECORDS 635 (Rufus King notes)(objecting to the Constitution because "the Power given respectg. Commerce will enable the Legislature to create corporations and monopolies"); (6) Letter from Roger Sherman & Oliver Ellsworth to Governor Huntington (Sept. 26, 1787), *in* 3 DOCUMENTARY HISTORY, 352 (arguing that state debtor relief legislation was thought necessary as a security to commerce, in which the interest of foreigners as well as the citizens of different states may be affected); (7) NOAH WEBSTER, AN EXAMINATION INTO THE PRINCIPLES OF THE FEDERAL (Oct. 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 597 (saying that landed property in England will never be sufficiently distributed, to give the powers of wholly into the hands of the people, but that here commerce and manufacturing throw a vast weight of property into the democratic scale); (8) THE FEDERALIST NO. 12, at 74 (Alexander Hamilton) (first published Nov. 27, 1787) (referring to "rivalship" between agriculture and commerce); (9) "AN AMERICAN" (TENCH COXE), TO RICHARD HENRY LEE, PHILADELPHIA INDEPENDENT GAZETTEER (Dec. 28, 1787), *reprinted in* 15 DOCUMENTARY HISTORY 165, 169 (contrasting commerce and agriculture and arguing that even in commercial states, agriculture predominates); (10) AN OLD MAN, CARLISLE GAZETTE (Jan. 2, 1788), *reprinted in* 15 DOCUMENTARY HISTORY 228 (reporting toast to an increase of the agriculture, manufactures and commerce of America); (11) CENTINEL VIII, PHILADELPHIA INDEPENDENT GAZETTEER (Jan. 2, 1788), *reprinted in* 15 DOCUMENTARY HISTORY 233 (saying that "[e]very concern of individuals will be sacrificed to the gratification of the men in power, who will institute injurious monopolies and shackle commerce with every device of avarice"); (12) THE FEDERALIST NO. 35, at 219 (Alexander Hamilton) (first published January 5, 1788) (saying that many mechanics and manufacturers are immediately connected with commerce and that merchants are their natural friends); (13) RESOLUTIONS OF THE TRADESMEN OF THE TOWN OF BOSTON, MASSACHUSETTS GAZETTE (Jan. 8, 1788), *reprinted in* 15 DOCUMENTARY HISTORY 292 (saying that if the proposed frame of government should be rejected, the small remains of commerce yet left us, will be annihilated, the various trades and handicrafts dependent thereon, must decay); (14) A COLUMBIAN PATRIOT: OBSERVATIONS ON THE CONSTITUTION, BOSTON (Feb. 1788), *reprinted in* 16 DOCUMENTARY HISTORY 278 (saying that "there are few who do not unite in the general wish for the restoration of public faith, the revival of commerce, arts, agriculture, and industry, under a lenient, peaceable and energetick government"); (15) Charles Cotesworth Pinckney, South

commerce, as well as too little, which is consistent with mercantilism. Some, blessedly, have no specific remedy in mind. Charles Cotesworth Pinckney, for instance, adopted a physiocratic argument in South Carolina that there were only three ways for a nation to acquire wealth – the first is by war, which is “robbery.” The second is in commerce, “which is generally cheating.” The third is agriculture, which is “the only honest way.”¹⁹⁴ The theory of the Physiocrats that all other human activities were parasites upon agriculture, would, of course, have been especially attractive to the planters. The natural supremacy of agriculture under physiocratic principles, however, did not seem to have any program attached to it in America.

The usages of the word “commerce,” listed separately from “agriculture” or “manufacturing,” do not seem to preclude more inclusive definitions of “commerce.” “Regulation of commerce” is sometimes used to mean only nationalizing the state imposts¹⁹⁵ or used to justify other enumerated powers. Those usages, however, do not seem to preclude other government programs that would be allowed under broader

Carolina Ratification Convention (May 14, 1788), in 2 DEBATE ON THE CONSTITUTION 581 (saying that “there are but three ways for a nation to acquire wealth – the first is by war ... which is robbery; the second is in *commerce*, which is *generally cheating*; the third is agriculture, the only honest way”).

Justice Thomas has a sample of 12 cites in *United States v. Lopez*, 514 U.S. 549, 586 (1995) in which agriculture or manufacturing are contrasted with “commerce,” only three of which seem to overlap with this sample.

¹⁹⁴ Charles Cotesworth Pinckney, South Carolina Ratification Convention (May 14, 1788), in 2 DEBATE ON THE CONSTITUTION 581.

¹⁹⁵ See, e.g., THE FEDERALIST NO. 7, at 40 (Alexander Hamilton) (first published Nov. 17, 1787) (saying that some states—e.g. New York—have the opportunity of rendering others—Connecticut and New Jersey—tributary to them by commercial regulations by laying duties on importations).

definitions of “commerce.” “Regulation of commerce” was an omnibus term with a cloud of specific and more general references. The more specific meanings do not seem to exclude any others. Given how “utterly wrongheaded” the Physiocrats were,¹⁹⁶ in any event, it does seem quite lucky that physiocratic attitudes toward “commerce” are not the only meaning embodied in the Constitution.

Words that do not have any programs attached to them also do not seem to carry any water as a cause tending toward the adoption of the Constitution. Clause 3, for instance, gives Congress the power to regulate commerce with Indian tribes, but there were no controversies in trade with the Indians that show up in the sample. The Constitution just repeated the power allowed to the Congress by the Articles of Confederation, without treating the power as having any weight.¹⁹⁷ Regulation of trade

¹⁹⁶ Bruce Ackerman, *Taxation and the Constitution*, 99 COLUMB. L. REV. 1, 8 (1999); see EDWIN R.A. SELIGMAN, *THE SHIFTING AND INCIDENCE OF TAXATION* 125-142 (4th ed. 1921) (describing the physiocrats and their influence). Voluntary trades add value to both sides, if they are voluntary, and manufacture adds immense value to its raw materials, not all of which come from agriculture. Adam Smith’s critique, concluding that agriculture is not the exclusive source of wealth, was devastating. There is something awful about reading a distinction between agriculture and “nonproductive” activity as the Constitutional distinction, even if planters liked it. This is supposed to be a durable Constitution, interpreted sympathetically. Commerce, in any event, has other definitions in 1787 in which agriculture is not the key distinction.

¹⁹⁷ The Congressional trade with the Indians comes from the Articles of Confederation, which provided that congress had the power to regulate “the trade and managing all affairs with the Indians, not members of any of the States.” ARTICLES OF CONFEDERATION, art. IX. It was added to a draft of the commerce clause, which provided that Congress could regulate commerce with foreign nations and among the states,

with the Indians is not a substantial cause of the Constitution, even though the trade with the Indians is included in the words. So similarly other usages of “commerce,” without any program or remedy behind them can not have had substantial influence on the adoption of the Constitution.

Finally, six references to “commerce” are so general as to not give a sufficient clue about the controversy or even arena they are talking about.¹⁹⁸ Some are important, for example, George Washington’s cover letter for the Constitution citing the power to regulate commerce as one of the reasons for ratification. The interpretation here is that

on September 4, 1787 by motion of the Committee of Eleven (chaired by Brearly) and adopted without dissent. 2 FARRAND’S RECORDS 493, 498 (Madison notes).

¹⁹⁸ (1) Letter from [George Washington] the President of the Federal Convention to the President of Congress (Sept. 17, 1787), *in* FORMATION OF THE UNION (saying that desire is for general government to have the power to make war, peace, and treaties, levy money and regulate commerce); (2) Alexander Hamilton’s Conjectures About the New Constitution (Sept. 1787), *in* 1 DEBATE ON THE CONSTITUTION 9 (saying the Constitution probably would be ratified because “the good will of the commercial interest throughout the states which will give all its efforts to the establishment of a government capable of regulating protecting and extending the commerce of the Union.”); (3) THE FEDERALIST NO. 11, at 72 (Alexander Hamilton) (first published November 24, 1787) (saying that “[an] unity of commercial, as well as political interests, can only result from an unity of government”); (4) CENTINEL VI, PENNSYLVANIA PACKET (Dec. 25, 1787), *reprinted in* 15 DOCUMENTARY HISTORY 99 (opposing the Constitution by saying that people are so impatient to “reap the golden harvest of regulated commerce, that they will not take time to secure their liberty and happiness”); (5) Governor Edmund Randolph’s Reasons for not Signing the Constitution, Richmond, Virginia (Dec. 27, 1787), *in* 1D EBATE ON THE CONSTITUTION 601 (saying that the members of that Convention thought unanimously, that the control of commerce should be given to Congress); (6) THE FEDERALIST NO. 45, at 314 (James Madison) (first published January 26, 1788) (saying that the regulation of commerce is a new power, but one that few oppose).

these references are trying to talk about all cases fitting under “regulation of commerce” and that they are therefore proxies for the full universe of “commerce,” the content and mix of which are determined by the other cites in the sampling. These six too-general references are not part of the total sample used to calculate percentages for the other categories.

D. How Important was Commerce as a Cause?

The programs the advocates contemplated within the commerce clause were in total very modest. The retaliatory impost against the British and the monopoly for American vessels for American commodities were touted by the Federalists, but they were never enacted, once the Constitution was adopted, even in the overwhelmingly Federalist Congress that could do as it wished on the issue. As it turned out, even proponents of the Constitution did not really want to provoke the ire of the British and risk loss of access to the British ports, once they thought seriously about it. Port preferences were even more starkly rejected, within the Convention itself. “Regulation of commerce” was also a code word to justify replacing the 2-1/2% New York state impost with a 5% federal impost, but that replacement was needed to pay Revolutionary War debts and restore the public credit, and it should be understood therefore as a tax and war debt issue, adequately covered by the tax powers clause. There is no purely commerce clause program that had any legs.

Given the modest original size of the commerce clause, it is ironic that the commerce clause has come to be viewed as the general jurisdictional boundary of the federal government. The commerce clause seems in strict historical context no more important than the next clause, clause 4, which authorized Congress to make a national

bankruptcy law. The bankruptcy power remained, a “mere dead letter,” as Story’s Commentaries put it in 1833.¹⁹⁹ A national bankruptcy act was not passed until 1898,²⁰⁰ considerably too late for the bankruptcy to be a live cause of the Constitution. Given the 110 year delay, the bankruptcy clause can not be called a significant cause of the Constitution, although it is listed in section 8. The same is true for the commerce clause. Arguably recognizably modest clauses, like punishing counterfeiting (clause 6) and establishing post roads and post offices (clause 7) are more meaningful historical causes.

Given its modest original size, the modern importance of the commerce clause comes, much like a panda’s thumb, because of evolutionary growth. A panda’s thumb is apparently not a thumb at all, but is rather an evolutionary development from a once-tiny wrist bone, which evolved over time into a sharp tool to strip bamboo.²⁰¹ Its humble roots do not mean that it is illegitimate. Pandas, for example, do need their bamboo-stripping “thumbs” for survival. So similarly, the growth of the commerce clause was driven by “the necessities of the Union”²⁰² and the demand for a federal government able to serve a national economy. Evolution for survival is not an illegitimate process.

¹⁹⁹ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 3:§§ 1105 (1833), *reprinted in* 2 THE FOUNDERS’ CONSTITUTION 639, 641.

²⁰⁰ *See, e.g.,* Rhett Frimet, *The Birth of Bankruptcy in the United States*, 96 COM. L.J. 160 (1991) (describing the history of American bankruptcy legislation and proposals through the Bankruptcy Act of 1898.)

²⁰¹ STEPHEN JAY GOULD, THE PANDA’S THUMB: MORE REFLECTIONS IN NATURAL HISTORY (1980).

²⁰² Edmund Randolph, Draft of the Constitution for the Committee of Detail, Federal Convention, July-August 1787, 2 Farrand 142.

Still, the modesty of the commerce power makes it difficult to lean on it to explain the Constitutional Revolution. The Constitution replaced the sovereignty of the states with the sovereignty of the people, and created a new government in the federal level supreme over the states. Clause 1, the first power listed, gives the Federal government the power to tax to provide for the common defense and general welfare. The tax power gave effect and consequence to the federal government. The explanation for the Constitutional Revolution thus plausibly resides in clause 1, tax to provide for common defense and general welfare, rather than in clause 3, the commerce clause. The power to adopt programs that the country did not in fact want and Constitutional language with no significant programs or grievances attached to it gives no meaningful help in explaining why the Founders created the Constitutional revolution. The important causes of the Constitution have to be lie elsewhere.