

WILLIAM & MARY BILL OF RIGHTS JOURNAL

VOLUME 13

OCTOBER 2004

ISSUE 1

THE PANDA'S THUMB: THE MODEST AND MERCANTILIST ORIGINAL MEANING OF THE COMMERCE CLAUSE

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INTRODUCTION

The third power listed in 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 In the original debates over adoption of the Constitution, "regulation of commerce" was used, almost exclusively, as a cover of words for specific mercantilist proposals related to deep-water shipping and foreign trade. The Constitution was written before Adam Smith, laissez faire and free trade came to dominate economic thinking² and the Commerce Clause draws its original meaning from the preceding mercantilist tradition. All of the concrete programs intended to be forwarded by giving Congress the power to regulate commerce were restrictions on international trade giving subsidy or protection to favored domestic merchants or punishing imports or foreign producers.³ Neither trade with the Indians nor interstate commerce shows up as a significant issue in the original debates.

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¹ U.S. CONST. art. I, § 8, cl. 3.

² See, e.g., JOHN E. CROWLEY, *THE PRIVILEGES OF INDEPENDENCE: NEOMERCANTILISM AND THE AMERICAN REVOLUTION* xi (1993) (stating that a book about the influence of Smith on the American revolutionary generation would be "very short"); DOUGLAS IRWIN, *AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE* 80 (1996) (Adam Smith's free trade ideas were published in his 1776 work, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS*).

³ Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 448 (1941).

None of the nontax proposals covered by “regulation of commerce” ever amounted to much even once the ratified Constitution gave Congress the authority to adopt them. “Regulation of commerce” was used to describe a proposal to nationalize the state “imposts” or tariffs on imports and that was important. The federal government desperately needed revenue to pay the Revolutionary War debts. Indeed, giving the federal government power to tax for the national defense is a major purpose for the Constitution.⁴ But the Tax Clause⁵ gives Congress the power to tax for the common defense and general welfare and that seems adequate to justify the federal impost without the power to regulate commerce. If the impost is treated, reasonably, as a tax rather than a commerce power, then the other programs covered by “regulation of commerce” did not prove to have enough support for adoption by Congress, even once the Constitution authorized them. The failure of the proposals acts a referendum, as close to the Constitution as we can expect, that shows that the programs intended by “regulation of commerce” did not have majority support. Programs that a majority did not want even once allowed cannot be used as important causal weights in explaining why the Constitution was adopted. The power to regulate commerce was written to authorize specific mercantilist proposals that the country did not in fact want. The Commerce Clause has been aptly described as “a modest little power.”⁶

Many of the things now said about the Commerce Clause are not viable descriptions of the original meaning. The Commerce Clause is now said to be a “strong impetus for calling the Constitutional Convention.”⁷ That interpretation cannot stand in the face of the failure to adopt the concrete programs that “regulation of commerce” was originally meant to describe. It is not uncommon to find descriptions of the constitutional document as “a part of the liberal, free trade tradition.”⁸ The programs articulated under “regulation of commerce” in the

⁴ See, e.g., MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE UNITED STATES CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* (2003) (arguing that the Constitution was adopted to give federal government revenue to provide for the national defense). CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION* (forthcoming 2005) (arguing that revenue for defense was a proximate cause of the Constitution, but tax to restore the public credit turned out to be too easy for tax to be a sufficient explanation for the revolutionary changes the Constitution effected).

⁵ U.S. CONST. art. I, § 8, cl. 1. Imposts must, however, have uniform rates across the states. *Id.*

⁶ Abel, *supra* note 3, at 481.

⁷ Robert J. Steamer, *Commerce Power*, in *OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 167 (Kermit L. Hall ed., 1992).

⁸ 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).

original debates, however, were restrictions on trade under the mercantilist tradition that preceded free trade. It is often now stated that the 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.⁹ Barriers on interstate commerce, however, were not a notable issue in the original debates.

The Commerce Clause has evolved into a significantly greater and very different power. Commentators now describe the Commerce Clause as “plenary”¹⁰ and as “the single most important source of national power.”¹¹ 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.¹² The Founders did express the expectation that the new federal government would be able to act within the appropriate national sphere, that is, that it would provide for the “common Defense and general Welfare,”¹³ but very little of that expectation falls under the original meaning of the Commerce Clause.

Given its modest original meaning, the modern importance of the Commerce Clause comes, much like a panda's thumb, because of evolutionary growth. A panda's thumb is not a thumb at all, but is rather a development from a once-tiny wrist bone, which evolved over time into a sharp tool to strip bamboo.¹⁴ Its humble roots do not mean that it is illegitimate. Pandas do need their bamboo-stripping

⁹ See, e.g., *Baldwin v. G.A.F. Seeling, Inc.*, 294 U.S. 511, 522 (1935).

¹⁰ BERNARD SCHWARTZ, *CONSTITUTIONAL LAW: A TEXTBOOK* 105 (2d ed. 1979) (quoting *Nat'l League of Cities v. Usery*, 426 U.S. 833, 840 (1976)).

¹¹ *Steamer*, *supra* note 7, at 167; accord SCHWARTZ, *supra* note 10, at 105 (stating that the Commerce Clause is the “source of the most important powers that the Federal Government exercises”).

¹² See, e.g., *Nat'l League of Cities*, 426 U.S. at 867 (Brennan, J., dissenting).

¹³ “A Citizen of New York” [John Jay], *Address to the People of the State of New York* (April 15, 1787), in 17 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 111 (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter *DOCUMENTARY HISTORY*] (“[T]he Convention concurred in opinion with the people that a national government *competent to every national object*, was indispensably necessary.”); Alexander Hamilton, *Speech to the New York Ratification Convention*, June 28, 1788, in 2 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 364 (Jonathan Elliot ed., 1836) [hereinafter *ELLIOT'S DEBATES*] (stating that the division between federal and state governments is legislative, not constitutional, because it would be too extensive and intricate to fix it in the Constitution and because changing circumstances would make it necessary to change it). See Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, *CONST. COMMENT.* (forthcoming 2005) (arguing that the constitutional text was intended to give Congress the power to legislate for the common defense and general welfare by any tool).

¹⁴ STEPHEN JAY GOULD, *THE PANDA'S THUMB: MORE REFLECTIONS IN NATURAL HISTORY* (1980).

“thumbs” for survival. So similarly, the growth of the Commerce Clause was driven by the “necessities of the union”¹⁵ and the demand for a federal government able to serve the national needs. That the power to regulate commerce was once a mercantilist clause, regulating commerce by restricting it, should not bother us very much. We are no longer mercantilists. That the power to regulate commerce was once a small and very different power does not mean that the modern Commerce Clause is illegitimate. Evolution for survival is not an illegitimate process.

I. THE SAMPLE

If we want to understand historical texts, Quentin Skinner tells us, “we need to make it one of our principal tasks to situate the texts we study within such intellectual contexts as enable us to make sense of what their authors were doing in writing them.”¹⁶ The words of any historical document, including the Constitution, are always actions, attempting to find allies to accomplish a program. 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.¹⁷ “Regulation of commerce” was included in the Constitution to give the national government power to accomplish specific programs. Words do have radiating ripples beyond the specific programs, but the further we go from the rock of the programs, the less energy there is in the ripples. Even to understand the penumbra of the words, one must first understand the core programs. One can also gain only limited understanding from reading a historical text, over and over again, far removed from the context in which it was written. To understand the historical meaning, we have to look, not for the connotations or abstractions of words in the twenty-first century, but for the programs that gave the words their concrete meaning in 1787–1788.¹⁸

To determine what was meant by “regulation of commerce,” this review collects and categorizes 161 uses of the phrase “regulation of commerce” or the word “commerce” in the debates over the adoption of the Constitution. One hundred thirty-nine of those uses are associated with a specific goal or program and it is those uses that form the 100% used as a baseline to measure the relative weight of the programs, as percentages of sampled quotes. The samples come from both sides

¹⁵ Edmund Randolph, Draft of the Constitution IV, *reprinted in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 142 (Max Farrand ed., rev. ed. 1937) [hereinafter FARRAND’S RECORDS].

¹⁶ 1 QUENTIN SKINNER, *VISIONS OF POLITICS: REGARDING METHOD* 3 (2002).

¹⁷ Quentin Skinner, *Meaning and Understanding in the History of Ideas*, in MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS 57 (James Tully ed., 1988) (explaining that “contextual reading” is a way to understand text).

¹⁸ Quentin Skinner, *Motives, Intentions and the Interpretation of Texts*, in ON LITERARY INTENTION 210–21 (D. Newton de Molina ed., 1976), *reprinted in* MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS, *supra* note 17, at 55–65, 260.

of the debate and the sampling was intended to be omnivorous.¹⁹

Usually the meaning of “regulation of commerce” comes 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 the phrase. One must generally be suspicious of speeches from both sides of the ratification debates: the proponents of the Constitution understated its meaning to encourage adoption and the opponents exaggerated its impact to encourage defeat. When the definition of “commerce” was assumed as a side issue, by contrast, the speaker seems to be manipulating the main argument to persuade but not the side assumption, so that the definition of “commerce” in the side assumption is more reliable.²⁰

The sampling did not pick up dictionary definitions. Dictionaries are, at best,

¹⁹ As many of the cites as possible were picked up electronically by searching the following web databases: PHILIP B. KURLAND & RALPH LERNER, *THE FOUNDERS’ CONSTITUTION* (1987), available at <http://press-pubs.uchicago.edu/founders/> (last visited Sept. 16, 2004); *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (Max Farrand ed., 1937), available at <http://memory.loc.gov/ammen/amlaw/lwfr.html> (last visited Sept. 16, 2004); *THE FEDERALIST PAPERS*, available at <http://www.yale.edu/lawweb/avalon/federal/fed.htm> (last visited Sept. 16, 2004); and *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* (Jonathan Elliot ed., 1836), available at <http://memory.loc.gov/ammem/amlaw/lwed.html> (last visited Sept. 16, 2004).

²⁰ There is at least one exchange in which the debaters seem to spin 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. George Mason, Speech at the Federal Convention (Madison notes, Sept. 15, 1787), in 2 FARRAND’S RECORDS, *supra* note 15, at 616. 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,” and a Navigation Act that Mason opposed was a monopoly on shipping. *Id.* at 631. 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 of the Hon. George Mason to the Proposed Federal Constitution*, in 1 ELLIOT’S DEBATES, *supra* note 13, at 496. Accord Elbridge Gerry, Speech at the Federal Convention (King notes, Sept. 15, 1787), in 2 FARRAND’S RECORDS, *supra* note 15, at 635 (objecting to the Constitution because it would “enable the legislature to create corporations 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*, in 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).

a sampling of usages from some other time or place. There is 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. Other scholars have used dictionaries and collected uses quite far removed from the constitutional debate.²¹ All of the samples here are from debates related broadly to the formulation or adoption of the Constitution. The time span of the sampled quotes, however, extends from descriptions of the problems that led to the Constitution long before adoption and to recollections made long after the constitutional period of what the issues were in the constitutional debates. 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 samples can be summarized quickly. In the constitutional debates, “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 suppression of imports by tax or restriction would preserve precious specie and serve the national welfare. Revenue was also critical to the Founders to restore the public credit. “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 retaliatory impost against the British to induce the British 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 other three programs — a monopoly for American shippers, a retaliatory impost against the British, or port preferences — ever amounted to anything and indeed port preferences were banned by the Philadelphia Convention itself. Finally, this review shows that interstate commerce was not a material issue in the debates. The Founders were concerned with fairness between the states, but the norm condemning discrimination shows up almost exclusively outside of the Commerce Clause. Interstate tolls were not a realistic threat and were not an issue in the debates.

The table immediately following summarizes the results of the sampling. “Commerce” in the constitutional debates primarily referred, at 83% of the program-

²¹ WILLIAM W. CROSSKEY, 1 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); WALTON H. HAMILTON & DOUGLASS ADAIR, THE POWER TO GOVERN: THE CONSTITUTION — THEN AND NOW 42–63 (1972); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause*, 85 IOWA L. REV. 1, 14–21 (1999) (analyzing the meaning of the Commerce Clause through a comparison of English and American usages).

associated quotes, to Atlantic Ocean shipping. The most important issues within “regulation of commerce” were tax issues: “to regulate commerce” meant “to tax it” (27% of program-associated quotes). The remainder of the actively-proposed programs under “regulation of commerce,” besides tax, were restrictions on foreign trade. Proponents of the Constitution advocated retaliatory tariffs against the British as punishment 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 were 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 in the 161 samples under either trade with the Indians or among the states.

SAMPLE OF 161 CITES FOR “COMMERCE” CATEGORIZED:

			Percent of references to programs (143 total)
1. Deep-water shipping		115	83%
a. Regulation of commerce means taxation	37		27%
b. Retribution to open foreign ports	39		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		9%
b. Fairness of one state to another reflected in other clauses	10		
<i>Sum of reference to programs</i>	<i>139</i>		<i>100%</i>
4. Words without Controversies		22	
a. Commerce apart from manufacture and agriculture	16		
b. Too vague to categorize	6		

II. DEEP WATER SHIPPING

For 83% of the cites, “regulation of commerce” relates to Atlantic Ocean shipping. Gordon Wood has argued that in the eighteenth century “commerce” usually referred to international trade²² 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.

A. *The Impost*

The most important “commerce” issue in the ratification debate was the nationalization of state imposts. The core grievance was the 2½% impost that the state of New York imposed on imports coming in through New York harbor.²³ For thirty-four cites, “regulation of commerce” meant taxing commerce.²⁴ The

²² GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 316 (1992). Wood argues that “commerce” did not begin to refer to domestic trade until the nineteenth century, which is beyond the borders of the time period sampled here.

²³ See, e.g., Act of Nov. 18, 1784, 8th Sess., ch. 7, *reprinted in* 2 *LAWS OF THE STATE OF NEW YORK PASSED AT THE SESSIONS OF THE LEGISLATURE* 11–12 (Weed Parsons 1886) [hereinafter 2 *LAWS OF NEW YORK*] (stating that the 2½% rate was the default rate; for listed goods such as Madeira wine, a specific amount was set per case in shillings or pence).

²⁴ (1) David Ramsay (S.C.), Speech to the Continental Congress (Jan. 27, 1783), *in* 25 *JOURNALS OF THE CONTINENTAL CONGRESS, 1784–1789*, at 869 (Gaillard Hunt ed., 1922) [hereinafter 25 *JOURNALS*] (saying that states could not pay the revolutionary debts because “rivalships relative to trade . . . impede a regular impost”); (2) Committee of James Madison et al., *Address to the States, by the United States in Congress Assembled* (Apr. 26, 1783), *in* 24 *JOURNALS* 278 (Gaillard Hunt ed., 1922) [hereinafter 24 *JOURNALS*] (advocating state ratification of 5% federal impost to pay the debts of the Revolutionary War because impost cannot be used without concerted uniformity, properly achieved through Congress, because of the position of more commercial states); (3) REPORT OF THE COMMITTEE OF THE CONTINENTAL CONGRESS (James Monroe et al.) (July 13, 1785), *reprinted in* 1 *ELLIOT’S DEBATES*, *supra* note 13, at 111 (reporting a 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 both foreign nations and with each other); (4) Letter from Edmund Carrington to Gov. Edmund Randolph (Apr. 2, 1787), *in* 9 *THE PAPERS OF JAMES MADISON* 362 (Robert A. Rutland et al. eds., 1975) [hereinafter 9 *MADISON PAPERS*] (arguing that only a federal head with full authority over commerce could prevent states from destroying a source of revenue that might be immensely valuable to the Union); (5) “Z,” PHILA. FREEMAN’S J., May 16, 1787, *reprinted in* 13 *DOCUMENTARY HISTORY*, *supra* note 13, at 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 merchants to elude . . .”); (6) Edmund Randolph, Speech at the Federal Convention (Madison notes,

May 29, 1787), in 1 FARRAND'S RECORDS, *supra* note 15, at 19 (saying that there were many advantages which the United States could not attain under the Confederation, "such as a productive impost — counteraction of the commercial regulations of other nations — pushing of commerce *ad libitum*"); (7) Roger Sherman, Speech at the Federal Convention (King notes, June 6, 1787), in 1 FARRAND'S RECORDS, *supra* note 15, at 143 (referring to "powers to regulate com[er]ce & draw therefrom a revenue"); (8) Nathaniel Gorham, Speech at the Federal Convention (Madison notes, July 23, 1787), in 2 FARRAND'S RECORDS, *supra* note 15, at 90 (saying that New York is very attached to her present advantage "of taxing her neighbour[']s by the regulation of her trade"); (9) Philip A. Crowl, *Charles Carroll's Plan of Government*, 46 AM HIST. REV. 588, 591 (1941) (outlining Carroll's July 23, 1787 plan to revise the Articles of Confederation, which asserts that Congress needs exclusive power over regulation of trade by duties on trade because uniformity in duties on imports from foreign countries is necessary for the effectual, nonoppressive collection of the duties); (10) Report of the Committee of Detail, IV (Edmund Randolph et al.) (July 23, 1787), *reprinted in* 2 FARRAND'S RECORDS, *supra* note 15, at 143 (categorizing the "regulat[ion of] commerce[']both foreign and domestic" as the fifth restriction to the argument for curtailing the unlimited congressional power to tax exports); (11) James Wilson, Speech at the Federal Convention (Madison notes, Aug. 16, 1787), in 3 FARRAND'S RECORDS, *supra* note 15, at 307 (dwelling on the injustice of leaving "N[ew] Jersey [and] Connecticut . . . any longer subject to the exactions of their *commercial* neighbours") (emphasis added); (12) John Mercer (Md.), Speech at the Federal Convention (Madison notes, Aug. 16, 1787), in 2 FARRAND'S RECORDS, *supra* note 15, at 307 (opposing giving Congress power to tax exports because at the time states could "tax both imports and exports of their *uncommercial* neighbours" and "[i]t was enough for them to sacrifice one half of it") (emphasis added); (13) Chesterfield Town [Mass.] Meeting Instructions to Representative (Oct. 9, 1787), in 4 DOCUMENTARY HISTORY *supra* note 13, at 60 (calling for additional imposts on importations of foreign articles, to prevent transfer of wealth from western Massachusetts to pay New York imposts); (14) Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 MADISON PAPERS 211 (Robert A. Rutland et al. eds., 1977) [hereinafter 10 MADISON PAPERS] (arguing that there was no definable distinction between the power of regulating trade and that of drawing revenue from it); (15) THE FEDERALIST NO. 7, at 40 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (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"); (16) Hugh Williamson's Speech at Edenton, North Carolina (Nov. 8, 1787), in DAILY ADVERTISER (N.Y.) Feb 25–27, 1788 [hereinafter Williamson Speech at Edenton], *reprinted in* 2 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 231 (Bernard Bailyn ed., 1993) [hereinafter DEBATE ON THE CONSTITUTION] (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); (17) THE FEDERALIST NO. 12, at 76 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (stating that a general union will be conducive to the interests of commerce and extend the revenue to be drawn from it); (18) James Wilson, Speech at the Pennsylvania Ratification Convention (Nov. 24, 1787), in 3 FARRAND'S RECORDS, *supra* note 15, at 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 . . ."); (19) THE FEDERALIST NO. 12, *supra*, at 78 (Alexander Hamilton) ("The single article of ardent

spirits, under [f]ederal *regulation*, might be made to furnish a considerable revenue.”) (emphasis added); (20) “One of the Middle-Interest,” MASS. CENTINEL, Dec. 5, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 13, at 387.

For if one State makes a law to prohibit foreign goods of any kind, or to draw a revenue, from any imposition upon such goods, another State is sure to take the advantage, and to admit such goods free of costs. By this means it is well known how the trade of Massachusetts is gone to Connecticut, and that for want of a revenue, our own *State taxes* are increased.

Id. (21) “Landholder IX,” CONN. COURANT, Dec. 31, 1787, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 13, at 192 (stating that New York impost draws 40,000 pounds from Connecticut and ruins the State’s foreign trade); (22) Charles Pinckney, Speech at the South Carolina House of Representatives (Jan. 16, 1788), in 4 ELLIOT’S DEBATES, *supra* note 13, at 253 (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); (23) Rawlins Lowndes, Debate in the South Carolina Legislature (Jan. 16, 1788), in 2 DEBATE ON THE CONSTITUTION, *supra*, at 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*”); (24) Thomas Dawes, Speech at the Massachusetts Ratification Convention (Jan. 21, 1788), in 2 ELLIOT’S DEBATES, *supra* note 13, at 57 (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); (25) THE FEDERALIST NO. 42, at 283 (James Madison) (Jacob E. Cooke ed., 1961) (stating 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”); (26) THE FEDERALIST NO. 44, at 302 (James Madison) (Jacob E. Cooke ed., 1961) (stating that the prohibition of state taxes on imports and exports is proven by the necessity of submitting the regulation of trade to the federal government); (27) Charles Pinckney, Speech at the House of Representatives 16th Cong., 1st Sess. (Feb. 14, 1820), in 36 ANNALS OF THE CONGRESS OF THE UNITED STATES (Joseph Gales ed., 1855) 1317–18 [hereinafter 36 ANNALS OF CONGRESS] (arguing that Congress could not prohibit movement of slaves to territories because power over interstate commerce by water between the states was given to prevent port preferences and the obligations of paying duties on commerce to another state); (28) “A Farmer,” PHILA. FREEMAN’S J., Apr. 23, 1788, *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 13, at 139 (stating that the “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); (29) “A Plebian,” *An Address to the People of New York* (Apr. 17, 1788), *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 13, at 146 (supporting the granting to the general government the power to regulate trade and lay imposts for that purpose, as well as raising revenue, but stating that the hopes from the change will never be realized because the country buys more than it sells and because there are too many merchants); (30) *To Be or Not to Be? Is the Question*, N.H. GAZETTE (Portsmouth), Apr. 18, 1788, *reprinted in* 2 DEBATE ON THE CONSTITUTION, *supra*, at 404 (“An increased revenue, from a proper and universal regulation of trade, will render needless so large a *dry tax* as we

major program was to federalize the New York and other state imposts and use them to pay the debts from the Revolutionary War. Closely related is the Constitution's prohibition 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 (three cites).²⁵

In 1783 Congress proposed to the states that it be granted the power to lay a federal impost of 5% of imports, so as to have a source of revenue to make payments on the debts of the Revolutionary War.²⁶ The Articles of Confederation had allowed the federal government to collect revenue only by requisitions.²⁷ The Articles also required that an amendment to give the federal government the power to tax directly would require unanimous ratification by all the states.²⁸ New York vetoed the 1783 proposal to allow a federal impost. New York's motivation was to retain the revenue from the New York harbor impost for exclusive New York

have been subject to."); (31) Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), in 3 FARRAND'S RECORDS, *supra* note 15, at 477 (stating that the encouragement of manufacturing was an object of the power to regulate trade, as indicated that Framers and Anti-Federalists in the first Congress had proposed duties and even prohibitions of articles that competed with domestic production); (32) Letter from James Madison to Joseph C. Cabell (Feb. 18, 1828), in 2 THE FOUNDERS' CONSTITUTION 517 (Philip B. Kurland & Ralph Lerner eds., 1987) (writing that the power to lay imposts is included in the power to regulate trade, even though tax is expressed separately); (33) Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), in 3 FARRAND'S RECORDS, *supra* note 15, at 478 (stating that federal power over interstate commerce "grew out of the abuse of the power by the importing States in taxing the non-importing"); (34) James Madison, *Preface To Debates in the Convention of 1787* (c. 1830), in 3 FARRAND'S RECORDS, *supra* note 15, at 547 (observing that lack of a general congressional power to regulate commerce led to an exercise of this power separately by the States and engendered undercutting rivalry and "vain attempts to supply their respective treasuries by imposts").

²⁵ (1) James Wilson, Speech at the Federal Convention (Aug. 21, 1787), in 5 ELLIOT'S DEBATES, *supra* note 13, at 455 (saying that to deny the federal government the power to tax exports "is to take from the common government half the regulation of trade"); (2) Roger Sherman, Speech at the Federal Convention (Madison notes, Aug. 16, 1787), in 2 FARRAND'S RECORDS, *supra* note 15, at 308 (supporting a 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"); (3) Gouverneur Morris, Speech at the Federal Convention (Madison notes, Aug. 21, 1787), in 2 FARRAND'S RECORDS, *supra* note 15, at 360 (arguing that without prohibition, "exporting States will tax the produce of their uncommercial neighbours").

²⁶ 24 JOURNALS, *supra* note 24, at 358.

²⁷ See ROGER H. BROWN, REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION 26 (1993).

²⁸ ARTICLES OF CONFEDERATION art. VIII (U.S. 1781) (requisitions); *id.* at art. XIII (requiring unanimous confirmation by each state).

needs.²⁹ Under the requirement of the Articles of Confederation for unanimous confirmation by all the states, New York's vote was sufficient to veto the federal impost.³⁰ 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."³¹ When New York vetoed the 1783 impost, it was said, every "liberal good man [wished] New York in Hell."³²

New York was expected to repeat its veto of nationalization of the impost if again given the chance. New York was too much attached to "taxing her neighbours []by the regulation of her trade."³³ "Much opposition is expected in New-York," Timothy Pickering wrote home.³⁴

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 thro[ugh] New-York, who put into her *own* treasury all the duties arising on the goods consumed in [these] states.³⁵

Connecticut and New Jersey were outraged by the New York impost.³⁶ 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 expen[s]es of government shall be paid by their constituents,

²⁹ 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.

³⁰ ARTICLES OF CONFEDERATION art. XIII (U.S. 1781), *reprinted in* 19 JOURNALS 221 (Gaillard Hunt ed., 1912) [hereinafter 19 JOURNALS].

³¹ Unsent letter from James Madison to John Tyler (1833), *in* 3 FARRAND'S RECORDS, *supra* note 15, at 530–31.

³² 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, 390 (1969).

³³ Nathaniel Gorham, Speech at the Federal Convention (Madison notes, July 23, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 15, at 90.

³⁴ Letter from Timothy Pickering to John Pickering (Dec. 29, 1787), *in* 15 DOCUMENTARY HISTORY, *supra* note 13, at 177.

³⁵ *See id.*

³⁶ *See, e.g.*, Oliver Ellsworth, Speech at the Connecticut Ratifying Convention (Jan. 7, 1788), *in* 2 ELLIOT'S DEBATES, *supra* note 13, at 192 (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).

than while paid by us.”³⁷ 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.³⁸ New Jersey, placed between Philadelphia and New York, was “a Cask tapped at both ends.”³⁹ New Jersey and Connecticut ratified the Constitution quickly and overwhelmingly to nationalize the New York harbor taxes.⁴⁰

Rhode Island shared New York's villainy. Rhode Island had vetoed a similar proposal in 1781 to give Congress a 5% impost.⁴¹ “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 contiguous States.”⁴² 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.”⁴³ Rhode Island was “shameful” and this “perverse sister,”⁴⁴ this “[c]ursed State, ought to be erased out of the Confederation, and . . . out of the earth, if any worse place could be found for them.”⁴⁵

³⁷ Editorial, CONN. COURANT (Dec. 24, 1787), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 13, at 82.

³⁸ 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 127–31 (1982).

³⁹ James Madison, *Preface to Debates in the Convention of 1787* (c. 1830), in 3 FARRAND'S RECORDS, *supra* note 15, at 542.

⁴⁰ FORREST McDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION 126, 139 (1958) (attributing the quick and overwhelming ratification of the Constitution by Connecticut and New Jersey to the New York harbor impost controversy). *Accord* James Madison, *Notes to a Speech to the Continental Congress* (Feb. 26, 1783), in 25 JOURNALS, *supra* note 24, at 914 n.2 (arguing that both Connecticut and New Jersey favored general revenue to protect their commerce from New York tax).

⁴¹ Letter from the Rhode Island Speaker of the Assembly (Nov. 30, 1782), in 23 JOURNALS 788–89 (Gaillard Hunt ed., 1914) (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).

⁴² James Madison, *Notes to a Speech to the Continental Congress* (Feb. 26, 1783), in 25 JOURNALS, *supra* note 24, at 914 n.2. *Accord* Alexander Hamilton, *Speech to the Continental Congress* (Madison notes, Feb. 13, 1783), in 25 JOURNALS, *supra* note 24, at 902 (“[T]he true objection on the part of R[hode] I[sland] was the interference of the impost with the opportunity afforded by their situation of levying contributions on Con[n]ecticut., [etc.], which rec[eive]d[] foreign supplies through the ports of R[hode] I[sland].”).

⁴³ IRVIN H. POLISHOOK, RHODE ISLAND AND THE UNION, 1774–1795, at 96 (1969) (quoting ST. GAZETTE S.C. (Charleston), June 1, 1786, and “A Fable,” EXCHANGE ADVISER (Boston), Feb. 11, 1786).

⁴⁴ James Madison to Edmund Randolph (Nov. 19, 1783), in 5 THE PAPERS OF JAMES MADISON 288 (William T. Hutchinson & William M.E. Rachal eds., 1973).

⁴⁵ Letter from John Montgomery to Edward Hand (July 26, 1784), in 7 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 575 (Edmund C. Burnett ed., 1934).

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.⁴⁶ “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 the *improper* contributions levied on them by the latter.”⁴⁷ Publius also said that under the Articles some states have the opportunity of rendering others “tributary” to them by laying duties on her importations.⁴⁸ 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.⁴⁹ The uncommercial states would fail in paying their quota, Hamilton argued, their example would be followed, and the Union would then inevitably dissolve.⁵⁰ 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. Only the “[federal] 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 whole Union.”⁵¹ 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.⁵² The general government would regulate commerce with a uniform impost and so make commerce productive of general revenue.⁵³

⁴⁶ Williamson Speech at Edenton, *supra* note 24, at 227.

⁴⁷ THE FEDERALIST NO. 42, *supra* note 24, at 283 (James Madison) (emphasis added).

⁴⁸ THE FEDERALIST NO. 7, *supra* note 24, at 40 (Alexander Hamilton).

⁴⁹ Alexander Hamilton, Speech at the Federal Convention (Madison notes, June 18, 1787), in 1 FARRAND’S RECORDS, *supra* note 15, at 286.

⁵⁰ *See id.*

⁵¹ Letter from Edmund Carrington to Edmund Randolph (Apr. 2, 1787) in 9 MADISON PAPERS, *supra* note 24, at 362.

⁵² THE FEDERALIST NO. 12, *supra* note 24, at 77 (Alexander Hamilton).

⁵³ *See, e.g.*, Crowl, *supra* note 24, at 591 (stating that Congress needs exclusive power over regulation of trade by duties on trade because uniformity in duties on imports from foreign countries is necessary to effectual, nonoppressive collection of the duties); “One of the Middle-Interest,” MASS. CENTINEL, Dec. 5, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 13, at 387:

For if one State makes a law to prohibit foreign goods of any kind, or to draw a revenue, from an imposition upon such goods, another State is sure to take the advantage, and to admit such goods free of costs. By

The revenue aspects of the imposts were very important to the adoption of the Constitution, but the equity aspects of the fight over the New York impost is probably properly viewed, as Merrill Jensen put it, as a “teapot tempest.”⁵⁴ The New York tax at 2½% was probably not even worth smuggling around. The New York deep-water harbor and established docks were probably worth many times that 2½% amount. It was hard to unload a deep water ship without a deep water harbor.⁵⁵

From 1784 through 1787 New York exempted from its impost goods held for re-export, provided they were kept in their original package.⁵⁶ 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 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

this means it is well known how the trade of Massachusetts is gone to Connecticut, and that for want of a revenue, our own *State taxes* are increased.

See also Thomas Dawes, Speech at the Massachusetts Ratification Convention (Jan. 21, 1788), in 2 ELLIOT'S DEBATES, *supra* note 13, at 57–58 (arguing that state imposts drive the trade to neighboring states); “Z,” PHILA. FREEMAN'S J., May 16, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 13, at 98–99 (“It has been long 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 merchants to elude . . .”); James Madison, *Preface To Debates in the Convention of 1787* (c. 1830), in 3 FARRAND'S RECORDS, *supra* note 15, at 547 (stating that lack of a general congressional power to regulate 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”).

⁵⁴ MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781–1789*, at 339 (1950). 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.

⁵⁵ Letter from James Madison to Thomas Jefferson (Aug. 20, 1784), in 8 THE PAPERS OF JAMES MADISON 103 (Robert A. Rutland & William M.E. Rachal eds., 1973) [hereinafter 8 MADISON PAPERS] (complaining that prices on Baltimore and Philadelphia docks for Virginia exports were 15–20% higher than on Virginia rivers). If we attribute the higher prices 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.

⁵⁶ Act of Nov. 18, 1784, 8th Sess., ch. 7, *reprinted in* 2 LAWS OF NEW YORK, *supra* note 23, at 14; Act of Apr. 11, 1787, 10th Sess., ch. 81, *reprinted in* 2 LAWS OF NEW YORK, *supra* note 23, at 513. South Carolina, Massachusetts and Virginia had similar exemptions for re-exports kept in the original package. *See also* Edward Kitch, *Regulation and the American Common Market*, in REGULATION, FEDERALISM AND INTERSTATE COMMERCE 9, 17–19 (A. Dan Tarlock ed., 1981).

the New York harbor wharves to ship through New York in the original package without paying the 2½% tax.⁵⁷ 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 2½% 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 generating almost universal assent, outside of New York and Rhode Island.⁵⁸ The "impost" was the least objectionable federal tax because it could be collected without interfering with the "internal police" of the states.⁵⁹ 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 1781.⁶⁰ 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.⁶¹

⁵⁷ 2 LAWS OF NEW YORK, *supra* note 23, at 513–14. In the 1784 version, a shipper had sixty days to re-export goods after a landing. *Id.* at 14.

⁵⁸ Abel, *supra* note 3, at 446–51.

⁵⁹ Oliver Ellsworth, Speech at the Connecticut Convention on Ratification (Jan. 7, 1788), in 3 DOCUMENTARY HISTORY, *supra* note 13, at 550.

⁶⁰ 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. 11 STATUTES OF VIRGINIA AT LARGE; BEING A COLLECTION OF ALL THE LAWS 171 (William Waller Hening ed., 1823) [hereinafter STATUTES OF VIRGINIA]. Madison was appalled. *See* Letter from James Madison to Edmund Randolph (Jan. 22, 1783), in 6 THE PAPERS OF JAMES MADISON 55–56 (William T. Hutchinson & William M.E. Rachal eds., 1969) ("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.

⁶¹ "Federal Farmer," *Letters to the Republican*, N.Y.J., Oct. 10, 1787, reprinted in 14 DOCUMENTARY HISTORY, *supra* note 13, at 30, 35–36 (stating that impost may be collected by a few officers in seaport towns, but opposing internal taxes); "Cato Uticensis," *To the Freeman of Virginia*, VA. INDEP. CHRON. Oct. 17, 1787, reprinted in 8 DOCUMENTARY HISTORY, *supra* note 13, at 73 (opposing conceding imposts and requisitions if imposts are not sufficient); "An Old Whig," *Letter VI*, PHILA. INDEP. GAZETTEER Nov. 24, 1787, reprinted in 14 DOCUMENTARY HISTORY, *supra* note 13, at 218 ("Without the power of imposing duties on foreign commerce and regulating trade, the United States will be weak and contemptible . . ."); "Brutus V," N.Y.J., Dec. 13, 1787, reprinted in 14 DOCUMENTARY HISTORY, *supra* note 13, at 426–27 (stating that impost duties are proper and "should be laid by the general government"); Letter from James Madison to Edmund Randolph (Dec. 2, 1787), in 14 DOCUMENTARY HISTORY, *supra* note 13, at 332 ("[T]he 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 at the Connecticut Convention (Jan. 7, 1788), in 15 DOCUMENTARY HISTORY, *supra* note 13, at 274 (arguing that impost is not a proper mode of taxation); John Smilie, Debate at the Pennsylvania Ratifying Convention (Nov. 28, 1788), in 2 DOCUMENTARY HISTORY, *supra* note 13, at 408–09 (saying if "they have unlimited power to drain the wealth of the people,

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 planned 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?”⁶² 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.⁶³ New York’s giving revenue to New Jersey, however, would not have improved the fiscal health of the federal government.

The unfairness arguments seem to be just rhetorical 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 doubling of the then current 2½% 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.⁶⁴ 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.

whether by imposts or by direct levies,” then the “system must be too formidable” for states to break) (emphasis added).

⁶² THE FEDERALIST NO. 40, at 262 (James Madison) (Jacob E. Cooke ed., 1961).

⁶³ “A Freeholder,” BRUNSWICK GAZETTE, Feb. 10, 1789, *cited in* KAMINSKI, *supra* note 29, at 136 (stating that Abraham Clark had thought New Jersey had ratified too precipitously and that New York would have made concessions including giving up the impost and refunding prior collections if New Jersey had declined); PA. J., Dec. 19, 1787, *quoted in* KAMINSKI, *supra* note 29, at 136 (reporting that Clinton tried to defeat the Constitution by “negotiat[ing] ‘thro[ugh] a person of considerable weight in Jersey’ (probably Abraham Clark), to return half of New York’s state impost to New Jersey if the state refused to adopt the Constitution”).

⁶⁴ Of the sample of thirty-seven quotes on regulation of commerce referencing the federalizing impost, nine used “regulation of commerce” as a synonym for taxation. *See supra* note 24.

B. Retaliation Against the British

For thirty-nine (28%) of the cites in the sample, “regulation of commerce” is a reference to attempts to open up foreign ports to U.S.-owned ships by imposing a retaliatory impost or embargo on foreign ships coming into American ports.⁶⁵ The

⁶⁵ (1) REPORT OF A COMMITTEE OF THE CONTINENTAL CONGRESS (Elbridge Gerry et al.) (Apr. 26, 1784), *reprinted in* 26 JOURNALS 319 (Gaillard Hunt ed., 1928) (proposing that the legislatures of the States give Congress the power for fifteen 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, *supra* note 55, at 329 (observing that Congress had proposed to grant itself the power to regulate commerce so to obtain reciprocity from other nations); (3) Letter from James Madison to James Monroe (Aug. 7, 1785), 8 MADISON PAPERS, *supra* note 55, at 334–35 (“Should G[reat] B[ritian] 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 tempted.”); (4) Letter from James Madison to Thomas Jefferson (Aug. 20, 1785), *in* 8 MADISON PAPERS, *supra* note 55, at 344 (“[I]f any thing should reconcile Virg[ini]a to the idea of giving Cong[ress] a power over her trade, it will be that this power is likely to annoy Great Br[itian] against whom the animosities of our Citizens are still strong.”); (5) James Madison, *Motion in the Virginia House of Delegates* (Nov. 30, 1785), *in* 1 ELLIOT’S DEBATES, *supra* note 13, at 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, *supra* note 55, at 502 (observing that if the Annapolis Convention should come to nothing, it will “confirm G[reat] B[ritian] and all the world in the belief that we are not to be respected, nor apprehended as a nation in matters of Commerce”); (7) Edmund Randolph, Speech at the Federal Convention (Madison notes, May 29, 1787), *in* 1 FARRAND’S RECORDS, *supra* note 15, at 19 (saying that among the advantages that the United States might acquire are “counteraction of the commercial regulations of other nations — pushing of commerce *ad libitum* — [etc.]”); (8) David Ramsay, *Oration*, CHARLESTON COLUMBIAN HERALD, June 5, 1787, *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 13, at 163 (“Our protected commerce will open new channels for our native commodities, and give additional value to the soil, by increasing the demand for its productions.”); (9) Letter from Philippe Andre’ Joseph de Létombe to Comte de la Luzerne (June 26, 1787), *in* 18 DOCUMENTARY HISTORY, *supra* note 13, at 197 (foreseeing that adoption of the Constitution will unite the states and facilitate the desirable reciprocity of commerce between the United States and France); (10) Anonymous [Alexander Hamilton], DAILY ADVERTISER (N.Y.), July 21, 1787, *in* 19 DOCUMENTARY HISTORY 12 (defending the Philadelphia convention as necessitated by “the stagnation of commerce occasioned to a just degree by the exclusions and restraints with which foreign nations fetter our trade with them”); (11) Letter from James Bowdoin to George Erving (Aug. 12, 1787), *in* 18 DOCUMENTARY HISTORY, *supra* note 13, at 324 (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.”); (12) John Rutledge, Speech at the Federal Convention (Madison notes, Aug. 29, 1787), *in* 2 FARRAND’S RECORDS, *supra* note 15, at 452 (arguing that gaining access to the West Indies is the “great object” of regulating commerce); (13) Letter from Andrew Allen to Tench Coxe (Sept. 8, 1787), *in* 18 DOCUMENTARY HISTORY, *supra* note 13, at 361–62 (arguing that

advocates of the Constitution are too sanguine in assuming adoption will immediately “extend[] Commerce or open new Channels of Trade”); (14) *Social Compact*, NEW HAVEN GAZETTE (Oct. 4, 1787), *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 13, at 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); (15) “Marcus,” DAILY ADVERTISER (N.Y.), Oct. 15, 1787, *reprinted in* 1 DEBATE ON THE CONSTITUTION, *supra* note 24, at 127 (arguing that when commerce is a national object, nations will form treaties with us); (16) “A Landholder I,” CONN. COURANT, Nov. 5–12, 1787, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 13, at 399–400 (arguing that until the Constitution is effected, our commerce may be “insulted by every overgrown merchant in Europe”); (17) THE FEDERALIST NO. 11, at 66–67 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (advocating a government in America, capable of excluding Great Britain from all ports); (18) James Wilson, Speech at the Pennsylvania Ratification Convention (Nov. 24, 1787), *in* 2 DOCUMENTARY HISTORY, *supra* note 13, at 360 (observing that being devoid of importance, we were unable to command a sale for commodities in foreign markets); (19) “A Landholder V,” CONN. COURANT, Nov. 26, 1787, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 13, at 480 (threatening that without the Constitution “your commerce, the price of your commodities, your riches, and your safety will be the sport of every foreign adventurer”); (20) “Candidus I,” INDEP. CHRON. (Boston), Dec. 6, 1787, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST 128 (Herbert J. Storing ed., 1981) (“Those nations laid these duties to promote their own fishery, [etc.] and . . . will pursue their own politicks respecting our imports and exports, unless we can check them by some *commercial* regulations.”); (21) THE FEDERALIST NO. 22, at 135–36 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“The want of a power to regulate commerce . . . operated as a bar to the formation of beneficial treaties with foreign powers . . .”); (22) “One of the Middle-Interest,” MASS. CENTINEL, Dec. 5, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 13, at 387 (“Congress has no power to withhold *some* advantages from foreigners, in order to obtain *other* advantages from them.”); (23) *The Dissent of the Minority of the Pennsylvania Convention*, PA. PACKET, Dec. 18, 1787, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 13, at 14 (regretting that “we were suffering from the restrictions of foreign nations, who had shackled our commerce, while we were unable to retaliate”); (24) “Centinel VI,” PA. PACKET, Dec. 25, 1787, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 13, at 99 (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”); (25) Edmund Randolph, *Reasons for Not Signing the Constitution* (Dec. 27, 1787), *in* 8 DOCUMENTARY HISTORY, *supra* note 13, at 265 (arguing that the states cannot organize retaliation against foreign nations and what is needed is “exclusion . . . opposed to exclusion, and restriction to restriction”); (26) Charles Pinckney, Speech at the South Carolina House of Representatives (Jan. 16, 1788), *in* 4 ELLIOT’S DEBATES, *supra* note 13, at 253 (asserting 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”); (27) Edward Rutledge, Speech to the South Carolina Legislature (Jan. 16, 1788), *in* 2 DEBATE ON THE CONSTITUTION, *supra* note 24, at 23 (asking, “could [the Articles] obtain security for our commerce in any part of the world?”); (28) James Bowdoin, Speech at the Massachusetts Ratification Convention (Jan. 23, 1788), *in* 2 ELLIOT’S DEBATES, *supra* note 13, at 83 (observing that trade is in a miserable state because “other nations prohibit our vessels from entering their ports, or lay heavy duties on our exports,” and we cannot prevent it because

core grievance was that Great Britain, under the British 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

Congress has “no retaliating or regulating power over their vessels and exports”); (29) Nathaniel Gorham, Speech at the Massachusetts Ratification Convention (Jan. 25, 1788), 2 ELLIOT’S DEBATES, *supra* note 13, at 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”); (30) Letter from Gaspard Joseph Amand Ducher to Comte de la Luzerne (Feb. 2, 1788), in 16 DOCUMENTARY HISTORY, *supra* note 13, at 13 (reporting that “the navigation acts of the states of New[H]ampshire and [M]assachusetts had been suspended because the other states did not wish to proclaim similar ones, designed to punish [E]ngland for its strictness against [A]merican commerce”); (31) Jonathan Williams, Jr., *The Fabrick of Freedom*, PHILA. FED. GAZETTE, Mar. 8, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 13, at 361 (expressing in part, “See Commerce with extended hand/ Flies the restraint of kings/ And foreign riches to this land/ From ev’ry climate brings/”); (32) JOHN JAY, ADDRESS TO THE PEOPLE OF THE STATE OF NEW YORK (Sept. 17, 1787), *reprinted in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 67, 73 (Paul Leicester Ford ed., 1888) [hereinafter PAMPHLETS ON THE CONSTITUTION] (warning that “other nations taking the advantage of [our] imbecility, are daily multiplying commercial restraints upon us” and that there is not one English, French or Spanish “island or port in the West-Indies to which an American vessel can carry a cargo of flour for sale”); (33) *To Be or Not To Be? Is the Question*, N.H. GAZETTE (Portsmouth), Apr. 16, 1788, *reprinted in* 2 DEBATE ON THE CONSTITUTION, *supra* note 13, at 407 (stating that the “inconvenience [that] foreign powers must suffer from a proper regulation of commerce by Congress, will oblige them” to open ports); (34) Letter from Comte de Moustier to Comte de Montmorin (May 29, 1788), in 18 DOCUMENTARY HISTORY, *supra* note 13, at 145 (arguing that Americans are indignant and that John Adams failed to get treaty of commerce so that their flag is excluded from trading in the West Indies); (35) James Monroe, Speech at the Virginia Ratification Convention (June 10, 1788), in 3 ELLIOT’S DEBATES, *supra* note 13, at 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); (36) Letter from George Washington to Marquis de Lafayette (June 18, 1788), in 18 DOCUMENTARY HISTORY, *supra* note 13, at 184 (referring to time “when foreign nations shall be disposed to give us equal advantages in commerce from dread of retaliation”); (37) N.J. J., June 18, 1788, *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 13, at 185 (envisioning 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”); (38) William R. Davie, Speech at the North Carolina Ratification Convention (July 24, 1788), in 4 ELLIOT’S DEBATES, *supra* note 13, at 18 (“The United States should be empowered to compel foreign nations into commercial regulations,” and counter British insults.); (39) James Madison, *Preface To Debates in the Convention of 1787* (c. 1830), in 3 FARRAND’S RECORDS, *supra* note 15, at 547 (describing the reasons for the Constitution to include “the want of auth[orit]y[] in Cong[re]s[s] to regulate [c]ommerce, [which] had produced in Foreign nations particularly G[reat] B[ritian] a monopolizing policy injurious to the trade of the U.S. and destructive to their navigation”).

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 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.⁶⁶

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.”⁶⁷ 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 Spanish “island or port in the West-Indies, to which an American vessel can carry a cargo of flour for sale.”⁶⁸ Without a Constitution, proponents argued, our commerce would be “insulted by every overgrown merchant in Europe”⁶⁹ and “your commerce, the price of your commodities, your riches, and your safety will be the sport of every foreign adventurer.”⁷⁰ Britain’s system of commerce will be altered, former Massachusetts Governor James Bowdoin wrote to George Erving, only when “Congress, under [the] new Constitution will have the power of regulating it within [the] Ports of [the] United States.”⁷¹ What was needed, said Edmund Randolph, was “exclusion . . . opposed to exclusion, and restriction to restriction.”⁷² Even the threat of retaliation, Washington wrote, would induce foreign powers to give the United States beneficial commercial treaties.⁷³

⁶⁶ LORD SHEFFIELD, OBSERVATIONS ON THE COMMERCE OF THE UNITED STATES WITH EUROPE AND THE WEST-INDIES 264–65 (6th ed. 1784), *described in* CROWLEY, *supra* note 2, at 81–83, and STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 69 (1993).

⁶⁷ Thomas Russell, Speech at the Massachusetts Ratification Convention (Feb. 1, 1788), *in* 2 ELLIOT’S DEBATES, *supra* note 13, at 139.

⁶⁸ JOHN JAY, ADDRESS TO THE PEOPLE OF THE STATE OF NEW YORK (Sept. 17, 1787), *reprinted in* PAMPHLETS ON THE CONSTITUTION, *supra* note 65, at 73.

⁶⁹ “A Landholder I,” CONN. COURANT, Nov. 5–12, 1787, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 13, at 399–400.

⁷⁰ “A Landholder V,” CONN. COURANT, Nov. 26, 1787, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 13, at 480.

⁷¹ Letter from James Bowdoin to George Erving (Aug. 12, 1787), *in* 18 DOCUMENTARY HISTORY, *supra* note 13, at 324.

⁷² Edmund Randolph, *Reasons for Not Signing the Constitution* (Dec. 27, 1787), *in* 8 DOCUMENTARY HISTORY, *supra* note 13, at 265.

⁷³ Letter from George Washington to Marquis de Lafayette (June 18, 1788), *in* 18 DOCUMENTARY HISTORY, *supra* note 13, at 184 (imagining the time “when foreign nations shall be disposed to give us equal advantages in commerce from dread of retaliation”); Letter from Philippe Andr  Joseph de L tombe to Comte de la Luzerne (June 26, 1787), *in* 18 DOCUMENTARY HISTORY, *supra* note 13, at 197 (predicting that adoption of the Constitution will unite the states and facilitate the desirable reciprocity of commerce between the United States and France); “Marcus,” DAILY ADVERTISER (N.Y.), Oct. 15, 1787, *reprinted in* 1 DEBATE ON THE CONSTITUTION, *supra* note 24, at 127 (arguing that when commerce is a national object, nations will form treaties with us); James Wilson, Speech at the Pennsylvania

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.⁷⁴ Shortly before the Annapolis Convention, Madison wrote to Jefferson that “if any thing should reconcile Virg[ini]a[] to the idea of giving Cong[ress] a power over her trade, it will be that this power is likely to annoy G[reat] B[ritain] against whom the animosities of our [c]itizens are still strong.”⁷⁵ Even staunch Anti-Federalists endorsed the idea that the new government should be empowered to impose a retaliatory impost to open up the British West-Indies to American ships.⁷⁶

The retaliatory impost or embargo was similar to a revenue-producing impost in that both 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.⁷⁷ For an embargo or impost to be effective, it could not be

Ratification Convention (Nov. 26, 1787), in 2 ELLIOT’S DEBATES, *supra* note 13, at 431 (“Devoid of national *importance*, we could not procure, for our exports a tolerable sale at foreign markets.”); THE FEDERALIST NO. 22, *supra* note 65, at 135-36 (Alexander Hamilton) (“The want of a power to regulate commerce . . . operated as a bar to the formation of beneficial treaties with foreign powers . . .”).

⁷⁴ Charles Pinckney, Speech in the South Carolina House of Representatives (Jan. 16, 1788), in 4 ELLIOT’S DEBATES, *supra* note 13, at 253. Consistently, Professor John Crowley has written that “[i]n the name of seeking power to regulate commerce, Congress really only sought authority for retaliatory Navigation Acts.” CROWLEY, *supra* note 2, at 94.

⁷⁵ Letter from James Madison to Thomas Jefferson (Aug. 20, 1785), in 8 MADISON PAPERS, *supra* note 55, at 344. See also Letter from James Madison to Thomas Jefferson (Mar. 18, 1786), 8 MADISON PAPERS, *supra* note 55, at 502.

The Annapolis Convention 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 259–66 (1978). See also *id.* at 251–66 for a discussion of how giving Congress the power over commerce contributed to the constitutional movement in Virginia.

⁷⁶ *The Dissent of the Minority of the Pennsylvania Convention*, PA. PACKET, Dec. 18, 1787, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 13, at 14 (regretting that “[w]e were suffering from the restrictions of foreign nations, who had shackled our commerce, while we were unable to retaliate”); “Centinel VI,” PA. PACKET, Dec. 25, 1787, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 13, at 99 (finding “considerable benefit [in] strengthening the hands of Congress, so as to . . . counteract the adverse restrictions of other nations”).

⁷⁷ Letter from Gaspard Joseph Amand Ducher to Comte de la Luzerne (Feb. 2, 1788), in 16 DOCUMENTARY HISTORY, *supra* note 13, at 13 (writing that while Massachusetts and New Hampshire had both attempted an exclusion of British ships to punish Britain for its strictness against American commerce, the attempts were suspended because the competing ports in other states would not join the embargo and so got the advantage of British ships not welcomed in Massachusetts and New Hampshire).

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 enforce retaliatory exclusions against the British.⁷⁸ The states would clearly have to present a united front.

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 duty."⁷⁹ 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 Britain did not respond, Madison hoped, the discriminatory impost would move American commerce away from Britain into its more "natural channels," for instance, France.⁸⁰

The Senate, however, led by the New York delegation, stripped the anti-British discrimination features from the 1789 impost bill.⁸¹ An American navigation act was intended as a benefit for the Northern shipping states at the expense of Southern commodities, but in the end, the Northern states did not want it. 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.⁸² The House acceded to the Senate, and Madison's plan for discrimination against the British failed to be part of the enacted impost.⁸³ As Stanley Elkins and Eric McKittrick write, "Madison hardly pictured

⁷⁸ JENSEN, *supra* note 54, at 338–39.

⁷⁹ James Madison, Speech at the House of Representatives (Apr. 8, 1789), in 1 ANNALS OF CONGRESS 107 (Joseph Gales ed., 1834)[hereinafter 1 ANNALS OF CONGRESS]. See also James Madison, Speech at the House of Representatives (Apr. 21, 1789), in 1 ANNALS OF CONGRESS, *supra* at 193 (arguing that we will not give Great Britain a motive for entering into a treaty unless we discriminate against them).

⁸⁰ James Madison, Speech at the House of Representatives (Apr. 21, 1789), in 1 ANNALS OF CONGRESS, *supra* note 79, at 193 (describing trade with Britain is an "artificial channel" larger than natural).

⁸¹ Stanley Elkins & Eric McKittrick have collected the evidence for the New York merchants opposing discrimination. ELKINS & MCKITTRICK, *supra* note 66, at 766 n.66. While there was no specifically anti-British discriminations, there were differentials in whether goods were imported in American ships. See *infra* text accompanying notes 141–43.

⁸² Cf. John Laurence, Speech in the House of Representatives (Apr. 21, 1789), in 1 ANNALS OF CONGRESS, *supra* note 79, at 192 (arguing that England does not now discriminate against American vessels coming into England).

⁸³ An Act for Laying a Duty on Goods, Wares and Merchandises Imported into the United States, July 4, 1789, 1 STAT. 24–27 (May 16 and 26, 1789), in 1 ANNALS OF CONGRESS, *supra* note 79, at 409 (reporting that the 5% impost passed but discrimination defeated).

himself as a spokesman for the interests of American merchants. Indeed, when merchants objected to his plan, he turned his hostility upon them, charging that they were unduly subservient to British influence.”⁸⁴

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.⁸⁵ 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.⁸⁶ 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.⁸⁷ 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.⁸⁸ Madison’s discriminatory impost is

⁸⁴ ELKINS & MCKITRICK, *supra* note 66, 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”).

⁸⁵ SHEFFIELD, *supra* note 66, at 264–65, *cited in* ELKINS & MCKITRICK, *supra* note 66, at 69–71. *See also* Letter from Andrew Allen to Tench Coxe (Sept. 8, 1787), *in* 18 DOCUMENTARY HISTORY, *supra* note 13, at 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 at the House of Representatives (June 25, 1790), *in* 13 THE PAPERS OF JAMES MADISON 256 (Charles F. Holson et al. eds., 1981) [hereinafter 13 MADISON PAPERS].

⁸⁶ ELKINS & MCKITRICK, *supra* note 66, at 414.

⁸⁷ *See, e.g., id.* at 131 (finding that a treaty opening West Indies for trade would just confirm what was already accessible informally).

⁸⁸ *But see* Letter from James Madison to Thomas Jefferson (Aug. 20, 1784), *in* 8 MADISON PAPERS, *supra* note 55, at 102–04 (arguing for the regulation of trade only to

probably best understood as driven by ideological hatred of Great Britain, more than by any reasonable view of American self-interest.⁸⁹

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 of 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.

C. 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 above, so as to give U.S. vessels exclusive monopolies on shipping American commodities out of U.S. ports (thirty cites and 22%).⁹⁰

reduce the trade of Great Britain to an equality with other nations and not to make a mercantile element rich).

⁸⁹ See ELKINS & MCKITRICK, *supra* note 66, at 131, 375–88, 432 (arguing 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 at the House of Representatives on Navigation and Trade (May 13, 1790), in 13 MADISON PAPERS, *supra* note 85, at 213. For Jefferson in Paris, the failure of the retaliatory impost of British shipping hurt France, which had “spent her blood and money” 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, 366–67 (Julian P. Boyd ed., 1958). 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 (1974).

⁹⁰ (1) Alexander Hamilton, *Continentalist V* (Apr. 18, 1782), in 3 THE PAPERS OF ALEXANDER HAMILTON 75, 78 (Harold C. Syrett ed., 1962) [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 unremitted vigilance of government, that they have been able to extend their traffic to a degree so much beyond their natural and comparative

advantages”); (2) Letter from James Monroe to James Madison (Dec. 18, 1784), *in* 22 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 78 (Paul H. Smith ed., 1995) (describing proposal to invest Congress the power to “regulate the duties upon imports & exports, by wh[ich] if wise regulations are adopted, we may take some share in the carrying trade by giving priviledges to our own citizens in the exportation”); (3) Letter from Richard Henry Lee (Oct. 10, 1785), *in* 2 THE FOUNDERS’ CONSTITUTION, *supra* note 24, at 482 (arguing that the Northern and Southern states are so different that “the Staple States should [oppose] the proposed plan of vesting powers absolute for the restraint & regulation of Commerce in [Congress] whose Constituents are very differently circumstanced”); (4) Gouverneur Morris, Speech at the Federal Convention (Madison notes, Aug. 29, 1787), *in* 2 FARRAND’S RECORDS, *supra* note 15, at 451 (opposing the requirement of a two-thirds vote for the regulation of commerce because encouraging American ships and seamen would reduce Southern produce costs and improve security); (5) Hugh Williamson, Speech at the Federal Convention (Madison notes, Aug. 29, 1787), *in* 2 FARRAND’S RECORDS, *supra* note 15, at 451 (arguing that if “Northern States should push their regulations [of commerce] too far, the S[outhern] States would build ships for themselves”); (6) Charles Pinckney, Speech at the Federal Convention (Madison notes, Aug. 29, 1787), *in* 2 FARRAND’S RECORDS, *supra* note 15, at 449–50 (saying that the interests of the Southern states were against regulation of commerce, but that he thought it proper to allow power to make commercial regulations because of the concessions that the North had made); (7) James Wilson, Speech at the Federal Convention (Madison notes, Sept. 14, 1787), *in* 2 FARRAND’S RECORDS, *supra* note 15, at 616 (explaining that power to grant monopolies was included in the power to regulate commerce); (8) George Mason, Speech at the Federal Convention (Madison notes, Sept. 14, 1787), *in* 2 FARRAND’S RECORDS, *supra* note 15, at 616 (opposing monopolies and arguing that the power to regulate commerce does not include the power to give monopolies); (9) Eldridge Gerry, Speech at the Federal Convention (King notes, Sept. 15, 1787), *in* 2 FARRAND’S RECORDS, *supra* note 15, at 635 (opposing giving Congress power to regulate commerce because it would enable Congress to “create corporations and monopolies”); (10) George Mason, Speech at the Federal Convention (Madison notes, Sept. 15, 1787), *in* 2 FARRAND’S RECORDS, *supra* note 15, at 631 (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, § 9, cl. 6 (“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 Governor Richard Caswell (Sept. 18, 1787), *in* 13 DOCUMENTARY HISTORY, *supra* note 13, at 216 (“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, *supra* note 24, at 9 (arguing that 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, *supra* note 13, at 281 (arguing that the “Commercial plunder of the South stimulates the rapacious Trader”); (15) George Mason, *Objections to the Constitution* (Oct. 7, 1787), *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 13, at 350 fearing 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 FEDERALIST NO. 12, *supra* note 24 (Alexander Hamilton) (praising the fostering of commerce so as to increase the circulation of precious metals, invigorate the channels of industry and boost government revenue); (17) "The Landholder" [Oliver Ellsworth], CONN. COURANT, Dec. 10, 1787, *reprinted in* 3 FARRAND'S RECORDS, *supra* note 15, at 165 (writing that George Mason's opposition to giving Congress the power to regulate trade was "an open decided preference of all the world to you"); (18) "Agrippa VI," MASS. GAZETTE, Dec. 14, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 13, at 428 (opposing congressional power to grant exclusive charters because they would be "injurious to . . . commerce, by enhancing prices and destroying . . . rivalry"); (19) "Agrippa XIV," MASS. GAZETTE, Jan. 25, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 13, at 821 (stating 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 "[a]s 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, Speech at the Massachusetts Ratification Convention (Jan. 21, 1788), *in* 2 ELLIOT'S DEBATES, *supra* note 13, at 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 at the Massachusetts Ratification Convention (Feb. 1, 1788), *in* 2 ELLIOT'S DEBATES, *supra* note 13, at 130 ("[W]ell-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 at the Massachusetts Ratification Convention (Feb. 1, 1788), *in* 2 ELLIOT'S DEBATES, *supra* note 13, at 139 (arguing that Congress should confine shipping to American vessels, just as all the great trading nations have benefitted from "secur[ing] to themselves the advantages of their carrying trade"); (23) RECOMMENDED AMENDMENTS TO THE CONSTITUTION, GENERAL COURT OF THE MASSACHUSETTS RATIFICATION CONVENTION, (Feb. 6, 1788), *reprinted in* 2 ELLIOT'S DEBATES, *supra* note 13, at 177 (recommending that "Congress erect no company of merchants with exclusive advantages of commerce"); (24) Williamson Speech at Edenton, *supra* note 24, at 231 ("By 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, *supra* note 13, at 230 (writing 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 & PORTSMOUTH J. (Va.), Mar. 12, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 13, at 380 (stating 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, *supra* note 15, at 303 (stating 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 freight costs if "[s]hips of every Nation may

Both Hamilton and Madison were mercantilists, by their participation in the serious thinking of the times. Mercantilism focused on stimulating foreign exports and discouraging foreign imports so as to maximize the domestic supply of specie. Mercantilism assumed that government should actively stimulate exports by giving monopolies and bounties, and should also discourage imports by creating taxes and restrictions.⁹¹ Hamilton's argument, 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 [i.e. 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

come into their [p]orts"); (28) Letter from Richard Henry Lee to Edmund Pendleton (May 26, 1788), in 2 DEBATE ON THE CONSTITUTION, *supra* note 13, at 465 (stating that the danger of monopolized trade may be avoided by requiring three-fourths of the states to approve regulations of commerce); (29) Alexander Hamilton, Speech at the New York Ratification Convention (June 20, 1788), in 2 ELLIOT'S DEBATES, *supra* note 13, at 236 (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) M. Smith, *Resolution in the New York Ratification Convention* (July 2, 1788), in 2 ELLIOT'S DEBATES, *supra* note 13, at 407 ("[N]othing in the Constitution contained shall be construed to authorize Congress to grant monopolies, or erect any company with exclusive advantages of commerce.").

⁹¹ See, e.g., CROWLEY, *supra* note 2, at xiii (tracing the ideas of government intervention back to the 14th century).

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.⁹²

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.”⁹³ The constitutional debates are also filled with moral condemnation of imported luxuries. Federalist Tench Coxe condemned the “ineffective” federal government under the Articles for its inability to control the “wanton consumption” of imported luxuries.⁹⁴ “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.”⁹⁵ “Wise commercial regulations,” said Federalist John Howard, “will reduce imports of foreign luxuries in foreign ships to one-tenth.”⁹⁶ We need a controlling Union government to regulate commerce, George Washington wrote, to balance against the “luxury, effeminacy and corruption” introduced by foreign trade.⁹⁷

Anti-Federalist opponents of the Constitution were no friendlier to imported luxuries. At the Philadelphia Convention, Anti-Federalist George Mason had desecanted, Madison tells us, on the necessity of restricting the “excessive consumption of foreign superfluities.”⁹⁸ Anti-Federalist 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.⁹⁹ John Lansing opened the Anti-Federalist opposition at the New York Ratification debate with a fine mercantilist diagnosis, arguing that the

⁹² THE FEDERALIST NO. 12, *supra* note 24, at 73–75 (Alexander Hamilton).

⁹³ “Honestus,” N.Y. PACKET, Mar. 27, 1786, *quoted in* KAMINSKI, *supra* note 29, at 99.

⁹⁴ TENCH COXE, AN ENQUIRY INTO THE PRINCIPLES ON WHICH A COMMERCIAL SYSTEM FOR THE UNITED STATES OF AMERICA SHOULD BE FOUNDED 5–6 (1787) (regretting that an “ineffective [and] disjointed” federal government should not be able to overcome the “wanton consumption of imported luxuries”).

⁹⁵ James Wilson, Speech at the Pennsylvania Ratification Convention (Nov. 26, 1787), *in* 2 ELLIOT’S DEBATES, *supra* note 13, at 431 (emphasis omitted).

⁹⁶ Letter from John Howard to George Thatcher (Feb. 27, 1788), *in* 16 DOCUMENTARY HISTORY, *supra* note 13, at 230.

⁹⁷ *See, e.g.*, Letter from George Washington to James Warren (Oct. 7, 1785), *in* 3 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 298, 299–300 (W. Abbot ed., 1994) [hereinafter 3 WASHINGTON PAPERS].

⁹⁸ George Mason, Speech at the Federal Convention (Madison notes, Sept. 13, 1787), *in* 2 FARRAND’S RECORDS, *supra* note 15, at 606.

⁹⁹ Patrick Henry, Speech at the Virginia Ratification Convention (June 9, 1788), *in* 3 ELLIOT’S DEBATES, *supra* note 13, at 157.

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.”¹⁰⁰ The French Counsel reported home that the New York opponents of the Constitution wanted fewer commercial ties with Europe, which only furnished them with “luxuries that they must do without to live in the simplicity that befits a newborn State.”¹⁰¹ The wearing of British machine-woven woollens 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.¹⁰²

Mercantilism’s general espousal of frugality and disapproval of imported luxuries can, indeed, be traced back for at least the prior hundred years.¹⁰³ The participants in the ratification debates all approved of restricting imports and keeping specie at home, regardless of their support for the Constitution. On his inauguration in 1789, Washington was to wear “a great rarity” — “a suit made from cloth woven in the United States.”¹⁰⁴

“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.”¹⁰⁵ Hamilton had argued as early as 1781 that the Congress needed the “power of regulating trade, comprehending a right of granting bounties and premiums by way of encouragement.”¹⁰⁶

¹⁰⁰ John Lansing, Speech at the New York Ratification Convention (June 20, 1787), in 2 ELLIOT’S DEBATES, *supra* note 13, at 218.

¹⁰¹ Letter from Comte de Moustier to Comte de Montmorin (June 25, 1787), in 18 DOCUMENTARY HISTORY, *supra* note 13, at 190.

¹⁰² John Williams, Speech at the New York Ratification Convention (June 21, 1788), in 2 ELLIOT’S DEBATES, *supra* note 13, at 240 (calling for the abandonment of all the foreign commodities that “deluged our country, which have loaded us with debt.”). *See also* “A Citizen of Dutchess County,” N.Y. PACKET, Mar. 6, 1786, *noted in* KAMINSKI, *supra* note 29, at 99 (suggesting New York should prohibit “the importation of all foreign articles that might be made among us, and [levy] heavy duties on all imported luxuries”). *Cf.* Rebecca K. Starr, *Political Mobilization, 1765–1776*, in THE BLACKWELL ENCYCLOPEDIA OF THE AMERICAN REVOLUTION 231, 238 (Jack P. Green & J.R. Pole eds., 1991) (stating that a pledge to use homespun cloth was a symbolic display of loyalty to the Revolutionary cause at the outset of the War).

¹⁰³ *See, e.g.*, IRWIN, *supra* note 2, at 37.

¹⁰⁴ JAMES THOMAS FLEXNER, WASHINGTON: THE INDISPENSABLE MAN 214 (1969).

¹⁰⁵ Samuel Osgood & Arthur Lee, Address from the United States in Congress Assembled, to the Legislatures of the Several States (Aug. 31, 1786), in 31 JOURNALS 613, 618 (John C. Fitzpatrick ed., 1934).

¹⁰⁶ Alexander Hamilton, *Continentalist IV* (Aug. 30, 1781), in 2 HAMILTON PAPERS, *supra* note 90, at 670 (emphasis omitted).

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 their natural and compar[a]tive advantages.”¹⁰⁷ James Bowdoin argued before the Massachusetts Ratification Convention that the well-being of trade depended upon the proper regulation of it and that unregulated trade would ruin rather than enrich those who carried it on.¹⁰⁸ George Washington argued that “it behoves us to place [commerce] in the most convenient channels, under proper regulation — freed, as much as possible from those vices [from] which luxury . . . naturally introduce.”¹⁰⁹ Hamilton denounced the argument that trade would regulate itself as a “wild speculative paradox[] . . . contrary to the uniform practice and sense of the most enlightened nations.”¹¹⁰ Madison joined in the enthusiasm, denouncing those who were “decoying the people into a belief that trade ought in all cases to be left to regulate itself.”¹¹¹

In true mercantilist terms, James Madison 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].¹¹²

Even federalization of the state imposts can be explained in mercantilist terms,

¹⁰⁷ Alexander Hamilton, *Continentalist V* (Apr. 18, 1782), in 3 HAMILTON PAPERS, *supra* note 90, at 78.

¹⁰⁸ James Bowdoin, Speech at the Massachusetts Ratification Convention (Feb. 1, 1788), in 2 ELLIOT'S DEBATES, *supra* note 13, at 130.

¹⁰⁹ Letter from George Washington to Thomas Jefferson (Mar. 29, 1784), in 3 WASHINGTON PAPERS, *supra* note 97, at 239 (emphasis omitted).

¹¹⁰ Alexander Hamilton, *Continentalist V* (Apr. 18, 1782), in 3 HAMILTON PAPERS, *supra* note 90, at 76.

¹¹¹ Letter from James Madison to James Monroe (Aug. 20, 1784), in 8 MADISON PAPERS, *supra* note 55, at 102.

¹¹² Letter from James Madison to Thomas Jefferson (Mar. 18, 1786), in 8 MADISON PAPERS, *supra* note 55, at 501. In the passage just before the one quoted, Madison makes clear that he is complaining about the failure of the states to unify to achieve an enforceable embargo or retaliatory impost against the British.

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 and regulate imports. 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”¹¹³ Only high taxes on imports could suppress the corruption of wonton and luxurious consumption that imports represented.

The Constitution prohibited the federal government from taxing exports¹¹⁴ and that is also 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 deep-water harbor states) monopolizing the taxes on exports 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 southern favoritism.

In 1789 James Madison spoke to the new Congress saying that “if industry and labour are left to take their own course, they will generally be directed to those objects which are the most productive.”¹¹⁵ 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.¹¹⁶ By the time he had finished his list, the exceptions had swallowed the free trade. Indeed, given that Madison had condemned those who advocated free trade¹¹⁷ and had traced most of our political and moral errors to the imports that drained us of our precious metals,¹¹⁸ the insincere part of Madison’s 1789 address to the House was the opening claim that he was “the friend to a very free system of commerce.”¹¹⁹

¹¹³ Speech at the Pennsylvania Ratification Convention (Nov. 24, 1787), in 3 FARRAND’S RECORDS, *supra* note 15, at 141.

¹¹⁴ U.S. CONST. art. I, § 9, cl. 5.

¹¹⁵ James Madison, Speech at the House of Representatives (Apr. 9, 1789), in 12 THE PAPERS OF JAMES MADISON 71 (Charles F. Hobson et al. eds., 1979) [hereinafter 12 MADISON PAPERS].

¹¹⁶ *Id.* at 73.

¹¹⁷ Letter from James Madison to James Monroe (Aug. 20, 1785), in 8 MADISON PAPERS, *supra* note 55, at 102.

¹¹⁸ Letter from James Madison to Thomas Jefferson (Mar. 18, 1786), in 8 MADISON PAPERS, *supra* note 55, at 501.

¹¹⁹ 12 MADISON PAPERS, *supra* note 115, at 71.

Once free trade replaced mercantilism as an economic philosophy, thanks mostly to the work of Adam Smith, importing British woollens 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.¹²⁰ When Adam 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.

1. 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.¹²¹ 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.¹²² The port preferences have been said to be the economic “centerpiece” of the Madison’s coalition out of which the constitutional movement arose.¹²³ Both Thomas Jefferson¹²⁴ and George Washington¹²⁵ 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,

¹²⁰ 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 literature supporting free trade and comparative advantage arguments see Paul R. Krugman, *Is Free Trade Passé?*, 1 *J. ECON. PERSP.* 131 (1987). See also IRWIN, *supra* note 2, which includes a discussion of where exceptions to free trade might be justified.

¹²¹ Letter from James Madison to James Monroe (June 21, 1785), in 8 *MADISON PAPERS*, *supra* note 55, at 307.

¹²² See ALBERT ANTHONY GIESECKE, *AMERICAN COMMERCIAL LEGISLATION BEFORE 1789*, at 77–82, 100–06 (1910) (stating that American iron exports had been required to go first to the port of London, while Carolina rice exports were allowed to bypass Britain entirely).

¹²³ BRUCE A. RAGSDALE, *A PLANTERS’ REPUBLIC: THE SEARCH FOR ECONOMIC INDEPENDENCE IN REVOLUTIONARY VIRGINIA* 269 (1996).

¹²⁴ Letter from Thomas Jefferson to James Madison (Nov. 11, 1784), in 8 *MADISON PAPERS*, *supra* note 55, at 127.

¹²⁵ RAGSDALE, *supra* note 123, at 269.

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 seventeen listed Virginia ports.¹²⁶ The Virginia legislature also exempted Virginia-owned ships from the port restrictions.¹²⁷

Madison denied that he meant to sacrifice the "conveniency" of planters to provide incentives for merchants,¹²⁸ but the monopoly nonetheless seemed motivated by 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.¹²⁹ 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 dock¹³⁰ and, once again, anti-British ideology seemed as important as Virginia self-interest.

George Mason vehemently opposed 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 to restrict deep-water ships from passing.¹³¹ To use a current analogy, the port bill was like throwing a very large rock into the river at the

¹²⁶ *Bill Restricting Foreign Vessels to Virginia Certain Ports* (June 8, 1784) editorial note, in 8 MADISON PAPERS, *supra* note 55, at 64. See RAGSDALE, *supra* note 123, at 269–72; RISJORD, *supra* note 75, at 136–37.

¹²⁷ RAGSDALE, *supra* note 123, at 270. Giving Virginia-owned ships an exemption from the port preference, while still subjecting other U.S.-owned ships to the import fee, 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 (U.S. 1781), and Madison told Monroe that it "was an erratum which will no doubt be rectified." Letter from James Madison to James Monroe (Aug. 20, 1785), in 8 MADISON PAPERS, *supra* note 55, at 103. Virginia ownership of deep-water ships would not have been material at the time, however.

¹²⁸ Letter from James Madison to James Monroe (Aug. 20, 1785), in 8 MADISON PAPERS, *supra* note 55, at 103.

¹²⁹ RISJORD, *supra* note 75, at 137. See also CROWLEY, *supra* note 2, at 100 (describing Madison's approach to the port bills a bit more sympathetically as a "provincial mercantilist" trying to provide commercial incentives).

¹³⁰ Letter from James Madison to James Monroe (Aug. 20, 1785), in 8 MADISON PAPERS, *supra* note 55, at 102–03.

¹³¹ *Protest by "A Private Citizen" against the Port Bill* (Nov.–Dec. 1786), in 2 THE PAPERS OF GEORGE MASON 859 (Robert A. Rutland ed., 1970) [hereinafter 2 MASON PAPERS].

bottom of each planter's wharf.¹³² Mason had been an ally of Madison's regarding enforcement of the British debts and he argued that giving foreign merchants speedy justice and honest payment of our debts would be "a more effectual means of inviting foreigners to trade with us" than the port monopoly.¹³³ Mason was not consistently laissez faire: he was in favor of industry subsidies such as high, protectionist imposts,¹³⁴ and grants and bounties,¹³⁵ 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."¹³⁶ 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."¹³⁷ The Constitution thus prohibited what had been a "centerpiece" or at least a core concrete example of what Madison had in mind while serving in the Virginia legislature for 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.

2. An American Navigation Act

The proponents of the Constitution objected to the British exclusion of American ships from the British West Indies, under the British Navigation Act, but they simultaneously wanted an American version of the Act to exclude British ships in American ports and to give American vessels a monopoly in the business of carrying American commodities. In the Massachusetts ratification convention, for example, Thomas Russell argued that all the great trading nations had benefitted from "secur[ing] to themselves the advantages of their carrying trade" and that

¹³² See, e.g., 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).

¹³³ Protest by "A Private Citizen" against the Port Bill (Nov.–Dec. 1786), in 2 MASON PAPERS, *supra* note 131, at 861.

¹³⁴ George Mason, Speech at the Federal Convention (Madison notes, Aug. 28, 1787), in 2 FARRAND'S RECORDS, *supra* note 15, at 441 (asking Congress to allow states to tax imports so as to protect local manufacturing).

¹³⁵ George Mason, Speech at the Federal Convention (Madison notes, Sept. 13, 1787), in 2 FARRAND'S RECORDS, *supra* note 15, at 606 (advocating association to discourage foreign superfluities and to encourage American economy, frugality and manufactures).

¹³⁶ U.S. CONST. art. I, § 9, cl. 6. See Mssrs. Carrol & Luther Martin (Madison notes, Aug. 25, 1787), in 2 FARRAND'S RECORDS, *supra* note 15, at 417 (arguing that Congress might enact port preferences, requiring "vessels belonging or bound to Baltimore, to enter [and] clear at Norfolk").

¹³⁷ Letter from James Madison to Edmund Pendleton (Oct. 28, 1787), in 10 MADISON PAPERS, *supra* note 24, at 223.

Congress should confine American shipping to American vessels.¹³⁸ Rhode Island was Anti-Federal, stingy in giving revenue to the federal government, but it was also a shipping state eager to allow Congress the power to prohibit the importation of foreign goods except in American vessels.¹³⁹ 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.”¹⁴⁰ 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 would ultimately both reduce costs of transporting Southern produce and improve security.¹⁴¹

Sometimes what was wanted was not just an exclusion of British ships from the American trade but also exclusion of British merchants. In April of 1785, a committee of Boston merchants that included John Hancock met at Faneuil Hall and voted in favor of a petition to give Congress immediate power to regulate the trade of the United States. The immediate complaint was that British merchants residing in Boston had received large quantities of English goods and expected more, which threatened an entire monopoly by those merchants. The British imports were said to be “calculated to drain us of our currency and have a direct tendency to impoverish this country.”¹⁴² Pending a congressional remedy, the merchants voted not to lease or sell any shop or warehouse to the British merchants for sale of their goods nor to employ anyone who assisted the British. They also asked that Massachusetts naval officers prevent goods destined for the British merchants from being landed.¹⁴³ Regulation of trade would protect the Boston merchants from British competitors.

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.¹⁴⁴ In 1774 as the War

¹³⁸ Thomas Russell, Speech at the Massachusetts Ratification Convention (Feb. 1, 1788), in 2 ELLIOT’S DEBATES, *supra* note 13, at 139.

¹³⁹ REPORT OF THE SECRETARY OF THE CONGRESS (Jan. 3, 1786), *reprinted in* 30 JOURNALS 8, 10 (John C. Fitzpatrick ed., 1934) (noting that Rhode Island ratified the 1783 impost subject to a substantial list of self-serving conditions, but agreed to ratify any article empowering Congress “to regulate, restrain, or prohibit the importation of all foreign goods in any but American [v]essels.”).

¹⁴⁰ Williamson Speech at Edenton, *supra* note 24, at 231.

¹⁴¹ Gouverneur Morris, Speech at the Federal Convention (Madison notes, Aug. 29, 1787), in 2 FARRAND’S RECORDS, *supra* note 15, at 450; *see also* Letter from North Carolina Delegates to Governor Richard Caswell (Sept. 18, 1787), in 13 DOCUMENTARY HISTORY, *supra* note 13, at 216 (“A navigation [a]ct or the Power to regulate [c]ommerçe 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.”).

¹⁴² *Monthly Chronology, for April, 1785*, BOSTON MAG., Apr. 4, 1785, at 156.

¹⁴³ *Id.* at 155–56.

¹⁴⁴ OLIVER M. DICKERSON, THE NAVIGATION ACTS AND THE AMERICAN REVOLUTION 290–300 (1951) (arguing that the Navigation Act was not the cause of the Revolution and

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, with taxes that channeled commerce.¹⁴⁵ 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.

At 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 one half.¹⁴⁶ The southern states would be ruined, Mason argued, because commercial laws would enable “the Merchants of the Northern [and] Eastern States not only to demand an exorbitant Freight, but to monopolize the Purchase of the Commodities at their own Price.”¹⁴⁷ The French Consul in Wilmington, North Carolina reported home the view, fair to Mason’s viewpoint, that the Constitution was all to the advantage of the northern shipping states because they could raise shipping prices.¹⁴⁸ 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.¹⁴⁹ Soon after the Convention broke, Richard Henry Lee complained that the “Commercial plunder of the South stimulates the rapacious

was actually quite popular). For a review of the economic history literature that finds the Navigation Act had a trivial adverse impact, see Larry Sawers, *The Navigation Acts Revisited*, 45 *ECON. HISTORY REV.* 262 (1992) (arguing, contrarily, that the burdens of the Navigation Act did in fact play a key role in causing the Revolution).

¹⁴⁵ Oct. 14, 1774, in 1 *JOURNALS* 69 (Worthington C. Ford ed., 1904).

¹⁴⁶ George Mason, Speech at the Federal Convention (Madison notes, Sept. 15, 1787), in 2 *FARRAND’S RECORDS*, *supra* note 15, at 631. Charles Pinckney of South Carolina had proposed at the Convention that Congress should require a two-thirds majority for any regulation of commerce or navigation act, but his motion was defeated, four states in favor and seven against. (Madison notes, Aug. 29, 1787), in 2 *FARRAND’S RECORDS*, *supra* note 15, at 453. The Committee of Detail, chaired by John Rutledge of South Carolina, also required a two-thirds majority for a navigation act. *REPORT OF THE COMMITTEE OF DETAIL, DRAFT OF ART. VII, § 6* (Aug. 6, 1787), in 2 *FARRAND’S RECORDS*, *supra* note 15, at 183. However, this provision both appeared and disappeared without an explanation.

¹⁴⁷ George Mason, *Objections to the Constitution* (Oct. 7, 1787), *reprinted in* 13 *DOCUMENTARY HISTORY*, *supra* note 13, at 350.

¹⁴⁸ Letter from Gaspard Joseph Amand Ducher to Comte de la Luzerne (Feb. 2, 1788), in 16 *DOCUMENTARY HISTORY*, *supra* note 13, at 13.

¹⁴⁹ Letter from Edmund Randolph to the Speaker of the Virginia House of Delegates (Oct. 10, 1787), in 3 *FARRAND’S RECORDS*, *supra* note 15, at 127 (citing the power to regulate commerce without two-thirds majority as reason not to sign the Constitution); GEORGE MASON, *OBJECTIONS TO THIS CONSTITUTION OF GOVERNMENT* (Sept. 15, 1787), *reprinted in* 2 *FARRAND’S RECORDS*, *supra* note 15, at 639–40 (stating that a majority vote allows Northern merchants to demand exorbitant rates, but a two-thirds vote produces mutual moderation).

Trader.”¹⁵⁰ Opposition to “corporations and monopolies,” more generally, was a recurring theme among Anti-Federalist opponents to the Constitution.¹⁵¹

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. On the other hand, 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.¹⁵² The prohibition on export tax meant that Congress could not give a differential tax advantage to American ships in the carrying of Southern commodities. Congress would have had to take the far more radical step of banning foreign ships from carrying American exports entirely and Congress never seriously considered a complete prohibition.

On the import side, where tax was allowed, Congress did use imports to discriminate against 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.¹⁵³ 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 U.S. ships.¹⁵⁴ 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

¹⁵⁰ Letter from Richard Henry Lee to George Mason (Oct. 1, 1787), in 3 MASON PAPERS, *supra* note 131, at 996.

¹⁵¹ See, e.g., Eldridge Gerry, Speech at the Federal Convention (King notes, Sept. 15, 1787), in 2 FARRAND'S RECORDS, *supra* note 15, at 635 (opposing congressional power to regulate commerce because the authority will enable Congress “to create corporations and monopolies”); “Agrippa VI,” MASS. GAZETTE, Dec. 14, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 13, at 428 (opposing congressional power to grant exclusive charters because they would be injurious to commerce by enhancing prices and destroying rivalry); “Agrippa XIV,” MASS. GAZETTE, Jan. 29, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 13, at 821 (stating that two or three monopoly charters in navigation “would annihilate the importance of our seaports, by transferring the trade to Philadelphia”); M. Smith, *Resolution in New York Ratification Convention* (July 2, 1788), in 2 ELLIOT'S DEBATES, *supra* note 13, at 407 (“[N]othing in the said Constitution contained shall be construed to authorize Congress to grant monopolies, or erect any company with exclusive advantages of commerce.”); see also NORFOLK & PORTSMOUTH J. (Va.), Mar. 12, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 13, at 380 (stating that gentlemen of Virginia opposing the Constitution worry “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”).

¹⁵² U.S. CONST. art. I, § 9, cl. 5.

¹⁵³ Act of July 20, 1790, ch. 30, 1 Stat. 135 (repealing Act of July 20, 1789, ch. 3, 1 Stat. 27).

¹⁵⁴ Where scheduled taxes exceeded 10%, e.g., on Madeira, the tax on foreign-ship imports did not add on to the impost. Act of Aug. 10, 1790, ch. 39, § 2, 1 Stat. 181. See also Act of July 4, 1789, ch. 2, § 5, 1 Stat. 27 (reducing tax on imports by one-tenth, generally from 5% to 4½%, if the imports were carried in on U.S. ships).

higher taxes on each other's ships,¹⁵⁵ and it seems to have been ended generally in 1799 when general impost rates were raised to 10%.¹⁵⁶

The discriminatory tonnage fees and the extra 5% tax on imports in foreign owned ships from 1789–1799, while not insubstantial, were much less than what the Federalists were calling for in advocating the Constitution. The call for monopoly turned out, after deliberation, not to have majority support. Giving a monopoly to American-owned vessels would have induced Britain, and indeed France as well, to reciprocate with exclusions of American ships from European ports, which 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.

D. 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.¹⁵⁷ A writer named “Philadelphiensis,” for

¹⁵⁵ See Treaty of Amity, Commerce and Navigation [Jay's Treaty], Nov. 19, 1794, arts. III, XV. See also SAMUEL FLAGG BEMIS, JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY 333–34 (1921).

¹⁵⁶ Act to Regulate the Collection of Duties on Imports and Tonnage, ch. 22, § 61 (Mar. 2, 1799) (imposing the tax of 10% of cost). Imports from beyond the Cape of Good Hope were taxed at 20% of cost, 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. See *id.*

¹⁵⁷ (1) Francis Hopkinson, *An Ode, Philadelphia* (July 4, 1787), in 18 DOCUMENTARY HISTORY, *supra* note 13, at 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 (Madison notes, Sept. 15, 1787), in 2 FARRAND'S RECORDS, *supra* note 15, at 625 (explaining that whether states were to be denied power to lay harbor taxes called “tonnage” depended on the scope of power to regulate commerce); (3) “Philadelphiensis VII,” PHILA. INDEP. GAZETTEER, Jan. 10, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 13, at 338 (“If America is to be a commercial neutral power, she ought to have some naval strength to intitle her to the appellation.”); (4) Edmund Randolph, Speech at the Virginia Ratification Convention (June 6, 1788), in 3 ELLIOT'S DEBATES, *supra* note 13, at 73–74 (arguing 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, Speech at the New York Ratification Convention (June 25, 1788), in 2 ELLIOT'S DEBATES, *supra* note 13, at 350 (arguing that the objects of the federal government include “the regulation of commerce, — that is, the whole system of foreign intercourse.”); (6) James Madison, Speech at the Virginia Ratifying Convention (June 11, 1788), in 3 ELLIOT'S DEBATES, *supra* note 13, at 249–50 (predicting that if America could 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

instance, argued that if America meant to be a commercial power, it should endeavor to have a navy.¹⁵⁸ “Commerce” required a navy because it was a deep sea activity. 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.¹⁵⁹ In two cites “commerce” is defined as what “merchants” do,¹⁶⁰ and “merchants” seems to refer to only the deep-water importers, and not to the country or retail storekeepers.¹⁶¹ When tax issues (37 cites), mercantilist restrictions (69 cites) and miscellaneous uses (9 cites) are combined, deep-water shipping is the reference in 115, or 83%, 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 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.¹⁶² 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

DOCUMENTARY HISTORY, *supra* note 13, at 190 (stating that New York Anti-Federalists 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”); (8) THE FEDERALIST NO. 35 (Alexander Hamilton); (9) GENERAL COURT OF THE MASSACHUSETTS RATIFICATION CONVENTION, RECOMMENDED AMENDMENTS TO THE CONSTITUTION (Feb. 6, 1788), *reprinted in* 2 ELLIOT’S DEBATES, *supra* note 13, at 177.

¹⁵⁸ “Philadelphiensis VII,” PHILA. INDEP. GAZETTEER, Jan. 10, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 13, at 338.

¹⁵⁹ Edmund Randolph, Speech at the Virginia Ratification Convention (June 6, 1788), *in* 3 ELLIOT’S DEBATES, *supra* note 13, at 74.

¹⁶⁰ (8) THE FEDERALIST NO. 35, at 217 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“[I]n a country of small commercial capital, [a merchant] is often under a necessity of keeping prices down in order to make a more expeditious sale”); (9) GENERAL COURT OF THE MASSACHUSETTS RATIFICATION CONVENTION, RECOMMENDED AMENDMENTS TO THE CONSTITUTION (Feb. 6, 1788), *reprinted in* 2 ELLIOT’S DEBATES, *supra* note 13, at 177 (recommending “[t]hat Congress erect no company [of merchants] with exclusive advantages of commerce”).

¹⁶¹ *See, e.g.*, REPORT OF THE OFFICE OF FINANCE (Robert Morris) (July 29, 1782), *reprinted in* 22 JOURNALS 432 (Aug. 5, 1782) (Gaillard Hunt ed., 1914) (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, OBJECTIONS TO THIS CONSTITUTION OF GOVERNMENT (Mason notes, Sept. 15, 1787), *reprinted in* 2 FARRAND’S RECORDS, *supra* note 15, at 639–40 (stating that a 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.”

¹⁶² Letter from Comte de Moustier to Comte de Montmorin (May 29, 1788), *in* 18 DOCUMENTARY HISTORY, *supra* note 13, at 145.

given that the French North American empire had been active in fur trading. The reference, however, is surely not a reference to deep-water shipping.

III. FAIRNESS BETWEEN STATES

Coastal shipping or other trade between the states shows up in only twenty-three, or 17%, of the sampled quotes, and for many of those there is no remedy attached.¹⁶³ A subset of thirteen uses of “commerce” refers to trading between the states¹⁶⁴ and a subset of ten justifies other enumerated restrictions on state abuses by

¹⁶³ 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.

¹⁶⁴ (1) MASS. GAZETTE, July 8, 1787, *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 13, at 391 (stating that when the government can pay its debts “even the circulation of the interest may become a national blessing, by increasing the means for commerce”); (2) Letter from Roger Sherman and Oliver Ellsworth to Governor Samuel Huntington (Sept. 26, 1787), *in* 3 DOCUMENTARY HISTORY, *supra* note 13, at 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, Speech at the Pennsylvania Ratification Convention (Dec. 7, 1787), *in* 2 ELLIOT’S DEBATES, *supra* note 13, at 492 (“Merchants . . . will tell you that they cannot trust their property to the laws of the state in which their correspondents live.”); (4) THE FEDERALIST NO. 22, *supra* note 65, at 137 (Alexander Hamilton) (arguing that if the Constitution is not ratified, states will impose tolls on interstate transportation as the German states do on their rivers); (5) “Agrippa VIII,” MASS. GAZETTE, Dec. 25, 1787, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 13, at 516 (stating that commerce between diverse states is the “bond of union” among the states); (6) Edmund Randolph, *Reasons for Not Signing the Constitution* (Dec. 27, 1787), *in* 1 DEBATE ON THE CONSTITUTION, *supra* note 24, at 602 (The general government needs “to be the supreme arbiter for adjusting every contention among the states . . . particularly in commerce, which will probably create the greatest discord.”); (7) THE FEDERALIST NO. 35, *supra* note 160, at 217 (Alexander Hamilton); (8) THE FEDERALIST NO. 42, *supra* note 24, at 283 (James Madison) (stating that a “defect of power in the existing confederacy [is the power] to regulate the commerce between its several members”); (9) NEWPORT HERALD, Feb. 7, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 13, at 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*, ST. GAZETTE N.C., Mar. 27, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 13, at 495 (asserting that if North Carolina does not ratify, “[t]he United States will treat us as foreigners, and will . . . preclude us from all commerce with them” and annihilate our trade); (11) Edmund Randolph, Speech at the Virginia Ratification Convention (June 6, 1788), *in* 9 DOCUMENTARY HISTORY, *supra* note 13, at 985 (stating that “the commercial regulations between [Virginia] and Maryland” have prevented reprisals on each other); (12) “Phocion,” *On the Economic Advantages of Union: Providence Will be Another Antwerp, Newport Another Brest*, U.S. CHRON. (Providence, R.I.), July 17, 1788, *reprinted in* 2 DEBATE ON THE CONSTITUTION, *supra* note 24, at 529 (“[I]f we should join the new

calling them “commerce issues.”

A. 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 the commercial intercourse among the States free from all invidious and partial restraints.”¹⁶⁵ To this day it is commonly echoed that the 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.¹⁶⁶

Confederacy, our former inland commerce must necessarily be restored.”); (13) James Madison, *Preface to Debates in the Convention of 1787* (circa 1830s), in 3 FARRAND’S RECORDS, *supra* note 15, at 548 (stating 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”).

¹⁶⁵ *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 231 (1824) (Johnson, J., concurring). Justice Johnson also described the regulation of commerce as the “immediate cause” of the Constitution. *Id.* at 224. Justice Johnson often cites to arguments surrounding the Articles of Confederation, including 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.

¹⁶⁶ *See, e.g.*, *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 423 (1994) (Souter, J., dissenting) (describing the dormant commerce clause as patrolling an American “common market” premised on the economic interdependence of the states); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949) (asserting 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 in their commercial regulations”); *Baldwin v. G.A.F. Seeling, Inc.*, 294 U.S. 511, 522 (1935) (“[A] chief occasion of the [C]ommerce [C]ause[] was the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.”) (citations omitted). For more support that the Commerce Clause was meant to enforce a common market, see *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980), and *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 350 (1977). *See also* Patrick Garry, *Commerce Power*, THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 167 (Kermit L. Hall ed., 1992) (“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 effort to protect business enterprise for its own citizens.”); 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); Winkfield F. Twyman, Jr., *Justice*

Reducing barriers on interstate trade, however, was not an important part of the constitutional debates. The major reason for this was 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 citizens that it did not impose on its own inhabitants.¹⁶⁷ 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 interstate barriers. As one superb review of the evidence put it, “[t]he first thing that strikes one’s attention in seeking references directed to interstate commerce is their paucity.”¹⁶⁸

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 “Clause for regulating commerce with foreign nations . . . &c.”¹⁶⁹ Regulation of commerce among the states shows up only within the “&c.”

In retrospect over forty years after the Convention, Madison wrote 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).¹⁷⁰ Nationalization of the impost is not the only issue that shows up under interstate commerce in the original debates, but because 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 nationalization of the state imposts, then there is no (significant) room in the Commerce Clause 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. Hamilton argued that the various states might impose multiple duties on interstate transportation, much as the separate German states imposed tolls on the great rivers that flow through Germany.¹⁷¹ “Publicola” argued that if North Carolina did not ratify, the other states would “treat us as

Scalia and Facial Discrimination: Some Notes on Legal Reasoning, 18 VA. TAX REV. 103, 108 (1998) (“The Articles of Confederation had been unable to stem disruptive protectionism among the several states, thus threatening the life of the infant republic.”).

¹⁶⁷ ARTICLES OF CONFEDERATION art. IV (U.S. 1781) (“[T]he 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.”).

¹⁶⁸ Abel, *supra* note 3, at 470.

¹⁶⁹ 2 FARRAND’S RECORDS, *supra* note 15, at 308.

¹⁷⁰ Letter from James Madison to Joseph C. Cabell (Feb. 13, 1829), in 3 FARRAND’S RECORDS, *supra* note 15, at 478.

¹⁷¹ THE FEDERALIST NO. 22, *supra* note 65, at 137 (Alexander Hamilton).

foreigners” and thus annihilate interstate trade.¹⁷² Rhode Island ratified the Constitution in 1790 in large part reacting 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.¹⁷³ 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 Constitution was not ratified by a state and the unity of the United States fell apart. Hamilton’s example of interstate barriers came from the German empire, not from the United States.¹⁷⁴ Tolls on interstate 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 overriding of the “genius” of the American people.¹⁷⁵

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.¹⁷⁶ 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.¹⁷⁷ The Pennsylvania impost, which also drained New Jersey, had an exemption for goods “of the growth, produce or manufacture of the united states of America or any of them.”¹⁷⁸ The Massachusetts impost¹⁷⁹ and the South Carolina impost¹⁸⁰ did the same.

There were violations of the norm. Before 1788, Virginia had a 1% impost on

¹⁷² “Publicola,” *Address to the Freemen of North Carolina*, ST. GAZETTE N.C., Mar. 27, 1788, reprinted in 16 DOCUMENTARY HISTORY, *supra* note 13, at 495.

¹⁷³ Bruce Ackerman & Neal Kumar Katyal, *Our Unconventional Founding*, 62 U.CHI. L. REV. 475, 538 (1995) (attributing Rhode Island’s ratification heavily to a Senate-passed bill that would prohibit Rhode Island ships in American harbors and American ships in Rhode Island harbors); John P. Kaminski, *Rhode Island: Protecting State Interests*, in RATIFYING THE CONSTITUTION 368, 385 (Michael Allen Gillespie & Michael Lienesch eds., 1989); John Page, Speech at the House of Representatives (May 26, 1790), in 2 ANNALS OF CONGRESS, *supra* note 79, at 1672–73 (Joseph Gales ed., 1834) (opposing Senate-passed bill that would embargo all goods coming from Rhode Island).

¹⁷⁴ THE FEDERALIST NO. 22, *supra* note 65, at 137 (Alexander Hamilton).

¹⁷⁵ *Id.*

¹⁷⁶ FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 18 (1985) (“[S]ister states were exempted from restrictions against foreigners.”); Kitch, *supra* note 56, at 18–19 (listing the only example of a discriminatory state tax as New York’s attempt to prevent end-runs around its anti-British tax); William Frank Zornow, *New York Tariff Policies, 1775–1789*, 37 N.Y. HIST. 40, 47–48 (1956) (discussing exemptions to New York tariffs).

¹⁷⁷ Act of Mar. 22, 1788, ch. 10, § 2, reprinted in THE FIRST LAWS OF THE STATE OF NEW YORK 10 (John D. Cushing ed., 1984) [hereinafter FIRST LAWS OF NEW YORK].

¹⁷⁸ Act of Dec. 23, 1780, ch. 190, § 21, reprinted in THE FIRST LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 427 (John D. Cushing ed., 1984).

¹⁷⁹ ACT AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, 1783, ch. 12, p. 17.

¹⁸⁰ Act of March 25, 1784, SOUTH CAROLINA ACTS 96 (1784).

goods from “any port or place whatsoever”¹⁸¹ and in 1784, Virginia raised the impost to 2½%.¹⁸² Virginia also did not exempt vessels from other states from its tonnage fees — the user fees for harbor maintenance.¹⁸³ In 1787, Virginia was shamed into adopting the usual exemption for goods of American growth or manufacture.¹⁸⁴ In 1788, a Rhode Island newspaper complained that Virginia’s impost imposed prohibitive rates on American goods,¹⁸⁵ but by the time of the report, Virginia had both increased its impost to 3% and exempted American goods. Prior to its 1787 revision, the Virginia impost is a violation of the normal rule that goods of American growth or manufacture should not bear state impost, and it seems to be the most serious violation.

There were attempts to prevent smuggling of foreign goods in avoidance of the state imposts, which is a different issue. New York had tried to prevent end-runs around its impost on foreign imports by imposing taxes of 10% or four times the normal rate, on foreign-source goods coming into New York from Connecticut and New Jersey.¹⁸⁶ The target was smuggled foreign imports, however. New York had the normal exemption for American source goods.

The New York 10% penalty tax could not have been very important economically. 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 2½% impost that was being avoided, and that New York harbor was very convenient, most shippers would have used the New York docks and paid its fees. The New York penalty tax was also a tax on smugglers, not a tax on legitimate interstate trades. Trying to maintain a tax on “innervating” imports was also a very different thing from taxing interstate commerce in American goods, especially in the thinking of the times.

Madison in the 1830s wrote that he understood that Connecticut taxed imports from Massachusetts higher than imports from Great Britain,¹⁸⁷ but if so, I have found no evidence of it in the 1787 contemporaneous debates.

Once the anti-smuggling taxes are excluded, the violations of nondiscrimination do not seem to have any importance. The Virginia impost before its amendment in 1787 seems to be as bad as they get, and Virginia did see the error of its ways. Even

¹⁸¹ 11 STATUTES OF VIRGINIA, *supra* note 60, at 70.

¹⁸² Act of May 1784, ch. xiii, § 2, at 8.

¹⁸³ *Id.* at 121–22.

¹⁸⁴ 12 STATUTES OF VIRGINIA, *supra* note 60, at 416.

¹⁸⁵ NEWPORT HERALD, Feb. 7, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 13, at 512 (complaining that Virginia’s January 1788 impost created prohibitive rates for American goods and commodities).

¹⁸⁶ FIRST LAWS OF NEW YORK, *supra* note 177, at 10. *See* Kitch, *supra* note 56, at 18–19 for a description of the controversy.

¹⁸⁷ James Madison, *Preface To Debates in the Convention of 1787* (circa 1830s), in 3 FARRAND’S RECORDS, *supra* note, 15, at 547.

today, 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.¹⁸⁸ 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 interstate trade in the constitutional debates holds true in this 161-cite sample.¹⁸⁹

B. 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 interstate commerce. Prohibition against discrimination was commonly used to justify provisions outside of the Commerce Clause, but for rules expressed elsewhere, the Commerce Clause is not carrying any extra weight. 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.¹⁹⁰ The Constitution, similarly, prohibited export taxes to

¹⁸⁸ 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, 1029–43 (3d ed. 2000). Compare Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43 (1988) (defending the need of the Commerce Clause to prevent discrimination and to protect economic union), with Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 222 (expressing skepticism that the dormant commerce clause serves efficiency, democracy, or national union), and Kitch, *supra* note 56 (arguing that free trade policies would inevitably have triumphed and without the warping interference from the federal government).

¹⁸⁹ Abel, *supra* note 3, at 470.

¹⁹⁰ (1) THE FEDERALIST NO. 7, *supra* note 24, at 40 (Alexander Hamilton) (stating that New York had the opportunity to render Connecticut and New Jersey a tributary through commercial regulations by laying duties on importations); (2) Letter from Timothy Pickering to John Pickering (Dec. 29, 1787), in 15 DOCUMENTARY HISTORY, *supra* note 13, at 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); (3) THE FEDERALIST NO. 42, *supra* note 24, at 283 (James Madison) (stating that power to regulate commerce between the states was adopted to prevent commercial states from collecting improper and unfair contributions from their noncommercial neighbors); (4) Letter from James Madison to J.C. Cabell (Feb. 13, 1829), in 3 FARRAND'S RECORDS, *supra* note 15, at 478 (writing that the 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 a negative and preventative provision against injustice among the States themselves"); (5) James Madison, *Preface to Debates in the Convention of 1787* (circa 1830), in 3 FARRAND'S RECORDS, *supra* note 15, at 542 (A cause of the Constitution was that some of the states had "no convenient ports for foreign commerce, were subject to be taxed by their neighbors, thro[ugh] whose

prevent the deep-water-harbor “commercial” states from taxing export goods produced in neighboring “uncommercial” states.¹⁹¹ The Constitution prohibits “Preference . . . to the Ports of one State over those of another,”¹⁹² because such port preferences would affect the states unevenly.¹⁹³ The anti-discrimination norm was strongly felt, but it was used primarily to justify goals accomplished in the text outside of the Commerce Clause.

Consistently, the Constitution’s adoption of protection for creditors’ rights was justified in part in terms of justice across state lines. The Constitution prohibits states from impairing contracts, and in the constitutional debates, this prohibition was said to be necessary to prevent “aggressions on the rights of other States”¹⁹⁴ and injury to the citizens of other States.¹⁹⁵ The Constitution prohibits states from issuing paper money and from making anything but gold and silver as legal tender in payments of debts.¹⁹⁶ 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.”¹⁹⁷ Wicked Rhode Island had attempted to require out-of-state creditors to accept Rhode Island

ports, their commerce was carried on. New Jersey, placed between [Philadelphia and New York], was likened to a Cask tapped at both ends.”); (6) *id.* at 547 (stating 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”).

¹⁹¹ (7) Gouverneur Morris, Speech at the Federal Convention (Madison notes, Aug. 21, 1787), in 2 FARRAND’S RECORDS, *supra* note 15, at 360 (Without prohibition on state export taxes, deep-water harbor “States will tax the produce of their uncommercial neighbours.”); (8) James Wilson, Speech at the Federal Convention (Madison notes, Aug. 16, 1787), in 2 FARRAND’S RECORDS, *supra* note 15, at 307 (opposing the prohibition on tax on exports but dwelling “on the injustice and impolicy of leaving N[ew] Jersey [and] Connecticut . . . subject to the exactions of their commercial neighbours”); (9) Roger Sherman, Speech at the Federal Convention (Madison notes, Aug. 16, 1787), in FARRAND’S RECORDS, *supra* note 15, at 308 (Although supporting prohibition of tax on exports, Sherman observed that “[t]he oppression of the uncommercial States [by commercial States] was guarded [against] by the power to regulate trade between the States.”).

¹⁹² (10) U.S. CONST. art. I, § 9, cl. 6.

¹⁹³ Charles Pinckney, Speech at the House of Representatives (Feb. 14, 1820), in 36 ANNALS OF CONGRESS, *supra* note 24 at 1317–18 (arguing that congressional power over interstate commerce by water between the states was given to prevent, among other things, port preferences).

¹⁹⁴ James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9 MADISON PAPERS, *supra* note 24, at 349.

¹⁹⁵ THE FEDERALIST NO. 44, *supra* note 24, at 300–01 (James Madison) (If states were given the power to issue money, then “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 be kindled among the States themselves.”).

¹⁹⁶ U.S. CONST. art. I, § 10, cl. 1.

¹⁹⁷ William R. Davie, Speech at the North Carolina Ratification Convention (July 24, 1788), in 4 ELLIOT’S DEBATES, *supra* note 13, at 20 (emphasis omitted).

dollars, worth twenty cents on the dollar, as if they were worth face value.¹⁹⁸ Paper money was a trick, Gouverneur Morris explained, that harmed citizens of other states.¹⁹⁹

State debtor relief laws were prohibited by the Constitution as “impairments to the Obligation of Contracts”²⁰⁰ and the prohibition was similarly thought necessary as a security to commerce against abuse by the states. Debtor relief was a discrimination issue, stated Roger Sherman and Oliver Ellsworth, in that “the interest of . . . citizens of different states may be affected.”²⁰¹ 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 correspondents live.²⁰² 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.”²⁰³

“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 law²⁰⁴ 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.”²⁰⁵ For the national powers allowed elsewhere, however, the Commerce Clause is not adding anything.

Federal supervision of commerce was considered strong enough to send the federal government into issues of “internal police” of the states. In Philadelphia, Roger Sherman of Connecticut proposed giving immunity from congressional activity for

¹⁹⁸ POLISHOOK, *supra* note 43, at 179.

¹⁹⁹ Gouverneur Morris, Speech at the Federal Convention (Madison notes, July 17, 1787), in 2 FARRAND’S RECORDS, *supra* note 15, at 26.

²⁰⁰ U.S. CONST. art. I, § 10, cl. 1.

²⁰¹ Letter from Roger Sherman and Oliver Ellsworth to Governor Samuel Huntington (Sept. 26, 1787), in 3 DOCUMENTARY HISTORY, *supra* note 13, at 352.

²⁰² James Wilson, Speech to the Pennsylvania Ratification Convention (Dec. 7, 1787), in 2 ELLIOT’S DEBATES, *supra* note 13, at 492.

²⁰³ James Madison, Speech at the Virginia Ratification Convention (June 20, 1788), in 3 ELLIOT’S DEBATES, *supra* note 13, at 534–35.

²⁰⁴ THE FEDERALIST NO. 42, *supra* note 24, at 287 (James Madison) (“The 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 . . .”).

²⁰⁵ THE FEDERALIST NO. 69, at 470 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (stating 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 coins).

“internal police” of the states.²⁰⁶ The Convention rejected the immunity for internal police by the margin of two states for and eight against.²⁰⁷ Consistently, in the consideration of the Bill of Rights, the Anti-Federalists attempted to insert an exemption from federal power for internal police of the states, but the proposal failed.²⁰⁸ “Internal police ought to be infringed,” Gouverneur Morris told the convention, “as in the case of paper money [and] other tricks” because citizens of other states might be affected.²⁰⁹ In the *Federalist*, Publius sold the Constitution by arguing the authority of the union would be strengthened when it extends to “matters of internal concern” because by circulating there it could win the loyalty of the people.²¹⁰

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 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.”²¹¹

Sometimes the norm against discrimination leads 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

²⁰⁶ Roger Sherman, Speech at the Federal Convention (Madison notes, Sept. 15, 1787), in 2 FARRAND'S RECORDS, *supra* note 15, at 629.

²⁰⁷ James Madison, *Notes of the Federal Convention* (July 17, 1787), in 2 FARRAND'S RECORDS, *supra* note 15, at 26. See also James Madison, Speech at the Federal Convention, (Madison's notes, June 19, 1787), in 1 FARRAND'S RECORDS, *supra* note 15, at 318 for Madison's attack on the New Jersey plan on the ground that it would not “secure a good internal legislation [and] administration to the particular States.”

A supplanted draft of the Articles of Confederation had reserved for the states power over their internal police. The draft was replaced by language more protective of the states, saying that Congress would have only powers expressly delegated to it. See discussion by Thomas Burke who instigated the change in his Letter to Governor Richard Caswell of North Carolina (Apr. 29, 1777), in 7 JOURNALS 122–23 n.4 (Worthington C. Ford ed., 1907).

²⁰⁸ Debate at the House of Representatives (Aug. 18, 1789), in 1 ANNALS OF CONGRESS, *supra* note 79, at 790–92 (reporting the defeat of an amendment offered by Rep. Thomas Tudor Tucker to prohibit Congress from overriding any state or district law, within a state or district without the consent of that state or district).

²⁰⁹ Gouverneur Morris, Speech at the Federal Convention (Madison notes, July 17, 1787), in 2 FARRAND'S RECORDS, *supra* note 15, at 26.

²¹⁰ THE FEDERALIST NO. 27, at 173–74 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (arguing for an extension of the federal government “to what are called matters of internal concern” so as to increase the people's familiarity with the government and to decrease their violent resistance).

²¹¹ George Mason, Speech at the Federal Convention (Madison notes, Sept. 15, 1787), in 2 FARRAND'S RECORDS, *supra* note 15, at 631. *Cf.* Letter from Richard Henry Lee to George Mason (Oct. 1, 1787), in 3 MASON PAPERS, *supra* note 131, at 996 (“Whilst the Commercial plunder of the South stimulates the rapacious Trader.”).

against out-of-staters and the Constitution prohibits states from imposing tonnage, in absence of congressional approval.²¹² 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 lighthouses 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.²¹³ The prohibition on tonnage was thus probably an overreaction, driven by the 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 seemed 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."²¹⁴ 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 throughout 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

²¹² U.S. CONST. art. I, § 10. See James Madison, Speech at the Federal Convention (Madison notes, Sept. 15, 1787), in 2 FARRAND'S RECORDS, *supra* note 15, at 625 (arguing that the regulation of commerce was in its nature indivisible and ought to be wholly under one authority).

²¹³ See James McHenry, *Notes of the Federal Convention* (Sept. 4, 1787), in 2 FARRAND'S RECORDS, *supra* note 15, at 504 (stating that it "does not appear that the national legislature can erect light houses or clean out or preserve the navigation of harbours") (emphasis omitted). See also James McHenry & Daniel Carrol, Speech at the Federal Convention (Madison notes, Sept. 15, 1787), in 2 FARRAND'S RECORDS, *supra* note 15, at 625 (moving unsuccessfully that "no State shall be restrained from laying duties of tonnage for the purpose of clearing harbours and erecting light-houses").

²¹⁴ Letter from James Madison to James Monroe (Aug. 20, 1785), in 8 MADISON PAPERS, *supra* note 55, at 103.

Articles of Confederation, but not the constitutional text, prohibit a state from imposing a tax or restriction on an out-of-state citizen that it is unwilling to impose on one of its own.²¹⁵ 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.²¹⁶ 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.²¹⁷ Congress can act to regulate commerce between the states, because the specific words of Clause 3, the Commerce Clause, give Congress this 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.²¹⁸ Fairness to citizens of other states, in any event, was a deep norm that shows up in the constitutional debates, but not as to tolls on interstate commerce nor as to viable programs with the Commerce Clause.

IV. WORDS WITHOUT CONTROVERSIES

There are also twenty-two 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 139 cites, or 100%, used to determine what percentage any one advocated program represents. Indeed, the quotes without controversies are under-collected, 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%.

²¹⁵ ARTICLES OF CONFEDERATION art. IV (U.S. 1781).

²¹⁶ *See supra* note 188.

²¹⁷ 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. *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 200–01 (1995); *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 94–95 (1987). *See also* Lino A. 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 the absence of text, policing discrimination against out-of-staters is a function the Court should not perform); *Accord* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and Constitutional Balance of Federalism*, 1987 *DUKE L.J.* 569, 571 (arguing that the dormant commerce clause is without basis in text or structure).

²¹⁸ Mark P. Gergen, *The Selfish State and the Market*, 66 *TEX. L. REV.* 1097, 1117–18 (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 in the several States,” but the language needs to be 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.”

Sixteen quotes in the sample, without any program attached, contrast “commerce” with either “manufacturing” or “agriculture,” at least to the extent of listing commerce separately.²¹⁹ Some of the quotes show that the Founders worried

²¹⁹ (1) James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9 MADISON PAPERS, *supra* note 24, at 350 (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”); (2) PA. MERCURY, June 28, 1787, *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 13, at 210 (“[A]griculture, manufactures, and commerce, shall impart their blessings, and enrich our country.”); (3) NORWICH PACKET (Conn.), July 5, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 13, at 167 (“Commerce must take the lead, agriculture next follow, and manufactures should bring up the rear.”); (4) PA. GAZETTE, Aug. 1, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 13, at 182 (America should adopt the means of “agriculture and manufactures” in order to obtain “growth in wealth, independence and happiness,” yet “[s]he has no business with commerce, until she derives it from the products of the earth, or from her own arts.”) (emphasis omitted); (5) James Madison, Speech at the Federal Convention (Madison notes, Aug. 29, 1787), in 2 FARRAND’S RECORDS, *supra* note 15, at 452 (stating that Connecticut and New Jersey were “agricultural, not commercial States”); (6) Elbridge Gerry, Speech at the Federal Convention (King notes, Sept. 15, 1787), in 2 FARRAND’S RECORDS, *supra* note 15, at 635 (objecting to the Constitution because “[t]he Power given [respecting] Commerce will enable the Legislature to create corporations and monopolies”); (7) Letter from Roger Sherman and Oliver Ellsworth to Governor Samuel Huntington (Sept. 26, 1787), in 3 DOCUMENTARY HISTORY, *supra* note 13, at 352 (arguing that restrictions on state debt-relief legislation were thought necessary as a security to commerce because the interests of foreigners and citizens of other states might be affected); (8) Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* (Oct. 10, 1787), *reprinted in* 1 THE FOUNDERS’ CONSTITUTION, *supra* note 24, at 597 (“Landed property in England will never be sufficiently distributed, to give the powers of government wholly into the hands of the people [but that here commerce and manufacturing have] thrown a vast weight of property into the democratic scale.”); (9) THE FEDERALIST NO. 12, *supra* note 24, at 74 (Alexander Hamilton) (referring to “rivalships” between agriculture and commerce); (10) “An American Citizen” [Tench Coxe], *To Richard Henry Lee*, PHILA. INDEP. GAZETTEER, Dec. 28, 1787–Jan. 3, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 13, at 169 (contrasting commerce and agriculture and arguing that even in commercial states, agriculture predominates); (11) “An Old Man,” CARLISLE GAZETTE, Jan. 2, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 13, at 228 (reporting a toast to “[a]n increase of the agriculture, manufactures and commerce of America”); (12) “Centinel VIII,” PHILA. INDEP. GAZETTEER, Jan. 2, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 13, at 233 (“[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.”); (13) THE FEDERALIST NO. 35, *supra* note 160, at 219 (Alexander Hamilton) (stating that many mechanics and manufacturers are immediately connected with commerce and that merchants are their natural friends); (14) *Resolutions of the Tradesmen of the Town of Boston*, MASS. GAZETTE, Jan. 8, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 13, at 292 (“[I]f the proposed frame of government should be rejected, the small remains of commerce yet left us, will be annihilated, the various

a lot about too *much* commerce, which is consistent with mercantilist economics that considered foreign imports to be innervating. Some, blessedly, have no specific remedy in mind. Charles 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.”²²⁰ 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, at least 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 imposts²²¹ or used to justify other enumerated powers. Those usages, however, do not seem to preclude other government programs that would be allowed under broader definitions of “commerce.” “Regulation of commerce” was an omnibus term with a cloud of both specific and more general references. The more specific meanings do not seem to exclude any others. Given how “utterly wrongheaded” the Physiocrats were,²²² in any event, it does seem quite lucky that physiocratic attitudes toward “commerce” are not the only meaning embodied in our Constitution.

trades and handicrafts dependent thereon, must decay.”); (15) “A Columbian Patriot,” *Observations on the Constitution* (Boston), Feb. 1788, reprinted in 16 DOCUMENTARY HISTORY, *supra* note 13, at 278 (“[T]here 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 energetic[] government.”); (16) Charles Pinckney, Speech at the South Carolina Ratification Convention (May 14, 1788), in 2 DEBATE ON THE CONSTITUTION, *supra* note 24, at 581 (quoting an unidentified author on national wealth: “there are but three ways for a nation to acquire wealth”).

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

²²⁰ Charles Pinckney, Speech at the South Carolina Ratification Convention (May 14, 1788), in 2 DEBATE ON THE CONSTITUTION, *supra* note 24, at 581.

²²¹ See, e.g., THE FEDERALIST NO. 7, *supra* note 24, at 40 (Alexander Hamilton).

²²² Bruce Ackerman, *Taxation and the Constitution*, 99 COLUMB. L. REV. 1, 18 (1999). See EDWIN R.A. SELIGMAN, THE SHIFTING AND INCIDENCE OF TAXATION 125–42 (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.

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.²²³ Regulation of trade 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 cannot 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.²²⁴ 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 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 also not part of the total sample used to calculate percentages for the other programs.

²²³ 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 (U.S. 1781). It was added to a draft of the Commerce Clause, which provided that Congress could regulate commerce with foreign nations and among the states, on September 4, 1787 by motion of the Committee of Eleven (chaired by David Brearly) and adopted without dissent. James Madison, *Notes of the Federal Convention* (Sept. 4, 1787), in 2 FARRAND’S RECORDS, *supra* note 15, at 499.

²²⁴ (1) Letter from the President of the Federal Convention [George Washington] 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) (stating that desire is for general government to have the power to make war, peace, and treaties, levy money and regulate commerce); (2) Alexander Hamilton, *Conjectures About the New Constitution* (Sept. 1787), in 1 DEBATE ON THE CONSTITUTION, *supra* note 24, at 9 (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, *supra* note 65, at 72 (Alexander Hamilton) (“[A] unity of commercial, as well as political interests, can only result from [a] unity of government.”); (4) “Centinel VI,” PA. PACKET, Dec. 25, 1787, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 13, at 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) Edmund Randolph, *Reasons for Not Signing the Constitution* (Dec. 27, 1787), in 1 DEBATE ON THE CONSTITUTION, *supra* note 24, at 600 (stating 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) (Jacob E. Cooke ed., 1961) (stating that the regulation of commerce is a new power, but one that few oppose).

V. HOW IMPORTANT WAS COMMERCE AS A CAUSE?

The programs that 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 First 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 2½% 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 1833.²²⁵ A national bankruptcy act was not passed until 1898,²²⁶ considerably too late for the bankruptcy to be a live cause of the Constitution. Given the 110-year delay, the Bankruptcy Clause cannot 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 contributions to adoption of the Constitution.

The modesty and mercantilist focus of the original Commerce Clause should not bother us very much. The panda’s thumb, so essential for survival, evolved from what was originally a tiny wrist bone and it became an effective bamboo cutting tool only by evolution over time. Things change. Edmund Burke was surely right that human beings and human institutions change only slowly — it is impossible to start from scratch.²²⁷ Still a lot of incremental changes have occurred since 1787, and it

²²⁵ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, 3: § 1105 (1833), *reprinted in* 2 THE FOUNDERS’ CONSTITUTION, *supra* note 24, at 641.

²²⁶ *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).

²²⁷ EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (Conor O’Brien rev. ed., 1969) (1790).

would be error as well to presume that everything sincerely meant in 1787 is both wise and binding today.

The Founders' true intent should not be binding on us, among other reasons, because their most intense meanings were focused on the short term and on programs that would be adopted or abandoned in short order. The prior constitution, the Articles of Confederation, had been ratified only in 1781,²²⁸ so that judging from their experience, a constitution should be expected to last no more than six or seven years. The Founders were essentially politicians trying to get specific things accomplished, and in politics six months is a very long time. There were undoubtedly implications beyond the specific programs they wanted, but the specific programs are the hard rock in the water and the ripples grow smaller the farther we go from the rock. It is very hard to write eternal verities binding two hundred years hence, when that is not a significant part of what you are trying to do. They could solve our problems no better than we can now solve the critical problems of the year 2221, whatever they are.

The modesty of the commerce power also 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 on 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 lie elsewhere.

²²⁸ 19 JOURNALS, *supra* note 30, at 214 (Mar. 1, 1781).