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THE MEANING OF FEDERALISM IN A SYSTEM OF INTERSTATE COMMERCE: FREE TRADE AMONG THE SEVERAL STATES

*Donald J. Kochan**

INTRODUCTION

As states become dissatisfied with either the direction of federal policy or the gridlock that seems like a barrier frustrating action, their disdain or impatience is increasingly manifest in state legislative or regulatory efforts to reach big issues normally reserved to federal resolution. Increasingly, such efforts to stake a position on issues of national or international importance are testing the limits of state autonomy within a system of federalism that includes robust protection for the free flow of commerce among the several states.

This Essay provides the primary historical backdrop against which these measures should be judged with a particular emphasis on the importance of sustaining a national market for commerce within our system of federalism. Too often state initiatives are framed in terms of “states’ rights” seeking to capitalize on the rhetorical power that phrase offers. If the states are told they cannot do X or Y, those who favor local control within our democratic republic find appealing arguments that national policy preventing states from acting is excessive. When states are told they cannot act alone, some may fear that the federal government is becoming too big and controlling and become suspicious of the claim of state disempowerment. But even those who favor localized control must be cautious in advocating in favor of “states’ rights,” a concept that is often nothing more than a siren song. Those rocky shores sometimes harbor positions that would allow states to act in a manner that is quite contrary to perhaps the most important aspect of American federalism embodied in the Constitution—the constitutional facilitation of a national free trade zone known as the United States wherein each independent

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* Incoming Professor of Law and Deputy Executive Director of the Law & Economics Center, George Mason University Antonin Scalia Law School. I am grateful to the Chapman University Dale E. Fowler School of Law for its support for completion of this research, which was provided while I was the Parker S. Kennedy Professor in Law there. I also thank Bethany Ring (Chapman Law Class of 2020) for excellent research assistance on this project.

unit is disabled from erecting barriers to trade under what is popularly termed the Interstate Commerce Clause (although it may more appropriately be called the Commerce Among the Several States Clause).

I. RECENT EXAMPLES OF EMBOLDENED STATE ACTION SOMETIMES CONTRARY TO FREE TRADE PRINCIPLES

States are increasingly retesting the waters of their authority to act as guardians of high-order principles, attempting to use their lawmaking authority in ways intended to produce external effects.¹ More and more, states want to change the world, not just make their states better. As arbiters of good policy, many state politicians see openings to legislate in ways that force changes in behavior, even in other states or other nations.

Many states also seek to shift national policy by undertaking policy initiatives themselves that they perceive the federal government not doing or not doing well, sometimes (such as in immigration) seeking to find ways to act which directly frustrate contrary national policy. There should be no doubt that states will use these techniques with increasing frequency if they are legitimized. There already seems to be an upward trend, and a few examples below will provide context.

In recent years in the state of Washington, for example, Governor Inslee and his administration's strong preference to promote alternative energy, protect against climate change, and prevent coal exports has led to federal and state litigation over whether that state may deny approvals for a coal export terminal that would facilitate both interstate and foreign commerce in coal.²

If the allegations in *Lighthouse Resources, Inc. v. Inslee* are true, Washington has taken regulatory action that interferes with commerce from other states by preventing out-of-state interests from having nondiscriminatory access to engage in foreign commerce and interferes with foreign commerce in a manner that potentially prejudices the interests of the federal government in speaking with one voice on foreign affairs and foreign trade issues.³ If coal exports are to be banned, it should be a federal decision.

A state can be charged with unconstitutionally discriminating against the interests in another state, even if their actions do not directly benefit an in-state industry. All kinds of reasons, including raw political differences, can lead to Dormant Commerce Clause violations. Market interference is often about protecting preferred industries, including so-called "clean energy" or "green energy" industries in Washington, and giving them a competitive edge over disfavored resources like coal from out of state. Ultimately, in *Lighthouse*, harming the competitive

¹ See, e.g., Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 MARQ. L. REV. 497, 505–15 (2016) (listing multiple examples of states' attempts to influence policy outside their borders).

² See, e.g., Complaint for Declaratory and Injunctive Relief, *Lighthouse Res., Inc. v. Inslee*, No. 3:18-cv-05005, 2018 WL 6505372 (W.D. Wash. Dec. 11, 2018) (No. 3:18-cv-05005).

³ See *id.* at 45–48.

(politically or literally) traditional energy producers is beneficial to Washington's preferred interest groups.

The Washington example is not isolated. We already see how some food or agricultural standards in states like California necessarily result in controls on behaviors in other states. Consider how goose feeding is constrained by foie gras regulations, and cage sizes for chickens are impacted in other states when California bans the sales of eggs not produced in what it believes are minimally humane conditions.⁴ Other very recent examples of states pushing the envelope include New York's 2017 cybersecurity regulations which controlled information sharing policies across state lines,⁵ Tennessee's residency requirements for liquor licenses,⁶ and Maryland's price control laws on pharmaceutical drug sales.⁷

States are finding ways to pretextually advance an "in-state" hook to control out-of-state behavior that they find inconsistent with their policy, moral, or other preferences. Fuel standards developed in Oregon and California, for example, by functional necessity have had the extraterritorial effect of regulating how companies produce fuel in other states by targeting out-of-state action rather than grounding their regulations in a justification of controlling in-state harm.⁸ Similarly, failure to protect the Founders' vision of free trade federalism might encourage a state to think creatively about ways to expressly or in effect control out-of-state behaviors inconsistent with its preferred policy positions. States wanting to minimize timber harvesting and sales might find ways to deny transportation routes through their states—for example, Washington might try to forbid transportation of timber through its state, effectively restricting commerce between Colorado or Wyoming timber company sellers and Canadian buyers. Or, states with strong union protections could seek to constrain sales of products made in "right to work" states like Michigan or Wisconsin by placing transportation restrictions on goods produced under "disfavored" conditions from passing into or through their states, and vice

4 See generally, e.g., Ernesto Hernández-López, *Food, Animals, and the Constitution: California Bans on Pork, Foie Gras, Shark Fins, and Eggs*, 7 U.C. IRVINE L. REV. 347, 348–72 (2017). See also *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 949 (9th Cir. 2013) (upholding foie gras regulations against commerce clause challenge).

5 See Matthew A. Schwartz & Corey Omer, *The Constitutionality of State Cybersecurity Regulations*, BANKING PERSP. (July 3, 2017), <https://www.bankingperspectives.com/the-constitutionality-of-state-cybersecurity-regulations/>.

6 See *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019) (invalidating Tennessee residency-based liquor law requirements as violating the Commerce Clause).

7 See *Ass'n for Accessible Meds. v. Frosh*, 887 F.3d 664 (4th Cir. 2018) (holding state law unconstitutional as violating Dormant Commerce Clause when it imposed price controls with effects on upstream sales of drugs outside state's borders); see also Darien Shanske & Jane Horvath, *Maryland's Generic Drug Pricing Law Is Constitutional: A Recent Decision Misunderstands the Structure of the Industry*, HEALTH AFF. (June 22, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180621.752771/full/>.

8 See, e.g., *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940 (9th Cir. 2019) (upholding standards against a commerce clause challenge); Debra Kahn, *California to Extend Low-Carbon Fuel Standard Through 2030*, SCI. AM. (Apr. 30, 2018), <https://www.scientificamerican.com/article/california-to-extend-low-carbon-fuel-standard-through-2030/>.

versa. Or, as noted by the National Mining Association and others, as *amici curiae* in the *Lighthouse* case, the Washington coal export terminal denial could serve as precedent to encourage California to deny port access and refuse to permit new port facilities for agricultural exports if it disagrees with the manner in which livestock are raised in another state.⁹ Or, as also stated in the brief, South Carolina could refuse port access for manufactured goods that rely on immigrant labor if it disagrees with the liberal immigration policies that contribute to that labor supply.¹⁰

The main point here is that states respond to precedents set. And states increasingly seem interested in testing the limits of their authority, including bigger states which have the ability to flex some muscle based on their size and market power, as well as states that have power because they control vital passages of commerce like sea ports.

Yet, it was precisely to prevent bullying by big states or manipulation of markets by any state that motivated the Framers to include the commerce clauses in the first place. Alexander Hamilton understood this well. One passage in *Federalist No. 22* illustrates that precedents will be abused and will invite more unneighborly conduct:

The interfering and unneighbourly regulations of some States contrary to the true spirit of the Union, have in different instances given just cause of umbrage and complaint to others; and it is to be feared that examples of this nature, if not restrained by a national controul, would be multiplied and extended till they became not less serious sources of animosity and discord, than injurious impediments to the intercourse between the different parts of the confederacy.¹¹

On many of these issues, one could very well agree with the policy a state prefers over a policy that the existing federal administration prefers. But that is not the point in our system of free trade federalism facilitated through the Commerce Among the Several States Clause in the Constitution.¹²

The point is that the Constitution prescribes the appropriate *means* of achieving policy in a federal system. This Essay's discussion examines a Constitution which attempts to coordinate conflicts and often expressly allocates powers in a way the Founders believed would best achieve very important policy ends—namely, the protection of markets from unnecessary interference or chaos from a multitude of regulatory voices.

9 Brief of the National Mining Ass'n et al. as *Amici Curiae* in Opposition to Defendants' Motion for Partial Dismissal and Abstention at 14, *Lighthouse Res., Inc. v. Inslee*, No. 3:18-cv-05005, 2018 WL 6505372 (W.D. Wash. Dec. 11, 2018) (No. 3:18-cv-05005).

10 *Id.*

11 THE FEDERALIST NO. 22, at 137 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

12 Nothing I will say about these policies should be seen as stating a personal preference for one position or another.

II. FEDERALISM, FREE TRADE, AND THE MULTIPLE CLAUSES REGARDING COMMERCE

The U.S. Constitution provides the architecture for a federalist system that manages relations between the states and between the state and federal government in a manner that protects and facilitates free trade among the states and free trade between the United States and foreign nations or Indian tribes. The key constitutional language is in Article I, Section 8, Clause 3, which gives Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹³ A corollary doctrine associated with this language is what is often referred to as the “Dormant Commerce Clause.” Dormant Commerce Clause jurisprudence is based on the idea that the federal power to regulate commerce is exclusive and, as such, any state interference with commerce among the several states constitutes a violation of that prerogative and also runs contrary to the constitutional mandate that the regulation of commerce is designed to make commerce “regular,” not impeded. The historical background of these commerce clauses supports the idea that they are designed to enshrine in constitutional law a high level of protection for free trade principles and to limit state authority to the extent its exercise interferes with the flow of commerce within the United States or impedes commerce between the United States as a collective and foreign nations or Indian tribes.

To provide this historical understanding, this Essay principally examines two key questions: (1) In a constitutional system grounded in principles of federalism, what are the inherent limits on states?; and (2) What are the grand purposes of the combined commerce clauses—or what might be deemed the free trade clauses? The latter question can only be answered by understanding the deep commercial infirmities identified in the Articles of Confederation at the Founding—given the human nature, if you will, of states versus states—and by understanding the deep concerns for developing constitutional rules to protect and facilitate markets and to counteract the natural tendencies of states to act in the selfish, petty, greedy, and discriminatory ways that impede both the interests of other states and the interests of the Nation as a whole.

It cannot be overstated that the Framers saw the commerce clauses as a vital feature of the new Constitution that were necessary to combat grave infirmities seen in the Articles of Confederation. Their market-facilitating and free trade purposes were evident to the Framers and should guide our understanding of them today. As Joseph Story exclaimed in *A Familiar Exposition of the Constitution of the United States*, section 164:

The power to regulate commerce “among the several States[.]” . . . annihilated the cause of domestic feuds and rivalries. It compelled every State to regard the interests of each, as the interests of all; and thus diffused over all the blessings of

13 U.S. CONST. art. I, § 8, cl. 3.

a free, active, and rapid exchange of commodities, upon the footing of perfect equality.¹⁴

Story's reflections on the importance of the commercial clauses in the Constitution importantly stress that these clauses are the true glue that hold us together as a peaceful nation. They help ensure that each state may capitalize on the benefits of uniting within a common marketplace. They help states realize mutual gains that would be impossible without union and, more importantly, without a constitutional infrastructure that holds all states to a set of rules that ensures the continuation of that common market and prevents any one state from shirking, self-dealing, or cheating other states out of the benefits of the commercial union.

State actions which may possibly interfere with these commerce clause goals are subject to a high level of scrutiny because, as Alexander Hamilton expressed in *Federalist No. 11*, “[t]here are rights of great moment to the trade of America, which are rights of the Union.”¹⁵ Hamilton also stressed that the Constitution was adopted to create “[a]n unrestrained intercourse between the States . . . advanc[ing] the trade of each, by an interchange of their respective productions.”¹⁶ Otherwise, interstate and foreign trade would be “fettered, interrupted and narrowed by a multiplicity of causes.”¹⁷

Part of the reason for giving the federal government control over foreign commerce decisions was to allow the federal government to use the power (and restraint of the power) when negotiating with foreign nations and incentivizing behavior. Joseph Story has an excellent passage in *A Familiar Exposition of the Constitution of the United States* that captures this idea. In section 171, Story states:

Many . . . powers have been applied in the regulation of foreign commerce. The commercial system of the United States has also been employed sometimes for the purpose of revenue; sometimes for the purpose of prohibition; sometimes for the purpose of retaliation and commercial reciprocity; sometimes to lay embargoes; sometimes to encourage domestic navigation, and the shipping and mercantile interest, by bounties, by discriminating duties, and by special preferences and privileges; and sometimes to regulate intercourse with a view to mere political objects, such as to repel aggressions, increase the pressure of war, or vindicate the rights of neutral sovereignty. In all these cases, the right and duty have been conceded to the National Government by the unequivocal voice of the people.¹⁸

One state (like Washington) with access to the ports of commerce, for example, should not be able to have a veto power over the landlocked states' ability to access these ports which are necessarily part of the market system left within the exclusive regulation of the federal government under both commerce clauses and their dormant components. “[T]he peculiar situation [was] some of the States, which having no convenient ports for foreign commerce, were subject to be taxed by their

14 JOSEPH STORY, *A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES* § 164, at 141 (Regnery Gateway, Inc. 1986) (1859).

15 THE FEDERALIST NO. 11, *supra* note 11, at 69 (Alexander Hamilton).

16 *Id.* at 71.

17 *Id.* at 72.

18 STORY, *supra* note 14, § 171, at 144.

neighbors”¹⁹ Washington’s actions in the *Lighthouse* litigation, for example, seem to fall into the scope of the type of evils against which the commerce clauses were designed to provide protection.

III. PURPOSES OF THE COMMERCE CLAUSES AND LESSONS FROM THE ARTICLES OF CONFEDERATION

We can more clearly understand when state legislation that asserts power over commercial activities is problematic if we understand the situation of commerce at the Founding and the work that the Framers intended the commerce clauses to do. The facilitation of trade was a primary motivating purpose for replacing the Articles of Confederation with the Constitution. And the commerce clauses were the vehicle for accomplishing those ends. Joseph Story explains in his *Familiar Exposition* just how bad the situation was for the free flow of commerce under the Articles:

The want of this power to regulate commerce was . . . a leading defect of the Confederation. In the different States, the most opposite and conflicting regulations existed; each pursued its own real or supposed local interests; each was jealous of the rivalry of its neighbors; and each was successively driven to retaliatory measures, in order to satisfy public clamor, or to alleviate private distress. In the end, however, all their measures became utterly nugatory, or mischievous, engendering mutual hostilities, and prostrating all their commerce at the feet of foreign nations. It is hardly possible to exaggerate the oppressed and degraded state of domestic commerce, manufactures, and agriculture, at the time of the adoption of the Constitution.²⁰

Indeed, a “major defect[] of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1787, was the fact that the Articles essentially left the individual States free to burden commerce both among themselves and with foreign countries very much as they pleased.”²¹

Thus, one purpose of the commerce clauses is to prevent any single state’s interference with the ability of other states to engage in commerce. In other words, they were designed to preclude discriminatory or protectionist behavior that disadvantages other states because the offending state is seeking a competitive edge or is seeking to further its idiosyncratic policy preferences at the expense of another state’s ability to engage in free trade.

Furthermore, the clauses operate to ensure that one state is not able to block the ability of other states and their citizens to engage in foreign commerce. The very definition of “[a]n unrestrained intercourse between the States,” Hamilton says in *Federalist No. 11*, includes protecting the ability of every state to interchange—in other words, coordinate—with other states to facilitate the “exportation to foreign markets.”²² As stated by Hamilton,

19 James Madison, Preface to Debates in the Convention of 1787, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 539, 542 (Max Farrand ed. 1911).

20 STORY, *supra* note 14, § 163, at 140.

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

22 THE FEDERALIST NO. 11, *supra* note 11, at 71 (Alexander Hamilton).

An unrestrained intercourse between the States themselves will advance the trade of each, by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and vigour from a free circulation of the commodities of every part.²³

Reciprocal advantages abound so long as states respect each other in the free flow of commerce. Indeed, each state has a self-interested reason to refrain from interfering with commerce, principally that the other states will also refrain to that state's advantage. This reciprocal or agreed-upon restraint works to the mutual advantage of all state participants in the system. I do not harm you in exchange for a promise that you do not harm me. If we both fulfill that promise, we are both better off. If either of us breaks the agreement, we risk devolution into chaos and struggle and no one wins.

Madison saw fit in *Federalist No. 42* to elaborate further on these important points regarding mutual gains from free trade and the absence of barriers to it. That passage in *Federalist No. 42* is important but too often missed. There, Madison closely evaluated the purposes of the commerce clauses and the interplay between the Interstate Commerce Clause and the Foreign Commerce Clause. Madison's observations are worth quoting at length. First, Madison reiterated the failings of trade that existed under the Articles of Confederation: "The defect of power in the existing confederacy, to regulate the commerce between its several members, is in the number of those which have been clearly pointed out by experience."²⁴ Madison then continued to explain that the commerce clauses—as combined with the Import Export Clause of Article I, Section 10, Clause 2 of the Constitution—were the vital ingredients to the new Constitution that could cure this defect: "To the proofs and remarks which former papers have brought into view on this subject, it may be added, that without this supplemental provision, the great and essential power of regulating foreign commerce, would have been incomplete, and ineffectual."²⁵ The Import Export Clause provides that

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.²⁶

In *Federalist No. 42*, Madison continued to explain that whole document review of the Constitution helps us understand the limitations on state interference with trade and the ability of other states and their citizens to engage in it. Madison first posited that the capacity to interfere with commerce is broad if unconstrained by constitutional prohibition:

23 *Id.*

24 THE FEDERALIST NO. 42, *supra* note 11, at 283 (James Madison).

25 *Id.* (footnote omitted).

26 U.S. CONST. art. I, § 10, cl. 2.

A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out, to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter, and the consumers of the former.²⁷

Finally, Madison stressed that the history of human experience proves that, left unchecked, states would interfere with commerce and it would lead to disastrous effects for the fate of the Union and its prosperity. In Madison's words:

We may be assured by past experience, that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquillity. To those who do not view the question through the medium of passion or of interest, the desire of the commercial States to collect in any form, an indirect revenue from their uncommercial neighbours, must appear not less impolitic than it is unfair; since it would stimulate the injured party, by resentment as well as interest, to resort to less convenient channels for their foreign trade. But the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned before public bodies as well as individuals, by the clamours of an impatient avidity for immediate and immoderate gain.²⁸

Something more than an appeal to reason would be necessary to prevent states from interfering with trade in practice on each occasion where the temptation would arise. A constitutional architecture was erected to provide assurances of commercial flow.

Thus, the commerce clauses, in context with other portions of the Constitution like the Import Export Clause and Duties and Imposts Clause, include not only a noninterference principle between states but also ultimately cast regulatory authority over commerce—including if, when, and how to use it—in a single source: the federal government. As Hamilton further explained in *Federalist No. 11*, the commerce clauses are designed to overcome the dangers of a “multiplicity of causes”²⁹ and to prevent interference with national interests.

The Dormant Foreign Commerce Clause, in particular, is designed to prohibit states from displacing the federal government's policymaking role in matters of foreign trade. James Madison summed it up well in *Federalist No. 42*: the power to regulate “forms an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations.”³⁰ It is also worth noting that if any one state can interfere with foreign trade, it will disincentivize foreign nations and their businesses from trading.

The Framers looked to historical examples of rogue internal actors in other nations burdening foreign commerce with the nation writ large.³¹ For example, after examining these lessons of history in *Federalist No. 22*, Hamilton noted that

27 THE FEDERALIST NO. 42, *supra* note 11, at 283 (James Madison).

28 *Id.*

29 THE FEDERALIST NO. 11, *supra* note 11, at 72 (Alexander Hamilton).

30 THE FEDERALIST NO. 42, *supra* note 11, at 279 (James Madison).

31 *See generally* THE FEDERALIST NO. 22 (Alexander Hamilton).

[i]t is indeed evident, on the most superficial view, that there is no object, either as it respects the interests of trade or finance that more strongly demands a Federal superintendence. . . . No nation acquainted with the nature of our political association would be unwise enough to enter into stipulations with the United States, by which they conceded privileges of any importance to them, while they were apprised that the engagements on the part of the Union, might at any moment be violated by its members³²

Strong individual state powers over commerce send a poor signal to foreign nations that might want to cooperate, but who fear making commitments against the backdrop of the possibility of rogue states.

The Framers understood that the disunity under the Articles of Confederation and the dispersion of regulatory authority over interstate and foreign commerce open the door for states to act selfishly. They also understood that disunity and dispersion open the door to foreign capture, influence, lobbying, and control. Again in *Federalist No. 11*, Hamilton described how European nations might be motivated to combine if they sense weakness from disunion that would make it possible to overcome individual states.

[I]n a state of disunion these combinations might exist, and might operate with success. It would be in the power of the maritime nations, availing themselves of our universal impotence, to prescribe the conditions of our political existence; . . . in all probability [by] combin[ing] to embarrass our navigation in such a manner, as would in effect destroy it, and confine us to a passive commerce.³³

But, by uniting under the Constitution—in no small part because of its architectural features in the commerce clauses that make states interdependent—much of this silliness and these unfortunate risks can be overcome. As explained in more detail earlier, Hamilton explained in *Federalist No. 11* that the states become interdependent through the Interstate Commerce Clause in the Constitution because each will see reciprocal benefits in taking advantage of the “diversity in the productions of different States” in supporting each others’ access and “exportation to foreign markets” because “[t]he veins of commerce . . . will acquire additional motion and vigour from a free circulation of the commodities of every part.”³⁴ Through mutual cooperation there is opportunity for mutual gain. From mutual disarmament from the weapons of protectionism, each state will see mutual advantage. But because human nature did not always guarantee people would make wise choices on their own, the Constitution was designed to institutionalize the system and codify an agreement of noninterference. Indeed, as is so often the case in understanding what the Constitution is aiming to do, Madison’s famous passage on “if men were angels” serves a purpose here as well, especially when you understand that state governments are just collections of individuals imbued with human motivations and human flaws. In this famous passage, Madison observed

32 THE FEDERALIST NO. 22, *supra* note 11, at 136 (Alexander Hamilton).

33 THE FEDERALIST NO. 11, *supra* note 11, at 69 (Alexander Hamilton).

34 *Id.* at 71.

the necessity of embedding in the constitutional system mechanisms of governmental accountability when he wrote:

But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself. A dependence on the people is no doubt the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions.³⁵

These commerce clauses and their cousins in the Constitution that help facilitate trade and prevent state interference with trade are some of the auxiliary precautions designed to shape an American federalism with thick free trade features.

CONCLUSION

Against this backdrop of the importance of limits on state authority to interfere with commerce, potential bases for denying permits, banning products, or otherwise controlling commercial activity with the purpose of preventing disfavored commerce are illegitimate. The free market provisions in the Interstate Commerce Clause, the Foreign Commerce Clause, the Indian Commerce Clause, the Export Import Clause, the Duties and Imposts Clause and other parts of the Constitution are designed to disempower states from erecting barriers to commerce; states cannot circumvent the limits on their power by hiding behind other policy goals.

In conclusion, not everything about federalism is about leaving states alone to do what they please. A state simply cannot shroud a market-manipulating regulation in some public-spirited sounding justification about its rights or about its internal interests legitimize it.³⁶ Oftentimes that will either be a pretextual basis for imposing the state's will on other states and, even if it is not, it may nonetheless have negative spillover effects on commerce that were meant to be contained by the firewalls developed in the Constitution. In other words, a state may not cloak a regulation as being in the public welfare when the law is actually intended to impede lawful interstate or foreign commercial activity. Indeed, such commercial activity is favored in our system of free trade federalism emboldened and protected by very intentionally crafted component parts of the Constitution that limit the states' rights to act.

35 THE FEDERALIST NO. 51, *supra* note 11, at 349 (James Madison).

36 See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981) ("If a state law purporting to promote environmental purposes is in reality 'simple economic protectionism,' [a] 'virtually *per se* rule of invalidity' [applies]." (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978))).