

# Commerce and the Constitution

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*Among the federalism questions that ought to occupy the nation and the Supreme Court, none rivals the importance of protecting federalism and the national economy against state parochialism and exploitation. Those protections are defined by two sets of legal doctrines: constitutional rules, especially the “dormant” commerce clause (discussed in this Outlook); and the “preemption” of state law under federal statutes (the subject of an upcoming issue). In both areas, the law is in considerable disrepair. The Rehnquist Court may well compound past mistakes. Ironically, it may also be on the path to getting it right—even if that may take some time.*

## You Want to Be Sedated

Past *Outlooks* have dissected such “states’ rights” exertions as the imposition of a national \$250 billion tobacco tax under a multistate “settlement” of liability lawsuits brought by trial lawyers and state attorneys general; New York attorney general Eliot Spitzer’s continuing efforts to exact, by means of threatened criminal prosecutions, Wall Street funding for a government-sponsored equity research firm; and state lawsuits to impose price controls on pharmaceutical products. After all that excitement, faithful readers are supposed to stay awake for *the dormant commerce clause?*

In a word, yes. The campaigns of the trial lawyers and state attorneys general are a menace, not only to the national economy but also to the autonomy and integrity of sister states. The central task is to arrest this false federalism and its practitioners (“arrest” at least in the sense of stopping them). That in turn requires constitutional rules for “horizontal” federalism—that is, the protection of states against exploitation by sister states.

The Constitution teems with rules against state protectionism, discrimination, and exploitation. For example, states may not erect protectionist tax barriers, and they must extend to sister states’ citizens the same “privileges and immunities” that they provide to their own citizens. Those guarantees, however, have fallen into desuetude, and that judicial abdication has facilitated the aggressions of the trial lawyers and attorneys general. The dormant commerce clause—which prohibits states from discriminating against sister states—is to all intents the last horizontal federal rule to be enforced with any regularity. But it is a very poor substitute for the actual rules. Moreover, it is not actually *in* the Constitution and has for that reason come under heavy judicial and scholarly fire.

The dormant commerce clause is not so untenable as its critics have made it out to be. The true constitutional problem, though, is not the clause itself but rather its aftermath. On the one hand, the plea for abandonment may signal a plea for the demise of any and all constitutional barriers to interstate aggression. Chief Justice William H. Rehnquist holds something close to this view. It would spell a government of, by, and for the Association of Trial Lawyers of America and the National Association of Attorneys General. On the other hand, the attacks on the dormant

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commerce clause may also signal a call for a return to the *actual* constitutional rules against interstate aggression. Justice Clarence Thomas and, with reservations, Justice Antonin Scalia favor such a move. It would entail more robust limitations on the states' transgressions—outside the dormant commerce clause, but firmly grounded in the Constitution. That is the right move.

## Negative!

The need to end economic warfare among the states was a driving force behind the push for a more powerful national government. Under the Articles of Confederation, states harassed each other with tariffs and—in James Madison's words—"rival and spiteful measures, dictated by mistaken views of interest." New York and Pennsylvania taxed overseas goods destined for New Jersey, which lacked a seaport. Delaware ignored the trade embargo against Britain and vitiated the union's policy choice and made money in the process. Economic disputes among states provided the impetus for the Annapolis Convention, which in turn led to the Constitutional Convention in Philadelphia.

The Constitution authorizes Congress to regulate commerce among the several states. The central, irreducible purpose of that power is to police state exploitation and discrimination. The constitutional debates contain only nine substantive mentions of the commerce clause. All reference the need to enjoin protectionist or exploitative state legislation; none contemplates affirmative federal regulation over the economy. If the delegates entertained notions of federal minimum wage laws and such, they kept those thoughts to themselves.

The tough, controversial question is whether the commerce clause prohibits state interferences with interstate commerce *even when Congress has failed to regulate it*—that is, when the commerce clause is "dormant." Institutionally, that problem translates into the question whether the courts have a role in policing state economic regulation that affects other states (as the view of a "dormant" and exclusive commerce clause implies) or whether the regulation of interstate commerce is left entirely to Congress.

James Madison thought that the commerce clause was exclusive—meaning that states had no business regulating interstate commerce, regardless of what Congress through its own fault may have done or have

failed to do. Chief Justice John Marshall saw "great force" in that argument. His successor, Roger B. Taney, rejected it. In 1851 the Court settled on the formula that a dormant or "negative" commerce clause exists in some limited domain. That view has, in one form or another, prevailed ever since.

The modern understanding is that the commerce clause is not "exclusive" in the sense of barring state regulation over a certain subject matter. It rather limits the ways in which states may regulate: states may not treat out-of-state interests differently (and worse) from in-state interests. Moreover, states may not directly regulate commercial transactions in other states.

While the Rehnquist Court has by and large adhered to that view, three justices have called for the demise of the dormant commerce clause. Justice Thomas, in a scorched-earth dissent in a 1997 case called *Camps Newfoundland/Owatonna v. Town of Harrison*, argued that "the negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application."<sup>1</sup> Justice Scalia, who had in earlier opinions expressed similar criticisms, joined this plea for a wholesale abandonment, as did Chief Justice Rehnquist. Their argument against the dormant commerce clause has considerable force. But it is neither conclusive nor complete.

## Commerce . . .

The Constitution authorizes *Congress* to regulate commerce among the several states and thus suggests that the states lack that power. Critics of the dormant commerce clause insist, however, that the Founders usually made explicit their intent to divest states of sovereign powers. When and where they failed to do so (as with the commerce clause), the states retain concurrent powers.

The usual starting point of this argument is *Federalist Paper 32*. There, Alexander Hamilton argues that the Constitution effects an exclusive grant of federal authority—and a total alienation of state sovereignty—in only three cases:

where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the states from exercising the like authority; and where it granted

an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.

With certain constitutionally specified exceptions (such as the prohibition against state laws impairing the obligation of contracts), the commerce power does not conform to Hamilton's first two cases. It does not seem to answer the third case either. The power of Congress to establish a uniform rule of naturalization, Hamilton says, is necessarily exclusive: if states had power to legislate in that arena, the rule would no longer be uniform. Hamilton distinguishes that case from instances where "the exercise of a concurrent jurisdiction might be productive of occasional interferences in the *policy* of any branch of administration." In those instances, Hamilton says, the power of the states remains undiminished, and conflicts between the states and the union will have to be managed by "reciprocal forbearance." Interstate commerce seems to fit that description.

Or does it? Hamilton does not mention the commerce clause. His example of a concurrent power retained by the states is *taxation*, not regulation. The Constitution authorizes Congress to "lay and collect taxes" and, in the so-called import-export clause, provides that "no state shall, without the consent of Congress, lay any imposts or duties on imports and exports." That, Hamilton argues persuasively, must mean that the states *may* tax all other goods and transactions, even those already taxed or taxable by Congress. While concurrent state and federal taxation of the same articles (other than imports and exports) may be "inexpedient," it poses no constitutional conflict.

Arguably, though, concurrent *regulation* may pose conflicts in a way in which concurrent taxation of the same activities does not. For example, if states were to regulate Internet advertising, that commerce would no longer be "regular" (and might in fact come to a halt). For another example (Laurence H. Tribe's), if each state could provide that two-thirds of the crews on all incoming and outgoing airline flights must be state residents, interstate airline traffic would end.<sup>2</sup> While Congress can always trump such parochial legislation, it seems odd that the Founders should have invested the states with the means of shutting down the national economy until Congress reopens it. In some cases, at least, the power of Congress to make interstate commerce "regular" looks a lot like the power to make

rules of naturalization "uniform": it may be exclusive, after all.

### . . . and Federalism

The dormant commerce clause is a constitutional inference. The Rehnquist Court, however, has been quite willing to entertain comparable inferences when those constructs cut in favor of "states' rights." Thus, the Court's difficulty with the argument is not its form but its content: the dormant commerce clause imposes a judicially inferred disability on the states and therefore smacks of nationalism. Two examples illustrate this point—as we shall see, a dreadful misunderstanding.

**Immunity.** In a long line of decisions, the Rehnquist Court has held that private parties may not sue states—without their explicit consent—in federal courts, state courts, and even in federal agencies. Even Congress may expose states to private suits only in a very narrow class of cases. Chief Justice Rehnquist and Justices Thomas and Scalia—the dormant commerce clause skeptics—have been leading sovereign immunity advocates.

The sovereign immunity construct is admittedly a constitutional "inference." Arguably, it flies in the face of the constitutional text (the Eleventh Amendment). It is based, in the main, on a single 1890 precedent of questionable merit.<sup>3</sup> By comparison, the dormant commerce clause looks positively compelling. The clause has *some* textual support, and its existence has been affirmed in an unbroken (albeit meandering) string of Supreme Court decisions over 150 years. The justices' willingness to take an inferential leap in the former case—but not the latter, stronger case—must have to do with the substance of what is being inferred. The principal substantive difference is that sovereign immunity protects states, whereas the dormant commerce clause constrains them.

**Clarity.** State violations of the dormant commerce clause are not exactly unconstitutional. They are merely unconstitutional until and unless Congress permits them (or regulates the field in some fashion, in which case state laws are displaced). In other words, the dormant commerce clause is a kind of federal common law, revisable by Congress. Justices Thomas and Scalia have forcefully inveighed against a body of "constitutional" law that can be rewritten by Congress.

In an imposing body of decisions starting in 1991, though, the Rehnquist Court—led by those same justices—has held that Congress may regulate states only when it declares its intent to that effect with crystalline clarity. This so-called clear statement rule wipes out every other interpretive rule (and almost every statutory provision on which it has been brought to bear). The rule reflects general federalism principles, not the constitutional text. Just like the dormant commerce clause, it declares some state statutes presumptively unconstitutional unless Congress overcomes the presumption with a clear statement. Again, if that form of judicial argument is legitimate in one case (but not in the other), the reason must be its tendency to protect or, respectively, to constrain the states.

One can argue—although not very compellingly—against any kind of judicial inference from the structure and logic of the Constitution, beyond its plain text. To the extent, however, that critics of the dormant commerce clause rest their case on an understanding of the clause as a nationalist construct, they are gravely mistaken. States need protection, not only against national overreach but also against “horizontal” aggression and discrimination by sister states.

## Constitutional Logic

Federalism must start with a premise of equal and autonomous states. That implies, most obviously and immediately, an injunction against legislation by one state over the territory and citizens of another state. The question remains how to structure exchanges and relations among the states and their citizens.

Nothing is incoherent about an equal right to mutual exclusion and discrimination in commercial and other relations. Sovereign nations operate on that principle. But a country cannot. Nor can a federal union make do with a vague commitment to work out harmonious relations among member states: that would be a mere treaty of convenience. So a federal union must move to the only other available principles. It must insist on open borders and nondiscrimination among citizens of the several states. It must establish those principles at the outset, as constitutional principles. It must prohibit state defections from the arrangement and provide effective institutional means of enforcing that prohibition.

Prohibitions on extraterritoriality, protectionist barriers, and state discrimination: those are the basic tenets of the

modern dormant commerce clause. The real argument against the construct is not that it is unsupported by the constitutional structure but rather that it is *unnecessary*, for the actual Constitution supplies the necessary and sufficient horizontal federalism protections. The full explication of all those protections and their inherent logic—from injunctions against extraterritorial state legislation to the command that states must give “full faith and credit” to sister states’ laws—would require a treatise. For purposes at hand, two provisions bear emphasis.

Article I, section 10, of the Constitution contains the already mentioned import-export clause, which prohibits states from taxing either without the consent of Congress. The point of that clause was to bar tariffs and, more generally, to force states into forms of taxation that fall on each state’s own citizens, such as poll and real estate taxes. To gauge the potential range of the clause, consider this: of the twenty-six dormant commerce clause cases decided by the Rehnquist Court, nineteen (including *Camps Newfound*) involved state taxation rather than regulation.

Article IV, section 2, provides that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” While that may sound (to modern, jaundiced ears) like a brief for snazzy, newfangled rights, the clause in fact creates no rights. Rather, it compels each state to extend to noncitizens, on an equal basis, whatever privileges and immunities it has chosen to extend to its own citizens. The hard core of the clause, moreover, is commercial conduct. The Fourth Article of Confederation contained a longer, expansive, but largely unenforceable guarantee against discrimination in interstate commerce. The Constitutional Convention split that article in two—the commerce clause and the privileges and immunities clause. The basic machinery for enforcing the former is Congress. The vehicle for enforcing the latter is the federal judiciary, as an unbiased forum for the resolution of disputes between the citizens of one state and those of another state.

All that disappeared—not on account of the Constitution but on account of judicial mistakes. In an 1868 decision, *Woodruff v. Parham*, the Supreme Court effectively read the import-export clause out of the Constitution by holding that it applies only to foreign commerce (rather than to commerce among the states). That same year, in *Paul v. State [sic] of Virginia*, the Court held that the privileges and immunities clause applies only to private citizens, not to corporations. Lo, it turned out that states cheerfully imposed all sorts of

interstate taxes—and that a huge amount of interstate commerce was carried on by corporations, among which the states proceeded to discriminate.

The Supreme Court recoiled, rethought, and stumbled on the same federalist logic that the Founders had written into the Constitution. The Court then followed the usual trajectory of constitutional adjudication: instead of correcting past mistakes, it piled an extraconstitutional inference on top of a constitutional abdication in the hope that the two would balance out. The dormant commerce clause may in a few cases shield the national government's exclusive authority against state interference. For the most part, though, the clause has served as a functional substitute for the states' constitutional safeguards against sister-state aggression. The clause has failed to do the job.

## The Choice Ahead

Judicial pleas for an abandonment of the dormant commerce clause often cite a 1982 *Yale Law Journal* article, "Laying the Dormant Commerce Clause to Rest."<sup>4</sup> Had the clerks who stuck that citation into the opinions read beyond the suggestive title, they would have discovered that the author proposes to abandon the dormant commerce clause—and to resurrect the *privileges and immunities clause*. The misleading citation illustrates that the plea for a dormant commerce clause burial marks not a one-way highway to Hell but a fork in the road.

Justice Thomas's *Camps Newfound* dissent, joined by Justice Scalia, devastates the dormant commerce clause—but proceeds to make an even more compelling case for overruling *Woodruff v. Parham*. An equally compelling case can be made against *Paul v. State of Virginia*. The decision rests on the notion that a state grant of incorporation is a discretionary favor rather than a "privilege and immunity" available under generally applicable laws. That, though, was before the advent of general incorporation statutes and before the understanding of corporations as networks of contracts among private parties. *Paul's* quasi-feudal basis is no longer tenable. The precedent is on its last legs, and prominent scholars have urged the Court to put it out of its misery.

Chief Justice Rehnquist would embark on the alternate course. He has been a steadfast foe of any judicially enforceable constitutional rule against state aggression. In *Camps Newfound*, for example, he joined Justice Thomas's call for a repeal of the dormant commerce clause—but

not his plea for restoring the import-export clause. And, where Thomas and Scalia have voted—in cases brought by individuals rather than by corporations—to enforce the privileges and immunities clause against the states, the chief justice has dissented.

The Court and the country may not confront that dilemma over the next two years or so. Chief Justice Rehnquist's and Justices Thomas's and Scalia's three votes for a wholesale repeal of the dormant commerce clause are two short of five, and those additional votes do not exist on the Court, as currently constituted. But the Court's composition may change. Moreover, the undeniable force of the argument against the dormant commerce clause, as well as the seeming difficulty of reconciling a judge-made rule limiting state sovereignty with the Rehnquist Court's federalism, exerts a gravitational pull—if not toward a wholesale abandonment, then at least toward a very narrow interpretation of the dormant commerce clause.

The correct course is to sustain the dormant commerce clause, warts and all—while building a majority for the real Constitution.

## The Stuff in the Constitution

The first argument for respecting the explicit constitutional prohibitions against interstate discrimination and exploitation is, well, the written Constitution. A second, equally potent argument is that the dormant commerce clause is neither as tough nor as broad as the explicit provisions whose place it has taken.<sup>5</sup>

Extant doctrine, for example, prohibits only "facial," explicit state discrimination against interstate commerce. State laws that are facially neutral but discriminate in effect are subject to a "balancing" between the state's averred interests and the impact of its law on interstate commerce. Under that test, the state always wins. Most discriminatory measures, though, can be written in facially neutral language. So the actual dormant commerce clause test is whether the state legislature has a stupid staff.<sup>6</sup>

Under the privileges and immunities clause, in contrast, the modern Court has—in cases not involving corporations—permitted discriminatory state laws only upon a persuasive showing that such laws are the least restrictive means to accomplishing the state's legitimate policy ends. That much more demanding test is the right one. (It smokes out pretextual justifications for discriminatory laws.) The trouble, and the thing that

needs fixing, is that corporations—the usual targets of discriminatory state regulation—cannot avail themselves of the protection.

As for breadth of application, consider the single, dramatic example of modern product liability law—more precisely, the choice-of-law rules that drive the liability explosion. Those rules permit each state to prefer its own law to that of a sister state, including that of the defendant's home state. Plaintiffs shop for favorable jurisdictions that will home cook out-of-state defendants. Those choice-of-law rules are constitutional under the dormant commerce clause. They are quite arguably unconstitutional, however, under the privileges and immunities clause. Brainerd Currie, the father of modern choice-of-law doctrine, considered his concoction unconstitutional in most applications, and leading constitutional experts have arrived at the same conclusion.<sup>7</sup> Unlike the dormant commerce clause, then, the privileges and immunities clause offers a prospect of reimposing constitutional discipline on an out-of-control litigation machine.

While one can imagine a dormant commerce clause as tough and as broad as the constitutional provisions, that prospect is neither likely nor desirable. The clause will always carry the burden of its sinful judicial creation. The farther it is extended beyond a plain—but underprotective—injunction against flagrantly discriminatory state legislation, the more problematic and controversial it becomes. Nor is that the only drawback: the dormant commerce clause—in any shape—will be systematically underenforced.

## What the States Believe

In an article that supplies facts to a barren literature, Christopher R. Drahozal has shown that the Supreme Court tends to view the dormant commerce clause as a protection for states as political entities.<sup>8</sup> When states participate in dormant commerce clause cases as plaintiffs or in support of private plaintiffs, they prevail in eight out of ten cases. Private parties, in contrast, have a fifty-fifty batting average. As Drahozal puts it, the Court treats state participation as a kind of “fire alarm” that signals a serious threat to interstate commerce and comity. In contrast, the Court treats corporate plaintiffs as private attorneys general for the states' interests or for the national interest in a common market. Since such plaintiffs are likely to invoke dormant commerce clause claims for selfish concerns, their cases meet with judicial skepticism.

The trouble is that the states raise fire alarms only in exceedingly few cases. Drahozal's set of sixty-one dormant commerce clause cases, dating back to 1970, contains precisely five state challenges to a sister-state enactment; only eight additional cases feature state amicus support for such challenges. When private citizens yell “fire,” the states often protest (in twenty-seven of Drahozal's sixty-one cases) that the alarm is false. All of that could mean either that we are blessed with a low level of interstate exploitation or that the states are lousy at policing it. The correct answer is the latter.

When Madison attributed the states' mutual transgressions to “mistaken views of interest,” he had in mind the operation of factions—or, as we now say, interest groups that mobilize the political process to obtain special favors. State politicians naturally prefer to impose the costs of those schemes on outsiders rather than on their own citizens. Thus, interest group politics systematically pushes toward interstate exploitation.

When state A sets out to exploit state B, it is not really seeking to exploit its neighbor *as a state*. It is rather seeking to exploit state B's citizens. Since such aggression is rarely as obvious as a fist in the face, it will usually go undetected. Even if it is detected, a remedy is hard to come by. Foremost, the victimized citizens cannot vote the aggressors out of office.

Which rule, then, will a rational state politician prefer: a lax rule that permits him to do favors for domestic constituencies on the backs of noncitizens or a constitutional prohibition against such exploitation? No contest. “Fire alarms” are raised when a state engages in a form of discrimination or exploitation that threatens a sister state as a state—for example, by endangering its tax base or by imposing burdens on out-of-state producers who, by virtue of high industry concentration or preferred access to politicians, can obtain their home state's official support. (Private plaintiffs with state amicus support in dormant commerce clause cases are often utilities.) Barring such assaults, the states' interstate commerce agenda is not to ensure protection against discrimination and exploitation. Their agenda, rather, is to ensure a rough average reciprocity of exploitation.

## Activism?

By directing judicial attention to the concerns of states (as states), the dormant commerce clause tends to invert the constitutional premise that horizontal federalism

protections are supposed to *discipline* states, not to empower them. The privileges and immunities clause, in contrast, explicitly protects citizens against states and thus orients the judicial inquiry to the real, constitutional federalism and its intended beneficiaries—citizens and their rights. That strength, ironically, may be a weakness: it raises the specter of judicial activism. Upon inspection, though, the specter proves a mirage.

The privileges and immunities clause cannot possibly apply to *every* state action affecting interstate commerce. For instance, it does not apply to differential tuition rates at state universities—presumably on the theory that the citizens who subsidize those rates should be able to limit their beneficence to their own state's sons and daughters. What, then, of business subsidies, permits, state contracts, and other discretionary state decisions? Defining the range of the clause eventually requires a distinction between the right to engage in a lawful profession (which falls under the clause) and gratuitous state favors (which do not). That distinction reeks of “substantive due process” and of a judicial activism that has usually gotten the Court into trouble—no?

No. First, the difficulty just sketched also arises under the dormant commerce clause. There, too, the Court must distinguish between regulation and taxation (where facial discrimination is prohibited) and discretionary subsidies. Most scholars have sharply and often persuasively criticized the made-up economic and political theories that the Court has advanced in support of those distinctions.

Second, the privileges and immunities clause poses an “activism” problem only in a highly attenuated form. It neither creates rights nor invites judges to do so. The judicial inquiry is, first, whether the state has discriminated against noncitizens and, second, whether it has discriminated with respect to something that it extends as a matter of right—rather than a discretionary favor—to its own citizens. Only at that point, in a few hard cases, must courts draw an independent, constitutional line.

That problem will always arise unless the privileges and immunities clause were to be banished entirely from respectable constitutional discourse. In the few modern cases under the clause, the Supreme Court has by most accounts handled the conceptual difficulty quite well. The question at hand is whether citizens should enjoy the protection of the clause even when they band together under contractual networks called “corporations.” The answer, for reasons mentioned, is yes.

## Where Have You Gone, Jemmy Madison?

Perhaps, the obstacle to a revival of horizontal federalism's constitutional safeguards is not a (demonstrably unwarranted) fear of judicial “activism.” Perhaps, the obstacle lies in an intuition that we may no longer need the Founders and may in some sense no longer be able to afford them. The Founders' drastic remedies for interstate exploitation stemmed from a fear that economic warfare among the states might lead to actual warfare. That threat is now remote. Far from being unable to control the states, the national government has overwhelmed them. States, for their part, have substituted cooperation for contention. Eliot Spitzer is constructing his very own Securities and Exchange Commission, but he is doing so with the support of his fellow attorneys general. He is not, moreover, proposing to raise his own army, at least not yet. Perhaps the modern federalism agenda must be to protect the states' rights and maneuvering room—instead of subjecting them to constitutional discipline.

The Founders themselves supplied the arguments against this neo-Confederate agenda. Their discussions of interstate commerce reflect their desire to seize a moment of good fortune—when the horrific experience of economic warfare among the states persuaded the states to surrender their sovereign rights, the better to secure the long-term advantages of mutual recognition and forbearance.

That commitment, with the harsh discipline that it requires, is frozen into the Constitution precisely because it cannot last on its own. A federal system of dual sovereignty always leaves the door open for an appeal to state sovereignty. States will forever seek to barge through that door in pursuit of a short-term advantage: that was Alexander Hamilton's mortal fear of “the spirit that will kill the Constitution.” State factions will forever seek to procure special advantages by imposing the costs of their schemes on outsiders: that was James Madison's nightmare of the states' “mistaken views of interest.”

The tendencies dreaded by the Founders no longer generate discord among states. Instead, they generate intergovernmental conspiracies against American citizens. Federalism, however, is for citizens, not states. That is why the import-export clause pushes states to tax their own residents, not outsiders. That is why the privileges and immunities clause subjects states to a brutal regime of nondiscrimination.

The states agreed to that bargain in a momentary recognition of its long-term advantages. The time to remind the states of that constitutional commitment, and to procure those advantages, is now. Considering the states' arrogant defections, a jurisprudential monument to extraconstitutional states' rights parochialism is the last thing we need. Justices Thomas and Scalia have turned their lonely eyes to Mr. Madison and his Constitution: let the Court, and the nation, do likewise.

## Notes

1. 520 U.S. 564, 610 (1997) (Justice Thomas dissenting).
2. Laurence H. Tribe, *American Constitutional Law*, vol. 1, 3d ed. (2000), pp. 1040–41.
3. The precedent—which few scholars would care to defend on its merits—is *Hans v. Louisiana*, 134 U.S. 1 (1890). It is proffered as binding authority in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the *fons et origo* of the Rehnquist Court's expansive sovereign immunity jurisprudence.
4. Julian N. Eule, "Laying the Dormant Commerce Clause to Rest," *Yale Law Journal*, vol. 91 (1982), p. 425.
5. The list of examples in this section is by no means exclusive. By way of additional examples, the dormant commerce clause permits states to discriminate in interstate commerce when they act as "market participants" rather than as regulators; the privileges and immunities clause does not. Similarly, as noted, state statutes that

violate the dormant commerce clause are only presumptively unconstitutional; Congress may, by means of a clear statement, authorize the states' measures. Statutes in violation of the privileges and immunities clause are *actually* unconstitutional, and Congress cannot remedy the defect. The McCarran-Ferguson Act, which authorizes states to discriminate against out-of-state insurance companies, is constitutional under the dormant commerce clause: *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946). It is unconstitutional under the privileges and immunities clause—or would be, if corporations were permitted to invoke the clause.

6. I have cribbed the sneer from Justice Scalia, who has deployed it in a different context: *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n. 12 (1992). The balancing test was established in *Pike v. Bruce Church*, 397 U.S. 137 (1970). Since that decision, only one state law has failed to pass the test: *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977).

7. See, for example, John Hart Ely, "Choice of Law and the State's Interest in Protecting Its Own," *William and Mary Law Review*, vol. 23 (1981), p. 173; and Douglas Laycock, "Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law," *Columbia Law Review*, vol. 92 (1992), p. 249. Both authors provide insightful discussions of Brainerd Currie's views.

8. Christopher R. Drahozal, "Preserving the American Common Market: State and Local Governments in the Supreme Court," *Supreme Court Economic Review*, vol. 7 (1999), p. 233.