place it under the protection of a uniform law." [1002] In other words, the constitutional grant was itself a regulation of commerce in the interest of uniformity.[1003]

That the Commerce Clause, unimplemented by congressional legislation, took from the states any and all power over foreign and interstate commerce was by no means conceded and was, indeed, counterintuitive, considering the extent of state regulation that existed before the Constitution.[1004] Moreover, legislation by Congress that regulated any particular phase of commerce would raise the question whether the states were entitled to fill the remaining gaps, if not by virtue of a "concurrent" power over interstate and foreign commerce, then by virtue of "that immense mass of legislation" as Marshall termed it, "which embraces everything within the territory of a State, not surrendered to the general government" [1005]—in a word, the "police power."

The text and drafting record of the Commerce Clause fail, therefore, to settle the question of what power is left to the states to adopt legislation regulating foreign or interstate commerce in greater or lesser measure. To be sure, in cases of flat conflict between an act or acts of Congress that regulate such commerce and a state legislative act or acts, the act of Congress is today recognized, and was recognized by Marshall, as enjoying an unquestionable su-

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[1002] 22 U.S. (9 Wheat.) 1, 11 (1824). Justice Johnson's assertion, concurring, was to the same effect. Id. at 226. Late in life, James Madison stated that the power had been granted Congress mainly as "a negative and preventive provision against injustice among the States." 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 14–15 (1865).

[1003] It was evident from THE FEDERALIST that the principal aim of the Commerce Clause was the protection of the national market from the oppressive power of individual States acting to stifle or curb commerce. Id. at No. 7, 39–41 (Hamilton); No. 11, 65–73 (Hamilton); No. 22, 135–137 (Hamilton); No. 42, 283–284 (Madison); No. 53, 362–364 (Madison). *See* H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 533 (1949). For a comprehensive history of the adoption of the Commerce Clause, which does not indicate a definitive answer to the question posed, *see* Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941). Professor Abel discovered only nine references in the Convention records to the Commerce Clause, all directed to the dangers of interstate rivalry and retaliation. Id. at 470–71 & nn. 169–75.

[1004] The strongest suggestion of exclusivity found in the Convention debates is a remark by Madison. "Whether the States are now restrained from laying tonnage duties depends on the extent of the power 'to regulate commerce.' These terms are vague but seem to exclude this power of the States." 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 625 (rev. ed. 1937). However, the statement is recorded during debate on the clause, Art. I, § 10, cl. 3, prohibiting states from laying tonnage duties. That the Convention adopted this clause, when tonnage duties would certainly be one facet of regulating interstate and foreign commerce, casts doubt on the assumption that the commerce power itself was intended to be exclusive.

[1005] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824).