

Sec. 8—Powers of Congress

Cl. 3—Power to Regulate Commerce

“Dormant” Commerce Clause: The Old Law

In 1959, the Supreme Court acknowledged that “over three hundred full-dress opinions” had resulted, not in “consistent or reconcilable” “dormant” Commerce Clause doctrine, but rather in something more resembling a “quagmire.”¹⁰⁴⁹ Justice Frankfurter was similarly skeptical of any definitive statements regarding the then-current state of the doctrine. “To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts.”¹⁰⁵⁰ The comments in these cases dealt with state taxation, but they could just as well have included state regulation of commerce. Although many of the principles still applicable in constitutional law may be found in the older cases, the Court has worked a revolution in this area, though it did so at different times for taxation than it did for regulation. Thus, in this section we summarize the “old” law and then deal more fully with the “modern” law of the negative commerce clause.

The difficulty with preventing burdens to “commerce among the States” is that such commerce begins in the interior of states, by persons and corporations that are ordinarily also engaged in local business. Its usual incidents are acts that, if unconnected with commerce among the states, would fall within the state’s powers of police and taxation, while the things it deals in and the instruments by which it is carried on comprise the most ordinary subject matter of state power. In this field, the Court consequently was unable to rely upon sweeping solutions. To the contrary, its judgments have often been fluctuating and tentative, even contradictory, and this was particularly the case with respect to the infringement of interstate commerce by the state taxing power.¹⁰⁵¹ By comparison, the task of drawing the line between state power and foreign commerce proved a comparatively simple one, the two things being in great part territorially distinct.¹⁰⁵²

Taxation.—The leading case dealing with the relation of the states’ taxing power to interstate commerce—the case in which the

¹⁰⁴⁹ *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457–58 (1959) (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344 (1954)).

¹⁰⁵⁰ *Freeman v. Hewit*, 329 U.S. 249, 251–52 (1946).

¹⁰⁵¹ In addition to the sources previously cited, see J. HELLERSTEIN & W. HELLERSTEIN (8th ed.), ch. 5, *supra*. For a succinct description of the history, see Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 *TAX LAW.* 37 (1987).

¹⁰⁵² See J. HELLERSTEIN & W. HELLERSTEIN, *STATE AND LOCAL TAXATION: CASES AND MATERIALS* (8th ed. 2005), ch. 5.