

Read the Commerce Clause in the Light Cast by the Other Parts of Our Constitution



By Publius Huldah

The parts of our federal Constitution are so interrelated that it is impossible to understand a single clause therein without considering all of the other provisions of our Constitution.

Article I, §8, clause 3, US Constitution, states:

“The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;”

The original intent of the power to regulate commerce “among the several States” is proved here: [Does the “interstate commerce” clause authorize Congress to force us to buy health insurance?](#) That paper proves that the primary purpose of the power is to prohibit the States from imposing tolls and tariffs on articles of import and export – goods & commodities – merchandize – as they are transported through the States for purposes of buying and selling.

But recently, some have asserted that since “foreign Nations”, “the several States”, and “the Indian Tribes” are grouped together in the same clause, it necessarily follows that Congress’ power to “regulate commerce” with each of them is

identical. And since Congress has broad powers over *foreign* commerce, they conclude that Congress has those same broad powers over *interstate* commerce, and may lawfully, for example, ban the movement of physical goods [such as firearms] across state lines.

So let's look at that clause in the Light cast by the rest of the Constitution.

Three totally different and separate entities

Three entities are listed in the same clause at Art. I, §8, cl. 3; *but we may not properly conclude that the extent and nature of the regulation permitted over the three entities is the same.* That's because each entity has a distinctly different status, and is treated accordingly in the Constitution.

The several States

The States are the sovereign entities which created the federal government when they ratified the Constitution. At Art. I, §10, the States agreed that they would not individually exercise the power to make commercial and trade treaties with foreign Nations; but would exercise that power collectively by delegating to the "creature" of the Constitution – the national government – the power to make such Treaties (Art. II, §2, cl. 2).

The States have a high status: They are **The Members of the Federation** the States created when they ratified our Constitution. The federal government is merely the "creature" of the constitutional compact the States made with each other when they ratified the Constitution, and is completely subject to its terms.

Foreign Nations

Various provisions are relevant to the power the States

delegated to Congress respecting commerce with foreign Nations:

- Pursuant to its treaty making power granted at Art. II, §2, cl. 2, the United States may make treaties with foreign nations addressing a great many commercial and trade matters, territorial and fishing waters [our ships won't fish within X miles of your shoreline, etc.], inspections of products, mutual assistance to merchant ships in distress at sea, assistance to each Party's sick merchant seamen, etc.
- I, §8, cl. 1, grants to Congress the power to levy "Duties, Imposts [tariffs on imports] and Excises". As they did with the infamous Tariff Act of 1828, Congress has the power to shut down imports from foreign Nations by imposing exorbitant tariffs.
- I, §8, cl. 10, grants to Congress power to define Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations. Congress may ban or restrict commerce with foreign nations who fail to rein in their countrymen who are operating pirate ships or violate the Law of Nations.
- I, §8, cl. 11, grants to Congress the power to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water. Congress may restrict or ban commerce with warring foreign nations and their allies, and make rules about seizing their cargo ("bounty").
- Imports and exports are unloaded and loaded at dockyards over which the federal government has (pursuant to Art. I, §8, next to last clause) exclusive legislative authority. Congress may make whatever inspection laws need to be made to protect us from contaminated imports – such as agricultural products infested with bugs or diseases, other contaminated products, etc. [1]

So Congress' power to "regulate commerce with foreign Nations"

is exercised by means of Treaties the United States makes with foreign Nations, and by means of Laws made by Congress. In the course of exercising this delegated power, the Legislative and Executive Branches have broad authority to restrict or ban commerce with foreign Nations, and determine its parameters.

Congress has no such powers over the Member States.[2]

Indian Tribes

In [Federalist No. 24](#) (10th & 11th paras), Hamilton speaks of the necessity of keeping small garrisons on our Western frontier which are necessary to protect “against the ravages and depredations of the Indians”; and that some of these posts (garrisons) “will be keys to the trade with the Indian nations.”

In [Federalist No. 42](#) (11th para), Madison speaks of the unsettled status of Indians and says this has been a question of frequent perplexity and contention in the federal councils.

So! It is a clear misconstruction of Art. I, §8, cl. 3 to assert that Congress has the same power to regulate commerce between the Member States that it does to regulate commerce with foreign Nations and the Indian Tribes.

James Madison’s letter of February 13, 1829 to J.C. Cabell

In Madison’s letter of [February 13, 1829 to J.C. Cabell](#), he warns that the claim that the power to regulate commerce with the three entities is identical, is *superficially plausible, but actually wrong*.

He then says, as to the power to “regulate Commerce among the States”:

“... it is very certain that it grew out of the abuse* of the power by the importing States, in taxing the non-importing; and was intended as a negative & preventive provision agst.

injustice among the States themselves; *rather than as a power to be used for the positive purposes of the General Govt.* in which alone however the remedial power could be lodged. And it will be safer to leave the power with this key to it, than to extend to it all the qualities & incidental means belonging to the power over foreign commerce..." [italics added]

*see the Federalist No 42."

So Madison **warns that we better stick with the original understanding**; and not interpret the clause to mean that the federal government has the same broad power over *interstate commerce* that it has over commerce with the *foreign Nations and with the Indian Tribes*.

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Endnotes:

[1]- The fed gov't can't lawfully ban imports of guns and arms because (1) gun control is not an enumerated power delegated to the fed gov't over the Country at Large, and (2) the 2nd Amendment prohibits the fed gov't from infringing our right to keep and bear arms. A disarmed citizenry is inconsistent with Congress' ***obligation***, imposed by Art. I, §8, cls 15 & 16, to provide for the arming and training of the Militia of the several States. To see what it was like when we elected to Congress people who knew and obeyed our Constitution, read the [Militia Act of 1792](#). But until We The People learn our Constitution, we will continue to elect ignoramuses to Congress. **We cannot be ignorant and free – and you can't see that a candidate is ignorant unless you are knowledgeable.**

[2]- Domestically, Congress has the power to impose **excise taxes** on specific articles in commerce. For a discussion of "imposts", "excises" and the Whiskey Rebellion, see [The Plot to Impose a National Sales Tax or Value Added Tax](#).