

Sec. 8—Powers of Congress

Cl. 3—Power to Regulate Commerce

a class the activities of which did affect interstate commerce, thus affording Congress the power to regulate the entire class.⁹⁹⁹

THE COMMERCE CLAUSE AS A RESTRAINT ON STATE POWERS

Doctrinal Background

The grant of power to Congress over commerce, unlike other powers such as levying customs duties or raising armies, does not explicitly contain a correlative restriction on state power.¹⁰⁰⁰ This circumstance does not, however, necessarily signify that the states were expected to participate in the power thus granted Congress, subject only to the operation of the Supremacy Clause. As Alexander Hamilton pointed out in *The Federalist*,¹⁰⁰¹ while some of the powers that are vested in the National Government admit of their “concurrent” exercise by the states, others are of their very nature “exclusive,” and hence render the notion of a like power in the states “contradictory and repugnant.” As an example of the latter kind of power, Hamilton mentioned the power of Congress to pass a uniform naturalization law. Was the same principle expected to apply to the power over foreign and interstate commerce?

Unquestionably, one of the great advantages anticipated from the grant to Congress of power over commerce was that state interferences with trade, which had become a source of sharp discontent under the Articles of Confederation, would thereby be brought to an end. As Webster stated in his argument for appellant in *Gibbons v. Ogden*: “The prevailing motive was to regulate commerce; to rescue it from the embarrassing and destructive consequences, resulting from the legislation of so many different States, and to

⁹⁹⁹ *Perez v. United States*, 402 U.S. 146 (1971). See also *Russell v. United States*, 471 U.S. 858 (1985).

¹⁰⁰⁰ Thus, by Article I, § 10, cl. 2, States are denied the power to “lay any Imposts or Duties on Imports or Exports” except by the consent of Congress. The clause applies only to goods imported from or exported to another country, not from or to another State. *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1869). This prevents its application to interstate commerce, although Chief Justice Marshall thought to the contrary, 25 U.S. (12 Wheat.) 419 (1827). *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 449 (1827), and the contrary has been strongly argued. W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 295–323 (1953).

¹⁰⁰¹ *THE FEDERALIST* No. 32 (J. Cooke ed. 1961), 199–203. Note that in connection with the discussion that follows, Hamilton avowed that the taxing power of the states, save for imposts or duties on imports or exports, “remains undiminished.” *Id.* at 201. The states “retain [the taxing] authority in the most absolute and unqualified sense[.]” *Id.* at 199.