

Sec. 8—Powers of Congress

Cl. 3—Power to Regulate Commerce

in the subsequent section, has been interpreted to be one of the most important limitations imposed by the Constitution on the exercise of state power.

This latter, restrictive operation of the clause, termed the “dormant” Commerce Clause, was long the more important one from the point of view of the constitutional lawyer. Of the approximately 1,400 cases that reached the Supreme Court under the clause prior to 1900, the overwhelming proportion stemmed from state legislation that was challenged as imposing undue burdens on commerce.⁶⁷² The result was that the guiding lines in construction of the clause were initially laid down in the context of curbing state power rather than in its operation as a source of national power.

An understanding of these related but distinct doctrines requires an examination of how particular terms of the clause have been interpreted, what types of federal or state regulation have been allowed, and the way in which the dual doctrines have been applied in particular issue areas. Because of the early emphasis on the limitations of the “dormant” commerce clause, the meaning of the word “commerce” was initially of most concern, with the significance of Congress’ power to “regulate” remaining in the background. The so-called “constitutional revolution” of the 1930s, however, which reinvigorated the exercise of federal authority, brought the latter term to its present prominence.

Definition of Terms

Commerce.—The etymology of the word “commerce”⁶⁷³ suggests a primary meaning of traffic, *i.e.*, the commercial exchange of goods. This potentially narrow construction of the term was rejected early on by Chief Justice Marshall in *Gibbons v. Ogden*,⁶⁷⁴ which remains one of the seminal cases dealing with the Constitution. That case arose when Ogden, authorized to operate steam-propelled vessels on New York waters under a monopoly granted by the New York legislature, filed a complaint against Gibbons, who transported passengers from New Jersey to New York under the authority of an act of Congress.⁶⁷⁵ The New York monopoly was not in conflict with the congressional regulation of commerce, argued the monopolists, because Gibbons’ vessels carried only passengers

⁶⁷² E. PRENTICE & J. EGAN, *THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION* 14 (1898).

⁶⁷³ Oxford English Dictionary (2nd ed.): “com— together, with, + merx, merci—merchandise, ware.”

⁶⁷⁴ 22 U.S. (9 Wheat.) 1 (1824).

⁶⁷⁵ Act of February 18, 1793, 1 Stat. 305, entitled “An Act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same.”