

What 'To Regulate Commerce' Among the States Means

By P.A. Madison on August 21, 2006

The federal government for years has claimed expansive powers under the authority to regulate commerce - so much, that the most innocent private activity can now come under federal control simply because it might have an influence on "interstate commerce." Our system of government has become so dysfunctional and judicially corrupt that today Congress could simply declare liquor to be a controlled substance and thereby prohibiting its sale without the fuss of having to amend the Constitution all over again.

However, did the States really empower Congress through the US Constitution with such an expansive, seemingly unlimited power under the Commerce Clause?

The first question most surely crosses anyone's mind when they come across the language of the clause is what the heck did the framers mean when they said, "to regulate commerce"? Did they imply something like an exclusive power to make rules over all matters of industry, professions, buying or selling? No.

The word "commerce" was always understood to mean the "exchange of commodities" through imports or exports, or simply, trade between different governments, which made regulating the slave trade awkward because it would have required treating human beings as commodities. Records of the constitutional convention shows James Madison felt it was "*wrong to admit in the Constitution the idea that there could be property in men. The reason of duties did not hold, as slaves are not like merchandise, consumed &c.*" This prompted a separate clause that specifically dealt with the foreign importation of slaves - not domestic trade.

The term "*to regulate commerce*" had a very definite and well-understood meaning before and after the American Revolution. The phrase had become popularized by disputes between the Colonies and England, as well with the Colonies themselves. It was never understood to embrace any of the offices between ship and shore, such as pilotage, wharfage, quarantine, etc., all of which were regulated by colonial law and not by the laws of England. It was also not understood to embrace the right to levy duties for revenue, upon either persons or articles, which explains why there are separate provisions in the Constitution for revenue.

Article 1, Sec. 9 clearly distinguishes between the "regulation of commerce" and revenue. Recall the assumption of the right to levy duties upon tea for revenue under the pretense of regulating commerce led to a revolution.

The power to regulate commerce was, in the full sense of the meaning of the term and usage of the day, meant the right to impose tariffs on articles of imports or exports in order to achieve reciprocal trade advantages or protection of local industries. President James Monroe re-affirmed this understanding in 1822:

Commerce between independent powers or communities is universally regulated by duties and imposts. It was so regulated by the States before the adoption of this Constitution, equally in respect to each other and to foreign powers. The goods and vessels employed in the trade are the only subjects of regulation. It can act on none other.

Monroe's explanation of regulating commerce makes it easy to understand why the Constitution speaks only of the method of laying duties, imposts or of vessel tonnage instead of legislative rules of buying and selling. During the August 1787 convention, Madison noted that Col. Mason observed the "*particular states might wish to encourage, by impost duties, certain manufactures, for which they enjoyed natural advantages, as Virginia [in] the manufacture of hemp, &c.*"

Madison responded by saying the "*encouragement of manufactures in that mode requires duties, not only on imports directly from foreign countries, but from the other states in the Union, which would revive all the mischiefs experienced from the want of a general government over commerce.*"

Oliver Ellsworth during the convention clearly stated the object of the language: "It is best as it stands—The power of regulating trade between the States will protect them against each other—Should this not be the case, the attempts of one to tax the produce of another passing through its hands, will force a direct exportation and defeat themselves."

In Federalist No. 42, Madison explains the objective behind the regulation of commerce among the States as to prevent the laying of duties on other States imports and exports:

A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out, to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter, and the consumers of the former. We may be assured by past experience, that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility.

James Wilson said to deny the common Government the power to tax the exports of the States would remove "*half the regulation of trade.*" Delegate John Langdon insisted the regulation of tonnage through duties "was an essential part of the regulation of trade." In an 1827 letter to Joseph Carrington Cabell, Madison explained the meaning of the words this way:

The meaning of the power to regulate commerce is to be sought in the general use of the phrase; in other words, in objects generally understood to be embraced by the power when it was inserted in the Constitution.

The objects embraced by the power was that "*no state be at liberty to impose duties on any goods, wares, or merchandise, imported, by land or by water, from any other state, but may altogether prohibit the importation from any state of any particular species or description of goods, wares, or merchandise, of which the importation is at the same time prohibited from all other places whatsoever.*" [Madison's resolution for empowering Congress to regulate trade, November 30, 1785]

James Madison draws attention to Connecticut's levying of duties on other Colonies imports/exports but not foreign nations in an 1832 letter to Professor Davis of the University of Virginia:

The power to regulate commerce among the States was well known and so explained by the advocates of the Constitution when before the people for their consideration, to be as a

necessary control on the conduct of some of the importing States toward their non-importing neighbors. A recurrence to the angry legislation produced by it among the parties, some of whom had passed commercial laws (tariff's) more rigid against others than against foreign nations, will well account for the constitutional remedy.

Mr. Madison said it was “very certain” that the power to regulate commerce among the States “grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, **rather than as a power to be used for the positive purposes of the General Government**, in which alone, however, the remedial power could be lodged.”

How could the regulation of commerce among the states be considered a “*negative and preventive provision*” as well as not a “*power to be used for the positive purposes*” of the general government? The answer is simple under Article I, Section 10 of the Constitution where the States are directly prohibited “*without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws.*” Additionally, Congress is forbidden to tax the exports of a State, give preferences to ports where vessels “enter, clear, or pay duties in another.”

If both the colonies and the text of the clause intended to give Congress exclusive legislative powers over all internal matters of trade between the States, then one must ask how is “to regulate commerce” different between foreign nations and among the States? In other words, if Congress can make laws for buying and selling under the clause, could they also impose laws with on buying and selling within other countries? Of course the regulation of commerce could not accomplish that, but the imposing of duties on imports of goods from other countries once arriving here could.

Jefferson said: “*To make a thing which may be bought and sold is not to prescribe regulations for buying and selling. Besides, if this were an exercise of the power of regulating commerce, it would be void, as extending as much to the internal commerce of every state, as to its external.*”

Joseph Story said if such expansive powers under the power to regulate commerce could be exercised, then it would be a *demolition of all constitutional boundaries*:

The question comes to this, whether a power, exclusively for the regulation of commerce, is a power for the regulation of manufactures? The statement of such a question would seem to involve its own answer. Can a power, granted for one purpose, be transferred to another? If it can, where is the limitation in the constitution? Are not commerce and manufactures as distinct, as commerce and agriculture? If they are, how can a power to regulate one arise from a power to regulate the other?

It is true, that commerce and manufactures are, or may be, intimately connected with each other. A regulation of one may injuriously or beneficially affect the other. But that is not the point in controversy. It is, whether congress has a right to regulate that, which is not committed to it, under a power, which is committed to it, simply because there is, or may be an intimate connexion between the powers...

If this were admitted, the enumeration of the powers of congress would be wholly unnecessary and nugatory. Agriculture, colonies, capital, machinery, the ages of labor, the profits of stock,

the rents of land, the punctual performance of contracts, and the diffusion of knowledge would all be within the scope of the power; for all of them bear an intimate relation to commerce. The result would be, that the powers of congress would embrace the widest extent of legislative functions, to the utter demolition of all constitutional boundaries between the state and national governments.

What about navigation? Nothing had changed in regards to navigation between the old and new Constitution. Under the old Articles of Confederation, Congress had no jurisdiction over transportation from State to State save as conducted by coasting navigation. Interstate transportation was left to the States and Congress was just as forbidden then as they are today to tax articles exported from any State.

Charles Pinckney, a man who would know what he is talking about on this subject since he was involved in the framing of the Constitution, sums up the entire issue with this statement in the House of Representatives on February 14, 1820:

*I will only mention here, as it is perfectly within my recollection, that the power was given to Congress to regulate the commerce by water between the States, and it being feared, by the Southern, that the Eastern would, whenever they could, do so to the disadvantage of the Southern States (impose tariff's), you will find, in the 6th section of the 1st article, Congress are prevented from taxing exports, or giving preference to the ports of one State over another, or obliging vessels bound from one State to clear, enter, or pay duties in another; which restrictions, more clearly than any thing else, **prove what the power to regulate commerce among the several States means.***

Pinckney brings up a very important point that defines the power to regulate commerce among the States that many ignore: The very purpose sought from the insertion of the words. Moreover, the answer to this question has always been without controversy or lack of evidence been to prevent one State from laying imposts and duties on another States imports as it passes through. In other words, it was inserted as a preventive measure and not as a authoritative power.

Finally, giving the commerce clause expansive meaning far beyond the defined limits of the Constitution itself has lead to conflicts between carefully crafted divisions of sovereignty the framers carefully framed around.

http://federalistblog.us/2006/08/busting_congress_interstate_commerce_myth.html