

American students “must know and love the laws, this knowledge should be diffused by means of schools and newspapers, and an attachment to the laws may be formed by early impressions on the mind.”

On the Indian and Interstate Commerce Clauses

By Kyle Dewan and Charlie Keimweiss (The Browning School)

Introduction:

When the Constitution was drafted, the framers included the Indian Commerce Clause to regulate trade between the United States and Native American tribes and prevent state commerce with these tribes absent federal oversight. The “Commerce Clause,” found in Article I, Section 8, Clause 3, stipulates that “The Congress Shall Have Power... To regulate Trade with Foreign Countries, and among the several States, and with the Indian Tribes.”¹ This clause comprises three key components, known as the “Foreign Commerce Clause,” the “Interstate Commerce Clause,” and the “Indian Commerce Clause.”

The Foreign Commerce Clause:

The Foreign Commerce Clause rests on the phrase which outlines “trade with foreign nations.”² This applies only to fully sovereign extraterritorial nations whose interests may not always align with the United States.

The Interstate Commerce Clause:

The Interstate Commerce Clause depends upon the phrase “among the different states.”³ This clause refers solely to interactions between different states. Thus, state governments themselves retain the right to regulate intrastate commerce so long as that commerce never travels outside the boundaries of the respective state and has no substantial effect on inter-state commerce.⁴

¹U.S. Const. art. I, § 8, cl. 3

²*Ibid.*

³*Ibid.*

⁴*Gonzales v. Raich*, 545 U.S. 1 (2005).

A variety of significant Supreme Court decisions that contributed to defining the reach and authority of this clause have affected the evolution of the Interstate Commerce Clause's interpretative range. For instance, the Supreme Court determined that the federal government has the authority to control navigation on interstate waterways in *Gibbons v. Ogden* (1824). The Court also ruled that this authority covered all facets of navigation, particularly boat licensing and interstate trade regulation.⁵ The Court further highlighted the boundaries of Interstate Commerce Clause in the case of *U.S. v. Lopez* in 1995.⁶ A hidden handgun was carried by Alfonzo Lopez, a 12th-grader at a high school in San Antonio, Texas. He was accused of possessing a handgun on school property in violation of Texas law. The following day, federal agents accused Lopez of breaking the Federal Gun-Free School Zones Act of 1990, leading to the dismissal of the state charges. The use of firearms in a neighborhood school zone is not an activity that, if repeated elsewhere, could affect interstate trade. There is no connection between the law's criminal provisions and “commerce” or any other type of economic activity. Therefore, the Court ruled that since the regulation goes beyond what Congress is authorized to act on under the Interstate Commerce Clause, the 1990 Federal Gun-Free School Zones Act, which forbade anyone from knowingly carrying guns in school zones, was unconstitutional.

Interpreting the Constitution using the context of its original meaning, the Indian Commerce Clause serves as a grant of federal authority over *commerce* with Native American tribes which does not necessarily extend to other interactions. Originalists should contend that the Interstate Commerce Clause possesses a broader authority and scope, as it was originally intended to prevent inter-state trade wars and protect the national economy. Therefore, this paper advances the position that originalist interpretations of the Interstate Commerce Clause would permit federal regulation to apply to all forms of interstate commerce, including transportation, trade, and communication. This paper does not fully examine the distinction between original public meaning (OPM) and original intent for purposes of analysis, leaving this issue for the future.

The Indian Commerce Clause:

⁵*Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824).

⁶*United States v. Lopez*, 514 U.S. 549 (1995).

The third section of the commerce clause outlines the Federal Government's power to regulate trade “with the Indian tribes”⁷ The Articles of Confederation, the predecessor to the Constitution, did not clearly establish the federal government’s authority to manage relations with Native Americans. Thus, this phrase was inserted to tackle the dynamic relations. In fact, the primary purpose of the Indian Commerce Clause was originally to give the government the authority to regulate trade and industry with Native American tribes and to prevent individual states from regulating this commerce without federal oversight.

In 1823, in *Johnson v. M'Intosh*, the Supreme Court held that the federal government could prohibit Americans from purchasing Native territory even if Native American tribes continued to have the right to utilize and occupy those areas. The court held this because the federal government had effectively claimed ownership of ancestral Native American grounds.⁸

The state of Georgia attempted to penalize a missionary for living within and among the Cherokee Nation in *Worcester v. Georgia* (1832). According to the Supreme Court:

“The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.”⁹

The Court clarified that the state government lacked control over the Cherokee Nation's affairs by finding that it was a sovereign entity. The Court did, however, confirm that the federal government still has the authority to control trade with Native American tribes.

The Supreme Court used this as the basis to solidify Congressional control over Indian commerce. In general, the federal government has used the Indian Commerce Clause as a key instrument to control trade with Native American tribes and defend tribal sovereignty. The Supreme Court has liberally construed the clause to cover a variety of acts and major court

⁷U.S. Const. art. I, § 8, cl. 3.

⁸*Johnson v. M'Intosh*, 21 U.S. 543 (1823).

⁹*Worcester v. The State of Georgia*, 31 U.S. (6 Pet.) 515 (1832), at 6.

judgments that helped to clarify how its authority has shifted. However, there have been attempts to clarify the Indian Commerce Clause's reach in more recent years

Examining the Interaction Between the Interstate Commerce Clause and the Indian Commerce Clause:

The Interstate and Indian Commerce Clauses interact in a number of different ways. Firstly, the Interstate Commerce Clause limits the power of individual states to regulate commerce with other states, reserving that right for Congress instead. Since Native American tribes are considered sovereign entities and not under the governmental jurisdiction of the individual state they are geographically situated in. Simultaneously, the Indian Commerce Clause establishes the authority of Congress to regulate this commerce in broader ways that would be impermissible under the Interstate Commerce Clause.

Origins of the Clauses:

In 1790, Congress attempted to control trade with Native American tribes by passing a group of legislation known as The Trade and Intercourse Acts.¹⁰ By mandating colonists to get a license to deal with Native Americans, the first law, passed by Congress during George Washington's administration, sought to resolve disputes between white settlers and Native Americans. A settler's registration might be taken away if they violated the rules. Moreover, trading without a license could result in legal action. In 1793, new sections were appended to the law. Even these sections, however, did not grant the federal government any authority over internal tribe matters.

This paper acknowledges that internal tribe matters has a definition that requires further analysis and research itself. Previously, the Supreme Court has defined this as “that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of

¹⁰See generally for this paragraph, Acts of July 22, 1790, Session 2D, Ch. 115, H.R. 5317, “To repeal section 2141 of the revised statutes to remove the prohibition on certain alcohol manufacturing on Indian lands,” Acts of June 30, 1834, Session 1, Ch. 161, Stat. 1, CHAP. CLXI, § 2: “An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers,” 18 USC § 1152: Offenses committed within Indian country, Cf. 25 U.S. Code § 177, and Act of July 22, 1790, ch. 33, 1 Stat. 137.

order and peace among their own members by the administration of their own laws and customs,” but this paper takes no view on the nuance.¹¹

In order to control commerce and interactions between Native American tribes and white settlers, Congress passed a number of laws known as the Trade and Intercourse Acts in the late 1700s and early 1800s. These regulations were primarily intended to control the behavior of European settlers, instead of the tribes themselves. The original 1790 Regulation required U.S. citizens to get a license to trade with Native American tribes, and subsequent revisions of the Act added additional requirements, such as criminal penalties for U.S. persons who committed crimes against Native Americans. The Acts primarily governed the tribal groups to the measure in which they engaged with white Americans; they did not establish government legislation of internal tribal affairs.¹² A law issued by Congress in 1817 rendered any crime being committed on tribal land illegal, but this reigned solely for interactions with Natives and non-Natives. Any legal disputes between Native Americans were regarded by the U.S. government as out of their range of control; this dictated the importance of separating white-American interactions from Native interactions.¹³ In 1834, the Act was expanded to include a prohibition on transporting alcohol into Indian tribal lands and to grant the federal government the authority to arrest and try someone who had fled to tribal lands after a criminal act in a U.S. state.¹⁴

Alongside the 1834 Act, Congress also proposed a new bill, called the Western (Indian) Territory Bill, to create a hierarchical system of Confederate Indian tribes within the Western Territory. This new system would be overseen by a presidentially-appointed governor. While this would have been the first Congressional regulation of internal Indian affairs, concerns over its constitutionality doomed its chances of passing. Many Congressmen felt that the Indian Commerce Clause alone was not enough to justify the Bill. For instance, when the Western Territory Bill was brought before the House, Representative John Adams criticized it harshly, asking “[w]hat Constitutional right had the United States to form a constitution and form of government for Indians?”¹⁵ In addition, a number of other Congressmen also had “concerns that

¹¹*Ex parte Crow Dog*, 109 U.S. 556 (1883).

¹²Acts of July 22, 1790, Session 2D, Ch. 115, H.R. 5317, “To repeal section 2141 of the revised statutes to remove the prohibition on certain alcohol manufacturing on Indian lands.”

¹³ Act of Mar. 3, 1817, ch. 92, §2, 3 Stat. 383.

¹⁴Acts of June 30, 1834, Session 1, Ch. 161, Stat. 1, CHAP. CLXI, § 2: “An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.”

¹⁵ 10 Reg. Deb. 4763 (June 26, 1834); Rep. John Adams of New York, arguing against the Western (Indian) Territory Bill.

it [the bill] impermissibly intruded on tribal sovereignty.”¹⁶ As a result, “the bill to establish a Western (Indian) Territory was laid upon the table; from which position it was not removed during the further progress of the session, and was, of course, lost.”¹⁷

The "Ward" Theory and the Court's Extra-Constitutional Justification of Plenary Powers:

The 1885 Major Crimes Act granted the federal government the jurisdiction to prosecute Native Americans for engaging in criminal acts, even if those crimes were committed within the legal borders of an Indian reservation.¹⁸ Critically, this marked the first direct assertion of federal government control over traditional Native American tribal autonomy. However, tribes do retain inherent sovereignty, as seen in *Heath v. Alabama* (1985), the Supreme Court expanded on the dual sovereignty theory and clarified that two different offenses are committed when a single act harms the “‘peace and dignity’ of two sovereigns by infringing the laws of each.”¹⁹ Furthermore, the Supreme Court then ruled in *Duro v. Reina* (1990), that Indian tribes may no longer use their criminal statutes to prosecute non-member Indians, once again directly interfering with affairs within tribal sovereignty, regardless of the relation between interstate commerce.²⁰

In *United States v. Kagama* (1886), the Supreme Court wrestled with whether the federal government had the jurisdiction to try and prosecute Native Americans for crimes committed on reservations. The United States’ case rested upon the argument that the Major Crimes Act was a regulation of commerce with Indian Tribes. The Court held that federal prosecutions on reservations constituted a breach of tribal sovereignty. Although the Court found no constitutional justification, it nevertheless utilized extra-constitutional theories to classify Native Americans as “wards of the nation,” who were dependent on the federal government for protection. By defaulting on previous textual interpretations in favor of extra-constitutional interpretations to justify power over internal Indian affairs, the United States engaged in unconstitutional behavior and threatened its very legitimacy.

This theory, known as the ward theory, was cited by the Court as justification that the federal government had the power to regulate Native American activities in order to protect tribal

¹⁶Cf. 10 Reg. Deb. 4763-4780 (June 26, 1834).

¹⁷10 Reg. Deb. 4779 (June 26, 1834).

¹⁸18 USC § 1152

¹⁹*Heath v. Alabama*, 474 U.S. 82, 88 474 U.S. 82, 88 (1985).

²⁰*Duro v. Reina*, 495 U.S. 676 (1990).

communities. Notably, the Court did not cite any constitutional basis for its ruling. The decision to neglect the established norms of constitutional interpretations makes it difficult to reconcile the Court's opinion with a textual delegation of congressional authority within the Constitution. In fact, it is this decision that led to the rise of the federal government's nearly unlimited power over Indian affairs through congressional actions.²¹

Later cases affirmed Congress's plenary power over internal tribal matters. For instance, the Court held in *Lone Wolf v. Hitchcock* (1903) that Congress possessed the power to seize tribal land without the consent of Native Americans residing on the land, even if that action violated previous treaties. Completed an effort that had been ongoing for a century to detribalize American Indians, maintaining the rule of law at the forefront of the assimilation drive of American culture; The *Lone Wolf* ruling justified Congress's plenary power through claims of historical precedent.²² The Major Crimes Act provides this reasoning false, as the Act was the blueprint for Congress's regulation of Native Americans via legal boundaries, even when America's past pointed to Congress's inability to execute such powers previously.

In recent years, the Supreme Court has begun to shift away from the "ward" theory and now argues that Congress's power to make treaties and regulate commerce with Native American tribes is the source of Congress's plenary authority.

For instance, the central question in *United States v. Lara* (2004) revolved around whether the Saginaw Chippewa Tribe might be accused of an offense under tribe law and federal law. The plaintiff contended that he couldn't be accused of such an offense because the Fifth Amendment's Double Jeopardy Clause forbids imposing numerous penalties for the same violation. However, the government contended that Congress has full authority to control tribal conviction, including the authority to sanction simultaneous charges.

The Court held that Congress possessed the requisite power to regulate tribal criminal jurisdiction, which thereby authorized dual prosecutions. The source of this power, according to the Court, was the Indian Commerce Clause. Furthermore, the Court held that the separate sovereignties of the tribal and federal governments meant that the Double Jeopardy Clause did not prohibit simultaneous charges in this specific instance.²³

²¹*United States v. Kagama*, 118 U.S. 375 (1886).

²²*Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

²³*United States v. Lara*, 541 U.S. 193 (2004).

In conclusion, the historical precedent of federal Indian laws demonstrates that current laws may actively violate constitutionality by contradicting the textual norms of constitutional interpretation. This active violation implies that these unconstitutional laws ought to be considered an infringement upon the rights of sovereign Native American tribes. Currently, the Court appears to be re-examining this argument, and this re-examination may rectify the situation and lead to a new interpretation that affirms the initial intentions of the Constitution.