

Lesson 5

CONGRESS'S ECONOMIC POWERS

Unit 2

Lesson Objectives:

When you complete Lesson 5, you will be able to:

- Understand the debates about the scope of Congress's power under the Spending Clause and explain how it is a limited power.
- State the purpose of the Appropriations Clause and the Borrowing Clause.
- Understand the difference between direct and indirect taxes.
- Understand the limits on direct taxation under the Direct Taxes Clause and the changes to congressional tax powers with the 16th Amendment.
- State the purpose of the Uniformity Clause and its relationship to indirect taxation.
- Describe the purpose of the Export Taxation Clause, and explain the importance of the Port Preference Clause to federalism.
- Explain the extent of Congress's power concerning commerce with foreign nations, commerce among the states, and commerce with Indian tribes.
- State the purpose of the Coinage Clause, the Weights and Measures Clause, and the Counterfeiting Clause, and understand their importance to a Commercial Republic.
- Explain the purpose of the Post Office Clause, and the Patent and Copyright Clause, and how these clauses support the Commercial Republic.

Part 1: Spending and Borrowing

Spending Clause

Article I, Section 8, Clause 1

Borrowing Clause

Article I, Section 8, Clause

Appropriations Clause

Article I, Section 9, Clause 7

The Spending Clause — Article I, Section 8, Clause 1

Essay by John C. Eastman (pp. 93–96)

Like the Commerce Clause and the Necessary and Proper Clause, the Spending Clause is often used to justify vast expansions of regulatory power; however, the Spending Clause does not grant unlimited power to Congress. The Spending Clause allows Congress to levy taxes and duties in two specific situations: to pay the country's debts and to defend the country or promote its general welfare.

The Founders disagreed about the scope of this clause, but even the most expansive understanding of the clause (Hamilton's) did not see it as authorizing Congress to regulate anything and everything it wished. Hamilton argued that the only limits on the tax-and-spend power are that duties must be uniform, direct taxes must be apportioned by population, and no tax should be laid on articles exported from any state. Hamilton argued that, with the exception of those requirements, Congress has a broad and expansive power to raise and appropriate revenue.

By contrast, James Madison and Thomas Jefferson held to a narrower interpretation of the clause: Congress could not tax and spend for any and every thing judged to be in the best interests of the nation. Congress could tax and spend only to achieve the purposes explicitly outlined elsewhere in the Constitution. A third interpretation, which James Monroe championed (and even Hamilton recognized) is that the words "common" and "general" are themselves a limitation on Congress's power. Spending must be general, meaning directed toward the benefit of the entire country rather than simply toward a specific region.

There are few examples of Congress's interpretation of this clause. The Fourth Congress, for instance, decided that it did not have the constitutional power to provide relief to Savannah, Georgia, after it suffered a devastating fire. However, Congress did fund several local projects that were tied specifically to another enumerated power or that served the general welfare of the entire country: for example, appropriations for the Cumberland Gap. Presidents prior to the Civil War were divided as to which of the three interpretations of the clause was correct, but Madison's, Jefferson's, and Monroe's positions largely prevailed.

Modern-day jurisprudence on the Spending Clause begins with the New Deal-era decision in *United States v. Butler* (1936). Both parties relied on Hamilton's interpretation of the clause, which the Supreme Court claimed to accept. The Court reasoned that the only limitation on Congress's power to tax and spend was that spending must be for the "general Welfare." Although the Court officially accepted Hamilton's interpretation, its analysis seemed to align more closely with Monroe's interpretation rather than Hamilton's. In fact, *Butler* departs from all earlier interpretations of the clause because the Court gave Congress virtually unlimited discretion to determine what is in the "general welfare." The Court refuses to examine the constitutionality of any spending program; it will only analyze whether the particular conditions for receipt of funding are constitutional, through the four-pronged test of *South Dakota v. Dole* (1987).



Before You Read

Ask: Does your family have a budget? What kind of expenses are in your budget? (Answers will vary.) Congress also has a budget. What kind of expenses do you think are in Congress's budget? (Accept all reasonable responses: For example, military expenses, salaries for Members of Congress, funding for roads.)



Active Reading

Ask: What two purposes of the Spending Clause make up the spending power?" (to pay the debts of the United States and to provide for the common defense and general welfare of the United States)



Check Understanding

Have students write a few sentences summarizing Alexander Hamilton's, James Madison's, and James Monroe's interpretations of the Spending Clause. (Sample answer: Hamilton stated that the only limits on Congress's tax-and-spend power were the requirements that duties be uniform, that direct taxes be apportioned by population, and that no tax be applied on anything exported from any state. Madison and Jefferson argued that Congress could tax and spend in order to achieve the purposes explicitly outlined elsewhere in the Constitution. Monroe thought that spending must be general, meaning directed toward the benefit of the entire country rather than simply toward a specific region.)



Work in Groups

Break students into small groups and have them use the Internet to research some ways in which Congress spends money today. Have them write a paragraph summarizing their findings and analyze how Madison, Hamilton, and Monroe would view these appropriations.

Borrowing Clause — Article I, Section 8, Clause 2

Essay by Claire Priest (pp. 98–100)

The Borrowing Clause grants Congress the power to borrow money on the credit of the United States. During peacetime, Congress was expected to craft a balanced budget, but the Framers realized that the power to borrow money would be essential during wartime. However, George Washington cautioned that America's credit should be used sparingly and that the accumulation of debt should be avoided.

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The Federalists and the Republicans agreed about maintaining public credit but disagreed about implementing this power—specifically, whether the Borrowing Clause authorized a national bank. Hamilton supported the bank as essential to commerce. Jefferson dismantled Hamilton’s program and supported a balanced budget in order to limit the size of government. Wartime exigencies and economic crises led the country toward the modern interpretation of the Borrowing Clause. Both sides accepted the use of the Bank of the United States to control its reserves and later permitted the federal government to issue legal tender.

Litigation related to the Borrowing Clause today focuses on intergovernmental taxation immunity and Congress’s contractual obligations. The Supreme Court has ruled that local governments cannot tax interest generated by debts held by the federal government. The Court has also ruled that Congress has an obligation to pay back money borrowed and that this obligation is enforceable in most instances. The Constitution does not limit the amount that may be borrowed. It is a political question; that is, the political branches must make a prudential judgment to accumulate debt.



Before You Read

Ask: What is debt? (money that you owe) What is a deficit? (when you spend more money than you make) When might a country find it necessary to borrow money from another country? (during a war or an economic crisis)



Make a Real-Life Connection

Help students understand the difference between the Framers’ approach to the national budget and the approach used in modern times. Explain that the Framers understood a balanced budget to be essential during peacetime and that the credit of the United States ought to be protected. Have students look up the current debt and deficit for the United States. Ask them to analyze what the Founders would think of the current budget predicament.



Active Reading

Ask: What did the Jeffersonian Republicans think about a balanced budget? (They thought that a balanced budget reflected a nation’s desire to limit the size and power of the federal government to protect the authority of the states.)



Research It

Have students trace the history of the First Bank of the United States, including a discussion of the constitutionality of the bank. Have students write a few pages answering the following questions. Why was the constitutionality contested? When and for what purpose was the bank established? By whom? What happened to the bank?



Discussion Question

What does the Borrowing Clause reveal about how the Framers viewed their role in international politics? (The Borrowing Clause shows that the Framers thought that the young nation was coming into its own in regard to international politics. The clause reveals that they foresaw a future in which the United States would be considered the political equal of other major countries with sufficient credit to borrow money.)

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Appropriations Clause — Article I, Section 9, Clause 7

Essay by Gary Kepplinger (pp. 163–166)

The Appropriations Clause is essential to Congress’s “power of the purse,” or the authority to spend money. The clause first appeared at the Constitutional Convention as part of a proposed division of authority between the House and the Senate. Part of the proposal declared that all “money bills” must originate in the House and that the Senate could not amend or alter these bills. Additionally, no money could be withdrawn from the public treasury unless the House appropriated it. The Committee of Eleven offered a compromise to which the delegates agreed: The Senate could amend money bills, and all money must be appropriated by law.

The Appropriation Clause was an important element of the separation of powers because it limits the executive’s access to funds. The second part of the Appropriations Clause, beginning with the words “a regular Statement and Account,” specifies that an account of expenditures from appropriations must be published periodically.

As the courts have routinely recognized, the Appropriations Clause gives Congress authority over the Treasury. The Supreme Court has declared the clause to be a restriction on the executive power to distribute money. Congress may enact a law directing a payment from the Treasury, and it may also adjust, suspend, or repeal laws concerning appropriation acts. Congress’s power is not unlimited. The Bill of Rights and other constitutional provisions constrain Congress.



Before You Read

Write these sentences on the board: The school district has appropriated funds for a new cafeteria. These funds may not be used for any other purpose. **Ask:** What does appropriated mean in the first sentence? (set aside) **Now,** what do you think the Appropriations Clause might be about? (the setting aside of money)



Make a Real-Life Connection

Tell students to think about how they or their families budget money. *Ask:* Do you set aside money for certain things? What are some of these things? (Answers will vary.) *Then ask:* In what way is the Appropriations Clause like a budget? (Students may say that money is earmarked for certain things and that this controls excessive spending.)



Make an Inference

Ask: Why is it important for Congress to record and publish a record of its spending? (so that taxpayers are aware of how their money is being spent) *Ask:* What might happen if Congress's spending was not recorded? (Politicians might spend money illegally or unwisely.)



Discussion Questions

1. Why is it important to limit the ways in which Congress may spend money? (Answers will vary: All money Congress spends comes from taxpayers and is inherently limited. Because there is only a certain amount of money available to spend, Congress must prioritize how it spends.)
2. How does the Appropriations Clause reflect to the separation of powers? (Congress holds the power of the purse. That power is divided between the House and the Senate: money bills must originate in the House, which is closest to the people, but the Senate must also approve any money bill, thus ensuring that members of the House make good decisions regarding the Treasury. The Appropriations Clause also ensures that the Executive may not access funds without Congress's (and therefore the people's) consent.)



Check Understanding

Have students complete the following assessment to check their understanding of Lesson 5, Part 1. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. Which of the following clauses gives Congress authority over the Treasury?
 - a. Emoluments Clause
 - b. Appropriations Clause**
 - c. Direct Taxes
 - d. Bill of Attainder Clause

2. Which Founding Father argued for a very broad interpretation of the Spending Clause?
 - a. James Madison
 - b. Alexander Hamilton**
 - c. James Monroe
 - d. George Washington

3. The Framers created the Borrowing Clause to empower Congress to borrow money
 - a. in times of war.**
 - b. to expand the federal government.
 - c. to give to the states.
 - d. in times of famine.

4. Internal improvements have been justified as a viable national expenditure by using the
 - a. Borrowing Clause.
 - b. Commerce Among the States Clause.
 - c. Spending Clause.**
 - d. Commerce with Foreign Nations Clause.

Short answer: Write out your answer to each question.

1. For what two purposes does the Spending Clause permit the levying of taxes? **(to pay the debts of the United States and to provide for the common defense and general welfare of the United States)**

2. How did the Federalist Party want the Spending Clause to be read? **(They argued for an expansive reading of the spending power.)**

3. Every President adopted a more restrictive interpretation of the Spending Clause until what period in American history? **(the Civil War)**

4. What ushered in the modern-day jurisprudence on the Spending Clause? **(The 1936 New Deal-era case of *United States v. Butler*. This case gave Congress virtually unlimited discretion to determine what is in the "general welfare.")**

5. What were the three interpretations of the Spending Clause advanced in the years immediately following ratification of the Constitution? **(One interpretation argued that the clause authorized spending for various projects such as internal improvements; another was that spending could be only for powers specifically enumerated in the Constitution; a third was that it was a limit on the power to spend, requiring that spending be for national and not merely local benefit.)**

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6. What was one of the main reasons a Borrowing Clause was essential? **(The nation could not successfully defend itself militarily without the power to borrow quickly and extensively when the need arose.)**
7. Which famous Federalist encouraged the chartering of the First Bank of the United States? **(Alexander Hamilton)**
8. The Appropriations Clause is the cornerstone of what? **(Congress's "power of the purse")**

True / False: Indicate whether each statement is true or false.

1. In early Congresses, local projects such as schools for public education and local roads and canals were seen as things that would benefit the general public, and monetary appropriations were therefore made from the federal treasury. **(False. Since the "general" benefit is not direct, early Congresses viewed these expenditures as unconstitutional.)**
2. Some taxes will inevitably affect some areas more than others. **(True)**
3. Federalists and Republicans agreed on the need to maintain public credit and on how borrowing power should be implemented. **(False. They did agree on the need to maintain public credit, but they diverged considerably on how the borrowing power should be implemented.)**

Part 2: Powers and Limits of Taxation

Uniformity Clause

Article I, Section 8, Clause 1

Direct Taxes

Article I, Section 9, Clause 4

Income Tax

Amendment XVI

Export Taxation Clause

Article I, Section 9, Clause 5

Port Preference Clause

Article I, Section 9, Clause 6

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Understanding Taxation

The American Revolution began as a tax revolt. The colonists' objections were not to the amount of taxation but to the process by which taxes were levied. Specifically, the colonists objected that Parliament was levying taxes without the consent of representatives in the colonists' local legislatures. In drafting the Constitution, the Framers vested their representatives in Congress with the power to levy taxes.

There are different types of taxes that a legislature may levy: direct taxes and indirect taxes. The Framers did not want states, interests, or industries to use the national legislature to burden other states, interests, or industries unjustly. Therefore, the Constitution creates certain limitations on indirect taxes and direct taxes: Indirect taxes are subject to the Uniformity Clause, and direct taxes are subject to apportionment.

Indirect taxes were meant to fund the national government in ordinary circumstances. These included "Duties, Imposts, and Excises"—generally, taxes on articles of consumption. If Congress raised rates too high, then people would not purchase the taxed goods, and revenue would decrease.

Direct taxes did not have the built-in protections characteristic of indirect taxes. Direct taxes were imposed directly on individuals, who could not shift their liability to others. To guard against abuse, direct taxes must be apportioned.

Uniformity Clause — Article I, Section 8, Clause 1

Essay by Nelson Lund (pp. 97–98)

The Uniformity Clause requires that indirect taxes, “Duties, Imposts, and Excises” must be uniform. The Uniformity Clause limits Congress’s taxing power by ensuring that indirect taxes are not designed to discriminate against specific regions and political groups. Together with the Port Preference Clause, which limits Congress’s power over taxing and commerce, the Uniformity Clause ensures that no single region would have a competitive advantage or disadvantage over the other regions of the country.

Any tax will naturally affect some regions more than others. Therefore, the challenge of the Uniformity Clause is to distinguish between non-uniformity that is constitutionally forbidden and non-uniformity that is inevitable with legitimate taxes and duties.

The Supreme Court ruled that a tax does not violate the Uniformity Clause if it has “the same force and effect in every place where the subject is found.” The Court later concluded in *United States v. Ptasynski* (1983) that (1) if the subject of a tax is defined in non-geographic terms, then the Uniformity Clause is satisfied, but (2) if the subject of a tax is described in geographic terms, it will be closely examined to determine whether it does in fact violate the clause. Even with these rules, Congress can easily impose taxes that are discriminatory.



Active Reading

Tell students that the Uniformity Clause was intended to ensure that geographical areas are treated equally. **How could a tax not be uniform?** (If Congress imposed a tax on the production of oil, it would be uniform if all producers of oil paid the same tax. However, some states do not produce oil. This tax could run afoul of the Uniformity Clause if the tax on oil was designed to harm oil-producing states or if producers in one state did not have to pay the same tax as producers in other states.)



Write About It

Break students into groups and have them use the Internet to find examples today where legislators have approved laws, levied taxes, or given benefits to one state but not another state. Have groups make a list of examples and be ready to discuss each.



Make an Inference

Ask: Why isn’t the Uniformity Clause enforced today? (The Supreme Court has not defined actual geographic discrimination.)

Direct Taxes – Article I, Section 9, Clause 4

Essay by Erik M. Jensen (pp. 159–161)

Under the Articles of Confederation, Congress did not have the ability to generate the revenue it needed. The Framers designed the Constitution to give the national government more power to generate the revenue it needed, but they feared using taxation to do this. The taxing authority could be used to burden certain regions of the country unfairly. Indirect taxes (taxes on goods) were not nearly as controversial as direct taxes such as capitation (a tax on each person). The Direct Taxes Clause requires that all capitation or other direct taxes be apportioned according to the census.

There is much debate about what kinds of taxes are direct and therefore subject to apportionment. It is clear from the Founding debates that capitation and land taxes were direct. Capitation was specifically labeled a direct tax in the Constitution. Land taxes generally included slaves, and prior to the Civil War, Congress enacted several real-estate taxes, which were apportioned through a complicated process. Yet the question remained whether direct taxes applied to anything further.

The Supreme Court addressed the question in *Hylton v. United States* (1796). The case addressed taxes on carriages; the Court held that carriage taxes were excise taxes and therefore did not require apportionment but affirmed that capitation and land taxes were direct taxes subject to apportionment. Based on the language in *Hylton*, the Court held that taxes on insurance receipts, state bank notes, and inheritance did not require apportionment.

In *Pollock v. Farmers' Loan and Trust* (1895), the Court expanded its understanding of direct taxes to include income taxes (though the Court had suggested a few years earlier that income taxes did not require apportionment). After *Pollack*, the Court continued to approve other unapportioned excise taxes. The Sixteenth Amendment was ratified to enable Congress to pass unapportioned income taxes, which proved to be a good source of revenue.



Active Reading

Explain that a capitation is a “head tax,” a tax on a person regardless of the person’s income or wealth. **Ask: Why did the Founders create such a direct tax that did not factor in wealth or income?** (The Framers did not want states, interests, or industries to use the national legislature to burden other states, interests, or industries unjustly. For direct taxes, everyone would pay the same amount because this would ensure that Congress was not giving preference to one area of the country or group of individuals.)

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Active Reading

Ask: Based on your readings of the Direct Taxes Clause and the Uniformity Clause, the Constitution divided governmental levies into what two mutually exclusive categories? (indirect taxes subject to the uniformity requirement and direct taxes subject to apportionment)

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Income Tax – Amendment XVI

Essay by Erik M. Jensen (pp. 411–413)

The Sixteenth Amendment allowed Congress to enact an income tax without its being subject to the rules of other direct taxes. According to Article I, all direct taxes must be apportioned among the states on the basis of population regardless of a state's financial condition. Thus, two states with the same population but with different per capita income would owe the same amount to the federal government. Though each state would pay the same amount to the federal government, the tax would be more burdensome to the state with low per capita income.

Because the Supreme Court had suggested that income taxes were indirect taxes, Congress enacted an unapportioned income tax during the Civil War. When Congress enacted another such tax years later, the Supreme Court ruled in *Pollock v. Farmers' Loan and Trust* (1895) that income taxes were direct and therefore must be apportioned to be constitutional. To circumvent this decision, Congress pushed for a constitutional amendment to exempt income taxes from apportionment. Despite opposition, the amendment was passed with majority support in Congress.

The Supreme Court has not commented on the scope of the amendment or whether it limits congressional power. The current understanding of Congress's taxing power is that it is so broad that Congress alone determines its limits regarding income taxes. This interpretation conflicts with the original, limited purpose of the amendment.



Before You Read

Explain to the students that in the past, the amount of taxation depended on the state's population—the fewer people in a state, the less money people had to pay. Ask: **How would this create conflict with other states?** (States with low per capita incomes would still pay the same amount as other states with the same population but higher per capita incomes. This would create more of a burden on states with low per capita income. These states would be more likely to resist tax increases.)



Active Reading

Ask: Why did the Constitution need be amended to allow for an income tax? (There are two types of direct taxes: land and head taxes. A personal income tax is a direct tax that is not apportioned through the states. For Congress to levy an income tax, it would need constitutional authority to do so.)



Make an Inference

Ask: What do you think an “indirect tax” is? (a tax levied on a good or service, such as a sales tax)



Work in Pairs

Some proponents of an income tax did not think a constitutional amendment was necessary, but others pushed for the amendment. Have students research the opinions on both sides and report why each side thought an amendment was or was not necessary for Congress to levy an income tax.

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Export Taxation Clause — Article I, Section 9, Clause 5

Essay by David F. Forte (pp. 161–162)

The Export Taxation Clause forbids the taxation of goods exported from any state. The Framers created this clause to show unity among the states, since export taxes would have burdened the Southern states, the primary exporters in the country. Some, however, favored export taxes as a good source of income for the federal government.

Unlike in Commerce Clause cases, the Court has kept the distinction between items intended for export and items intended for local use. The Export Taxation Clause prohibits the government from taxing goods or services *closely* related to the export process, but it does not prohibit taxes prior to exportation or the taxation of goods and services *loosely* related to exportation.

The Court often used the Export Taxation Clause to evaluate levies between 1876 and 1923, but it has rarely invoked the clause since then. Although the purpose of the Export Taxation Clause was to prevent Congress from favoring any one section of the country, the Court has interpreted the clause as a flat ban on all export taxes rather than evaluating an export tax’s discriminatory effect.



Check Understanding

Say: On page 161, Forte says that Southerners worried that export taxes could be used to attack slavery indirectly. How might this occur? (Answers will vary. Students may say that government would create an extremely high tax on the exportation of slaves to harm the institution. Article I, Section 9, Clause 1 limits the amount paid on importation of slaves to \$10 per head.)



Active Reading

Ask: Why did James Madison, Alexander Hamilton, George Washington, Gouverneur Morris, and James Wilson support export taxes? (They thought they were a necessary source of revenue. The South would likely pay more than the North, but this was justified because the South would need greater naval protection.)

Port Preference Clause — Article I, Section 9, Clause 6

Essay by Nelson Lund (pp. 162–163)

The Port Preference Clause limits Congress's commerce and taxing powers. The clause prevents a powerful commercial faction from using the legislature to injure a politically weaker rival. Specifically, it prevents strong industries located in one state from using Congress to create a law that limits activity in a rival state's port. The clause stemmed from the Maryland delegates' concern that vessels coming into and out of the port in Baltimore might be forced to stop in Virginia.

The Supreme Court has interpreted the Port Preference Clause to forbid Congress from blatantly discriminating between ports of one state and those of another, but it has allowed incidental preferences or unequal taxes. Most recently, Justice Thomas has argued that the most natural reading of the clause was to forbid Congress from using its commerce power to channel commerce into one state's ports. Under current case law, Congress is on its honor to refrain from favoring one state's port over another's.



Active Reading

Point out that Lund begins his commentary by mentioning the Uniformity Clause. Tell students that this clause requires the uniform collection of federal taxes. Ask: *In what way is the Uniformity Clause like the Port Preference Clause?* (Both clauses prevent Congress from discriminating against a particular state by giving a competitive advantage to one state over another. The Uniformity Clause limits Congress's taxing power because it ensures that Congress does not impose indirect taxes that discriminate against specific regions and political groups. The Port Preference Clause limits Congress's taxing and commerce powers.)



Make an Inference

Read aloud the sentence, "Some other delegates objected that Congress should not have its hands tied, lest it be unable to deal adequately with problems such as smuggling on long rivers like the Delaware." **Ask:** How could this clause interfere with Congress's ability to handle problems such as this? (Answers will vary. Example: Congress might not be able to make changes in the ports of one state, such as adding more security, bridges, or checkpoints.)



Discussion Questions

1. What do you think might happen if the ships in Baltimore were forced to stop in Virginia? (Answers will vary. They sell or buy goods in Virginia instead of in Baltimore. Ships might opt not to go to Baltimore at all if they would be forced to stop in Virginia anyway.)
2. Why might the citizens of a state or a country *not* want a high export tax on the goods they produce? (High taxes would raise the price of goods. People in other states or countries might stop purchasing goods if the price is too high.)



Check Understanding

Have students complete the following assessment to check their understanding of Lesson 5, Part 2. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. National real-estate taxes were enacted when?
 - a. during the Constitutional Convention
 - b. in antebellum America**
 - c. after World War I
 - d. after World War II
2. Direct taxes are generally understood to apply to which of the following?
 - a. land only
 - b. goods only
 - c. capitation and land**
 - d. goods and services

Fill in the Blank: Write the correct word or words in each blank.

1. The _____ prohibits taxation of goods exported between states or from states to foreign nations. (**Export Taxation Clause**)
2. The _____ was created to prohibit Congress from favoring the ports of a particular state. (**Port Preference Clause**)

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Short Answer: Write out your answer to each question.

1. What is the purpose of the Uniformity Clause? **(to prevent Congress from using the taxing power to give one area of the country an advantage over another)**
2. What are “indirect taxes”? **(An indirect tax is a tax usually on a good of consumption that can be passed on to someone else. For example, manufacturers or merchants increase the price on goods so that the consumer is paying more for the item, such as cigarettes, liquor, gasoline, etc.)**
3. What are “direct taxes”? **(taxes that are directly levied on the individual)**
4. What two forms of taxation are subject to apportionment? **(capitation taxes and taxes on land, which generally included taxation on slaves)**
5. The Constitution divided governmental levies into what two mutually exclusive categories? **(Indirect taxes subject to the uniformity requirement and direct taxes subject to apportionment)**
6. Why was the South opposed to an export tax? **(During the late 18th century, the South was a primary exporter of goods and would have borne a disproportionate burden from export taxes.)**
7. What is the natural protection of indirect taxes? **(If taxes on articles of consumption become too high, revenue will naturally decrease because consumers will stop buying the taxed goods.)**
8. What is the Sixteenth Amendment? **(It gives Congress the power to lay and collect an income tax without the apportionment requirement.)**

True / False: Indicate whether each statement is true or false.

1. Congress enacted an unapportioned income tax during the Civil War. **(True)**
2. Despite heated opposition to the unapportioned income tax, the Sixteenth Amendment was passed by Congress with huge majorities. **(True)**
3. Some taxes will inevitably affect some areas more than others. **(True)**
4. Federalists and Republicans agreed on the need to maintain public credit and on how borrowing power should be implemented. **(False. They did agree on the need to maintain public credit, but they diverged considerably on how the borrowing power should be implemented.)**

Part 3: Creating a Commercial Republic

Commerce with Foreign Nations

Article I, Section 8, Clause 3

Commerce Among the States

Article I, Section 8, Clause 3

Commerce with the Indian Tribes

Article I, Section 8, Clause 3

Bankruptcy Clause

Article I, Section 8, Clause 4

Coinage Clause

Article I, Section 8, Clause 5

Weights and Measures

Article I, Section 8, Clause 5

Counterfeiting

Article I, Section 8, Clause 6

Post Office

Article I, Section 8, Clause 7

Patent and Copyright Clause

Article I, Section 8, Clause 8

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Commerce with Foreign Nations — Article I, Section 8, Clause 3

Essay by David F. Forte (pp. 100–101)

The Commerce with Foreign Nations Clause grants Congress the power to regulate commerce conducted with other countries. Under the Articles of Confederation, a state could regulate its commerce with other states and nations. Consequently, foreign nations easily manipulated the states to their own benefit. The Framers agreed that Congress should regulate foreign commerce.

There is disagreement whether Congress's power to regulate commerce with foreign nations is coextensive with the power to regulate interstate commerce. The Supreme Court has held that Congress has greater power to regulate foreign commerce, since the federal government has sovereignty over foreign affairs. Similarly, the Court has recognized that states have more authority to tax interstate commerce than they have to tax foreign commerce.



Before You Read

Say: The word commerce means “buying and selling.” What is interstate commerce? (buying and selling between states) What is foreign commerce? (buying and selling between countries)



Make an Inference

Ask: What is a tariff? (a tax or duty on an imported product)

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Commerce Among the States – Article I, Section 8, Clause 3

Essay by David F. Forte (pp. 101–107)

Together with the Spending Clause and the Necessary and Proper Clause, the Commerce Among the States Clause is one of the most contentious clauses in the Constitution. Together, these clauses are cited to grant extensive regulatory powers to Congress. The Commerce Clause, however, was not designed to justify whatever regulation Congress desires to make.

The Commerce Among the States Clause is a delegation of power to Congress to regulate and promote commerce and to limit the states’ power over interstate commerce. There is some disagreement about the Framers’ understanding of commerce. Some scholars argue that the Framers interpreted the commerce power to extend to the exchange and transportation of goods between states and to closely related activities. Others argue that the Framers saw Congress as having the power to regulate any market activity that affects more than one state.

After their experiences under the Articles of Confederation, the Framers understood regulation of commerce and the money supply to be essential to Congress’s power over economic policy. Article I, Section 10 of the Constitution prohibits the states from coining money and grants Congress alone power over commerce between nations, among the states, and with Indian tribes. Because the Framers created a document of limited enumerated powers, and because they did not expressly include a plenary power over all local commerce, the Framers did not design the Commerce Among the States Clause to enable Congress to regulate local economic activity. Thus, the clause did not give Congress the authority to regulate intrastate commerce (commerce wholly internal to a state). Under the Necessary and Proper Clause (which will be discussed in lesson 8), it is possible for Congress to regulate certain local activities, but only if the regulation comports with another enumerated power of Congress.

The Supreme Court has increasingly recognized vast expansions of Congress’s commerce power. The Court’s understanding of commerce has expanded from the narrow definition of “trafficking and trading of economic commodities” to the broad definition of “any human activity or other phenomenon that has an ultimate im-

pact on activities in one or more states.” In *Gibbons v. Ogden* (1824), John Marshall defined the terms of the clause: “commerce” describes the commercial intercourse between nations, parts of nation, and its branches; “among the states” does not give Congress the power to regulate commerce internal to a state but only commerce concerning more than one state. The Court did not revisit the scope of the commerce power after *Gibbons* until late in the 19th century.

From 1895 until 1928, the Court dabbled with different tests to evaluate the scope of the Commerce Clause. In *United States v. E.C. Knight Co.* (1895), the Court determined that the clause did not extend to manufacturing because there was a *qualitative* difference between the production of goods and commerce. Gradually, the Court began to approve congressional regulations for manufacturing using a new *quantitative* analysis: Congress could regulate local activity and manufacturing if it had a “substantial” effect on interstate commerce. Later, in *A.L.A. Schechter Poultry Corp. v. United States* (1935), Justice Cardozo explained that Congress may regulate local activities if they have a proximate effect on interstate commerce.

By the early 1940s, the Court determined that any local activity—either separately or in aggregate—that had a sufficiently substantial effect on interstate commerce was therefore subject to Congress’s commerce power. With this reasoning, the Court functionally turned the commerce power into a general regulatory power and undid the Framers’ limited framework of government. Congress has invoked its commerce power to regulate guns in schools and violence against women and to enact civil rights legislation. In *United States v. Lopez* (1995) and *United States v. Morrison* (2000), the Court struck down some of these laws, arguing that they did not have a substantial effect on commerce and that Congress had exceeded its powers.

It is important to note that even the Founders understood the Commerce Clause to be a restraint on states’ legislative power. State law will inevitably conflict with Congress’s commerce power. These conflicts have been the subject of many Supreme Court cases, producing inconsistent holdings. The Court generally evaluates states laws according to a test articulated in *Pike v. Bruce Church, Inc.* (1970). Essentially, if a state regulation has a legitimate state interest, and only incidentally effects interstate commerce, the Court will uphold the law.



Check Understanding

Tell students that after the War for Independence, the states had imposed competing tariffs that restricted the flow of goods among them while trying to attract foreign trade to their own ports. Congress had no authority under the Articles of Confederation to make commerce “regular” to ensure that Americans had access to what they could not produce themselves. The Constitution gave Congress power under the Commerce Clause to lift artificial barriers on interstate commerce as a necessary condition for a thriving commercial republic.



Discussion Question

According to the commentary in your book, how do modern interpretations of the power of the federal government to regulate commerce among the states differ from the original intentions of the Framers? (The Framers regulated commerce between the states to prevent the states from creating artificial trade barriers and to promote commerce in the nation. It was not a broad regulatory power. Modern interpretations of the clause, however, treat it as a general regulatory power. Commerce means any activity—no matter how local—that has an impact on interstate commerce.)

Commerce with the Indian Tribes — Article I, Section 8, Clause 3

Essay by David F. Forte (pp. 107–109)

Congress also derives power to regulate commerce from the Indian Tribes Clause. Because the relationship between Indians, the United States, and the states was ambiguous, the Framers granted Congress alone the power to regulate commerce with Indian tribes. After ratification, Congress regulated Indian affairs through treaties and the Trade and Intercourse Acts. Tribes were considered domestic dependent nations, not foreign nations. They were therefore entitled to property rights and self-rule, subject to the will of Congress.

Federal policy toward Indian tribes has developed through various legislative acts, treaties, and conflicts. The Supreme Court monitors state laws affecting Indians but largely defers to Congress on Indian affairs.



Active Reading

Read aloud the first sentence of the commentary. Tell students that “plenary” means “complete or absolute.” Say: Therefore, the Commerce Clause gave Congress complete control over commerce between the states, foreign nations, and Indian tribes.



Discussion Question

Why was it important to give the federal government the ability to regulate commerce with Indian tribes? (The Constitution gives Congress the power to regulate commerce among three types of sovereign entities: Indian tribes, states, and foreign nations. Indians were an unusual sovereign entity because they resided in the United States as well as within states. They were not technically foreign nations, but domestic dependent nations.)

Bankruptcy Clause – Article I, Section 8, Clause 4

Essay by Todd Zywicki (pp. 112–114)

Congress has the power to create uniform bankruptcy laws. Under the Articles of Confederation, states governed debtor–creditor relations, leading to diverse and contradictory laws. Additionally, many states crafted legislation to benefit debtors and harm creditors. Seeing that uniform bankruptcy laws were essential to promoting commerce, the Framers gave Congress the power to create a coherent and consistent bankruptcy regime to support the young commercial republic.

English law had traditionally distinguished between insolvency (which applied to private debtors) and bankruptcy (which applied to merchants or traders). While some argued that Congress’s power extended only to the debts of merchants and traders, others (including, later, the Supreme Court) argued that Congress could create rules for personal insolvencies as well as commercial bankruptcies.

The original meaning of the Bankruptcy Clause limits Congress’s powers over debtor–creditor relations. First, Congress may establish rules for debtors who are insolvent. Second, Congress’s power extends only to the debtor and creditor, not to third parties. But current law ignores these limits. The Bankruptcy Code represents one accommodation between state and federal law. Most non-bankruptcy laws governing debtor–creditor relationships are state laws. Because the federal Bankruptcy Code honors or incorporates most of these state laws, debtors and creditors will be treated differently depending on state law.



Before You Read

Have students use the dictionary to determine the meaning of “insolvent” (unable to pay debts) and “bankrupt” (being legally declared unable to pay creditors). Explain that historically, these terms have different meanings. “Insolvent” applies to individuals, while “bankruptcy” applies to merchants and businesses.



Active Reading

Ask: Why were the Framers convinced of the need for the national government to oversee bankruptcy? (When the states crafted bankruptcy laws, they created unjust and extremely debtor-friendly laws. Additionally, each state had different and often contradictory laws, which created great problems when a creditor in one state tried to collect a debt from another state. This arrangement was not conducive to interstate commerce.)

Unit 2



Active Reading

Ask: Who could be declared “bankrupt” under English law? (Only merchants and traders. Individuals were declared insolvent.)



Discussion Question

What might happen if a country does not have uniform bankruptcy laws? (State bankruptcy laws will conflict. Creditors might be unwilling to lend money in states with laws that are too debtor-friendly. This would not be conducive to commerce.)

Unit 2

Coinage Clause – Article I, Section 8, Clause 5

Essay by Todd Zywicki (pp. 114–116)

The Coinage Clause gives Congress the plenary power to coin money. Congress may coin money using gold, silver, or other precious metals. It may establish the value for coins domestically and a set value for foreign coins, thereby promoting foreign and domestic commerce and preventing states from applying different values to currencies.

It is unclear whether Congress has the power to issue paper money. During the Founding era, there was a difference between coined specie and interest-bearing notes, or “Bills of Credit.” Given the rampant inflationary uses of bills during the Revolution and the absence of express permission to issue paper money, the Framers did not give Congress the power to issue bills of credit as legal tender.

Throughout the 18th and 19th centuries, the monetary system consisted of different types of legal tender: specie; minted coins (either from the government or from private institutions); foreign coins; and certain bank notes. The government did not issue fiat money (meaning money not backed by specie) as legal tender before the Civil War. Any issuance of fiat money was for limited purposes and was not intended for private use or circulation.

Nevertheless, the Supreme Court decided in *Veazie Bank v. Fenno* (1869) that Congress had the power under the Necessary and Proper Clause to issue bills of credit to pay for government operations. The Legal Tender Act of 1862 made “greenbacks” legal tender for public and private use, a decision contrary to the Founders’ design. In *The Legal Tender Cases* (1870), the Court upheld the Legal Tender Act, arguing that the federal government’s money power was inherent to its sovereignty and, consequently, needed no enumerated power from the Constitution.



Discussion Question

Why did the Founders want currency to be backed by precious metals? Why did the Founders oppose paper currency? (Although the Coinage Clause does not specifically require that all currency should be backed by precious metals, this was the practice during the constitutional period. The Founders wanted a stable money supply and recognized that gold- and silver-backed tender would provide this stability. They opposed paper-backed money because it caused many problems. For example, paper currency was frequently introduced intentionally to cause inflation as a way to aid factions such as debtors at the expense of banks and the wealthy who had given out loans.)

Unit 2

Weights and Measures – Article I, Section 8, Clause 5

Essay by Eric Chiappinelli (pp. 116–117)

The Weights and Measures Clause empowers Congress to create a uniform standard for weights and measures. This clause was not designed to remedy a situation, but was intended to promote domestic and foreign commerce by allowing the federal government to adopt and enforce uniform standards of measurement. The clause was adopted without controversy.

Though Thomas Jefferson and John Quincy Adams encouraged Congress to do so, it failed to adopt uniform standards for weights and measures. The Treasury Department, however, established certain standards for customs purposes, and many states established standards for trade purposes. Congress authorized the use of the metric system in 1866 but did not mandate its use. Since 1975, the metric system has been the “preferred system” for commerce, but the National Institute of Standards and Technology of the Department of Commerce routinely publishes the standards for both the English and metric systems.



Before You Read

Explain to students that weights and measures refers to a standard of length and weight. The metric system (meters and grams) and American units (inches and pounds) are examples of weights and measures.



Active Reading

Ask: What was the purpose of the Weights and Measures Clause? (to facilitate domestic and international commerce by permitting the federal government to adopt and enforce national measurement standards)



Discussion Question

Why did the Framers agree unanimously on the [Weights and Measures Clause](#)? (The Weights and Measures Clause was not controversial because there was already uniformity of measurement and Congress held the power to establish such standards under the Articles of Confederation.)

Unit 2

Counterfeiting – Article I, Section 8, Clause 6

Essay by David F. Forte (pp. 117–118)

Forgery and counterfeiting of currency was a concern expressed at the Constitutional Convention. Although Congress would have had the power to punish counterfeiting under the Necessary and Proper Clause (which will be discussed in Lesson 7), the Framers explicitly added the power for three reasons. First, the Founders wanted to depart from the British legal tradition of defining counterfeiting as a form of treason punishable by a bill of attainder. They therefore separated counterfeiting from treason by specifically defining treason and denying Congress the power to expand the definition. The Founders did, however, give Congress the authority to punish counterfeiting. Second, because counterfeiting foreign currencies would threaten America's international relations, Congress needed the power to punish it. Third, the power to punish counterfeiting is appropriate considering federal supremacy in monetary policy.

Despite the Framers' decision to include the clause, the Supreme Court's decisions have limited the clause and ultimately rendered it unnecessary. The Court upheld a state law punishing counterfeiting, thereby enabling states to have concurrent power over counterfeiting. When the Court upheld Congress's power to punish counterfeiting, it relied not only on the Counterfeiting Clause, but also on the Coinage Clause, the Necessary and Proper Clause, and the Commerce Clause.



Before You Read

Ask students what they think the term "currency" means. Ask them to look at a form of currency (a coin or paper bill) and note the imagery.



Discussion Question

How was the Counterfeiting Clause a departure from the British law practice of punishing counterfeiting? (British law included counterfeiting as a treasonous offense punishable by a bill of attainder. Under the Constitution, counterfeiting is no longer defined as treasonous, but Congress may punish the offense.)

Post Office – Article I, Section 8, Clause 7

Essay by David F. Forte (pp. 119–120)

The Articles of Confederation gave Congress the authority to create and control post offices. When drafting the Constitution, the Framers added the power to establish post roads to the power to establish post offices.

Congress created the Office of the Postmaster General through the Act of September 22, 1789. By then, dozens of post offices and thousands of miles of post roads existed. However, the Post Office Clause generated controversy; specifically, did Congress have the authority to create post offices and construct new post roads, or could it only designate locations of post offices and roads to be considered postal roads? Thomas Jefferson and James Monroe interpreted the clause narrowly. Joseph Story, however, relied on the textual similarities of other clauses to support a broad reading of the Post Office Clause.

The Supreme Court has interpreted the Post Office Clause broadly, including recognizing the power to determine what may or may not be mailed. The Court also has recognized some limits on the clause within the Constitution: namely, the First Amendment.



Work in Groups

Break students into small groups and have them create a list of three possible reasons why individuals in the past might have objected to the construction of a post office in their area. (Students might say lack of affordable land on which to build the post office, lack of road networks, and low volume of mail.)



Active Reading

Ask: What was **franking**? (an official signature affixed to the mail in place of a stamp) **Why is the franking privilege controversial?** (The franking privilege exempts federal government officials from paying postage if they are using the mail system to conduct official business. Members of the House of Commons and the Continental Congress enjoyed the privilege. Some contend that the privilege is prone to abuse. For instance, during an election period, an incumbent Member of Congress may send innumerable mailings to constituents without paying postage and thereby gain name recognition within the district. An opposing candidate would have to raise the money to pay postage for any mailings.)

Unit 2

Patent and Copyright Clause — Article I, Section 8, Clause 8

Essay by Thomas Nachbar (pp. 120–122)

The Patent and Copyright Clause gives Congress the authority to secure the rights to works created by authors and inventors. This clause was neither debated, nor part of a larger legal tradition, nor a structural innovation. In *The Federalist* No. 43, Madison briefly justifies the clause as providing a national uniform standard for intellectual property.

The text of the clause does not elucidate its meaning. Courts largely defer to Congress to determine the scope of the clause. Some judicial decisions have clarified terms within the clause; for instance, the term “writings” protects photographs and maps, and the term “author” is more accurately defined as “originator.” The Court has suggested certain limits intrinsic to the clause: Congress cannot grant patents without concern for innovation or the social benefit, and patents must promote the useful arts.

There are still many uncertainties in applying this clause. Congress has laws protecting databases, inventions that cannot be patented, and works that were once protected by copyright but are now considered part of the public domain. Yet it is unclear whether the courts will recognize these as within the scope of the Patents and Copyright Clause (or some other clause). The question of whether certain copyright legislation runs afoul of the First Amendment is also unsettled.



Before You Read

Have students think about the word “copyright.” *Ask: What kinds of things do you think should be copyrighted? Why do people want to copyright their work?* (Students may say that people want to copyright their work so that they get credit for it.) *What is the difference between a patent and a copyright?* (A patent gives an inventor exclusive property rights to an invention for a determined period of time. A copyright protects an author’s ownership of an original work of authorship; copyrights can cover a wide variety of published or unpublished materials, including artistic, literary, dramatic, and musical works.)



Active Reading

Help students understand that copyrights can be renewed multiple times, which can create a perpetual copyright. *Ask: Why are perpetual copyrights problematic?* (They do not promote commerce, because many items cannot be placed into the public domain. For instance, once books enter the public domain, they often become cheaper and more accessible.)



Make an Inference

Point out that copyrights can be claimed only on creative works and that facts cannot be copyrighted. *Ask: Why do you think that facts cannot be copyrighted?* (Students may say that facts cannot be copyrighted because they are not the independent creation of a single citizen.)



Check Understanding

Have students complete the following assessment to check their understanding of Lesson 5, Part 3. Review any material for questions they have missed.

Short answer: Write out your answer to each question.

1. Who has power to regulate commerce with foreign nations? **(Congress)**
2. Which clause in the 1787 Constitution has generated more court cases than any other? **(the Commerce Among the States Clause)**
3. What is the narrowest definition of “to regulate”? **(to make regular—or, specifically, to facilitate—the free flow of goods but not, except in cases of danger, to prohibit the flow of any good)**
4. What two key economic powers did the Constitution remove from the states and lodge in Congress? **(the power to coin money and the power to regulate interstate commerce)**
5. The Commerce Clause grants Congress plenary power to regulate commerce between the United States and which three forms of sovereign entities? **(the states, foreign nations, and Indian tribes)**
6. Under the Articles of Confederation, who governed debtor–creditor relations? **(the states alone)**
7. Who has the exclusive power to coin money? **(Congress)**
8. What are “greenbacks”? **(paper money printed and issued by the federal government during the Civil War)**
9. What was the purpose in granting Congress the power to fix the standard of weights and measures? **(to facilitate domestic and international commerce by permitting the federal government to adopt and enforce national measurement standards)**
10. Since the power to punish someone who is involved in producing counterfeit money is understood to be included in the Necessary and Proper Clause, for what three reasons would there need to be a separate delegated power to punish counterfeiters?
 - **Although the Framers did not punish counterfeiting as treason, they wanted the national legislature to punish counterfeiting.**

Unit 2

Unit 2

- The Constitution delegates powers over foreign relations to the national government, and since someone could counterfeit foreign securities and risk an international breach, it was important to keep the power to punish the crime within the powers of the national legislature.
- The clause continues to reinforce the fact that the federal government has supremacy over monetary policy.

Matching: Match the term on the left with the correct definition on the right.

- Fiat money.....**Paper money not backed by gold or silver**
Specie money.....**Money backed by gold or silver**
Bills of credit.....**A type of "fiat money," not backed by gold or silver**
Coin.....**Metal, frequently made of precious metal, used as legal currency in the United States**
Tender.....**Currency that is accepted as payment of a debt**
Note.....**Interest-bearing government bond**

True / False: Indicate whether each statement is true or false.

1. The Patents and Copyrights Clause was designed to provide a uniform standard for intellectual property. **(True)**
2. The Post Office Clause has generated no controversy. **(False, there was significant controversy over whether the clause authorized Congress to construct roads and post offices or whether it simply allowed Congress to designate the routes by which mail should be delivered.**