

imports, the Confederation had little leverage in prying open foreign markets for American exports.<sup>13</sup>

Thus, only a decade after they revolted against imperial taxes, Americans were being asked to authorize a sweeping regime of continental taxes, with the decisive difference that these new taxes would be decided on by public servants chosen by the American people themselves—taxation *with* representation. Elsewhere, Article I required that all revenue bills originate in the House of Representatives, a rule with little bite because the Senate would enjoy unlimited power to propose amendments.

Section 8's opening clause went on to link federal taxation to the payment of national "Debts"—most obviously war debts. The vast bulk of preexisting continental debt came from the Revolutionary War, and congressional power to "borrow Money on the credit of the United States," as authorized by section 8's next sentence, surely contemplated the possibility of future wars. Without the ability first to borrow money from abroad when war threatened and then to pay back the loans on time—lest lending nations treat nonpayment as grounds for their own wars<sup>14</sup>—America would become a tempting target for European empires lusting after dominion.

Next came words giving Congress power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Modern lawyers and judges typically refer to these words as the "commerce clause," and today's Supreme Court has moved toward reading the paragraph as applicable only to economic interactions.<sup>15</sup> But "commerce" also had in 1787, and retains even now, a broader meaning referring to all forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets. Bolingbroke's famous mid-eighteenth-century tract, *The Idea of a Patriot King*, spoke of the "free and easy commerce of social life," and other contemporary texts referred to "domestic animals which have the greatest Commerce with mankind" and "our Lord's commerce with his disciples."<sup>16</sup> Structurally, the broader reading of "Commerce" in this clause would seem to make better sense of the framers' general goals by enabling Congress to regulate *all* interactions (and altercations) with foreign nations and Indian tribes—interactions that, if improperly handled by a single state acting on its own, might lead to needless wars or otherwise compromise the interests of sister states. Draft language at Philadelphia had in fact empowered Congress "to regulate affairs with the Indians," but the word "affairs" dropped out when the delegates opted to fold the Indian clause into the general interstate and international "Commerce" provision.<sup>17</sup> Without a broad reading

of “Commerce” in this clause, it is not entirely clear whence the federal government would derive its needed power to deal with noneconomic international incidents—or for that matter to address the entire range of vexing nonmercantile interactions and altercations that might arise among states.<sup>18</sup>

Under a broad reading, if a given problem genuinely spilled across state or national lines, Congress could act. Conversely, a problem would not truly be “with” foreign regimes or “among” the states, so long as it remained wholly internal to each affected state, with no spillover. On this view, legal clarity might be advanced if lawyers and judges began referring to these words not as “the commerce clause,” but rather as “the international-and-interstate clause” or the “with-and-among clause.”\*<sup>19</sup>

The rest of section 8 continued in the same geostrategic spirit. Six separate paragraphs—a cluster that we shall consider in more detail presently—addressed interrelated issues of war, armies, navies, and militias. Two other paragraphs authorized Congress to naturalize immigrants from foreign lands and to punish criminals who menaced ships on the high seas or violated the law of nations. Most of these proposed federal powers had traditionally fallen outside the purview of individual colonial governments prior to 1763. Congress here inherited the mantle of British imperial authority.

Several other clauses aimed to further harmonize relations between the states, in keeping with the expansive vision sketched out in Jay/Publius’s *Federalist* No. 2. Uniform bankruptcy rules would stabilize interstate lending practices and spur a national market in negotiable instruments, just as continental standards for copyrights and patents would create a broad New World market for authors and inventors. Standard weights and measures, federal post offices and post roads, a continental money supply alongside uniform regulations of foreign currency—all these would help knit far-flung Americans together, economically and socially.

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\*Federal power over genuinely interstate and international affairs lay at the heart of the plan approved by the Philadelphia delegates. According to the Convention’s general instructions to the midsummer Committee of Detail, which took upon itself the task of translating these instructions into the specific enumerations of Article I, Congress was to enjoy authority to “legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.” *Farrand’s Records*, 2:131–32. It also bears notice that the First Congress enacted a statute regulating noneconomic interactions and altercations—“intercourse”—with Indians; see An Act to regulate trade and intercourse with the Indian tribes, July 22, 1790, 1 Stat. 137. Section 5 of this act dealt with crimes—whether economic or not—committed by Americans on Indian lands.