

Constitution Class Handout
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Lesson 04

Legislative Prohibitions

Prohibitions to the Federal Government, and the States

- Prohibitions to the Federal Government

The Slave Trade and Immigration

The common misconception is that Article I, Section 9, Clause 1 is obsolete. The abolition of slavery in the United States made the clause obsolete, we are told. In reality, only a part of the clause is not longer in force. The clause addressed the Atlantic slave trade, *and* the migration of people into the United States. Slavery was abolished by Amendment 13 so the part of Article I, Section 9, Clause 1 that addresses slavery is obsolete. But is the part about migration still in force?

One could say that the “migration” portion of the clause is still in force because the 13th Amendment only addresses slavery. The standard belief among historians is that the entire clause is no longer in force.

The ramifications of this clause may indeed reach into today's issue regarding illegal immigration.

Why would the Founding Fathers include a mention of migration in a clause that is essentially geared toward the abolition of the importation of slaves?

The word “importation” in this clause applies wholly to slaves.

The word, migration, then, would seem to apply wholly to non-slaves.

The intention was that since the Constitution, as the contract that created our federal government, is a document that grants powers to the federal government, and that all authorities not expressly delegated, are reserved to the States, it was expected that immigration would remain as an issue that would be addressed by the States.

Other national governments prohibited migration as they saw fit, so the Founding Fathers determined that the new United States Government must have that same authority.

According to the clause, however, from the year 1808 Congress would possess the power to stop the importation of slaves, as well as the migration of people the Congress felt must be prohibited from entering this country as immigrants, through the Congress’ power of legislation.

The Constitution was written specifically in regards to the federal government. All powers originally belonged to the States. Some of those authorities were granted to the federal government for the purpose of protecting and preserving the union. Therefore, all authorities regarding immigration originally belonged to the States, and before 1808 the States had sole authority regarding all immigration issues.

In Article I, Section 9, the federal government was given the opportunity to regulate immigration, but not until 1808. The reason for delaying the power to prevent migration were, to be simply put, to give the States twenty years to attract as many people as possible without Congressional regulatory consideration. After all, at this time in history we had immense and almost immeasurable territory, peopled by not more than two and a half million inhabitants. Therefore, migration was encouraged, especially of the kind of people that would bring a benefit to the new nation. The immigration of able, skilful, and industrious Europeans was encouraged.

Note that this clause gives the federal government the authority to prohibit certain persons from migrating into the United States, but it does not give the federal government the authority to dictate to the States which persons the States must admit inside their borders.

Habeas Corpus

Article I, Section 9, Clause 2 states that “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”

Habeas corpus is a legal term that means quite literally in Latin: "you may have the body." In legal terms, Habeas corpus is a writ that releases a prisoner from unlawful detention. Habeas corpus comes from British common law, and has historically served as an important legal instrument safeguarding individual freedom against arbitrary state action that includes detention without the due process of law.

A writ of habeas corpus is a summons with the force of a court order that demands a prisoner be taken before the court, and that the custodian present proof of authority, allowing the court to determine if the custodian has lawful authority to detain the person. If the custodian does not have authority to detain the prisoner, then the prisoner must be released from custody.

Habeas corpus is designed to protect citizens against any detention that is forbidden by law. The U.S. Constitution specifically includes the habeas procedure, and instructs the Congress not to suspend such unless the detainment is the result of a “Rebellion or Invasion,” adding that “the public Safety may require it.”

Normally, habeas corpus proceedings accompany questions of jurisdiction and authorities of the court that sentenced a defendant. The suspension of habeas corpus has recently become an issue regarding the detainment of terrorists, but one must ask if the public safety requires the suspension of habeas corpus in the case of terrorists, as prescribed in the Constitution. Secondly, one must consider that the Constitution applies to American citizens, so the question on whether or not Article I, Section 9, Clause 2 applies to captured combatants seems to be a moot point since it is obvious that the detained are not American Citizens, and therefore are not protected by Constitutional protections. Also, remember that Congress has the sole authority to make rules regarding captures on land and water as per Article I, Section 8, Clause 11.

Bills of Attainder

A Bill of Attainder is when the legislature declares the guilt of a person or group of persons, and punishes them without due process (the benefit of a trial).

In Britain, bills of attainder were used as a convenient way for the King to convict subjects of crimes and confiscate their property without the bother of a trial, and without the need for a conviction or indeed any evidence at all. Such actions were seen as tyrannical because often this

power was used against political enemies, and the Founding Fathers did not wish to give the new federal government those same kinds of powers. Some states, prior to the Constitution, did use attainders against British loyalists, but the practice all but disappeared after the Constitution so specifically forbid the use of attainders by the U.S. Congress, and the States.

Prohibiting the use of bills of attainder serves a number of purposes. One purpose is that by disallowing the bills of attainder the separation of powers is reinforced. By disallowing bills of attainder, it literally forbids the legislature from performing a judicial function. Another purpose is in regard to the protection of the concept of due process, which was later reinforced by the Fifth Amendment to the Constitution.

The true danger of a bill of attainder is that such a legislative act inflicts punishment without a judicial trial, and takes away the life, liberty or property of the target.

Ex Post Facto law

Ex post facto Law is literally retroactive law, or a law that retroactively changes the legal consequences (or status) of actions committed or relationships that existed prior to the enactment of the law. Ex post facto law could criminalize actions that were legal when committed, or in the case of amnesty laws, decriminalize certain acts or alleviate possible punishments. Generally speaking, ex post facto laws are seen as a violation of the rule of law as it applies in a free and democratic society. Ex post facto laws are expressly forbidden by the United States Constitution.

Direct Taxation

The U.S. Constitution originally forbade direct taxation upon the people by the federal government. Taxation of the people by the federal government could only be laid in relation to population. When the idea for the income tax came to fruition, an amendment (16th) had to be passed to allow for the direct taxation of the people without dependence upon the enumeration of the population.

Article I, Section 9, Clause 4 states that in addition to direct taxation, the federal government was forbidden from using Capitation. Capitation is a head tax. A Poll Tax is a kind of head tax. In the context of the period, any tax that singles out groups both directly and indirectly regardless of possession of lands or personal property is Capitation. Since Article I, Section 9 is a prohibitory section, the specific call by the Founding Fathers in that clause was that there shall be No Capitation, which included No Poll Tax.

In early New England, in keeping with traditions from the homeland, capitation (caput, meaning head), or poll taxes, were common. These taxes were levied as a way to manipulate the people for the “good of the government.”

Alexander Hamilton, though condemning capitation taxes in his Federalist Papers writings, was in favor of “head taxes” for emergency revenue reasons. He felt that since sources for revenue were so few, if the government needed to expand for any reason, the ability to lay head taxes, or direct taxation, needed to be an option. However, most of the Founding Fathers disagreed, not only because of their belief that taxation must be indirect and small, but also because of their opinion that the federal government must remain limited to the few authorities granted to it by the U.S. Constitution.

Article I, Section 9, Clause 4 forbids Congress to lay a tax upon individuals except uniformly, and in proportion to the census provided for in Article I, Section 2, Clause 3, where this subject is first brought up. In other words, direct taxation was forbidden. What the federal government did was tax the States, based on proportion to the census, or enumeration. The States then taxed the people in order to pay the tax to the federal government. The method of taxation by the States was left up to each individual State. The federal government, in this way, used *indirect taxation* to tax the people.

As we have learned, the U.S. Constitution is not designed to necessarily tell the federal government what it can't do as much as it is designed to tell the federal government what few authorities it has. But the Founders felt this to be so important that in addition to not giving direct taxation to the Federal Government as an authority, they felt they must also spell it out that the Federal Government cannot tax in this manner in any form. This clause restricts the Congress a lot more because it is prohibitive. Article 1, Section 8 provides a list of "enumerated powers," but knowing that politicians would bend and twist meanings to gain more power, Article 1, Section 9 was designed to spell out some very specific things the Congress is prohibited from doing (such as direct taxation and capitation taxes).

Preference in Commerce

Article I, Section 9, Clause 6 states that “No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.”

This proposal was placed before the Constitutional Convention by the delegates from Maryland, their fear being that congressional legislation might prefer Chesapeake Bay ports of Virginia to those of their State. Under the Articles of Confederation, each State was free to impose duties and make regulations to the disadvantage of others, and it was desired that equality in commerce be maintained in the future. This also gives us a clue to the intentions of the Commerce Clause in Article I, Section 8. The Founding Fathers did not wish to give the Federal Government control over commerce, only the ability to ensure that commerce was maintained in an equitable manner in regards to the several States.

U.S. Treasury

Article I, Section 9, Clause 7 reads: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”

This clause was inspired by the lessons learned in regards to merry old England. The Founding Fathers did not believe it should be in the power of the Executive alone, or of the legislature alone, to raise or spend the money at will. Article I, Section 7, Clause 1 requires that all bills for raising money must originate in the House of Representatives; but they must then pass the Senate and be signed by the President. In 1842 Congress began to make appropriations by *joint resolution*; but as that also must be approved by both Houses, and signed by the President, there is no real difference. Also, in the interest of transparency to the people, the records of all monetary transactions both of receipts and expenditures must be made available for public scrutiny.

Divided Allegiance

Article I, Section 9, Clause 8 reads: “*No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.*”

The Founding Fathers did not believe there should be any foreign influences in the affairs of our government.

This provision was taken from a provision in the first section of Article VI of the Articles of Confederation. It permitted persons holding office under a State to accept, with the consent of

Congress, the objectionable gifts or distinctions; but the constitutions of at least two of the States at that time forbade them altogether. This republic, being a nation born as a result of the tyranny of a monarchy, should not grant titles of nobility, that much was easily understood. Nobility betrayed the trust and honor of the people through the use of prestige and favoritism. This was the kind of government that did not protect the liberties of the people.

Jefferson, as President, accepted from Alexander I of Russia a bust of that Emperor, which he said would be "one of the most valued ornaments of the retreat I am preparing for myself at my native home." He said that he had laid it down as a law of his official conduct not to accept anything but books, pamphlets, or other things of minor value; but his "particular esteem" from the Emperor "places his image in my mind above the scope of the law." However, without the consent of Congress, who was the final determining factor, he could not have accepted that gift.

In 1810 Congress proposed an amendment, the original Thirteenth amendment (some would call it the lost 13th Amendment because some records showed it was ratified, then suddenly disappeared - as explained below), to add a heavy penalty to this clause by this wording:

"If any citizen of the United States shall accept, claim, receive or retain any title of nobility or honor; or shall, without the consent of Congress, accept and retain any present, pension, office or emolument of any kind whatever, from any emperor, king, prince or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding office of trust or profit under them, or either of them."

The people were told that the proposed amendment lacked the necessary ratifying votes. Ongoing research has shown that the proposed amendment was indeed properly ratified, the State Department WAS notified, and the amendment was on the books and records of the various States until at least 1876. From 1810 to 1812, twelve states ratified this amendment. The War of 1812 destroyed the library of Congress and these documents were thought destroyed, but in 1994 it was discovered they still exist after a chance discovery in Maine in 1983 made historians aware of the existence of the original 13th Amendment.

Terms:

Indirect Taxation: An indirect tax is contrasted with a direct tax which is collected directly by government from the people. An indirect tax, for example, may increase the price of a good so that consumers are actually paying the tax by paying more for the products. Another example of

indirect taxation is for one entity to tax another entity, and then the second entity taxing the people to recoup the taxes it paid.

Joint Resolution: A joint resolution is a legislative measure requiring approval by the Senate and the House and then is presented to the President for approval or disapproval. There is generally no legal difference between a joint resolution and a bill. Laws enacted by virtue of a joint resolution are not distinguished from laws enacted by a bill. Constitutional amendments are passed by joint resolutions, which are instead presented to the States for ratification. Resolutions are often temporary in nature.

Questions for Discussion:

1. How was immigration regarded by the Founding Fathers?
2. Why is Habeas Corpus so important?
3. If the Founding Fathers disagreed with divided allegiance, what would they think of dual citizenship?

Resources:

Articles of Confederation, March 1, 1781; http://avalon.law.yale.edu/18th_century/artconf.asp

Larry Schweikart and Michael Allen, *A Patriot's History of the United States*; New York: Sentinel (2004).

Madison's Notes on the Constitutional Convention, Avalon Project, Yale University: http://avalon.law.yale.edu/subject_menus/debcont.asp

The Original 13th Article of Amendment; American Patriot Friend's Network: <http://www.apfn.org/apfn/13th.htm> Thomas J. DiLorenzo, *Hamilton's Curse*; New York: Three Rivers Press (2008).

- Prohibitions to the States

The articles in the U.S. Constitution all apply to the federal government unless otherwise noted. Article I, Section 10, notes otherwise. Each clause begins with the words “No State shall,” making Article I, Section 10 prohibitive to the States.

Article I, Section 10, Clause 1 begins by disallowing the States to enter into any treaty, alliance, or Confederation. The goal was to keep the union intact, have all dealings with foreign governments go through the federal government, and to ensure there was no divided loyalties among the States. Treaties and alliances are external issues.

The disallowance of the States entering into a confederation was the argument used against the Confederacy during the American Civil War. President Lincoln considered the southern states seceding and joining into a confederation to be unlawful, partly due to this clause in the Constitution. However, by seceding, the States no longer fell under the jurisdiction of the Constitution, making the Confederacy a legal arrangement.

No State could grant letters of Marque and Reprisal, or coin money. These authorities were granted to the federal government in Article I, Section 8. States were not allowed to coin money so that they would not use currency as a means to gain an unfair advantage over each other in relation to interstate commerce.

Article I, Section 10 prohibits the States from emitting bills of credit. Bills of credit take two forms. Bills of credit are receipts for currency, such as a treasury note, and bills of credit can be items of credit such as bonds. What this means is that the States could not issue paper money, nor could States issue instruments of debt. In other words, the States were not allowed to borrow money. Today, all but two States of the union are in debt. The State deficits are in violation of the U.S. Constitution.

The States were also disallowed from passing bills of attainder, ex post facto law, or passing any law that would impair the obligation of contracts. The States, as the federal government, could not issue any title of Nobility. Ex post facto law has become a large concern in recent politics. Ex post facto law is retroactive law. By disallowing the passage of ex post facto law, the States (just like the federal government) cannot constitutionally pass laws retroactively. A gun legal at the time of purchase cannot be made retroactively illegal. Immigrants who entered the State illegally cannot be made retroactively legal. A tax cannot be retroactively imposed, creating a sudden large balance of tax due.

States are allowed to tax imports or exports, but only with the consent of Congress. Because States are tasked with having their own inspection laws, any costs necessary for executing those inspection laws may be recouped through imposts or Duties without the consent of Congress.

“The net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States.” In other words, the States cannot over tax imports and exports. They are only to charge taxes necessary to cover their costs, such as “executing inspection laws.” Any net produce, or what would be considered “profit” in the private sector, goes to the U.S. Treasury. All of the States inspection laws, or other laws regarding imports and exports, are also subject to revision and control by the Congress.

Having a military is also forbidden to the States in time of peace, except with the consent of Congress. However, if a State is invaded, or the State feels they are in imminent danger, they are allowed to form a military. Currently, 23 States have State Defense Forces, or “State Militias.” In recent years, State Defense Forces have proven vital to homeland security and emergency response efforts.

Questions for Discussion:

1. What does the various prohibitions to the States have in common?
2. How do the prohibitions to the States relate to concepts like the Tenth Amendment?

Resources:

21st-Century Militia: State Defense Forces and Homeland Security, Heritage Foundation: <http://www.heritage.org/Research/Reports/2010/10/The-21st-Century-Militia-State-Defense-Forces-and-Homeland-Security>

Madison’s Notes on the Constitutional Convention, Avalon Project, Yale University: http://avalon.law.yale.edu/subject_menus/debcont.asp

UNITED STATES v. COMSTOCK (No. 08-1224), Clarence Thomas Dissenting Opinion (State Sovereignty): <http://www.law.cornell.edu/supct/html/08-1224.ZD.html> (2010)