



# COMMERCE CLAUSE

ERIC JONES, DIRECTOR OF RESEARCH & COUNSEL

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On May 24, 2021, the state of Florida signed into law Senate Bill 7072. According to a press release from the governor's office, this law would hold social media platforms "accountable by driving transparency and safeguarding Floridians' ability to access and participate in online platforms." Much of the discussion around this law focused on the First Amendment's right to free speech. Indeed, while temporarily stopping the law before going into effect, Judge Robert Hinkle cited free speech concerns as a significant issue with the law.

However, there was another constitutional law at play that did not receive as much attention: the Commerce Clause. While courts have not yet determined whether S.B. 7072 violates the Commerce Clause, we can still examine this constitutional power to better understand how it affects Congress and the states.

## The Commerce Clause

An often overlooked aspect of the federal law-making process is that even if Congress wants to pass a law, Congress still needs the power to make the law. For Congress, these powers come from the U.S. Constitution, and as a general rule, if the Constitution does not grant Congress the power to do something, it cannot do it. These powers expressly granted to Congress are often called enumerated powers and are cited by lawmakers, lawyers, and judges when discussing the constitutionality of a given law. Essentially, if Congress makes a law that it does not have the power to make, it is deemed unconstitutional and therefore not a law.

One of the most important of these enumerated powers is the Commerce Clause, which states that Congress has the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The Congressional Research Service notes that the Commerce Clause has been used to justify a wide range of laws, making it one of "the most consequential of Congress's enumerated powers."

Even history underscores its significance to the Constitution. The Articles of Confederation were the first attempt at a unified government after the Revolutionary War. This attempt did not go well. While there were many issues with the Confederation, one of its most significant problems was that the states were creating trade barriers amongst themselves, which severely limited economic activity in the name of state protectionism. In his *Commentaries on the Constitution*, Supreme Court Justice Joseph Story wrote that "The want of any power in congress to regulate foreign or domestic commerce was

deemed a leading defect in the confederation." It was such a vast problem that Story goes on to say that without the Commerce Clause, the United States "would soon sink into discredit and [foolishness]."

As previously noted, the Commerce Clause grants Congress the power to regulate commerce "among the several states," also known as interstate commerce. How this works in practice has been up for considerable debate, dating back to the 1824 Supreme Court case *Gibbons v. Ogden*. However, the current rule is that Congress can make laws that regulate 1) the channels of interstate commerce (e.g., roads), 2) the instrumentalities, persons, or things of interstate commerce (such as the goods themselves), and 3) activities that have a substantial relation to interstate commerce.

### **The Dormant Commerce Clause**

There is another side to the Commerce Clause. In order to stop the interstate trade barriers that plagued the Articles of Confederation, the Commerce Clause also prevents states from creating laws that affect interstate commerce. This is known as the "dormant Commerce Clause" or "negative Commerce Clause." Though the text of the Constitution does not explicitly say so, courts have held for nearly two centuries that the congressional power to regulate interstate commerce also prevents the states from interfering in interstate commerce. As the Supreme Court stated in a 2019 case, "It is not surprising...that our cases have long emphasized the connection between the trade barriers that prompted the call for a new Constitution and our dormant "Commerce Clause [interpretation]."

This interference can come in various forms, but it is vital to keep in mind that any impact on economic activity between the states can be subject to challenges under the dormant Commerce Clause, even if it is minimal. This is relevant to Florida's social media law because the largest social media platforms do not just operate in the state of Florida; most social media platforms are multistate and multinational. A law that has an economic impact on such a business may be subject to the Commerce Clause and its dormant partner.

### **Conclusion**

Regardless of what happens with the Florida law, Congress has the power to regulate interstate commerce through the Commerce Clause of the Constitution. As we have seen, the Commerce Clause is a massively important part of congressional power, and it, in addition to the Commerce Clause, can appear in legal issues that do not seem, at first glance, to have anything to do with interstate commerce. Will the Commerce Clause apply to social media regulations, and if so, does the dormant Commerce Clause prevent Florida from making such a law? As this case makes its way through the courts, we may find out.

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