INTRODUCTION

During our study of the constitutional law of the United States of America, we were taken by surprise by the influence that one article of the Constitution can have on the complete judicial system.

One who looks up article 1 section 8 clause 3 of the Constitution, will find the following: "The Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes".

This article — mostly called the commerce clause — seems very innocent, because foreign commerce is mostly a task of a federal government. That this particular article has had more influence on American Law than suspected at first sight we will try to demonstrate in this paper.

1 THE CONSTITUTION

The convention of 1787 about the future of the United States, was merely addressed at the question whether there should be a confederation or a federation. Related to this matter was the question in how far the federal government should get authority to enact binding rules for the states.

Although these questions led to a vehement discussion with advocates and opponents of both systems, there was consensus about an article in the Constitution that left the regulation of foreign commerce to
the federal government. Madison did once write in The Federalist Papers:

"The regulation of foreign commerce ... has been too fully discussed to need additional proofs here of its being properly submitted to the federal administration." ¹

But not only the regulation of foreign commercial traffic relations, but the commercial traffic between the states and between the states and the Indian tribes were left to the federal government. About this there was unanimity in the former society as well. It was considered as one of the few powers that should belong to the federal government.² It does not seem that strange: the period before 1787 — in which there was a confederation of states with far-reaching autonomy — characterized itself by competing states through which the economy was far from clear.

"The defect of power in the existing Confederacy to regulate the commerce between its several members is in the number of those which have been clearly pointed out by experience. To the proofs and remarks which former papers have brought into view on this subject, it may be added that without this supplemental provision, the great and essential power of regulating foreign commerce would have been incomplete and ineffectual." ³

In short, Madison states in this passage that the authorities of the federal government to regulate the foreign commerce were not done justice, when the same government would not have authority to regulate interstate commerce. This article of the Constitution has not been amended since 1787.

¹ J. Madison, The Federalist Papers, nr. 42.
³ Again Madison in The Federalist Papers, nr. 42.