

# FEDERALISM AND THE CONSTITUTION

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The scope of federal government power under the Constitution has been a major point of controversy since the beginning of the Republic. As early as the 1790s, the Founding Fathers engaged in a vehement debate among themselves over whether Congress had the authority to establish a national bank. This was the start of a longstanding argument between those who argue that freedom and prosperity are best promoted by political decentralization and those who believe that a powerful central government is needed to ensure progress and prevent state governments from undermining the national interest.

The debate over the scope of federal power is often described as a conflict between national authority and “states’ rights.” But it may be more appropriately considered a conflict over the extent of congressional authority under the Constitution, regardless of whether the states benefit from restrictions on federal power or not. As the Supreme Court has pointed out in a recent unanimous decision, limits on federal authority are intended to protect “the freedom of the individual” as well as the authority of state governments. Moreover, state governments often support extensions of federal power, especially federal spending programs that transfer resources to the states themselves.

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Today’s federal government derives the lion’s share of its authority from three clauses of the Constitution: the Commerce Clause, the Necessary and Proper Clause, and the Spending Clause. The interpretation of each has been much debated.

## **The Commerce Clause**

The Commerce Clause gives Congress the power to regulate “Commerce ... among the several states,” as well as with foreign nations and Indian tribes. While there was some disagreement over its interpretation during the Founding era, the most common view at that time was that the Clause gave Congress the authority to regulate

interstate movement and trade in goods and services. In the famous 1824 case of *Gibbons v. Ogden*, the Supreme Court interpreted the Clause broadly enough to allow Congress to regulate interstate steamboat routes. Chief Justice John Marshall’s opinion noted that the Clause gives Congress “plenary” power to regulate any “commerce which concerns more states than one.” But he also emphasized that federal power under the Clause does not extend to many types of economic legislation. The latter include “[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State.” Although these sorts of laws “may have

a remote and considerable influence on commerce,” they are not themselves regulations of interstate trade, and therefore did not come within the scope of the Commerce Clause.

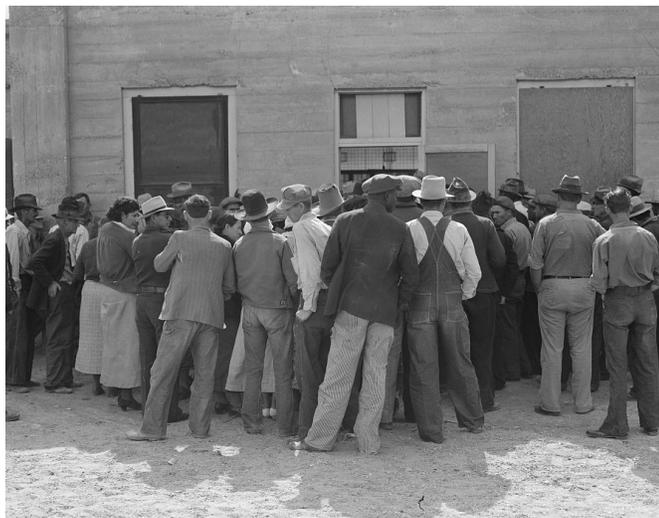
In the nineteenth and early twentieth centuries, the Supreme Court continued to enforce a relatively narrow interpretation of the Commerce Clause. It denied Congress the power to regulate activities such as agriculture and manufacturing, which had an impact on interstate trade, but were not themselves interstate commerce.

Critics of the Court increasingly argued that the Commerce Clause should be interpreted more broadly, in order to permit federal regulation of various economic activities that they believed to be essential in a modern, integrated economy. The crisis of the Great Depression reinforced these criticisms. Many believed that the Depression had arisen because of insufficient federal regulation of the economy.

In the early 1930s, Congress began to enact a wide range of new economic regulations that tested the limits of the Court’s Commerce Clause jurisprudence. Defenders of the new laws claimed that they were needed to deal with the economic crisis, and that allegedly antiquated legal categories should not stand in their way. As President Franklin D. Roosevelt famously put it, modern economic legislation should not be constrained by a “horse-and-buggy definition of interstate commerce.”

At first, the Supreme Court struck down many of the new laws. In its unanimous decision in *Schechter Poultry Corp. v. United States* (1935), the Court invalidated the National Industrial Recovery Act. The NIRA – probably the most sweeping economic regulation in American history – had established cartel-like wage and price controls over almost the entire nonagricultural economy of the United States. It was based on the theory – since rejected by most modern economists – that the Depression was caused by “overproduction” that had driven prices too low, and that prosperity would return if the federal government could increase producer income by raising prices to a higher level. The Court’s rejection of the NIRA and several other prominent New Deal laws led to a major political confrontation between the president and Congress on one hand and the judiciary on the other.

By 1937, however, the Supreme Court largely abandoned its opposition to most New Deal measures and began to interpret the Commerce Clause more broadly. Scholars differ on the extent to which this “switch in time” was caused by political pressure on the Court brought to bear by President Roosevelt’s plan to “pack” the Court by appointing new justices willing to uphold his policies.



*Waiting for relief checks. Calipatria, California. Image courtesy Library of Congress Prints and Photographs Division (LC-USF34-016123-C).*

In 1942, a Court by then largely composed of Roosevelt appointees, decided *Wickard v. Filburn*, a sweeping ruling that set the seal on the New Deal transformation of Commerce Clause doctrine. In *Wickard*, the Court concluded that Congress could use the Commerce Clause to restrict the amount of wheat that farmers can grow, even in a case where the wheat in question never crossed state lines and was never sold in any market. According to the Court, Congress could restrict such wheat production because doing so had an impact on interstate commerce in wheat. A farmer forbidden to grow his or her own wheat is more likely to purchase additional wheat in interstate commerce. By artificially restricting the production of wheat, Congress hoped to increase its price, and thereby raise the sagging profits of farmers around the country.

The Depression-era cases illuminate the real-world stakes of constitutional federalism issues. Defenders of the challenged New Deal laws argued that they were essential to alleviating an economic crisis that left millions in poverty and unemployed. Opponents argued that much of the new legislation actually made the crisis worse. For example, NIRA raised prices and may have increased unemployment, while the wheat law at issue in *Wickard* raised the price of food at a time when many workers were already having trouble making ends meet. To this day, specialists continue to debate whether the New Deal-era increases in federal power created more benefit than harm.

After *Wickard*, many observers believed that there were no longer any meaningful limits on Congress' powers under the Commerce Clause. Over fifty years passed before the next Supreme Court decision striking down a federal law because it exceeded congressional authority under the Clause. In *United States v. Lopez* (1995), the Court struck down a federal law banning gun possession near a school zone. It reasoned that this law was not authorized by the Commerce Clause because it did not regulate any kind of "economic activity." In *United States v. Morrison* (2000), the Court used the same reasoning to invalidate a law allowing victims of gender-motivated violence to sue their attackers in federal court.

Those who hoped that *Lopez* would lead to strong judicial enforcement of limits on federal power were dealt a major setback by the Court's 2005 decision in *Gonzales v. Raich*. In that case, the Court ruled that the Commerce Clause allowed Congress to forbid the growth and possession of medical marijuana even if the marijuana in question was not produced by a commercial enterprise, had never crossed state lines, and had not been sold in any market even within a single state. The majority reasoned that marijuana possession and production can be regulated because it is an "economic activity," which it defined as any activity involving the "the production, distribution, and consumption of commodities." Few if any activities fall outside this broad definition.

However, *Raich* arguably still left open the possibility that Congress' authority might not extend far enough to cover regulations that were not targeted at any activity at all, but instead forced individual citizens to engage in activities that they would otherwise have avoided. This was the main issue at stake in the individual health insurance mandate decided by the Court in June 2012. That important case, *NFIB v. Sebelius*, is addressed in a separate essay in this volume **Federalism and the Health Care Case** (p. 57).

## The Necessary and Proper Clause

The Necessary and Proper Clause gives Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States.” It is not a free-standing grant of power, but rather was intended to give Congress the power to enact laws needed to “carry into execution” the various powers granted to the federal government by other parts of the Constitution.

The wording of the Clause suggests that a law authorized by it must meet two separate requirements: it must be “necessary” to the execution of some power granted to the federal government, and also “proper.” Since at least the 1790s, debate has raged over the meaning of these two terms. In the early republic, debate over the interpretation of the Clause focused on the constitutionality or lack thereof of the First Bank of the United States. When the Bank was first proposed in 1790, James Madison and Thomas Jefferson argued that its establishment was not authorized by the Necessary and Proper Clause because the word “necessary” should be interpreted to include only such measures as are truly essential to the implementation of other federal powers. By contrast, Secretary of the Treasury Alexander Hamilton defended the Bank, arguing that “necessary” should be interpreted to include any law that is “useful” or “convenient.” The issue of the constitutionality of the Bank did not reach the Supreme Court until 1819, when the justices decided the case of *McCulloch v. Maryland*. In a famous opinion by Chief Justice Marshall, the Court unanimously upheld the constitutionality of the Bank and endorsed Hamilton’s interpretation of “necessary.” At the same time, however, Marshall noted that his reasoning was not a blank check for assertions of federal power. The Clause, he wrote, authorized only such laws as promote “legitimate” ends that are “within the scope of the constitution,” and use “means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution.”

*McCulloch*’s broad definition of “necessary” did not win universal acceptance. Critics of federal power such as President Andrew Jackson did not accept Marshall’s reasoning. In an 1832 message accompanying his veto of a bill reauthorizing the Bank, Jackson made clear his disagreements with *McCulloch*.

Despite this continuing controversy, the Court has repeatedly endorsed Marshall and Hamilton’s broad definition of “necessary,” most recently in *United States v. Comstock* (2010) where it emphasized that any measure qualifies as “necessary” under the Clause if it is “rationally related” to the implementation of some other federal power.

The Court has been far less clear in its interpretation of the word “proper.” Hamilton, Madison, and other Founders all agreed that propriety imposed restrictions separate from those of necessity. A measure that is “necessary” might still be declared unconstitutional on the grounds that it is not “proper.” The Court has also ruled in several cases that these are two distinct requirements. But it has never provided anything approaching a complete definition of “proper.” In the recent *Comstock* case, the Court was again unclear in its interpretation of “proper,” even as it reiterated its endorsement of a broad definition of “necessary.”

There is considerable disagreement over the issue among academic commentators. Among the more widely accepted interpretations of the term is the idea that a “proper” law at the very least cannot be justified by a rationale that would give Congress virtually unlimited authority. As Madison put it in a 1791 speech, “[w]hatever meaning this clause may have, none can be admitted that would give an unlimited discretion to Congress.” The interpretation of “proper” played a key role in the 2012 health insurance mandate case, *NFIB v. Sebelius*.

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**James Madison argued that the power to spend for the general welfare only gave Congress the authority to spend money for the purpose of implementing Congress’ other enumerated powers.**

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### **The Spending Clause**

The Spending Clause gives Congress the power to impose taxes to “pay the Debts and provide for the common Defence and general Welfare of the United States.”<sup>1</sup> The Clause seems to give Congress the authority to raise and spend tax revenue for three distinct purposes: providing for the common defense, paying the debts of the federal government, and promoting the “general welfare.” The meaning of this last phrase – often called the “General Welfare Clause” – has been the cause of repeated controversy. James Madison argued that the power to spend for the general welfare only gave Congress the authority to spend money for the purpose of implementing Congress’ other enumerated powers. By contrast, Alexander Hamilton claimed that the General Welfare Clause created a separate and distinct power to spend money for general purposes. However, he did not contend that Congress could spend money for any purpose it liked. Rather, it could only do so for purposes that are “general, not local.” During the nineteenth and early twentieth centuries, the Supreme Court never clearly resolved the dispute over the meaning of “general welfare.” Outside the courts, however, presidents such as James Madison, James Buchanan, and Grover Cleveland vetoed federal spending bills that allocated money for local construction projects on the grounds that such expenditures were not for the “general welfare,” but instead merely benefited local interests.

During the 1930s, Congress enacted a wide range of new spending programs transferring money to the states for the purpose of trying to combat the effects of the Great Depression. In a series of cases addressing constitutional challenges to these programs, the Court first endorsed Hamilton’s broad interpretation of “general welfare” in preference to Madison’s narrow one, and then went even further than Hamilton envisioned – concluding that the “general welfare” includes almost any purpose so defined by Congress. This effectively jettisoned Hamilton’s distinction between spending for “general” and “local” projects. As a result, Congress has been able to allocate funds for a variety of local “porkbarrel” projects, such as the notorious “Bridge to Nowhere,” an extremely expensive federally financed bridge that served only a handful of people in an isolated part of Alaska.

<sup>1</sup> The Clause is often also referred to as the Tax Clause or the Taxing and Spending Clause.

Although the post-1930s Supreme Court has been unwilling to impose restrictions on the purposes for which Congress spends money, it has enforced some conditions on federal grants to state governments. Such grants have grown enormously since the 1930s, currently encompassing over 25% of all state government spending. Nearly all federal grants to state governments come with conditions that state officials must meet if they are to qualify for the money.

In *South Dakota v. Dole* (1987), the Supreme Court upheld a federal law denying 5% of federal highway funds to states that refused to enact a law raising their drinking age to 21 (a measure the federal government claimed was related to promoting highway safety). The Court ruled that Spending Clause measures must meet four requirements in order to be constitutional. They must 1) promote the “general welfare,” 2) be “related” to a federal interest, 3) be clear and unambiguous, and 4) not violate any other part of the Constitution. The first requirement means little in practice because the Court defers to Congress in deciding what promotes the “general welfare”; the second has always been applied very deferentially; and the fourth is largely redundant – a spending bill that violated some unrelated part of the Constitution would be invalidated even without it. However, the Supreme Court has strongly enforced the requirement that conditions attached to federal grants to state governments must be clear, and has sometimes refused to enforce conditions that are excessively vague.

*Dole* also noted that a spending condition may be unconstitutional if it is so onerous as to be “coercive.” Unfortunately, the Court did not explain what it meant by this phrase, and did not do so in later decisions until 2012. So far, lower courts have struck down very few spending conditions on this basis.

The issue of coercion is important to the future of American federalism because states are increasingly dependent on the federal government for much of their funding. This enables Congress to use federal grants as leverage to force dissenting states to conform to the views of the national majority.

The Court began to clarify the meaning of “coercion” in its decision addressing the constitutionality of spending conditions attached to the Affordable Care Act of 2010. The Court struck down a provision of the Act that would have stripped states of all their Medicaid funds (which fund health care for the poor) unless they agree to greatly expand program eligibility to millions of additional people, including those with incomes up to 33% above the poverty line. Since Medicaid was established in 1965, most states have become heavily dependent on Medicaid funding.

In its closely-divided decision in *NFIB v. Sebelius*, the Court invalidated claims that the Affordable Care Act’s individual mandate provision is constitutional under the Commerce Clause, and the Necessary and Proper Clause, but upheld the requirement that people buy health care insurance under the Tax Clause. Continued controversy surrounding the Court’s decision in this case reflects the fact that constitutional federalism remains a divisive issue for both the Supreme Court and American society as a whole.