

Chapter 11: Powers of Congress  
Section 3: The Implied Powers

Lecture Notes

AMERICAN  
GOVERNMENT

PEARSON

## Objectives

1. Explain how the Necessary and Proper Clause gives Congress flexibility in lawmaking.
2. Compare the strict construction and liberal construction positions on the scope of congressional power.
3. Describe the ways in which the implied powers have been applied.

## Key Terms

- **Necessary and Proper Clause:** the final clause of Article I, Section 8 in the Constitution, which gives Congress the power to make all laws “necessary and proper” for carrying out its expressed powers; also called the Elastic Clause
- **strict constructionist:** someone who argues that Congress can use only those implied powers *absolutely necessary* to carry out its expressed powers

## Key Terms, cont.

- **liberal constructionist:** someone who argues that the Constitution gives Congress very broad implied powers
- **consensus:** a general agreement among the majority
- **appropriate:** to assign to a particular use; Congress appropriates billions of dollars to programs such as education, unemployment compensation, and Social Security

## Introduction

- How has the doctrine of implied powers increased the powers of Congress?
  - The Necessary and Proper Clause has been interpreted in a way that gives Congress many powers not specifically mentioned in the Constitution.
    - For example, the Commerce Clause has been interpreted to let Congress pass laws on many economic activities.

- What does the Constitution have to say about education?
  - Nothing, not a word.
  - Still, Congress provides tens of billions of dollars every year for the United States Department of Education to spend in a variety of ways throughout the country.
  - Look around you. What indications of these federal dollars can you find in your school?
  - If you attend a public school anywhere in the United States, that evidence should not be hard to spot.
- How can this be? You know that Congress has only those powers delegated to it by the Constitution, and that document says nothing about education.
  - The answer to that question lies in the central topic of this section.

## Necessary and Proper Clause

- The final clause of Article I, Section 8 of the Constitution says Congress has 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, or in any Department or Officer thereof.**

**—United States Constitution, Article I, Section 8, Clause 18**

- Remember, the implied powers are those powers that are not set out in so many words in the Constitution but are, rather, implied by (drawn from) those that are.
  - The constitutional basis for the existence of the implied powers is found in one of the expressed powers.
  - The Necessary and Proper Clause, the final clause in the lengthy Section 8 of Article I in the Constitution, gives to Congress the expressed 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, or in any Department or Officer thereof.”* —Article I, Section 8, Clause 18
- Much of the vitality and adaptability of the Constitution can be traced directly to this provision, and even more so to the ways in which both Congress and the Supreme Court have interpreted and applied it over the years.
  - In effect, the Necessary and Proper Clause allows Congress to choose the means “for carrying into Execution” the many powers given to it by the Constitution.

## Implied Powers

- Also called the Elastic Clause, this clause allows Congress to decide how it should carry out the many powers given to it by the Constitution.

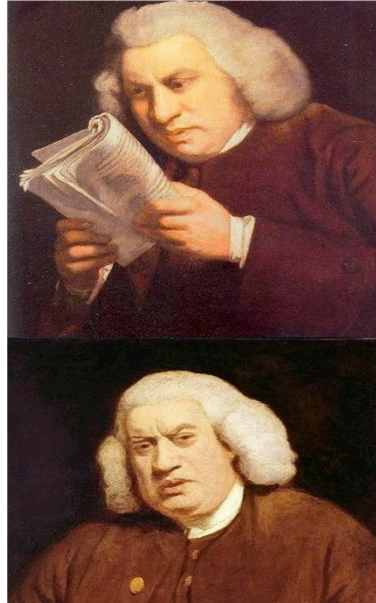


- In doing so, Congress has given itself implied powers not mentioned in the Constitution.
- It has argued that these implied powers are needed to fulfill its other duties.

- The manner in which Congress has viewed the concept, together with the supporting decisions of the Supreme Court, have made the final clause in Article I, Section 8, truly the "Elastic Clause."
  - It has earned that name, for it has been stretched so far and made to cover so much over the years.

## Implied Powers of Congress

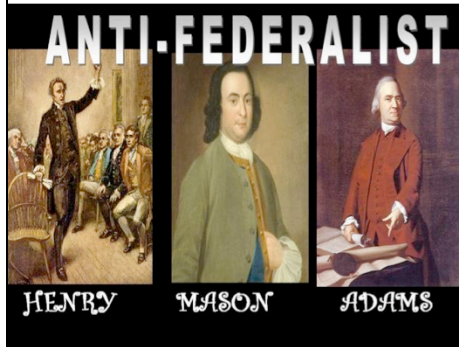
- Many of the laws of Congress makes today stem from the Necessary and Proper Clause.
- The Framers could not have made provisions for every situation that might arise in the modern world.
  - Without its implied powers, how effectively could Congress address new situations?



*Answer: Students should note that these implied powers make it much easier for Congress to adapt to situations not anticipated by the Framers—without such powers, it might be very difficult for Congress to act when faced with new circumstances not addressed by expressed powers.*



# Strict Constructionist



– **Anti-Federalists supported strict construction, arguing that Congress should only be able to use implied powers that are absolutely necessary to carry out its expressed powers.**

– **Strict constructionists** such as Thomas Jefferson wanted to protect the independence and power of state governments from a national government with too many implied powers.

- The Constitution had barely come into force when the meaning of the Elastic Clause became the subject of one of the most important disputes in American political history.
  - The Framers of the Constitution intended to create a new and stronger National Government.
  - The ratification of their plan was opposed by many, and that opposition was not stilled by the adoption of the Constitution.
  - Rather, the conflict between the Federalists and the Anti-Federalists continued into the early years of the Republic.
  - Much of that conflict centered on the powers of Congress and the meaning of the Elastic Clause.
    - Just how broad, in fact, were those powers?
- The strict constructionists, led by Thomas Jefferson, continued to argue the Anti-Federalist position from the ratification period. They insisted that Congress should be able to exercise
  - (1) its expressed powers and
  - (2) only those implied powers absolutely necessary to carry out those expressed powers.
  - They maintained that the States should keep as much power as possible.
  - They agreed with Jefferson that “that government is best which governs least.”
- Most of these Jeffersonians did acknowledge a need to protect interstate trade, and they recognized the need for a strong national defense.
  - At the same time, they feared the consequences of a strong National Government.
- They believed, for instance, that the interests of the people of Connecticut were not the same as those of South Carolinians or Marylanders or Pennsylvanians.
  - They argued that only the States—not the far-off National Government—could protect and preserve those differing interests.

# Liberal Constructionist

- **Liberal constructionists took the Federalist view that the Constitution should be interpreted broadly,** strengthening the national government by giving it a wide range of implied powers.
- The Supreme Court upheld the idea of implied powers in ***McCulloch v. Maryland*** in 1818.
- Since then, the **liberal constructionist view has dominated and federal power has grown.**



- The liberal constructionists, led by Alexander Hamilton, had led the fight to adopt the Constitution.
  - Now they favored a liberal interpretation of that document, a broad construction of the powers it gives to Congress.
  - They believed that the country needed, as Hamilton put it in *The Federalist* No. 70, "an energetic government."
- The strict constructionists were sorely troubled by that broad view of the powers of Congress.
  - They were sure that it would all but destroy the reserved powers of the States.
- The Supreme Court upheld the concept of implied powers in *McCulloch v. Maryland* in 1819.
  - That victory for the liberal constructionists set a pattern that, in general, has been followed ever since.
- Over the years, the powers wielded by the National Government have grown to a point that even the most ardent supporters of liberal construction could not have imagined.
  - It is impossible to see how the United States could have developed as it has over the past two centuries had the Court not ruled as it did in *McCulloch*.

## Expanding Powers

- **Major crises have placed more responsibility on the national government.**
- **Citizens have demanded more services from the government.**
  - Congress established the United States Border Patrol to guard the nation's borders.



- **Several factors, working together with the liberal construction of the Constitution, have been responsible for that marked growth in national power.**
  - They have included wars, economic crises, and other national emergencies.
  - Spectacular advances, especially in transportation and communication, have also had a real impact on the size and the scope of government.
  - Equally important have been the demands of the people for more and still more services from government.
- NOTE: Above image depicts the United States Border Patrol.

## Expanding Powers, cont.

- **Congress, the President, and the Supreme Court have all supported increased powers for the national government.**
- **Implied powers allow the federal government to adapt to changes in society and technology that the Framers could not have anticipated.**
  - For example, while Education is an area expressly delegated to the States, Congress has used its implied powers to make legislation affecting schools.



- **Congress has been led by these and other factors to view its powers in broader and broader terms.**
  - **Most Presidents have regarded their powers in like fashion.**
  - **The Supreme Court has generally taken a similar position in its decisions in cases involving the powers of the National Government.**
- **Moreover, the American people have generally agreed with a broader rather than a narrow reading of the Constitution.**
  - **This consensus, or general agreement, has prevailed even though our political history has been marked, and still is, by controversies over the proper limits of national power.**

## Implied Powers in Practice

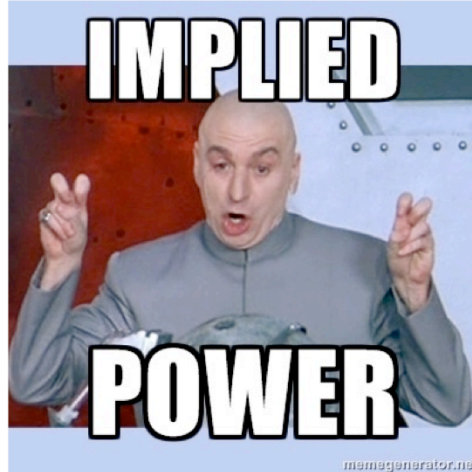


- **Implied powers have most often been connected to the commerce power, the power to tax and spend, and the war powers.**
- **Congress can levy a wide range of taxes and assign federal money to be spent on improving the general welfare through a variety of services like Social Security or Medicare.**

- The ways in which the Necessary and Proper Clause has been construed (interpreted) and applied over the last 200 years has enabled the National Government to meet the changing needs of the times.
  - As a result, it has **virtually eliminated the need for frequent amendment of the Constitution.**
- Instances of the exercise of the doctrine of implied powers are almost too numerous to count.
  - **The concept of implied powers has made it possible for the Government of the United States to meet any number of problems that could not possibly have been foreseen by the Framers.**
  - It does not stretch matters too much to say that, today, the Constitution's words "necessary and proper" really mean "convenient and useful."
- **Every exercise of implied powers must be based on at least one of the expressed powers.**
  - Thus, in *McCulloch v. Maryland* the Supreme Court found that the creation of the Bank of the United States was "necessary and proper" to the execution of four expressed powers held by Congress: the taxing, borrowing, currency, and commerce powers.
- Over the years, Congress has most often found a basis for the exercise of implied powers in (1) the commerce power, (2) its power to tax and spend, and (3) the war powers.

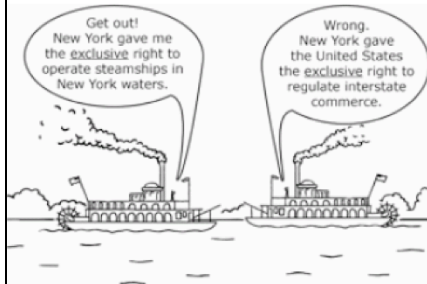
## Limits on Implied Powers

- **Congress cannot simply grant itself a power because such a power would benefit the public or the United States.**
- **An implied power must be based in some way on the expressed powers of the Constitution.**
- **Implied powers cannot violate the Constitution.**



- Still, **Congress is not free to use the Commerce Clause to do whatever it chooses.**
  - **The Constitution places four explicit limitations on the exercise of the commerce power.**
  - **And the Supreme Court does, at least on occasion, find that the lawmaking branch has overstepped its authority under that provision.**
- **Congress cannot pass a law based solely on the grounds that a measure will somehow promote “the general Welfare of the United States.”**
  - **But it can and does levy taxes and provide for the spending of money for that purpose.**
  - Thus, for example, as we said on the opening page of this section, **Congress appropriates —assigns to a particular use—tens of billions of dollars per year to support education.**
  - And, similarly, it does so to provide for such things as farm subsidies, unemployment compensation, Social Security, Medicare, and a host of other programs.

## The Commerce Power



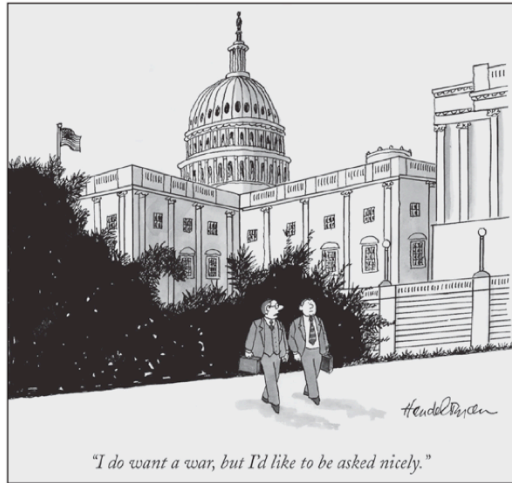
- The Commerce Clause is now defined to include the production, buying, and selling of goods as well as the transportation of people and goods.
  - Using implied powers derived from the Commerce Clause, **Congress can regulate manufacturing, wages, food and drugs, and more.**
  - **Congress can also build interstate highways, set consumer protection laws, and protect the environment.**

- **the Commerce Clause gives Congress the power to regulate both foreign and interstate trade.**
  - **And the Supreme Court's hugely expansive reading of that provision, beginning with *Gibbons v. Ogden* in 1824.**
  - The word "commerce" has been held to include the production and the buying and selling of goods as well as the transportation of people and commodities.
  - **Commerce has been defined so broadly that it encompasses virtually every form of economic activity today.**
  - **Congress has the authority to regulate manufacturing, wages and hours, labor-management relations, foods and drugs, air travel, and much more.**
  - **It can provide for the building of interstate highways, consumer protection, the protection of the environment—the list goes on and on. In 1998,**
- Congress used the Commerce Clause to impose a three-year moratorium on State taxation of e-commerce and other Internet activities; that freeze was extended in 2007.



## War Powers

- Congress can do whatever is needed to carry out its war power, except violate another part of the Constitution.
- Congress created the draft based on its implied war powers.
  - To which power does this cartoon refer?



- The several war powers reflect the fact that the National Government is responsible for the protection of this country against aggression and, when necessary, for the waging of war.
  - As with its other expressed powers, Congress has the authority to do whatever is necessary and proper for the execution of its war power—with the exception that, in doing so, it cannot violate any other provision of the Constitution.
  - Among many other examples of the point, Congress has the power to provide for compulsory military service—a draft—because Article I, Section 8 gives it the expressed power “[t]o raise and support Armies” (in Clause 12) and “[t]o provide and maintain a Navy” (in Clause 13).
  - The Supreme Court originally upheld the constitutionality of a draft in a series of cases challenging the Selective Service Act of 1917 (*Selective Draft Law Cases*, 1918).
- Answer: This cartoon refers specifically to Congress’s exclusive power to issue a formal declaration of war.



<p>The expressed power to lay and collect taxes</p>	<p>Implies the power to:</p> <ul style="list-style-type: none"><li>• Punish tax evaders</li><li>• Regulate (license) some commodities (such as alcohol) and outlaw the use of others (such as narcotics)</li><li>• Require States to meet certain conditions to qualify for federal funding</li></ul>
<p>The expressed power to borrow money</p>	<p>Implies the power to establish the Federal Reserve Systems of banks</p>
<p>The expressed power to create naturalization law</p>	<p>Implies the power to regulate and limit immigration</p>

<p><b>The expressed power to raise armies and a navy</b></p>	<p><b>Implies the power to draft Americans into the military</b></p>
<p><b>The expressed power to regulate commerce</b></p>	<p><b>Implies the power to:</b></p> <ul style="list-style-type: none"><li>• Establish a minimum wage</li><li>• Ban discrimination in workplaces and public facilities</li><li>• Pass laws protecting the disabled</li><li>• Regulate banking</li></ul>
<p><b>The expressed power to establish post offices</b></p>	<p><b>Implies the power to:</b></p> <ul style="list-style-type: none"><li>• Prohibit mail fraud and obstruction of the mails</li><li>• Bar the shipping of certain items through the mail</li></ul>