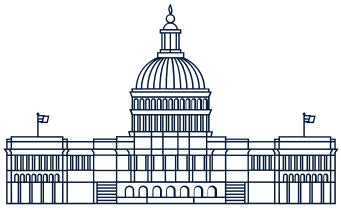

Scholar Exchange: Article I – How Congress Works

Briefing Document

INTRODUCTION

Big/Framing Question

- What role does Congress have in the national government?
- What powers does the Constitution grant to Congress? And what are some of the limits on congressional power?
- How did the framers come up with Congress, and what were some of the debates at the Constitutional Convention?
- Has the original vision for what Congress should be changed over time?
- What are some of the Supreme Court's key decisions on congressional power? And what are some of the topics of ongoing constitutional debate?

Let's begin—as we always do when interpreting the Constitution—with the Constitution's text.

The framers set out the basic structure of the national government—in other words, its three branches—in Articles I through III.

Article I establishes the national government's legislative branch—Congress.

It's the longest part of the Constitution. And that's because the founding generation thought that Congress would be the most powerful—and most dangerous—branch of government.

Within the national government, Congress is responsible for *making the laws*.

The Constitution separates Congress into two Houses. (We call this "bicameralism.")

A House of Representatives (with its representatives elected by the American people under the principle of popular sovereignty) and a Senate (with its senators originally selected by the state legislatures under the principle of equal representation).

Today, there are 435 members of the U.S. House of Representatives. Representatives must be at least 25 years old. They serve for two-year terms. And they can run for reelection.

And today, there are 100 U.S. senators. Two for each state. Senators must be at least 30 years old. They serve for six-year terms—with one-third of the Senate elected every two years. And each senator can run for reelection.

Finally, senators are now elected directly by the American people—*not* the state legislatures, as originally written into the Constitution in 1787 as part of the structure of federalism. (This is because of the 17th Amendment—ratified in 1913.)

Article I also sets out the powers of Congress and lists certain limits to those powers.

Big Idea: With Congress, the founding generation set up a national legislature to make the nation's laws. They looked to create a new national legislature with more authority—and ability to act—than the one that came before it, but also one of limited powers.

So, that's a bit about how the founding generation structured Congress, and what powers it set out for the legislative branch in the new Constitution.

HOW DOES CONGRESS WORK

But how does Congress work? How does a bill become a law? And what role do the other branches of the national government—the president and the courts—play in the legislative process?

Congress makes laws for the entire country. That's a big job, and a tough one, too.

Of course, Americans don't agree on everything. And people from different states and different political parties often have different views on what the law should say. In other words:

- Whether to cut taxes or raise them.
- Whether to protect local control of education or expand the national government's reach into our schools.
- Whether to restrict immigration or to promote it.

These are big questions, and the Constitution lays out a demanding—often slow—process for passing new laws. **This is by design.**

For the founding generation, this was a feature—not a bug—of their constitutional system. To become a law, a new bill must survive both Houses of Congress, the threat of a president's veto, and possible legal challenges inside the courts.

Here's how the process works today:

- Members in one House of Congress—either the U.S. House of Representatives or the U.S. Senate—introduce a bill. (Spending bills must start in the House of Representatives.)

- From there, both Houses of Congress must pass the bill. For instance, let's say that a member of the U.S. House of Representatives introduces a bill in the House. That bill is then sent to the congressional committee that covers the specific issue—whether its taxes, the environment, education, health care, etc. The committee then discusses the bill and, if it approves of it, it then sends it to the entire House for debate and a possible vote. The entire House then debates the bill and decides whether to pass it (or not). If the House passes the bill, then the

same process takes place in the Senate. Again, the bill has to pass *both* the U.S. House *and* the U.S. Senate to become a law.

- Once the bill passes the House and the Senate, it's then sent to the president. The president then has the option to veto—in other words, reject—the bill.
    - **If the president approves of the bill, then it becomes a law.**
    - If she vetoes it, then Congress has the power to override—in other words, cancel—the president's veto by a 2/3 vote in each Houses of Congress. This is a really high bar—often requiring the support of members of *both* political parties. **If Congress succeeds in overriding the president's veto, then the bill becomes a law.**
    - If Congress fails to override the president's veto, then the bill does *not* become a law—even though *both* Houses of Congress originally passed it.
- Finally, even after a bill becomes a law, people can go to court and challenge that law—arguing that it violates the Constitution. From there, the courts have the power to rule on whether a law is constitutional or unconstitutional. This is the power of judicial review. The Supreme Court stands at the top of the federal court system—ready to take up any final appeals. However, it has (nearly) complete control over which cases it takes—and it takes *very* few cases.

So, that's a really complicated, really difficult, (often) really slow process. Why did the founding generation create it that way?

To answer that question, let's return to Philadelphia in 1787—and to the Constitutional Convention.

FOUNDING STORY: THE CONSTITUTIONAL CONVENTION

At the Constitutional Convention, the framers spent more time on Congress than on any other part of their new government.

They struggled with how to structure the national legislature:

- Whether to have a single House of Congress or divide Congress into *two* Houses. (A relatively easy question for them.)
- Whether to set the number of representatives for each state by population (increasing the political power of the *large* states) or by equal representation (protecting the interests of the *small* states). (A *very* hard question for them!)
- Whether (and how) to count enslaved people when setting the number of seats for each state in Congress. (Another *very* hard question for them—with forceful voices on every side of the question!)

They struggled with which powers to grant Congress. And broadly speaking, they struggled with how to strike the right balance between a new Congress with more power than the weak Articles of Confederation and one so powerful that it would threaten the American people's liberties and destroy the traditional powers of the states. (So, once again, they

struggled with federalism—that question of which powers go to the national government and which powers remain with the states!)

To understand these debates, it's important to first remember that the framers weren't writing on a blank slate. Before the Constitution, the nation was governed by the Articles of Confederation. This charter of government was written during the Revolutionary War.

The Articles established a weak national government. Most political power remained with the states. And this should come as little surprise. Americans were waging a war against a distant empire to secure the right of self-governance. Before the Revolution, America was ruled by a government located across the Atlantic Ocean and with no representatives from the colonies. Not surprisingly, the colonists felt like they had little say in some of the most important decisions shaping their lives. So, they weren't eager to replace an out-of-touch, tyrannical British Empire with an out-of-touch, distant, powerful, elitist new national government.

Instead, the founders wanted to bring political power closer to the American people. The 13 states were very different from one another. And the founders wanted to make sure that the state governments had the power to shape policy decisions that responded to the diverse needs of people in different states.

Under the early state constitutions, state legislatures dominated state governors and state-court judges. And under the Articles of Confederation, the Confederation Congress similarly dominated the system. There was no Supreme Court. The "executive" was essentially the honorary chair of Congress. As a result, the legislative branch—Congress—served *both* the legislative *and* executive functions.

At the same time, under the Articles of Confederation, the national government was *so* weak that it couldn't even handle basic tasks of government like collecting taxes, raising troops, and keeping states from signing their own treaties with foreign powers.

The Articles brought the states together not as a country or a family, but like a loose group of friends. Everyone had an equal vote, and they all had to agree or things could not happen (or change). Sounds very fair, but it didn't work well at all.

By the time the framers met in the Constitutional Convention, the states were acting more like 13 separate nations than one *United* States. Many American leaders feared—and many foreign powers hoped—that the entire nation might fall apart.

Eager to construct a national government worthy of a great nation, the founders called a Convention in Philadelphia in 1787 to revise the Articles of Confederation. Of course, they would ultimately do far more than that. They would draft a new charter of government!

The new national legislature was at the center of the framers' vision of a new government.

So, what were some of the big debates over Congress?

Debates Over Representation

One big debate was over the framers' broad structure—and vision—for the new Congress. And specifically, how to balance the interests of the large states versus the interests of the small states. This turned on how the states were to be represented in the new national legislature.

Simply put, small states wanted equal representation—each state receiving the same number of seats in the new Congress. (So, just like the Articles of Confederation.)

And large states wanted representation by population—what's often referred to as **"proportional representation."** So, the bigger the state, the greater the number of seats in the new Congress.

At the Convention, this debate pitted James Madison's Virginia Plan against William Paterson's New Jersey Plan. It was one of the most heated debates at the Convention—threatening to derail the entire project.

It ended with the Connecticut (or Great) Compromise—brokered by Connecticut's Roger Sherman. And with a key defeat for James Madison. Madison may have been a "Father of the Constitution," but he certainly wasn't the father of the Connecticut Compromise!

So, what happened there?

Madison and his key ally—Pennsylvania's James Wilson—supported a national legislature organized by population. (So, based on proportional representation.)

This differed from the Articles of Confederation, which was organized under the principle of state equality. (Each state—regardless of its size—received one vote.)

Madison's ideas culminated in the **Virginia Plan—**which framed the Convention's debates over Congress. In it, Madison proposed a legislative branch consisting of two chambers. (This differed from the Confederation Congress, which included only one House.) Each of the states would be represented in proportion to their size. (So, in both houses of the national legislature, big states like Virginia would have more representatives than smaller states.) Majority rule in a large republic, Madison said, was best because the majority were "the safest guardians both of public good and of private rights." The national legislature would have the power to address issues that were beyond the ability of any single state government to handle. As Madison said, a national government elected on republican principles could "control the centrifugal tendency of the states" which otherwise would continually "fly out of their proper orbits." And the legislature could also veto state laws which it found to be against the national interest.

William Paterson and his allies countered with the **New Jersey Plan**—which grew out of small-state fears that the Virginia Plan would lead to domination by the large states. The New Jersey Plan envisioned a one-house legislature with each state—regardless of its size—receiving one vote. (So, just like the Articles of Confederation.) At the same time, the New Jersey Plan *would* expand the powers of the national government to address the needs of a growing nation. Even so, the basic structure of the government would remain the same.

The delegates spent a great deal of time in the early part of the Convention debating how to structure Congress. This is because if there was one central overlying debate among the delegates, it was regarding representation. These competing proposals led to intense debates—pitting small states against large ones.

Eventually, Roger Sherman and Oliver Ellsworth—both from Connecticut—proposed the **Connecticut (or Great) Compromise.** Under the Connecticut Plan, Congress would consist of *two* houses—a House of Representative and a Senate. The House would be elected on the basis of proportional representation—giving larger states more seats than smaller states. At the same time, the Senate would be elected on the basis of equal representation, with each state—regardless of its size—receiving two senators.

The Great Compromise eventually passed by a single vote.

In the end, Madison and Wilson won the fight over representation in the House. But they suffered a major defeat over representation in the Senate. They were devastated. But they would, of course, live to fight another day, and Madison himself would even defend the Senate—equal state representation and all—in *The Federalist Papers*, written during the battle over the ratification of the Constitution against Anti-Federalists who attacked the Senate as one of the most undemocratic and aristocratic institutions under the Constitution.

Three-Fifths Compromise

The framers also debated whether (and how) to count enslaved people for purposes of congressional representation. This debate culminated in the Three-Fifths Compromise.

Following the Connecticut Compromise, the U.S. House of Representatives would draw up districts based on a state's population—the larger the state, the greater the number of representatives it gets. And the greater the number of districts for each state—and for each region of the country (North v. South)—the greater the political power. But the question remained whether (and how) enslaved people might count in this process.

The Convention debates this issue multiple times. Pro-slavery Southerners argued that enslaved people should count as a full person—5/5s. But anti-slavery Northerners shouted hypocrisy: How could the Southern delegates treat enslaved people as full persons for purposes of representation in the national government but at the same time deny their humanity by treating them as property? These Northerners argued that enslaved people should count as 0/5s.

Ultimately, Roger Sherman of Connecticut secured support for the Three-Fifth Clause—counting enslaved people as 3/5s of a person for purposes of setting the number of seats each state got in the House of Representatives.

James Wilson wrote the original draft of the Clause, borrowing language from a proposed 1784 amendment to the Articles of Confederation. It counted enslaved people as 3/5 of a person.

Congress's Powers

So, those are a few of the key debates over congressional representation. What other debates do we see over Congress? Another big debate was over how much power to grant to Congress.

Under the new Constitution, many framers wanted to grant the national legislature powers that it lacked under the Articles of Confederation. But they also wanted to strike a difficult balance: They wanted to strengthen the national government. But they also wanted to maintain the states' key role in governance. (Again, this was a federalism story.)

The delegates wanted a Congress more powerful than the one created by the Articles of Confederation. But they also wanted one of limited powers—powers much more limited than the expansive powers of the states.

Madison's Virginia Plan provided a framework for debating the scope of Congress's power. It set out to define a broad principle to guide the debate. The Virginia Plan urged the delegates to grant Congress the powers it needed to address genuinely national problems.

Here's Madison's language: Congress should be able to "legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation…"

The Committee of Detail—a powerful committee that met during a recess two months into the Convention—translated this command into a specific list of powers.

The Convention appointed some real heavy hitters to this Committee:

- Pennsylvania's James Wilson—who was one of the intellectual leaders of the Convention, a strong nationalist, and a strong proponent of popular sovereignty—rule by "We the People."
- South Carolina's John Rutledge—who was one of the political leaders of the slaveholding states.
- Virginia's Edmund Randolph—who came from the most powerful family in the nation's most powerful state, Virginia, and was the person who actually presented the Virginia Plan to the Constitution Convention. He would also go on to refuse to sign the Constitution at the end of the Convention.
- Connecticut's Oliver Ellsworth—a key representative from the small-state contingent—with the Connecticut delegation serving as a driving force behind key compromises during the Convention.

- And Nathaniel Gorham, a respected delegate from Massachusetts who had previously served as president of Continental Congress.

This Committee put together the first full draft of the Constitution—taking resolutions that the delegates had already passed in the first two months of the Convention and trying to turn them into a real Constitution.

What did it do about the challenge of defining Congress's powers?

The Convention had already passed a resolution stating a guiding principle for congressional power—the Congress can make laws for "the general interests of the Union," as well as acting when states cannot address a problem separately or national "harmony" is at risk. Guided by this principle, the Committee began to write out specific powers.

The Committee also added the Necessary and Proper Clause. Before the Constitutional Convention, Congress was limited to the specific powers listed in the Articles of Confederation. Under the new Constitution, the framers gave Congress the flexibility to pass laws "necessary and proper" to carry out its enumerated powers—in other words, those powers that were specifically listed in the Constitution. This would become a key source of Congress's authority—and of ongoing constitutional debate from the Convention and the ratification debates all the way up until today. (Attacked by some, and beloved by others.)

By the end of the Convention, the delegates finally set on the language that we have today—Article I, Section 8—which lists Congress's specific powers. Over time, the most important congressional powers have proven to be its powers to:

- "collect Taxes, Duties, Imposts and Excises, to pay the Debates and provide for the common Defence and general Welfare of the United States";

- "regulate Commerce with foreign Nations, and among the several States";
- "declare War"; and
- (Again) "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."

National vs. State Governments

Finally, the framers also debated what sort of power the national government should hold over the states. Some delegates—like Madison and Wilson—wanted to grant the national government a veto over *all* state laws. (Massachusetts's Elbridge Gerry was a strong voice in opposition.) However, this move was viewed as far too ambitious a check on state power for most delegates.

Instead, the delegates settled on:

- Article I, Section 9, set out specific limits on Congress's power ("powers denied to Congress"), namely the Slave Trade provision (withholding power to ban it for twenty years, which was done January 1, 1808), the "Suspension Clause" (the writ of *habeas corpus* shall not be suspended "unless when in Cases of Rebellion or Invasion the public Safety may require it."), bans ex post facto laws and Bills of Attainder, the ban on direct and export taxes (as applied to other states), the appropriations clause ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"), and the ban on titles of nobility and the Emoluments Clause.

- Article I, Section 10, setting out a small number of specific (but important) limits on state power—for instance, bans on entering into treaties with foreign nations, coining their own money, and impairing contracts.

- And the Supremacy Clause (Article VI)—declaring properly enacted national laws supreme over state laws: **"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land…"**

After four months of debate, the delegates finally settled on the U.S. Constitution—sending it to the states for ratification.

So, that's the drafting story. But what was the framers' broader vision for Congress? While it's always dangerous to generalize, Madison, Hamilton, and John Jay set out a compelling vision in *The Federalist Papers.*

In designing their new government, the framers were no doubt concerned about threats to our liberties—and to the traditional powers of the states. They looked to guard against a new government that would abuse our rights. And they looked to protect our traditional system of federalism.

However, the founders were also interested in forming a national government—and a Congress—that worked. If dangers of a tyrannical government were at the front of their minds, so, too, were the weaknesses of the Articles of Confederation—a government that couldn't raise money, get the states to cooperate, or secure our new nation from foreign powers.

By drafting and ratifying our Constitution, the founding generation sought to create a Congress more powerful than the Continental Congress under the Articles of Confederation, but also one of limited powers. This was no simple task.

In *The Federalist Papers*, Madison, Hamilton, and Jay envisioned a constitutional system driven by reasoned debate and principled compromise. In part, they feared majority and minority factions as enemies of public reason, and, in part, they sought to build a system that guarded against majoritarian tyranny, making it hard for (as James Madison put it) "stronger factions [to] readily unite to oppress the weaker."

This is the familiar American Constitution story. Separation of powers. Checks and balances. Factions counteracting factions. However, that's only part of the story.

The founders also sought to design a system that worked—one that promoted public reason and filtered the views of the American people through representative bodies filled with America's best and brightest. Congress was central to this vision.

While the framers sought to create a structure to counteract the inevitable challenge of factions, the framers' goal was also to build a positive feedback loop of civic republican virtue: Build a system likely to attract great leaders, attract those leaders, build the public's affection for the national government, and rinse and repeat.

And the system as a whole was designed to slow the political process down, filter public opinion, and lead to good decision making. The people would elect the members of the House directly and indirectly play a role in the selection of the new government's president and senators.

And any idea or piece of legislation would face considerable obstacles before succeeding. Competitive elections. Bicameralism. The presidential veto. Judicial review. This process would kill bad ideas, revise flawed ones, and refine good ones.

For the American people, there was an obligation to remain engaged and involved. For elected officials, there was the duty to educate their constituents and shape their views. Over time, by slowing our politics down, national policy would promote the common good.

So, this is a system that's driven, not by the immediate preferences of the American people, but instead one that promotes widespread public deliberation guided by political leadership, a system relying on a dynamic conversation between elected officials and average citizens—and between Congress, the president, and the courts.

In the framers' system, the American people must have the last word, to be sure, but the system must also ensure that the American people's views are actually worth following.

Only then will our national government serve the public good.

CONGRESS'S POWERS THROUGHOUT HISTORY

So, we've covered the Constitutional Convention and the founding generation's vision for Congress. What happens next?

It's possible to divide the big debates over Congress and its powers into five separate periods:

- The Founding up to the Civil War
- The Civil War and Reconstruction
- The Gilded Age through the start of the New Deal
- The New Deal through the late twentieth century
- Debates at the Supreme Court today

(And for additional content, please check out the *Interactive Constitution* essays on Article I and Congress—especially Heather Gerken and Randy Barnett's essay on Article I, Section 8, covering these different historical periods in greater detail.)

Founding up to the Civil War

The first period covers American history from the Founding up to the Civil War. During this period, we see the Supreme Court—and various presidents and Congresses—battling over the scope of Congress's power.

Broadly speaking, we see the Marshall Court—covering 1801 through 1835—providing a fairly broad reading of Congress's powers under the new Constitution.

For instance, in *McCulloch v. Maryland*, the Marshall Court upheld the constitutionality of the Second Bank of the United States. (And the constitutional debate in fact started much earlier in Congress—with James Madison leading the fighting against the Bank—and in the Washington administration, with Alexander Hamilton battling against Thomas Jefferson!)

And it addressed the scope of the national government's power over commerce in landmark cases like *Gibbons v. Ogden*.

Other pivotal debates over that time had to do with internal improvements (the creating of a national roads system, which both Madison and Jackson vetoed as presidents), federal power over the territories (and the related right to ban slavery, how it applied to new states), and more generally Congress's power, if any, to regulate slavery. (Can also mention questions about power over Indian territory.)

Big Idea: While the Marshall Court confirmed over and over again that the Constitution created a Congress with limited powers, it often read those powers in a way that recognized an important role for Congress in regulating commerce and promoting the growth of the nation's economy.

Civil War and Reconstruction

Let's fast forward to the Civil War and Reconstruction. Following the Civil War, the Reconstruction generation amended the Constitution—adding three transformational amendments that expanded Congress's powers in many important areas: abolishing slavery, promising freedom and equality, and protecting the right to vote free of racial discrimination.

While the original Constitution left the issue of slavery to the states, the 13th Amendment abolished slavery and granted Congress new powers to enforce that constitutional command. The 14th Amendment granted Congress new power to pass laws to enforce the civil rights of all Americans—including the amendment's promise of guaranteeing equal protection of the laws to everyone. Finally, the original Constitution left the issue of voting to the states, but the 15th Amendment promised to ban racial discrimination in voting and gave Congress new powers to enforce that promise.

Taken together, these amendments—the Reconstruction Amendments—were the first set of constitutional amendments to *expand* the reach of national power—rather than *restrict* it (as, for instance, the Bill of Rights did). So, Congress has more power than before. Even so, the specific amount of power remains contested—as we continue to debate how far Congress's power sweeps—and as did the Reconstruction founders who gave us the 13th, 14th, and 15th Amendments.

Over the next half century, justices, elected officials, and movement leaders would battle over what this period of constitutional transformation meant for the scope of Congress's power and for our nation's traditional system of federalism. In other words, they'd ask: How powerful *was* Congress after the ratification of these new amendments?

The late 1800s featured a series of Supreme Court decisions that began to address this important question.

And the Supreme Court—in decisions like *The Civil Rights Cases* (1883)— read the Reconstruction Amendments narrowly, undermining new constitutional protections for African Americans. It would take nearly another century for the Civil Rights Movement to give them new life.

Big Idea: The Reconstruction Amendments granted Congress new powers, but the Reconstruction Court read them narrowly.

Lochner Era

Next, we move to a period that runs from the Gilded Age through the beginning of the New Deal Era. In the late 1800s and early 1900s—in a period traditionally known as the *Lochner* era—the Court read the Constitution in a way that imposed certain limits on Congress's powers.

During this period, government at all levels passed a wave of new laws regulating the economy—addressing the big changes to the economy. Railroad. Big factories. Big businesses. In turn, various constitutional challenges emerged inside the courts—fighting for a vision of limited government, extending back to the founding. (These arguments were also rooted in a longstanding concern about "class legislation (giving from A to B) and the principles of "free labor" central to Lincoln's Republican Party.)

The *Lochner* decision itself—*Lochner v. New York* (1905)—struck down a New York law regulating the working conditions of bakers. (The challengers also argued that the law was improper because it was meant to punish German immigrant bakers who had to keep shop in tenement housing.) So, it was a case dealing with a *state* law—*not* a law passed by Congress. But this period also touched on the scope of Congress's power—limiting it in important ways. (Has its roots in

The Slaughter-House Cases, *Munn v. Illinois*, earlier Reconstruction debates over regulatory power, and the "Free Labor" ideology of the Republican Party.)

When it came to Congress, the *constitutional* question was often how broadly to read the Constitution's Commerce Clause and Necessary and Proper Clause.

For instance, consider *Hammer v. Dagenhart* (1918). In 1916, Congress passed the Keating-Owen Child Labor Act—banning the shipment of goods produced by child labor across state lines. A father of a 14-year-old boy challenged the law.

And in a 5-to-4 decision, the Supreme Court agreed with the challenger, ruling the law unconstitutional. The Court concluded that this law was really about the process that went into making new things—for instance, new goods like furniture—and, in particular, the rules that set what sorts of workers businesses could hire.

With this new law, Congress looked to prevent businesses from hiring children. But according the Court, Congress didn't have the power to regulate this sort of thing under its Commerce Power. For the Court's majority, this wasn't "commerce."

Instead, it was the sort of thing that states traditionally handled. While Congress *could* pass laws that covered the types of things that get shipped across state lines—for instance, if the product itself was dangerous—*this* law was really about child labor. It was Congress's attempt use its Commerce Power to set a single age for when people could start working in businesses within individual states. The things that the companies were actually making—the goods themselves—were "harmless." For the Court, to rule otherwise would "destroy the local power always existing and carefully reserved to the states" by the 10th Amendment.

(Seven years later, in *Bailey v. Drexel Furniture Co*, the Supreme Court concluded that Congress couldn't use the taxing power to achieve the same ends as the Keating-Owen Act.)

Or, consider *ALA Schechter Poultry Corp. v. United States* (1935). (Also known as the "Sick Chickens" Case.) Enacted by Congress during the Great Depression, the National Industrial Recovery Act of 1933 gave the president power to approve **"codes of fair competition."** FDR approved codes establishing a 40-hour work week and a 50-cent minimum wage. The Schechter company purchased chickens that had been shipped to New York from other states and then used the poultry for slaughter and resale within New York. They were convicted for violating FDR's wage and hour rules.

The Supreme Court struck down the regulations fixing the hours and wages of individuals employed by an interstate business because the regulated activity was only "indirectly" related to interstate commerce: "Where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power."

In the end, even the *Lochner*-era Court upheld far more economic regulations than it struck down. Even so, the Court tried to enforce certain limits on the regulatory powers of the *both* the national government *and* the states.

The Big Idea: During the *Lochner* era, the Supreme Court faced a huge number of new laws regulating the economy. The Court responded by trimming back on the powers of Congress. While the Court kept far more laws than it struck down, it enforced a vision of a national government with limited powers.

New Deal Era

The fourth period begins with the New Deal and runs through much of the 20th century.

During the New Deal, FDR and the national government faced the challenges of the biggest economic collapse in American history—the Great Depression. Congress responded by passing a range of national regulatory programs—such as Social Security—that were designed to stabilize the economy, protect workers, and promote the general welfare.

Beginning in 1937, the Supreme Court upheld these programs—rejecting decades of cases limiting Congress's powers over the economy and reading the Constitution in a way that granted Congress broad powers to regulate the economy under the Commerce Clause.

Relying primarily on the Commerce Clause and the Necessary and Proper Clause to expand Congress's reach, the Court effectively brought an end of the *Lochner* era.

The Court interpreted Article I to give Congress the power to regulate wholly intrastate economic activity that substantially affected interstate commerce. Because the scope and importance of the national economy had outpaced the vision of interstate commerce held by the founders, the power to regulate anything that affected interstate commerce amounted to the power to regulate almost everything. As a result, the national government could now regulate in areas once governed exclusively by the states.

The Court accomplished this through a series of landmark cases.

For instance, two years after the "Sick Chickens" case, the Supreme Court reversed course in *National Labor Relations Board v. Jones & Laughlin Steel* (1937). There, in a 5-to-4 decision, the Court upheld the National Labor Relations Act. And it rejected *Schechter*'s approach when intrastate activities had "such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect the commerce from burdens and obstructions."

Consider *United States v. Darby* (1941). There, the Court returned to the same *constitutional* issue that we saw in *Hammer v. Dagenhart*: Can Congress regulate the process that goes into how things are made—in this case, the rules that businesses must follow when setting a workers' hours and deciding how much to pay them? While *Hammer* dealt with child labor, *Darby* addressed the constitutionality of the Fair Labor Standards Act—a law passed by Congress that set a minimum wage (and maximum hours) for workers.

The Court concluded that Congress had the power to ban the shipment in interstate commerce of lumber manufactured by employees whose wages were lower than the minimum wage or whose weekly hours were greater than the maximum hours. The Court also decided that Congress could reach the employment of workers in the *production* of such goods produced for interstate commerce in violation of wage and hour laws.

And the New Deal Revolution may have reached its zenith in *Wickard v. Filburn* (1942). There, the Court rejected a challenge the Agricultural Adjustment Act of 1938.

The case involved the regulation of wheat which had been grown purely for local purposes. The Court noted that there was "no decision of this Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof." Even so, the Court upheld the law.

The Court would no longer use "production" and "indirect" to foreclose consideration of the actual effects of the activity in question on interstate commerce. Thus, whether the subject of regulation was "production," "consumption," or "marketing" was not important, as Congress could reach activities local in nature if they exerted a "substantial economic effect on interstate commerce."

Big Idea: From the New Deal onward, the Supreme Court has read Congress's Commerce Power *very* broadly—expanding the reach of Congress's power over the economy.

New Federalism

Finally, in recent decades, the Supreme Court has trimmed back a bit on the powers of Congress.

After William Rehnquist became Chief Justice in 1986, the Court began developing what scholars call the "New Federalism." With this push, the Court tried to trim back on some of the broadest interpretations of the New Deal Revolution—trying to figure out a way to enforce some limits on Congress's power. These decisions continued to allow national regulation of wholly intrastate economic activity that had a substantial effect on interstate commerce, while drawing a line at the regulation of *non*-economic intrastate activity.

For instance, consider *Lopez v. United States* (1995). Alfonzo Lopez was arrested for carrying a concealed weapon in his high school. He was charged under the federal Gun Free Schools Act of 1990, which banned individuals from bringing guns into school zones. Lopez challenged his conviction, arguing that it was unconstitutional because the law exceeded Congress's Article I authority to regulate interstate commerce.

In a 5-to-4 decision, the Supreme Court agreed with Lopez and struck down the law for exceeding Congress's Commerce Power. The Court noted that carrying a gun into schools was not an "economic activity**."** Therefore, it wasn't the kind of private activity that Congress had authority to regulate under the Commerce Clause without a clearer link to interstate commerce.

In the end, the Court used *Lopez* to push back against the broadest reach of the New Deal Revolution. (At the same time, the Court suggested creating a "jurisdictional hook" such that Congress could repair the law to make it constitutional.)

(The Rehnquist Court tested the reach of its "Federalism Revolution" in later cases like *United States v. Morrison* (2000) (striking down a part of the Violence Against Women Act as exceeding the national government's power) and *Gonzales v. Raich* (2005) (upholding federal drug laws even in the context of homegrown cannabis).

In some ways, the Roberts Court has built on the Rehnquist Court's legacy on this front.

For instance, consider *NFIB v. Sebelius*. There, the Supreme Court considered a constitutional challenge to the Affordable Care Act.

Chief Justice Roberts wrote the controlling opinion in the case—joined by different justices for different parts.

First, the chief justice concluded that the Commerce Clause permits Congress only to regulate existing activity and not to compel people to purchase a product or join a market that they did not wish to join.

Second, he declared that the individual mandate could be legitimately considered a tax because it raised revenue for the national government and therefore was constitutional under Congress's taxing power.

And finally, seven justices agreed that the Medicaid provision unconstitutionally coerced the states to accept the Medicaid expansion. At the same time, the chief justice concluded that the Medicaid expansion provision could remain in place as long as the national government didn't threaten to withdraw Medicaid funding entirely for states that didn't agree to the plan.

Big Idea: Even after decisions like *Lopez*, the Supreme Court still reads the Constitution as granting the national government broad powers to regulate the economy and use its spending power to promote its preferred policies in the states. However, recent Court decisions *do* search for ways of enforcing certain limits on Congress's powers—ensuring that ours remains a national government of limited powers.

HYPOTHETICAL: NATIONAL MASK MANDATE

Does Congress have the power to pass a law requiring everyone to wear a mask during a pandemic?

Within our system of federalism, this sort of issue is usually the job of a state. It's at the core of a *state's* traditional (police) powers to pass laws that promote the health, safety, and welfare of its residents.

And this power for *state* governments is confirmed by well-established Supreme Court precedent—most notably, John Marshall Harlan's decision in *Jacobson v. Massachusetts* (1905), upholding a city's decision to require its residents to get a smallpox vaccine. (That is, as long as the regulation isn't too great a burden on constitutional rights—perhaps due to factors like how long the regulation is going to be in place, how many things/people it covers, etc.)

But that's *state* governments. Can *Congress* do it? Can Congress pass a *national* mask mandate?

The key question is this one: *Where in the Constitution does Congress get the power to pass a law like this?*

Remember: Unlike the states, Congress does *not* have a general police power to pass laws to promote the health, safety, and welfare of Americans. The Constitution creates a Congress with limited powers. It lists Congress's powers in Article I, Section 8.

So, even after the New Deal Revolution (and especially following more recent Supreme Court decisions like *Lopez*), we still have to be able to point to powers listed in the Constitution to justify a national mask mandate.

Congress needs to find a specific *constitutional* hook.

For instance, Congress might look to the Commerce Clause. Under the Commerce Clause, Congress has the power to regulate (1) "channels of commerce" like roads; (2) "persons or things in interstate commerce"; and (3) activities that substantially affect interstate commerce.

- Pro: Congress might argue that the pandemic has a substantial effect on interstate commerce and that a national mask mandate is within the core of Congress's Commerce Power—especially if it's targeted to cover specific situations touching on the economy like when people go to work or when they visit a business.
- Con: Challengers might argue that the Supreme Court has recently cut back on Congress's Commerce Power in cases like *Lopez* and *NFIB v. Sebelius* (the first Obamacare Case) and set certain limits on Congress's power. One key restriction—from *NFIB*—is that there's a limit to what Congress can force people to do.

There, a Court majority said that Congress couldn't use its Commerce Power to force uninsured people to buy health insurance. A broad mask mandate—depending on its specifics—might violate a similar principle.

Congress might also look to its Spending Power. Under the Spending Clause, Congress has the power to tax and spend to promote the general welfare. Congress could try to use this power to write a law that gets states to adopt a mask requirement—through some combination of carrots (new money) and sticks (taking away money). The Supreme Court has traditionally read Congress's Spending Power broadly, but it *has* cut back on it a bit in recent cases. Under existing Supreme Court precedent, Congress can use its Spending Power to push states to pass certain laws, but:

- Congress's goal must be related to the "general welfare."
- Congress must set clear conditions for the states (*e.g.*, the type of mandate that the states must pass and what will happen if they do/don't pass it).
- The conditions must not otherwise conflict with the Constitution. (For instance, it can't violate any rights protections like those enshrined in the Bill of Rights.
- And the conditions must not be *too* coercive. (In other words, Congress can't *really* force the states to do something they don't want to do. Here's the key Supreme Court language: the conditions must not be "so coercive as to pass the point in which pressure turns into compulsion.")

Congress might also look to the Necessary and Proper Clause. However, this Clause is more a way of reinforcing *other* constitutional powers than an independent source of power in its own right. In other words, this Clause simply builds on other enumerated powers like the Commerce Power. So, Congress *still* needs to find another specific constitutional hook.

Finally, the national mask mandate can't violate other rights enshrined in the Constitution—for instance, those written into the Bill of Rights.

In the end, this is an unsettled constitutional issue. As of today, there's no national mask mandate on the books, and therefore the Supreme Court has never squarely addressed the issue. Even so, hopefully, our discussion helped to clarify how the Supreme Court is likely to analyze this specific constitutional issue *if* Congress ever passes a law like this *and* a constitutional challenge reaches the Court.

In the end, a lot would depend on the details of the specific mandate.

To review:

- Congress would be in its strongest *constitutional* position if it limited the mandate to the economic context—*e.g.*, workers on the job and people visiting businesses—and limited its duration to a set period of time or objective indicators associated with the pandemic (*e.g.*, test positivity rate in a specific state or county).

- The challengers would be in their strongest *constitutional* position if Congress passed a broad mandate with few limits and no clear end point.

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