

**Constitutional Guidance for Lawmakers**

## Not So Sweeping After All: The Limits of the Necessary and Proper Clause

*Although often commonly referred to as the “sweeping clause” or the “elastic clause,” the “necessary and proper” clause is not in fact as expansive as its nicknames suggests. After listing the 17 specific powers delegated to Congress, Article I, Section 8 of the Constitution concludes by specifying that Congress has the power to pass any law both necessary and proper to implement the powers already delegated to it. This lawmaking power is limited and defined by the ends for which it is delegated: “for carrying into execution the foregoing powers.” All the clause does is to make explicit a power already implied in the grants of powers in Section 8 and elsewhere. The “necessary and proper” clause is thus a means for Congress to achieve its constitutionally mandated ends. As James Madison wrote in Federalist No. 44 to explain the meaning of the clause: “No axiom is more clearly established in law, or reason, than that wherever the end is required, the means are authorized.” This essay is adapted from The Heritage Guide to the Constitution for a new series providing constitutional guidance for lawmakers.*

**“The Congress shall have 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**

**A**t the Constitutional Convention, the Committee of Detail took the Convention’s resolutions on national legislative authority and particularized them into a series of enumerated powers. This originated the principle of enumerated powers, under which federal law can govern only as to matters within the terms of some power-granting clause of the Constitution. By including the Necessary and Proper Clause, the Fram-

ers set the criterion for laws that, even if they are not within the terms of other grants, serve to make other federal powers effective.

In *McCulloch v. Maryland* (1819), Chief Justice John Marshall noted that other grants of power by themselves “according to the dictates of reason” would “imply” a “means of execution.” He went on, however, to declare that the Constitution “has not left the

right of Congress to employ the necessary means for the execution of the powers conferred on the Government to general reasoning." For the Chief Justice, the Necessary and Proper Clause makes express a power that otherwise would only have been implied and thus might have been subject to cavil. By implanting the clause among the powers of Congress, the Framers confirmed that Congress may act to make the con-

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stitutional plan effective. In his parsing of the words of the clause, he concluded that the Necessary and Proper Clause authorizes laws enacted as means "really calculated to effect any of the objects intrusted to the government." Arguments for laws that lack this crucial means-to-end characteristic find no support in Marshall's opinion or in the Necessary and Proper Clause.

The Framers crafted the Necessary and Proper Clause to serve two great purposes. The first was to facilitate organization of the government, such as empowering Congress to organize the judicial branch (see Article I, Section 8, Clause 9). The second was to help effectuate the other enumerated powers of Congress. As to the first, the Constitution could not prescribe all points of government organization, so Detail Committee member Edmund Randolph proposed empowering Congress to "organize the government." James Wilson proposed the "necessary and proper" clause as a substitute, authorizing laws "for carrying into Execution" the other federal powers. The committee, and then the Convention, approved. The organizational function of this clause was recognized from the outset. Among Congress's first acts were establishing executive departments and staffs, determining the number of Justices of the Supreme Court, and allocating the judicial power among federal courts. The Supreme Court acknowledged this clause as the source of Con-

gress's power to legislate about judicial process and procedure. Without this clause (or some equivalent), statutes organizing the other branches not only would have violated the principle of enumerated powers, but also would have offended the principle of separation of powers.

As to the second and more significant purpose, the clause also supports laws for carrying into execution "the foregoing Powers," that is, those specified for the legislature itself in Article I, Section 8. It thus enhances the other powers given to Congress. During the ratification debates, opponents dubbed it the "sweeping clause" and the "general clause," arguing that it subverted the principle of enumerated powers by sweeping general legislative competence to Congress. The critic Brutus, for example, said it "leaves the national legislature at liberty, to do every thing, which in their judgment is best." In *The Federalist* No. 33, Alexander Hamilton replied that the clause is tautological but harmless, meaning nothing more than that Congress may exercise its legislative powers by making laws. Hamilton soon abandoned that simplistic view, however.

At Pennsylvania's ratification convention, James Wilson, the author of the clause, explained that the words "necessary and proper" are "limited, and defined by the following, 'for carrying into execution the foregoing powers.' It is saying no more than that the powers we have already particularly given, shall be effectually carried into execution." It authorizes what is "necessary to render effectual the particular powers that are granted." Congress thus can make laws about something otherwise outside the enumerated powers, insofar as those laws are "necessary and proper" to effectuate federal policy for something within an enumerated power. Although not independently valid under another enumerated power, such laws are supported by this clause to the extent that they constitute a means by which federal policy can be executed under an enumerated power.

On this principle, Hamilton, as Treasury Secretary, urged Congress in 1790 to establish a private bank-

ing corporation to facilitate tax collection and support of the army, to promote commerce among the states, and to answer the government's own borrowing needs. The Supreme Court confirmed the indispensable means-to-end nature of the necessary and proper power in *McCulloch v. Maryland* (1819). Writing for the Court, Chief Justice John Marshall upheld the Second Bank of the United States, utilizing the very rationale that Secretary Hamilton, and Wilson before him, had employed. Marshall rejected Thomas Jefferson's view that the clause limits Congress to "those means without which the grant of power would be nugatory." That would have precluded Congress from deliberating alternatives, and the Court read the clause instead as vesting "discretion, with respect to the means by which the powers it confers are to be carried into execution." *McCulloch* countenanced "any means calculated to produce the end," giving Congress "the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."

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***To invoke the Necessary and Proper Clause, a sufficient link to some enumerated-power end is constitutionally indispensable.***

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According to *McCulloch*, unless otherwise inconsistent "with the letter and spirit of the constitution," any law that is "appropriate," "plainly adapted to that end," and "really calculated to effect any of the objects entrusted to the federal government" is valid under the Necessary and Proper Clause. For the judiciary "to inquire into the degree of its necessity," Marshall said, "would be...to tread on legislative ground."

So long as a law promotes an end within the scope of some enumerated power, extraneous objectives do not render it unconstitutional. Indeed, one means might be preferred over others precisely because it advances another objective as well. For example, besides helping Congress effectuate various enumerated powers, a bank could make private loans to augment business capital or to satisfy consumer wants; while

these extraneous ends could provide no independent constitutional justification, Hamilton urged them as principal reasons why Congress should incorporate a bank. Record-keeping and reporting requirements regarding drug transactions, if apt as means to enforce federal taxes on those transactions, are no less valid because crafted for police ends that are not within any enumerated power. Extraneous objectives are constitutionally immaterial; but to invoke the Necessary and Proper Clause, a sufficient link to some enumerated-power end is constitutionally indispensable.

The Necessary and Proper Clause allows Congress to decide whether, when, and how to legislate "for carrying into Execution" the powers of another branch; but it respects and even reinforces the principle of separation of powers. Unlike Randolph's authorization to "organize the government"—which the Committee of Detail had replaced with Wilson's more exacting phrase—"laws...for carrying into Execution" the powers (and thus discretion) reposed in another branch can only mean laws to help effectuate the discretion of that other branch. It gives Congress no power to instruct or impede another branch in the performance of that branch's constitutional role. Of course, when the clause is invoked to effectuate ends within Congress's own powers, it compounds Congress's discretion: not only the selection of means, but also the selection of policy ends, rests in Congress's own discretion.

*McCulloch* remains the classic elucidation of this clause, but it has been elaborated in many other cases, such as in the proceedings concerning the Legal Tender Act of 1862. Congress, in an effort to stabilize commerce and support military efforts during the Civil War, determined that new paper currency must be accepted at face value as legal tender. The Supreme Court, in the *Legal Tender Cases* (1871), affirmed Congress's discretion to choose among means thought conducive to enumerated-power ends. The Court upheld Congress's choice, even though better means might have been chosen, and though the legal tender clause proved to be of little help: "The degree of the necessity for any Congressional enactment, or

the relative degree of its appropriateness, if it has any appropriateness, is for consideration in Congress, not here," said the Court.

The basic operation of the Necessary and Proper Clause is the same in every context. For example, federal tax lien and collection laws; record-keeping, reporting, and filing requirements; and civil and criminal penalties for non-payment are not themselves exertions of Congress's power to tax, but are laws "necessary and proper for carrying into Execution" the federal taxing power. That is why "provisions extraneous to any tax need" are not rendered valid simply by inclusion in a tax statute. *United States v. Kahriger* (1953); see also *Linder v. United States* (1925). Similarly, with regard to federal condemnation of property, "the really important question to be determined" is whether "it is necessary or appropriate to use the land in the execution of any of the powers granted to it by the constitution." *United States v. Gettysburg Electric Railway Co.* (1896). "Public use" alone is not sufficient, but if the proposed use is the kind of public use embraced by one of the enumerated federal powers, "the provision comes within the rule laid down by Chief Justice Marshall, in *McCulloch v. Maryland*...."

This clause's enhancement of Congress's power over commerce among the states had been judicially recognized decades before Congress began to exercise that power extensively. See *Gilman v. Philadelphia* (1866). Its means-to-end logic underlay the Supreme Court's approval of antitrust prosecutions for local monopolies when the government could prove a purpose to restrain interstate trade, *Addyston Pipe & Steel v. United States* (1899), but not when the government omitted to prove such a purpose, *United States v. E.C. Knight Co.* (1895). The same rationale sustained an amendment to the Safety Appliance Act, which prescribed safety equipment for railcars used only within a state, because the amendment increased safety for interstate cars and cargos on the same rails. *Southern Railway v. United States* (1911). Likewise, the Interstate Commerce Commission could authorize carriers to disregard state limits on rates for trips within a state,

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as a means to eliminate price discrimination against interstate commerce. *Shreveport Rate Case* (1914). Upholding the wage and hour provisions of the Fair Labor Standards Act on this ground in *United States v. Darby* (1941), the Court cited not only those older cases but also *NLRB v. Jones & Laughlin Steel Corp.* (1937) as illustrating the rationale of the Necessary and Proper Clause.

Often the Supreme Court has not articulated this Necessary and Proper Clause basis of its so-called affecting commerce doctrine. This has led to one of the most confused areas of all constitutional law. Justice Sandra Day O'Connor, however, did emphasize it: first in her dissent in *Garcia v. San Antonio Metropolitan Transit Authority* (1985), and then for the majority in *New York v. United States* (1989). The rule against federal "commandeering" of state officials, applied both in that New York case and in *Printz v. United States* (1997), was attributed to the word "proper" in the Necessary and Proper Clause, as interpreted in *McCulloch* to mean consistency with "the spirit of the constitution."

It should be emphasized, however that the Necessary and Proper Clause authorizes Congress to enact laws that are "appropriate" and plainly adapted for carrying into execution Congress's enumerated powers; it does not authorize Congress to enact any law that Congress thinks is "reasonable."

Thus, although a measure can be sustained under this clause, even if Congress's means-to-end judgment proves wrong, as Justice Robert H. Jackson said in *United States v. Five Gambling Devices* (1953), it must appear that the means-to-end relation "has been con-



sidered by Congress and has been explicitly and deliberately resolved.”

The Necessary and Proper Clause does not confer general authority over a matter simply because its regulation in some respects might serve an enumerated-power end; it only supports the particular regulations that have such an effect. For example, what mattered in *NLRB v. Jones & Laughlin Steel Corp* (1937) was not that steel manufacturing impacts interstate commerce, but rather that applying the particular NLRA provisions prohibiting those factories’ unfair labor practices would promote Congress’s policy of uninterrupted interstate commerce in steel. Similarly, in *Heart of Atlanta Motel v. United States* (1964), Title II of the 1964 Civil Rights Act was held applicable, not because hotels affect interstate commerce, but because prohibiting racial discrimination by hotels promotes Congress’s interstate commerce policy of unimpeded travel.

The Necessary and Proper Clause served as the model for the “enforcement” clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments, and the latter have always been construed as analogous to the former. See *Civil Rights Cases* (1883); *Katzen-*

*bach v. Morgan* (1966) (“the *McCulloch v. Maryland* standard is the measure for what constitutes ‘appropriate legislation’ under Section 5 of the Fourteenth Amendment”). Recent cases have held that to invoke Enforcement Clause support, a law must be “congruent” and “proportional” to the amendment violation it aims to redress. *City of Boerne v. Flores* (1997); *Board of Trustees of the University of Alabama v. Garrett* (2001). These can be seen as elaborations of the *McCulloch* principle—to invoke the Necessary and Proper Clause, a law must be “plainly adapted” to an enumerated end—a principle that for almost a century has been exhibited in “affecting commerce” cases as the requirement of “substantial effect.” This substantial effect test was raised to new prominence in *United States v. Lopez* (1995). If the analogy between this clause and the various enforcement clauses is to hold, perhaps the same principles of congruence and proportionality must also be applied in so-called affecting commerce cases and in other contexts of the Necessary and Proper Clause.

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