



Lee Epstein  
Thomas G. Walker

Constitutional Law  
for a Changing America  
**A Short Course**

**7**  
edition

# The Legislature

## Chapter 4

# Legislature Overview

- Article I of the Constitution is its longest, most explicit

## **Debate:**

- Congressional structure, rules, and so on.
- Powers of Congress (had little problem with this)
- Key was money (6 of 17 provisions in Section 8)

# Theory of Congress

- British essentially had virtual representation
- Framers thought legislators were simply agents of the people
- Adams: Legislature should think, feel, reason, and act like (the people)

# Structure of Congress

- Compromise was the Connecticut Plan, but the Virginia Plan loomed large
- Bicameral (almost all state legislatures were)
- Two Senators
- House decided by population

# Powers of Congress

## Two Key Controversies

- Supremacy of federal laws
- Powers not enumerated in Article I Section 8

# Term Limits

## **Arguments in favor:**

- Increase accountability
- Members only care about reelection
- Increase the power of the underrepresented
- Public has no confidence in Congress

# Term Limits

## **Arguments against:**

- Elections are inherently term limits
- Wrong problem (Congress is responsive)
- Members do not stay too long anyway
- It violates the constitution

# Term Limits

## ***U.S Term Limits v. Thornton (1995)***

- **Question:** May states alter the requirements set out in the Constitution for Members of Congress and is a simple ballot access restriction constitutional?
- **No.** 5-4 vote. Majority opinion by Stevens.
- Congress, nor the states, can add to qualifications in Article I Section 5.



# Term Limits

## ***U.S Term Limits v. Thornton (1995)***

- What does this case say about decision making?
- Is there any question about qualifications after this case?
- Why didn't *Powell* control in this case?

# Speech or Debate Clause

- Who is protected?
- What is protected?
- *Kilbourn v. Thompson* (1881): Things generally done in session [of Congress] by one of its members in relation to the business before it.

## ***U.S. v. Helstoski* (1979):**

- The clause does not permit the introduction of evidence involving past legislative acts

# Speech or Debate Clause

**TABLE 4-2** Speech or Debate Clause Cases after *Gravel v. United States*

CASE	LEGAL QUESTION	COURT'S RESPONSE
<i>United States v. Brewster</i> (1972)	Does the speech or debate clause protect members of Congress from prosecution for alleged bribery to perform a legislative act?	The clause protects members from inquiry into legislative acts; it does not protect all conduct relating to the legislative process.
<i>Doe v. McMillan</i> (1973)	Does the speech or debate clause protect members (and their staff) and other persons who were involved in creating and distributing a report on the D.C. school system that identified, by name, specific children and did so in a negative way?	The clause offers absolute immunity to members and staff, but not to individuals who, acting under congressional authority, distributed the materials.
<i>Eastland v. U.S. Servicemen's Fund</i> (1975)	Does the speech or debate clause protect members against a suit brought by an organization to stop the implementation of a subpoena ordering a bank to produce certain records?	The clause offers absolute protection because the activities fall within the "legitimate legislative" sphere.
<i>Davis v. Passman</i> (1979)	Does the speech or debate clause protect a member against charges of sex discrimination?	The Court decided the case on Fifth Amendment grounds and reached no result on the member's claim that he was protected by the speech or debate clause.
<i>United States v. Helstoski</i> (1979)	Does the speech or debate clause protect a member against prosecution (for accepting bribes) when evidence introduced in that action hinges on past legislative acts?	The clause does not permit the introduction of evidence involving past legislative acts.
<i>Hutchinson v. Proxmire</i> (1979)	Does the speech or debate clause protect a member from a civil suit in response to negative statements made to the press and in newsletters about a government grant awardee's research?	The clause does not protect a member from a libel judgment when information is disseminated to the press and the public through newsletters.

# Sources and Scope of Legislative Powers

- Does Congress have more powers than those enumerated in Article I Section 8?

## **Enumerated Powers:**

- There is no question these powers exist.
- The debate is in how to interpret the words (i.e., what is **interstate commerce**)?

# Sources and Scope of Legislative Powers

**TABLE 4-3** Sources of Congressional Power

POWER <sup>a</sup>	DEFINED	ILLUSTRATION
Enumerated powers	Those that the Constitution expressly grants	Article I, Section 8. Includes the powers to borrow money, raise armies, and regulate commerce among the states.
Implied powers	Those that may be inferred from power expressly granted	Article I, Section 8, Clauses 2–17, in conjunction with Clause 18, the necessary and proper clause. For example, the enumerated power of raising and supporting armies leads to the implied power of operating a draft.
Inherent powers	Those that do not depend on constitutional grants but grow out of national sovereignty	Foreign affairs. The national government would have foreign affairs powers even if the Constitution were silent, because these are powers that all nations have under international law. For example, the federal government can issue orders prohibiting U.S. businesses from selling arms to particular nations.
Amendment-enforcing powers	Those contained in some constitutional amendments that provide Congress with the ability to enforce them	Amendments 13, 14, and 15, for example, state that Congress shall have the power to enforce the article by “appropriate legislation.”

# Sources and Scope of Legislative Powers

## Implied Powers

- Most debate here, as to what the ***Necessary and Proper Clause*** means:
- 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.

# Sources and Scope of Legislative Powers

- **Federalists:**

- This clause implies more powers than those enumerated (a catch-all)

- **Jeffersonians:**

- Only power to carry out enumerated powers.

- *McCulloch v. Maryland* (1819) allowed the Court to decide.

# Sources and Scope of Legislative Powers

## ***McCulloch v. Maryland* (1819):**

- Two issues:
  1. Does Congress have the power to charter a national bank?  
(yes)
  2. Did the state of Maryland exceed its power by trying to tax a federal entity? (no)



# Sources and Scope of Legislative Powers

## ***McCulloch v. Maryland* (1819):**

- 6-0 vote. Majority opinion by Marshall.
- The Necessary and Proper Clause gives Congress broad power. We do not interpret Necessary in a restrictive way. Rather it means that Congress can use whatever means are necessary to achieve a particular end.

# Sources and Scope of Legislative Powers

## ***McCulloch v. Maryland* (1819):**

- Let the end be legitimate, let it be within the scope of the constitution, and all 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, are constitutional.
- The Constitution must be adaptable to the future
- Contemporary interpretations: *Comstock* and *Sebelius*

# Power to Investigate

- Not in the Constitution
- It is clear, however, that Congress has this power
- Some say it is inherent (need information)
- Some say it is implied—something Congress possesses from its other powers

# Power to Investigate

- What is the scope of this power?
- *Kilbourn v. Thompson* (1881): Power to investigate is limited to subjects where Congress can legislate
- This does not include *private* affairs
- Seems to severely limit this power

# Inherent Powers

- “. . . from the whole mass of the powers of the National Government, and from the nature of political society, [not as] a consequence of incident of the power specifically enumerated.”
- *U.S. v. Curtiss-Wright Export Corp.* (1936)

# Inherent Powers

## ***U.S. v. Curtiss-Wright Export Corp. (1936)***

- **Question:** May Congress issue a resolution that concerns external affairs, that gives the president the power to control U.S. involvement in foreign affairs?
- Yes. 7-1 vote. Majority opinion by Sutherland.
- History demonstrates that the federal government has always had authority over external affairs and the states have no power in this arena.

# Amendment Enforcing Power

- Seven Constitutional Amendments say: “Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”
- *South Carolina v. Katzenbach* (1966):
  - Against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.

# The Delegation of Powers

- “A power once delegated cannot be redelegated.”
- Not often followed? **Why?**
  - Congress is really busy.
  - Flexibility
  - Politics



# The Delegation of Powers

Court generally upholds delegations—with limits

- *Wayman v. Southard* (1825)—Courts can make their own rules (Judiciary Act of 1789)
- *Hampton v. U.S.* (1928)—Congress can give powers to president (Intelligible principles)

# The Delegation of Powers

## The New Deal and Delegation

- *Panama Refining v. Ryan* (1935)—Court strikes delegation to allow the president to set quotas on oil production.
- *Schechter Poultry v. U.S.* (1935)—Court strikes delegation to allow president to regulate entire poultry industry.
- **“Delegation running riot.”—Cardozo**

# The Delegation of Powers

## Switch in Time and Delegation

- Four Horsemen—Van Devanter, McReynolds, Butler, Sutherland (Roberts)
- After Schechter Roberts leaves coalition: “Switch in Time that Saved Nine.”
- Since this time (1936), lots of delegations upheld

# The Delegation of Powers

## ***Misretta v. U.S.* (1989)**

**Question:** May Congress create a commission in the judiciary to set federal sentencing guidelines?

- Yes. 8-1 vote. Majority opinion by Blackmun.
- The separation of powers doctrine and the non-delegation doctrine do not prevent Congress from obtaining assistance of other branches of government.

# The Delegation of Powers

## The Usurpation of Executive and Judicial Powers

### Judicial Powers

- *City of Boerne v. Flores* (1997):
  - Court overturns RFRA because it tried to interpret precedent set in *Sherbert v. Verner* (1963).

### Executive Powers

- Legislative Veto—*Chadha*
- Enforcing Laws—*Bowsher*

# The Delegation of Powers

## ***INS v. Chadha* (1983)**

**Question:** May one house of Congress pass a resolution that vetoes the actions of another branch of government after Congress delegated that power to the other branch?

- No. 7-2 vote. Majority opinion by Burger.
- While Congress argues that the legislative veto is efficient and convenient for facilitating governmental functions, this does not mean the action is not contrary to the constitution.