

What Is the "Necessary and Proper" Clause in the US Constitution?

The "Elastic Clause" gives wide powers to the United States Congress

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The "Necessary and Proper Clause," formally drafted as Clause 18 of Article 1 of the U.S. [Constitution](#) and also known as the elastic clause, is one of the most powerful and important clauses in the Constitution. Clauses 1–17 of Article 1 enumerate all of the powers that the government has over the legislation of the country. Clause 18 gives Congress the ability to create structures organizing the government, and to write new legislation to support the explicit powers enumerated in Clauses 1–17.

Article I, Section 8, Clause 18 allows the Government of the [United States](#) 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."

The definitions of "necessary," "proper," and "carrying into execution" have all been debated since the words were written during the Constitutional Convention in Philadelphia in 1787. There is a strong possibility that it was kept purposefully vague.

Necessary and Proper Clause

The Necessary and Proper clause of the U.S. Constitution provides Congress the power to fulfill its legal powers.

Also known as the "elastic clause," it was written into the Constitution in 1787.

The first Supreme Court case against the clause was in 1819 when Maryland objected to Alexander Hamilton's formation of a National Bank.

The Necessary and Proper clause has been used in cases about many things, including challenges about Obamacare, legalizing marijuana, and collective bargaining.

Purpose of the Elastic Clause

In general, the main purpose of this "elastic" clause, also known as the "sweeping" or "general clause," is to give Congress the flexibility to get the other 17 enumerated powers achieved. Congress is limited in its power over the American people to only those powers specifically written into the Constitution, such as determine who can be a citizen, collect taxes, establish post offices, and set up a judiciary. The existence of that list of powers implies that Congress can make laws necessary to ensure that those powers can be carried out. Clause 18 makes that explicit.

For example, the government could not collect taxes, which power is enumerated as Clause 1 in Article 1, Section 8, without passing a law to create a tax-collecting agency, which is not enumerated. Clause 18 has been used for all sorts of federal actions including requiring integration in the states—for instance, whether a National Bank can be created (implied in Clause 2), to Obamacare and the ability of states to legalize the growing and distribution of marijuana (both Clause 3).

In addition, the elastic clause allows the Congress to create the hierarchical structure to enact the other 17 clauses: to build a lower court (Clause 9), to set up an organized militia (Clause 15), and to organize a post office distribution method (Clause 7).

The Powers of Congress

According to Article 1, section 8, of the Constitution, Congress has the following 18 powers and **only** the following powers:

1. To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
2. To borrow Money on the credit of the United States;
3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
4. To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
5. To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

6. To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
7. To establish Post Offices and post Roads;
8. To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
9. To constitute Tribunals inferior to the Supreme Court;
10. To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;
11. To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
12. To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
13. To provide and maintain a Navy;
14. To make Rules for the Government and Regulation of the land and naval Forces;
15. To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
16. To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
17. To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings;—And
18. 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.

The Elastic Clause and the Constitutional Convention

The 18th clause was added to the Constitution by the Committee on Detail without any previous discussion at all, and it was not the subject of debate in Committee, either. That was because the original intent and wording of the Section was not to enumerate Congress's powers at all, but

instead to provide an open-ended grant to Congress to "legislate in all cases for the general interests of the Union, and also to those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." Proposed by Delaware politician Gunning Bedford, Jr. (1747–1812), that version was roundly rejected by the Committee, who instead enumerated the 17 powers and the 18th to help them get the other 17 completed.

However, Clause 18 was hotly debated in the ratification stage. Opponents objected to the 18th clause saying it was evidence that the Federalists wanted unlimited and undefined powers. The [Anti-Federalist](#) delegate from New York, John Williams (1752–1806), said with alarm that it is "perhaps utterly impossible fully to define this power," and "whatever they judge necessary for the proper administration of the powers lodged in them, they may execute without any check or impediment." The Federalist delegate from Virginia George Nicholas (1754–1799) said "the Constitution had enumerated all the powers which the general government should have but did not say how they should be exercised. The 'sweeping clause' should only be extended to the enumerated powers."

What Do "Necessary" and "Proper" Mean?

In his finding over the 1819 *McCulloch v. Maryland* case, Supreme Court Chief Justice [John Marshall](#) (1755–1835) defined "necessary" to mean "appropriate and legitimate." In the same court case, then-former U.S. president [Thomas Jefferson](#) (1743–1826) interpreted that it meant "essential"—an enumerated power would be pointless without the proposed action. Earlier, [James Madison](#) (1731–1836) said there had to be an obvious and precise affinity between the power and any implementing law, and [Alexander Hamilton](#) (1755–1804) said that it meant any law that might be conducive to the implemented power. Notwithstanding the long-term debate over what "necessary" means, the Supreme Court has never found a congressional law unconstitutional because it was not "necessary."

However, more recently, the definition of "proper" was brought up in [Printz v. the United States](#), which challenged the Brady Handgun Violence Prevention Act (Brady Bill), which compelled state officials to implement federal gun registration requirements. Opponents said it was not "proper" because it interfered with state's rights to set their own laws. President Barack Obama's Affordable Care Act (signed March 23, 2010) also came under attack in [National Federation of Independent Business v. Sebelius](#) because it was deemed not "proper." The Supreme Court was unanimous in their decision to keep the ACA but divided about whether a law could ever fail to be "proper" if it did not involve direct federal regulation of state governments.

The First "Elastic Clause" Supreme Court Case

Over the years, the interpretation of the elastic clause has created much debate and led to numerous court cases about whether or not Congress has overstepped its bounds by passing

certain laws not expressly covered in the Constitution.

The first such major Supreme Court Case to deal with this clause in the Constitution was [McCulloch v. Maryland](#) (1819). The issue at hand was whether the United States had the power to create the Second Bank of the United States, which had not been expressly enumerated in the Constitution. Further at issue was whether a state had the power to tax that bank. The Supreme Court decided unanimously for the United States: They can create a bank (in support of Clause 2), and it can't be taxed (Clause 3).

John Marshall, as the Chief Justice, wrote the majority opinion which stated that the creation of the bank was necessary to ensure that Congress had the right to tax, borrow, and regulate interstate commerce—something that was granted it in its enumerated powers—and therefore could be created. The government received this power, said Marshall, through the Necessary and Proper Clause. The court also found that individual states did not have the power to tax the national government because of Article VI of the Constitution which stated that that national government was supreme.

In the late 18th century, Thomas Jefferson had been against Hamilton's desire to create a National Bank, arguing that the only rights that had been given to Congress were those which were in fact spelled out in the Constitution. But after he became president, he used the Necessary and Proper clause to take on a huge amount of debt for the country when he decided to complete the [Louisiana Purchase](#), realizing that there was a pressing need to purchase the territory. The treaty including the purchase was ratified in the Senate on October 20, 1803, and it never reached the Supreme Court.

The Commerce Clause

Several implementations of the Commerce Clause (Clause 3) have been the target of debates over the use of the Elastic Clause. In 1935, a case for creating and enforcing a collective bargaining piece of the [National Labor Relations Act](#) was the focus of a Congressional finding that refusal to bargain collectively leads to worker strikes, which burden and obstruct interstate commerce.

The 1970 [Occupational Safety and Health Administration Act](#), as well as various civil rights acts and discrimination laws, are considered constitutional because the health and employment workplace affects interstate commerce, even if the workplace is a manufacturing plant not directly involved with interstate commerce.

In the 2005 court case [Gonzales v. Raich](#), the Supreme Court rejected California's challenge to federal drug laws banning marijuana. Since that time, several state laws allowing the production and sale of marijuana in one form or another have been passed. The federal government still sets the rules for all the states, and that rule is marijuana is a Schedule 1 drug and therefore illegal: But as of [late 2018](#), the federal government has chosen to not enforce their current drug policy.

Other issues referring to Clause 18 include whether the federal government can hold sex offenders past the ends of their terms for the protection of the public; whether the government can charter corporations to get a project such as an interstate bridge completed; and when the federal government can take a criminal from a state court to try him or her in a federal court.

Continuing Issues

The Necessary and Proper clause was intended to allow Congress to decide whether, when and how to legislate for "carrying into execution" the powers of another branch, and at the same time intended to respect and reinforce the principle of separation of powers. Even to this day, arguments still center on the extent of the implied powers the elastic clause gives to Congress. The arguments over the role that the national government should play in creating a nationwide health care system often come back to whether or not the elastic clause includes such a move. Needless to say, this powerful clause will continue to result in debate and legal actions for many years to come.

Sources and Further Reading

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