Scholar Exchange: Federalism and the Separation of Powers

Briefing Document

INTERACTIVE CONSTITUTION RESOURCES

- Resources for Federalism
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INTRODUCTION

BIG IDEA

When crafting a new Constitution, the Framers were concerned about the threats posed by a powerful new national government. To guard against potential abuses of power, the Founding generation divided power in *two* ways. Through the separation of powers, the Founders divided political power at the national level between three branches of government and through the system of federalism, the Founders further divided power between the national government and the states.

ESSENTIAL QUESTIONS

- What is the separation of powers? How does it work?
- What is federalism and how does it work?
- Where do we see these constitutional principles in the Constitution?
- Why are they needed?
- What are some of the key battles over the separation of powers and federalism in American history (and today)?

INTRODUCTION TO THE SEPARATION OF POWERS AND FEDERALISM

In this lesson, we're going to discuss two of the key principles underlying the U.S. Constitution: *the separation of powers and federalism*. Before we get too far, let's begin with some simple definitions.

Separation of Powers refers to the fact that the Constitution distributes political power between three branches of government: a legislative branch (Congress), an executive branch (led by a single President), and a judicial branch (headed by a single Supreme Court).

Furthermore, the Constitution sets up a system of **check and balances**—granting each branch of government the power to check abuses by the other branches.

Federalism is the word used to describe the Constitution's system of dividing political power between the national government and the states.

SEPARATION OF POWERS

Before turning to some of the key battles over these concepts throughout American history, let's introduce each of these key principles—and where we find them in the Constitution.

Let's begin with the separation of powers.

Through the separation of powers, the Constitution distributes political power between three branches of government at the national level. The Constitution itself lays out the three branches of government in Articles I through III.

- The legislative branch—Congress—makes the laws. (We find this branch in Article I)
- The executive branch—led by a single President—enforces the laws. (We find this branch in Article II)
- The judicial branch—headed by a single Supreme Court—interprets the laws. (We find this branch in Article III)

At the same time, through its system of checks and balances, the Constitution grants each branch of government the power to check abuses by the other branches.

How did this system of checks and balances work? Take one simple example.

Congress was given the power to make our nation's laws But the President was given the power to veto any law passed by Congress and federal judges were given the power to declare any law unconstitutional (this is known as the power of judicial review).

The Framers borrowed key principles like the separation of powers and checks and balances from Enlightenment political theory—for instance, key writers like Montesquieu (and his *Spirit of the Laws*) and John Locke (and his *Second Treatise*). But the Framers themselves came up with a new system in which the branches were meant to compete with one another to ensure that no one branch became too powerful.

So, why do we have such an overlapping system? Perhaps the best way to understand the theory driving this system is through one of the most famous essays in American history, James Madison's *Federalist No. 51.* This essay was part of *The Federalist Papers*. Today, scholars and ordinary Americans alike recognize *The Federalist Papers* as some of the finest works of political theory.

But it's also important to understand them in context—as political documents written during the fight over the ratification of the U.S. Constitution. *The Federalist Papers* were printed primarily in New York to rally support for the new Constitution during the debates over ratification. Alexander Hamilton, James Madison, and John Jay wrote these essays under the pen name "Publius."

Madison published *Federalist* No. 51 on February 8, 1788. He titled it: **"The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments."** In this powerful essay, Madison explained how the Constitution's structure checked the powers of the elected branches and protected against possible abuses by political elites.

For Madison, the solution was a combination of *both* separation of powers *and* checks and balances. With the separation of powers, the Framers divided the powers of the national government into the three separate branches. The goal was to prevent any single branch of government from becoming too powerful.

At the same time, each branch of government was also given the power to check the other two branches. Again, this is the key principle of checks and balances.

Madison explains this system in one of the most famous passages in American history:

"Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature?"

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."

But as Madison and his fellow Framers knew, men were *not* angels.

For Madison, ambition must be made to counteract ambition because the Constitution assumes that human nature is imperfect and that all political elites (and factions) will seek greater political power. As a result, the best way to control the national government was to harness the political ambitions of each branch of government and use them to check the other branches.

FEDERALISM

So, that's the separation of powers. What about federalism?

Federalism is the word used to describe the Constitution's system of dividing political power between the national government and the states. When we look for federalism in the Constitution, where can we find it?

The Constitution itself doesn't say "federalism" anywhere. There's no single "Federalism" Clause. But it's in there! It's everywhere!

Examples include:

- Article I, Section 3 (the original Senate);
- Article I, Section 8 (the powers of Congress—especially the Commerce Clause and the Necessary and Proper Clause);
- Article I, Section 10 (limitations on the powers of the states);
- Article IV (Privilege and Immunities Clause and Fugitive Slave/Rendition Clause);
- Article VI (Supremacy Clause);
- the Tenth Amendment;
- and the Enforcement Clauses of the Reconstruction Amendments. (13th, 14th, 15th)

Why so many layers? What would be a benefit of having lots of layers of government? Why did the Founding generation value federalism?

For the Founding generation, federalism was an important way of bringing government closer to the American people themselves—to the level of government closest to them. We are a country that was founded (as Lincoln said) on the promise of "government of the people, by the people, for the people."

By breaking the powers of the government up and not just having ONLY a national government, this gives a ton of power to the state governments—the governments that the Founders believed were closest to the people.

Furthermore, by empowering states to shape policy in important ways, federalism permits states to shape a range of policies in ways that serve our diverse nation.

This lets the people in the state that they live in—and their elected officials—write laws that fit their community best. Over time, these diverse approaches to different issues—from education to health to safety to the environment to whether people are treated equally to how much people are paid—sometimes benefit the nation as a whole.

In 1932, Justice Louis Brandeis offered his famous vision of the states as **"laboratories of democracy."** On this view, state governments often lead the way in trying out new laws and policies. When those ideas work out well, they can spread to other states and even bubble up to the national level—changing the way that things work all across the nation.

So, ideas that are tested out as state laws sometimes lead to larger changes in how our country works as a whole.

A famous example is women's suffrage.

Women began voting in Western states long before the Nineteenth Amendment. This experiment worked out so well that other states extended voting rights to women, as well—including (eventually) large states like New York and Michigan. Finally, this experiment culminated in the Nineteenth Amendment—banning sex discrimination in voting.

But not all national laws bubble up from the states. The same thing can happen in the opposite direction, too. By giving the national government the power to override the states in certain of areas, the Constitution permits the national government, to stop the states from doing certain things. The national government can set laws that apply to the entire nation—to everyone.

A key example is the national government's response to Jim Crow segregation.

Beginning in the late 1800s, many Southern states set up systems of laws that discriminated against African Americans. In response, the national government eventually passed new laws—like the Civil Rights Act of 1964 and the Voting Rights Act of 1965—that applied to the entire country.

What should we remember about the Founding generation's approach to federalism?

Even though the Founders established a new national government, they preserved a central role for the states in our constitutional system. To that end, they set up a system of federalism—dividing power between the national government and the states. While future amendments granted the national government new powers, the states retained substantial powers to promote the health, safety, and welfare of their residents.

The Founders were concerned about abuses of power by the government. So, with their new Constitution, they divided power in two ways. First, the Founders distributed political power between the three branches of the national government. The legislative branch—Congress—makes the laws. The executive branch—led by the President—enforces the laws. And the judicial branch—headed by the Supreme Court—interprets the laws. Second, the Founders set up a system of federalism—dividing power between the national government and the states.

So now that we have it in theory, let's see these ideas in action.

BATTLES OF THE BRANCHES: *MCCULLOCH V. MARYLAND*

One of the best examples capturing battles over federalism and the separation of powers in American history is the early battle over the constitutionality of a national bank.

This story takes us from President George Washington's Administration up through the Marshall Court's decision in *McCulloch v. Maryland* and President Andrew Jackson's decision to veto the Second Bank of the United States.

Beginning with the issue of federalism—in other words, with debates over the powers of the national government and the powers of the states—let's tell the story that leads up to the Marshall Court's landmark case of *McCulloch v. Maryland*.

The Marshall Court—named after Chief Justice John Marshall—is perhaps the most famous Supreme Court in American history and *McCulloch* is, perhaps, its most important decision. This landmark decision addressed the scope of national power—in particular, the powers of Congress. There, the Court weighed in on one of the most important debates in the early republic—the debate over the constitutionality of a national bank.

This story plays out in two acts—early debates in the Washington Administration and then the Marshall Court's decision decades later.

Let's begin with the Washington Administration.

Needless to say, this part of the story features quite the cast of characters. Let's set the stage. Of course, George Washington is the President, Alexander Hamilton is Washington's Treasury Secretary, Thomas Jefferson is Washington's Secretary of State, and James Madison is in the U.S. House of Representatives.

It's a new government governed by a new Constitution and the Administration is trying to figure out what the new Constitution means, how it works, and even what the new government is going to look like. This raises a slew of important constitutional questions—many of them turning on the scope of the new government's power.

Enter Alexander Hamilton. Hamilton is *the* leading advocate of national power within the government and as Treasury Secretary, he comes up with a robust economic plan. As part of it, he wants to set up a national bank.

Fundamentally, he thinks that the national government must play a central role in setting national economic policy and the national bank was at the center of that vision. For Hamilton, a national institution like that would help make the nation strong. In Hamilton's view, the states couldn't deal with many key issues of economics and finance. Only the nation *could*—through a unified national economic policy.

Once Congress passes Hamilton's legislation creating a national bank, Hamilton's plan reaches Washington's desk. Under the Constitution, President Washington has the power to either sign new law or veto (or reject) it. If he signed the new law, then it would become the law of the land. If he vetoed it, then the law would end up back before Congress—to either override (or cancel) the President's veto (with a 2/3 vote in *both* Houses of Congress) or not (meaning that the law would be dead).

When deciding whether to veto a bill, the President often asks whether the law is constitutional or unconstitutional.

So, President Washington asks his cabinet to weigh in on the constitutionality of a national bank. The key constitutional question is whether Congress has the power to establish one. So, this is the first great constitutional debate in the American republic and it's the President's cabinet—*not* the Supreme Court—tasked with settling it. Hamilton argues that the national bank is constitutional but Jefferson and Madison disagree—arguing that the bank is unconstitutional. Washington sides with Hamilton and signs the bill. So, Congress establishes a national bank.

Fast forward a couple of decades.

In the wake of the Panic of 1819, opposition to the National Bank of the United States grew. Bank opponents—channeling the arguments of Jefferson and Madison during the Washington Administration—argued that a National Bank went beyond the enumerated powers of Congress under Article I. The Constitution didn't grant Congress the power to establish a national bank. There is no "Establish Bank" Clause in Article I. End of story.

Even so, Chief Justice Marshall and the Supreme Court upheld the constitutionality of the National Bank in *McCulloch*—channeling many of Hamilton's arguments from decades earlier. The case arose out of a Maryland law designed to undermine the operation of the Second National Bank of the United States in Maryland by taxing all bank notes from banks chartered outside of the state.

The National Bank was the only bank operating in Maryland affected by this law. So, Maryland was looking to use its taxing powers to attack the unpopular national bank. McCulloch—the President of the National Bank's Maryland Branch—refused to pay the tax. So, this is a battle between the national government and the state of Maryland. In *McCulloch*, Marshall began his opinion with popular sovereignty—echoing the Preamble and arguments by Federalists like James Wilson. It's "We the People of the United States," not "We the People of the State":

"The Government of the Union . . . is, emphatically and truly, a Government of the people. In form and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

Marshall then turned to national supremacy—echoing Article VI's Supremacy Clause and explaining that while the national government was one of limited, enumerated powers, it was **"supreme, and its laws, when made in pursuance of the Constitution, form the supreme law of the land."** And while the power to charter a bank was not specifically listed in the Constitution, it flowed from other powers that *are*—so, it was implied by the rest of the Constitution's text—for instance, Congress's power to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies.

Congress needed to be able to meet the needs of an expanding, vast economy (and nation). For Marshall, that's what the new Constitution was all about. Marshall then turned to the Necessary and Proper Clause as supporting a reading of Congress's Article I powers beyond those specifically listed in the Constitution

Two famous quotes from the opinion capture Marshall's constitutional vision:

"A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake in the prolixity of a legal code, and could scarcely be embraced by the human mind. . . . [W]e must never forget that it is a *constitution* we are expounding."

"Let the end by 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 consistent with the letter and spirit of the constitution, are constitutional."

Finally, the Court concluded that Maryland had no power to tax national institutions, noting that the **"power to tax involves, necessarily, a power to destroy."**

BATTLES OF THE BRANCHES: ANDREW JACKSON AND THE SECOND NATIONAL BANK

So, that's *McCulloch v. Maryland* and debates over federalism. Let's fast forward to Andrew Jackson, the Second National Bank, and a key debate over the separation of powers.

While the Marshall Court advanced a broad vision of congressional power, President Andrew Jackson and his Democratic Party pushed back against the Marshall Court's constitutional vision.

This is, perhaps, best seen in President Jackson's famous veto of the Second National Bank. Jackson—like Jefferson and James Madison before him—thought that the Bank of the United States was unconstitutional.

The President of the Second National Bank, Nicholas Biddle of Philadelphia, was Jackson's political opponent in this public constitutional battle. Biddle pushed his allies in Congress to pass a bill to extend the charter of the Second National Bank and make it an election year issue in 1832.

Jackson took the bait and vetoed the bill in July 1832, with months to go before the 1832 election. Jackson issued his Veto Message on July 10, 1832. Jackson's essential message to the American people is two-fold:

- One, the Bank of the United States is unconstitutional because no such power is given in Article I.
- Two, the President is the representative of the people, and the bank is against their interests and thus he must fight to destroy this threat to the rights of the people and the powers of their states.

Jackson begins his message by saying that he understood the usefulness of a national bank to the people—he called it **"convenient."**

But Jackson thought it was **"unauthorized by the Constitution, subversive of the rights of the States, and dangerous to the liberties of the people." Therefore, he explained, "I felt it my duty at an early period of my Administration to call the attention of Congress to the practicability of organizing an institution combining all its advantages and obviating these objections."**

Jackson attacked the bank on egalitarian terms, seeing it as conferring a monopoly and privileges on certain elites at the expense of the American people.

To Jackson, the bank was a corrupt institution that did not act to benefit the people. As far as Jackson was concerned, the new Bill did nothing to change the existing **"odious"** features of the bank.

Jackson also clearly rejected "judicial supremacy," believing that both Congress and the President had a duty to consider independently the constitutionality of the bank.

"It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I can not assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled."

Jackson noted that Congress accepted the bank in 1791 with a significant debate, rejected re-chartering it in 1811 and 1815, and then did re-charter it in 1816. He claimed that if one looked to the states, they would see that by a 4-1 margin, they expressed opinions against the bank. Thus, Jackson concluded there was nothing **"in precedent . . . , which, if its authority were admitted, ought to weigh in favor of the act before me."**

Jackson then outlined his vision of "departmentalism."

"If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will

support it as he understands it, and not as it is understood by others. . . The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities."

From there, Jackson moves to criticize the Supreme Court's decision in *McCulloch v. Maryland*.

Jackson noted that Marshall relied on an interpretation of the **"necessary and proper clause" by which necessity meant "essential" or "needful" and thus was to be determined solely by the legislature.**

Jackson concluded that *McCulloch* meant that, **"it is the exclusive province of Congress and the President to decide whether the particular features of this act are necessary and proper in order to enable the bank to perform conveniently and efficiently the public duties assigned to it as a fiscal agent, and therefore constitutional, or unnecessary and improper, and therefore unconstitutional."**

Otherwise, such delegation of power was **"equivalent to a legislative amendment of the Constitution, and palpably unconstitutional."**

Jackson won re-election, but in the wake of his re-election, the Whig Party began to emerge as the opposition party to the Jacksonians.

BATTLES OF THE BRANCHES: PRESIDENT TRUMAN AND *YOUNGSTOWN SHEET & TUBE CO. V. SAWYER*

Our first set of examples took us back to the early days of America. Let's now fast forward to a famous battle in the twentieth century—involving President Harry S. Truman and the Korean War.

This is a key battle between Congress and the President—with the Supreme Court weighing in on how best to balance the powers of Congress against the powers of the President.

When it comes to presidential power, the *constitutional* question often comes down to this: *can the President do that?*

- Can she put government money towards building a border wall?
- Can her Administration issue sweeping regulations to address air pollution and combat climate change?
- Can she issue an executive order blocking immigration from certain countries?
- What about one to require everyone in the nation to wear a mask? Or to stay at home? Or get a vaccine?
- Can she send American troops to another country to defend American diplomats? To protect innocent civilians from a violent dictator? What about to try to overthrow that dictator?

It's worth noting that the Supreme Court often tries to steer clear of cases addressing the scope of presidential power—perhaps fearing that it might be stepping into an area where it has less knowledge than the President (and also one in which the Congress has some power to check the President).

However, the Court *has* provided *some* guidance over time.

These battles—both yesterday and today—often involve *executive orders*. What are they?

The American Bar Association describes an executive order as **"a signed, written, and published directive of the President."**

Executive orders go back to the very beginning of America—with President George Washington. They aren't specifically mentioned in the Constitution. For instance, there's no "Executive Order" Clause. However, they *are* rooted in the

President's role in leading the executive branch And the President's Article II duty to "take care" that the laws are "faithfully executed."

In other words, the President is the boss of other people working in the executive branch of the government.

And the President often uses executive orders to tell other executive-branch officials what to do. Simply put, executive orders tell people working in the executive branch to do something.

For instance, President Washington used them to ask his executive branch officials to prepare reports for him and President Truman used an executive order to desegregate the armed forces.

The main criticism is often that Presidents use executive orders to stretch their powers—and sometimes command executive-branch officials to do things that they can't get Congress to pass laws to do.

Perhaps the leading case on presidential power—and the ongoing battle between Congress and the President—is *Youngstown Sheet & Tube Co. v. Sawyer* (1952). (Also known as "The Steel Seizure Case.")

This case took place during the Korean War.

Steel workers were going on strike and President Truman responded by arguing that a steel strike was a threat to national security because the Army needed steel to conduct the war. Truman then decided on his own—in other words, without congressional approval—to seize the steel mills under his Article II Commander-in-Chief Power. (Truman used an executive order)

Truman argued that Article II of the Constitution made him commander-in-chief. Read broadly, this power gave him wide authority to take actions necessary to fight (and win) a war and if the steel workers went on strike, that would undermine the war effort. Therefore, the President had the power to step in and seize the steel mills.

This dispute ended up at the Supreme Court, and the Court ruled *against* Truman. The Court concluded that Truman couldn't seize the steel mills on his own.

Truman was shocked. He had appointed some of the Justices himself, and FDR—his political ally—had appointed the others. To be clear, some Justices agreed with Truman. (For instance, Chief Justice Fred Vinson—appointed by Truman. And he was joined by Justices Minton and Reed.) However, the majority ruled against him. According to the Court, the President's Commander-in-Chief Power didn't permit him to seize a steel mill inside the United States—even if it helped the war effort. (The majority opinion mostly focused on the separation of powers.) The President needed congressional approval to do that.

But the most influential opinion in the case was a concurring opinion by Justice Robert Jackson.

There, Justice Robert Jackson, identified *three* different categories for analyzing presidential power. When the President acts with congressional approval, he has the maximum authority to act. When he acts in the face of congressional *dis*approval, he has the least authority to act. (As Jackson wrote, the President's power is **"at its lowest ebb."**)

When Congress has neither approved nor disapproved of the President's actions, the President then acts in a **"zone of twilight"**—somewhere between those two situations. Applying his analysis to *The Steel Seizure Case*, Jackson reasoned that Congress hadn't authorized the seizure of the steel mills and the President had no non-military—in other words, no independent source of— authority to act. (Like an existing law passed by Congress.)

Therefore, Jackson concluded that the President had acted unconstitutionally. So, what's the take-home point that arises from the *Youngstown* decision?

When the President acts side by side with Congress, his power is at its highest level. (The Supreme Court tends to uphold his actions.) But when the President acts on his own—especially in the face of congressional *dis*approval—his powers are at their lowest level. (And the Supreme Court may rule against him.) In the end, Jackson's *Youngstown* concurrence remains a useful framework for analyzing constitutional debates over presidential power. In particular, it's a reminder to always ask the following question: *Where is the President getting her authority act?*

For instance, this is precisely the question that we ask when analyzing a President's executive order today.

In those debates, the President is often acting. But then, we must ask under what source (or sources) of legal authority?

Sometimes the President argues that the Constitution itself grants her the power to act. (Truman's position in *The Steel Seizure Case*.) Sometimes she draws on laws passed by Congress (the most common argument) and sometimes she looks to previous court decisions to guide her actions.

Regardless, she must her root her authority in some source of law. Otherwise, her executive action is invalid. Of course, once we establish that the President can look to some source of authority to act in a particular situation, we must still ask whether the President's actions violate any other parts of the Constitution. Whether that's a key Bill of Rights protection like free speech or religious liberty or some other part of the Constitution.

So, that's the basic framework for analyzing the scope of the President's powers in many instances—and for settling battles between Congress and the President.

BATTLES OF THE BRANCHES: CONTEMPORARY DEBATES

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 reinforced 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? Here's the key *constitutional* question: *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), 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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