



Article I: How Congress Works—The Legislative Branch Briefing Document

INTERACTIVE CONSTITUTION RESOURCES

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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.

FRAMING QUESTIONS

- 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?

INTRODUCTION TO THE CONSTITUTION'S TEXT

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. 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. 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 Seventeenth 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?

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

They thought that this slow process would promote deliberation and compromise. And guard against abuses by powerful factions. (Today, we would say “**parties.**”)

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. That’s hard to do!

The Founding generation’s theory? Kill the bad ideas, revise the flawed ones, and refine the good ones. Over time, by slowing the process down, national policy would promote the common good.

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.
- 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 the President's veto by a 2/3 vote in each House 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

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.

And the new national legislature was at the center of the Framers' vision of a new government. Over time, the delegates struggled with a range of issues. They debated how best to structure the national legislature. For instance:

- Whether to have a single House of Congress or divide Congress into *two* Houses.
 - A relatively easy question for them.
 - They went with two—a House and a Senate.
 - Again, this is known as **bicameralism**.
- 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!)



- At the Convention, this debate pitted James Madison’s “Virginia Plan” (arguing for more representatives for the larger states) against William Paterson’s “New Jersey Plan” (arguing for equal state representation—just like Congress had under the national framework of government that came before the U.S. Constitution, the Articles of Confederation).
- The delegates split the difference—with the Connecticut (or Great) Compromise, brokered (in important part) by Connecticut’s Roger Sherman.
- 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.
- This Compromise passed by a single vote.
- 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 each side of the question!
 - 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.

In addition, the delegates struggled with which powers to grant Congress.

Under the new Constitution, many Framers wanted to grant the national legislature powers that it lacked under the existing framework of government—the Articles of Confederation.

Part of this was looking at the flaws of the Articles of Confederation and trying to figure out which things we really needed a national government to do—in other words, where a national voice and a national policy were essential. But they also tried to strike a difficult balance.

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 at the Convention. 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.

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 something that looked like a real Constitution.

At that point, the Convention had already passed a resolution stating a guiding principle for congressional power—tracking Madison's language in the VA Plan—so, empowering Congress to address national problems. Guided by that principle, the Committee began to write out specific powers—like the power to tax and spend and to regulate interstate commerce.

As part of this process, 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 over time—and of ongoing constitutional debates from the Convention and the ratification debates all the way up until today. (Attacked by some, and beloved by others.)

As a practical matter, this clause was the path to (what scholars call) **"implied powers"** like the power to charter a national bank. There's no "establish bank" clause in the Constitution. But a national bank might be useful in helping Congress carry out its other responsibilities.

Or so Alexander Hamilton argued as part of the Washington Administration and so Chief Justice Marshall echoed in *McCulloch v. Maryland*. Only to be challenged by James Madison and Thomas Jefferson. But we're getting ahead of ourselves!

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.”

Finally, the Framers also debated what sort of power the national government should hold over the states.

Some delegates—like James Madison and James Wilson—wanted to grant the national government a veto over *all* state laws. However, this move was viewed as far too ambitious a check on state power for most delegates.

Instead, the delegates settled on some limits to state power in Article I, Section 10 (for instance, bans on entering into treaties with foreign nations, coining their own money, and impairing contracts). And on Article VI’s Supremacy Clause—declaring 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.

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*](#)—giving the Commerce Clause a relatively broad reading.

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 (the Thirteenth Amendment), promising freedom and equality (the Fourteenth Amendment), and protecting the right to vote free of racial discrimination (the Fifteenth Amendment).

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 and for our nation’s promise of a new birth of freedom for African Americans after the Civil War.

Big Idea: The Reconstruction Amendments granted Congress new powers, but the battle over their meaning—and their promise of freedom and equality—continued.

***Lochner* 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, the government at all levels passed a wave of new laws regulating the economy—addressing the big changes to the economy. Powerful railroads. Big factories. Big businesses. New dangers for workers. In turn, various constitutional challenges emerged inside the courts—pushing back against these new laws and fighting for a vision of limited government.

The *Lochner* decision itself—[*Lochner v. New York*](#) (1905)—struck down a New York law regulating the working conditions of bakers. 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. When it came to Congress, the *constitutional* question was often how broadly to read the Constitution’s Commerce Clause and Necessary and Proper Clause. The Court tried to set clear limits on Congress’s power. It wasn’t easy.

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. (More than 8 hours a day. Six days a

week. After 7:00pm and before 6:00am.) A father of a fourteen-year-old boy, who worked in a cotton mill in Charlotte, NC, 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 rules covering what sorts of workers businesses could hire—not commerce itself.

With this new law, Congress looked to prevent businesses from hiring children. But according to 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."**

For the majority, this was the sort of thing that states traditionally handled—not Congress.

And 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 or even immoral (like lottery tickets or alcohol)—*this* law was really about child labor itself.

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, this new law threatened to **"destroy the local power always existing and carefully reserved to the states"** by the Tenth Amendment. The law simply had to go.

Justice Holmes (in dissent): **"It is not for this Court to pronounce when prohibition is necessary to regulation if it may ever be necessary—to say that it is permissible as against strong drink but not as against the product of ruined lives."**

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 forty-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."**

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 twentieth 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.

This is the so-called “Switch in Time that Saved Nine”—with Justice Owen Roberts changing his vote in key cases in the face of FDR’s threat to pack the Court (in other words, add new FDR-appointed Justices).

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 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.

This was a national law about labor organizing and collective bargaining. The defendant was a steel plant in Pennsylvania interfering with the rights of its employees. This was not about production or commerce, but about effects. Industrial strife would greatly affect interstate commerce.

The Court 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.”**

Again, this is a 5-4 decision. The majority included the Court’s three progressives (Brandeis, Stone, and Cardozo) and its two centrists (Hughes and Roberts). The four dissenters were known as the “Four Horsemen”: McReynolds (dissent), Van Devanter, Sutherland, and Butler.

Or 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 rules that businesses must follow when it comes to their workers? 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 defendant was a GA lumber manufacturer. The Court explicitly overruled *Hammer v. Dagenhart*. The Tenth Amendment **“is but a truism that all is retained which has not been surrendered.”**

The Court concluded that Congress *did* have the power to ban the shipment in interstate commerce of lumber manufactured by employees whose wages were lower than the minimum wage.

This is only four years after the Court's 5-4 decision in *Jones & Laughlin*. But it's a *unanimous* decision. There are no Horsemen left on the Court! They were replaced by FDR appointees, including Black, Frankfurter, and Douglass.

And the New Deal Revolution may have reached its zenith in [Wickard v. Filburn](#) (1942). There, the Court rejected a challenge to the Agricultural Adjustment Act of 1938. This law limits the amount of wheat farmers can grow on their own farms.

The case involved the regulation of wheat which had been grown purely for local purposes. In particular, it involves a farmer: Roscoe Filburn.

He's growing wheat to feed animals on his own farm. He's not selling it in interstate commerce. He's not selling it to anyone.

The Court upheld the law. The national government *could* tell Mr. Filburn to stop growing his wheat. Why?

His wheat—when joined with others doing the same thing—has a substantial effect on the wheat market. He's using his own wheat—not buying it on the open market. And this would affect the price of wheat that others were bringing to the marketplace.

With *Wickard v. Filburn*, the New Deal Revolution is complete!

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.

The Powers of Congress Today

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

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.

For instance, consider [Lopez v. United States](#) (1995). There, 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 the law exceeded Congress's commerce power.

In a 5-to-4 decision, the Supreme Court agreed with Lopez and struck down the law. This was the first time that the Court had struck down a law under Congress's commerce power since the New Deal Revolution of 1937. It was a big deal!

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.

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 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?

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 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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