Implied Powers

The Elastic Clause, McCulloch, and the Expansion of Federal Power
Key Features

1. Popular Sovereignty
2. National Supremacy
3. Limited Government
   4. Federalism
   5. Bicamerlism
4. Separation of Powers
5. Checks and Balances
6. Implied Powers
7. Amendment Process
8. Judicial Review/Political Parties??

This lecture will focus on #8, implied powers.
Enumerated Powers

- Article I, Section 8:
  - Lists specific powers of Congress, a rather short list enumerating about 15 things, including:
    - Tax
    - Coin Money
    - Regulate Interstate Trade
    - Declare War
    - Etc.

Enumerated powers are those specifically listed in Section 8 of Article I on the Constitution.
Implied Powers

• The last clause of Section 8:
• States:
  – Congress may pass any law that ……

In the back of your text, note specifically what the last clause of Section 8 says. What do you think this means and why was it included?
Implied Powers

- The last clause of Section 8:
- States:
  - Congress may pass any law “necessary and proper” to “carrying out its foregoing powers”.

In case you were too lazy to look in the back of your book - you can see the key wording of the clause above.

The “foregoing” powers are all those listed in the clauses above the “necessary and proper” clause.

The framers wanted to make sure Congress had the power to carry out the other powers they specifically gave it; this was the main reason for the clause.

However, its wording led to a major debate over how broadly these words were meant to be interpreted.
What does “necessary and proper” mean?

• Hiring and paying post office employees?

• Requiring safety warnings on packs of cigarettes?

Congress has the specific power to create a post office. Passing a bill which would allow for hiring a certain number of postal workers at a certain wage would certainly seem necessary and proper to carry out this power.

Yet, Congress has passed all sorts of laws that do not seem so connected to the powers enumerated the Constitution. For example, Congress passed a law requiring companies to put labels on packs of cigarettes that tell you that smoking causes cancer. Which of the “foregoing” powers could this possible relate to? (Check them out and see if there is one that makes sense to you.)
What does “necessary and proper” mean?

- Hiring and paying post office employees?
  - “To create and maintain a post office.”

- Requiring safety warnings on packs of cigarettes?
  - “To regulate interstate trade.”

The law is ultimately based on Congress’ right to regulate interstate trade.

Interstate trade is trade BETWEEN the states. The framers gave this power exclusively to Congress; thus preventing California, for example, from taxing delicious oranges coming from Florida. However, the power to regulate interstate trade has expanded to included almost unlimited regulation of the economy (since most everything is traded across state lines). Thus we have laws restricting the manufacture and sale of firearms, a federal minimum wage, a host of environmental regulations, as well as health regulations such as the warning labels on cigarettes. All of these have are considered Constitutional because they have been regarded as “necessary and proper” to the power of regulating interstate trade.

If you are asking yourself if it is really “necessary” to put labels on cigarettes, rather than just a good idea then you are thinking like Thomas Jefferson. Just because something is a “good idea” does not make it constitutional. You might ask what’s more important, living in a nation of good ideas or a nation under the laws?
Jefferson

• Proponent of limited government
• “The Constitution allows only those means which are absolutely ‘necessary’, not those which are merely ‘convenient’.”
• This is referred as a “strict” or “narrow” view of constitutional powers.

Thomas Jefferson, a true Lockean, believed in small (limited) government fearing that powerful government would simply serve powerful interests and not the common man, whose voice was likely to be less strong. He thus, argued for what was called a “narrow” interpretation of the necessary and proper clause. Necessary means really necessary - as in I “need” oxygen to survive.

The words in BLUE above are quoted from what Jefferson wrote in an argument he had with Alexander Hamilton over the constitutionality of Congress creating a national bank. Jefferson believed Congress had exceeded its authority.
Hamilton

- Proponent of a strong central government.
- “Necessary often means no more than needful, requisite, incidental, useful, or conducive to.”
- This is referred to as a “broad” or “loose” interpretation of the governmental power.

The words in BLUE are from Hamilton’s retort to Jefferson.

Jefferson’s political opponent Alexander Hamilton (who was Secretary of the Treasury under Washington, though too controversial to ever become president as did Jefferson) was a major proponent of strong government believing it was necessary for the creation of a powerful nation with a strong economy.

He thus argued for a “loose” interpretation of the the elastic clause. “Necessary” doesn’t always mean necessary, he argued. For example, I might say I “need” a snack or a break but it doesn’t mean I will die if I don’t have a bowl of ice cream, only that it would quite nice.
So, Who is Right?

Who gets to settle an argument like this?
The Supreme Court Steps In

- Eventually this debate is settled by the Supreme Court when a case relevant to the “necessary and proper clause” comes before it.

Of course, in our system of separation of powers, it is the Judiciary that gets to interpret the meaning of laws. Eventually a case concerning the constitutionality of a National Bank chartered by the government made its way to the Supreme Court. …
The Fight over the National Bank

Leads to

McCulloch v. Maryland
1819

… in the famous case of McCulloch v. Maryland.
Background: The Fight over the National Bank

• Congress Creates a National Bank in 1816
• Hamilton supports the idea of the bank, believing it is constitutional and essential for the country’s economic development.
• Jefferson sees it as unconstitutional and fears it would primarily benefit wealthy New Englanders.

To understand the case, you need this background:

During the first session of Congress, a law was passed that allowed Congress to charter a national bank that would store all government revues and make commercial loans, primarily for projects to develop the country’s infrastructure. However, because of its potential size, it could have a powerful impact on the national economy. By holding money (loans) back, it could raise interest rate, or by pouring money into the economy, it could create inflation.

Jefferson feared this bank would follow policies that would help the wealthy lenders rather than indebted farmers. He also feared that money put into local branches from rural areas, would be funneled to urban centers for large scale projects rather than funding small projects in local communities. (Think of the movie “It’s a Wonderful Life.”) Most importantly however, he simply thought Congress did not have the power to create the bank and the law was thus unconstitutional. This unconstitutional expansion of power could set a dangerous precedent.
The Case: McCulloch vs. Maryland 1819

- The state of Maryland, whose state government opposed the bank, begins to tax its operations to drive the bank out of business.
- McCulloch, the cashier for the Maryland branch of the bank, refuses to pay the tax, is convicted, and appeals to the Supreme Court.

You can see the basics of the case here.

McCulloch is the plaintiff.
Maryland is the defendant.
Key Questions of the Case

- Can Maryland tax the bank?
- Is the National Bank constitutional?

The case is specifically over whether or not Maryland can tax the bank, but of course this is only at issue if the bank is Constitutional in the first place.
Marshall’s Decision

• The Constitution says “We the people….” (not, we the states)
  – Argues for national sovereignty/national supremacy.

• The necessary and proper clause allows for any legislation where “the ends are legitimate and the means not prohibited.”
  – Therefore, the bank is constitutional.

• “The power to tax is the power to destroy.”
  – Therefore, the Maryland tax is unconstitutional.

1. In his ruling Marshall first reminds everybody that a state law cannot violate the will of a constitutional act of Congress. This is based on the National Supremacy clause of the Constitution.

2. Secondly, and most importantly for our purposes, and the country’s political history, he rules on the meaning of the “necessary and proper clause”. Note his famous words (in BLUE), in which he basically sides with Hamilton and gives Congress a wide latitude to do almost anything it wants. Think carefully about what he is saying here: Congress can do anything it wants, as long as the purpose (end) is reasonable (legitimate) and as long as the Constitution does not specifically ban it. Whether you, or Jefferson, agree or disagree, because the Supreme Court ruled this way, this is now the law of the land. Thus, the bank was deemed constitutional: its goal was to strengthen the economy which seems to be a legitimate action, and secondly, there is nothing in the Constitution that says Congress MAY NOT create a bank. Same goes for putting warning labels on cigarettes and a host of other laws Congress has passed.
Marshall’s Decision

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3. Finally, Marshall rules on Maryland’s taxing of the bank with his famous words that the power to tax is the power to destroy (ain’t that the truth) (but of course the power to lower lower taxes is also the power to destroy - especially if you are dependent on the government to help you finance your education or subsidize your housing or health care - but that’s another story). Specifically, Marshall ruled that Maryland was using the tax to destroy the bank and thus subvert the will of Congress which was in violation of the national supremacy clause and thus unconstitutional. (As we shall see later, the court won the right to declare laws unconstitutional about 10 years earlier.)
The “Elastic” Clause

• Thus, Marshall paved the way for a broad interpretation of “necessary and proper”, stretching its meaning so that it is now commonly known as the “elastic clause”, the source of implied powers.
• This the role and power of the federal government has expanded well beyond that envisioned by many of our founders.