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Recurring Constitutional Issues in Federal Legislation

The Constitution both empowers and limits Congress in its lawmaking function. Each piece of federal legislation potentially raises two questions: (1) has Congress acted within the bounds of its enumerated powers; and (2) does the legislation implicate any other constitutional constraints, such as federalism, the separation of powers, or individual rights? This In Focus highlights constitutional issues that frequently arise in drafting and reviewing federal legislation. It sets out the main legal standards for each constitutional power and constraint discussed below to aid Members and congressional staff when analyzing these issues in consultation with CRS Legislative Attorneys.

Commonly Invoked Enumerated Powers

Federal statutes must fall within the scope of Congress's enumerated, constitutional powers. Congress often relies on its Commerce Clause and Spending Clause powers to enact federal programs and regulate the activities of private entities and even states. *See* CRS Report R44729, *Constitutional Authority Statements and the Powers of Congress: An Overview*. Congress also has lawmaking authority under other parts of the Constitution, such as the Fourteenth Amendment.

Commerce Clause: The Supreme Court has identified “three broad categories of activity” that Congress may regulate under its Commerce Clause power (U.S. CONST. art. I, § 8, cl. 3): (1) use of “the channels of interstate commerce”; (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce”; and (3) “activities that substantially affect interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). When a law regulates *noneconomic* activity under the third category, courts generally look for (1) an “express jurisdictional element” limiting the law’s reach to activities that “have an explicit connection with or effect on interstate commerce”; and (2) “express congressional findings” regarding the regulated activity’s effects on interstate commerce, which cannot be too attenuated. *Id.* at 562; *United States v. Morrison*, 529 U.S. 598, 612–14 (2000).

Spending Clause: Congress may spend federal funds to provide for the country’s “general Welfare.” U.S. CONST. art. I, § 8, cl. 1. It may also attach conditions to those funds, subject to four limitations. First, the law must provide *clear notice* of the condition to give recipients an opportunity to accept or reject the funding. Second, the condition must be *related to* the purpose of the funding. Third, Congress may encourage, but not *coerce*, states to accept the condition. Fourth, the condition must not violate an *independent constitutional bar*, such as the First Amendment. *South Dakota v. Dole*, 483 U.S. 203 (1987); *see* CRS Report R46827, *Funding Conditions: Constitutional Limits on Congress’s Spending Power*.

Power to Enforce the Civil War Amendments: The Thirteenth, Fourteenth, and Fifteenth Amendments respectively abolished slavery, enshrined rights to due process and equal protection of the laws, and barred states from abridging the right to vote because of race. Congress may enforce these rights through “appropriate legislation.” U.S. CONST. amends. XIII, § 2, XIV, § 5, XV, § 2. Such power allows Congress to remedy or prevent a constitutional violation, not to change the nature or scope of a constitutional right. *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Court’s standards for deciding whether an enforcement measure is “appropriate” may depend on the right at issue. Fourteenth Amendment legislation must be *congruent* and *proportional* to the asserted injury. *Id.* at 530–33. Measures imposed on particular states under the Fifteenth Amendment must reflect “current conditions” to preserve the states’ equal sovereignty. *Shelby Cty. v. Holder*, 570 U.S. 529, 557 (2013).

Necessary and Proper Clause: Congress may make laws that are “necessary and proper” for carrying out not only its own enumerated powers but also “all other Powers” that the Constitution vests in the federal government or its departments or officers. U.S. CONST. art. I, § 8, cl. 18. “Necessary” in this sense means that a law is *rationally related* to implementing a federal power. *United States v. Comstock*, 560 U.S. 126, 134 (2010).

Common Constitutional Limits

Federalism

The federal and state governments each have sovereign powers under the Constitution, creating federalism-based limits on Congress’s powers. *See* CRS Report R45323, *Federalism-Based Limitations on Congressional Power: An Overview*. The following doctrine and many of the foregoing limits on Congress’s enumerated powers are based on federalism concerns.

Anti-commandeering: This doctrine prohibits Congress from issuing “direct orders” to the states to enact or enforce a federal regulatory program or bar states from enacting a law otherwise within their power. *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018). The doctrine does not prevent Congress from *preempting* state law so long as the federal law regulates private entities and states rather than simply dictating what laws a state may or may not enact.

Separation of Powers

The Constitution divides the federal government’s powers into three branches (executive, legislative, and judicial), vesting each with specific authorities. A statute can implicate the separation of powers if it violates either an express or implied constitutional grant of authority to a

particular branch or if Congress acts beyond the lawmaking role assigned to it in the federal system.

Congress’s Exercise of Powers: When Congress exercises the legislative power, it sets legal rights or duties. Generally, an exercise of this power requires both houses of Congress to pass legislation, present it to the President for approval, and potentially override a presidential veto. U.S. CONST. art. I, § 7. Congress may not use procedures, such as legislative vetoes, that depart from the Constitution’s lawmaking requirements. *INS v. Chadha*, 462 U.S. 919 (1983). In addition, Congress may not execute the laws it passes or actively supervise persons who do. *Bowsher v. Synar*, 478 U.S. 714 (1986).

Appointment and Removal of Federal Officers: A law that creates a new position in the federal government or changes the duties of an existing office could implicate constitutional requirements involving the appointment or removal of federal officers. The Appointments Clause (U.S. CONST. art. II, § 2, cl. 2) requires that *principal* officers of the United States be nominated by the President and confirmed by the Senate, while Congress may vest the appointment of *inferior* officers in the President alone, department heads, or the courts. Officers occupy a “continuing position established by law” and exercise “significant authority” on behalf of the United States. *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018). Laws that give such authority to individuals who have not been properly appointed likely run afoul of the Constitution. Laws that interfere with the *removal* of federal officers may also violate the separation of powers. *E.g.*, *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010).

Nondelegation: This doctrine bars Congress from assigning its lawmaking function to another branch of government or granting federal powers to a private entity. Like the Appointments Clause, this doctrine could arise if a law creates a new federal agency or private body with regulatory functions. Congress must provide an “intelligible principle” to guide the executive branch’s implementation of federal law. *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019). In addition, Congress may not assign certain federal powers or duties to unappointed, private entities. CRS Report R44965, *Privatization and the Constitution: Selected Legal Issues*.

Individual Rights

Besides the legislative powers and structural issues discussed above, the Constitution guarantees that the government will not unduly infringe certain individual rights. These include rights to procedural and substantive due process; a speedy and public trial; the equal protection of the laws; freedom to bear arms; and freedom of speech, press, and religion. This In Focus describes a few crosscutting individual rights.

Bills of Attainder and Ex Post Facto Laws: Article I of the Constitution prohibits bills of attainder and ex post facto laws. A *bill of attainder* imposes punishment without

judicial trial. To determine whether a law is an unconstitutional bill of attainder, the Supreme Court asks whether it imposes a type of historically prohibited punishment; whether it furthers any legitimate, nonpunitive purposes; and whether there is other evidence of congressional intent to punish. *Nixon v. Gen. Servs. Adm’r*, 433 U.S. 425 (1977). *Ex post facto laws* impose retroactive punishment, whether by retroactively punishing a previously innocent act or increasing the punishment for a crime or by changing rules of evidence or proof needed to convict. *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

Procedural Due Process: The Fifth Amendment states that no person shall be “deprived of life, liberty, or property, without due process of law.” While due process is likely most familiar in the judicial context, this guarantee also applies to congressional action—for example, to ensure Congress provided sufficient procedures for the seizure of property. The Court has said that government actions satisfy due process if they are consistent with procedures historically guaranteed under the common law and, more generally, if they preserve “principles of liberty and justice.” *Hurtado v. California*, 110 U.S. 516, 537 (1884).

Equal Protection: The Fourteenth Amendment provides that a state may not “deny to any person within its jurisdiction the equal protection of the laws,” and the Supreme Court has held this principle applies to the federal government through the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). The Court evaluates discriminatory laws under a three-tier system. First, if a law discriminates against a suspect class such as race or religion or burdens a fundamental right, the law is to be subject to *strict scrutiny* and held unconstitutional unless it is narrowly tailored to a compelling government interest. Laws that discriminate on the basis of sex are evaluated under *intermediate scrutiny* and must be substantially related to an important government interest. All other laws are subject only to *rational basis review* and are to be upheld so long as they are reasonably related to a legitimate government interest. *Clark v. Jeter*, 486 U.S. 456 (1988).

Free Speech: The First Amendment’s Free Speech Clause bars the government from “abridging the freedom of speech.” The Supreme Court uses different tests to analyze laws that infringe on protected speech, depending on the context, but there are overarching principles. A law will usually be subject to heightened scrutiny if it regulates on the basis of speech’s content and will likely be considered unconstitutional if it discriminates among viewpoints. A court may also subject some disclosure requirements to heightened scrutiny on the ground that they compel speech. *Free Speech Clause*, CONSTITUTION ANNOTATED.

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