

# The “Elastic” Clause – Necessary and Proper Clause

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The **Necessary and Proper Clause** (also known as the **Elastic Clause**, the **Basket Clause**, the **Coefficient Clause**, and the **Sweeping Clause**<sup>[1]</sup>) is the provision in [Article One of the United States Constitution](#), section 8, clause 18:

The [Congress](#) shall have Power - 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.

## Early controversy

The clause provoked controversy during discussions of the proposed constitution. While Anti-Federalists expressed concern that the clause would grant the federal government boundless power, [Federalists](#) argued that the clause would only permit execution of power already granted by the Constitution. [Alexander Hamilton](#) spoke vigorously for this second interpretation in the [Federalist Papers](#) as part of his argument for why the federal government required powers of taxation. At this time [James Madison](#) concurred with Hamilton, arguing in [Federalist No. 44](#) that without this clause, the constitution would be a "dead letter". At the Virginia Ratifying Convention, [Patrick Henry](#) took the opposing view, saying that the clause would lead to limitless federal power that would inevitably menace civil liberties.<sup>[2]</sup>

## National bank

For several decades after the Constitution was ratified, the interpretation of the Necessary and Proper Clause continued to be a powerful bone of contention between the [Democratic-Republican Party](#) and the [Federalist Party](#), and several other political parties in the United States. The first practical example of this contention came in 1791, when Hamilton used the clause to defend the constitutionality of the creation of the [First Bank of the United States](#), the first federal bank in the new nation's history. Concerned that monied Northern aristocrats would take advantage of the bank to exploit the South, Madison now argued that congress lacked the constitutional authority to charter a bank. Hamilton argued that the bank was a reasonable means of carrying out powers related to taxation and the borrowing of funds, claiming the clause applied to activities reasonably related to constitutional powers, not just those that were absolutely necessary to carry out said powers. To embarrass Madison, his contrary claims from [the Federalist Papers](#) were read aloud in congress:<sup>[3]</sup> "No axiom is more clearly established in law or in reason than wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power for doing it is included." Eventually Southern opposition both to the bank and to Hamilton's plan to have the federal government assume the war debts of the states was mollified by the transfer of the nation's capital from its temporary seat in Philadelphia to a permanent seat on the Potomac, and the bill, along with the establishment of a national mint, was passed by congress and signed by President Washington.<sup>[4]</sup>

The power of the clause to justify the creation of a national bank was put to the test in 1819 in [McCulloch v. Maryland](#).<sup>[5]</sup> wherein the state of Maryland had attempted to impede the operations of the [Second Bank of the United States](#) by imposing a tax on out-of-state banks, of which the Second Bank of the United States was the only one. The court ruled against Maryland, and Chief Justice [John Marshall](#) wrote the opinion, which stated that while the constitution did not explicitly give permission to create a federal bank, it had the implied power to do so under the Necessary and Proper Clause in order to realize or fulfill its express taxing and spending powers. The case reaffirmed Hamilton's view that legislation reasonably related to express powers was constitutional. "We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction

of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be 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," wrote Marshall.

In addition to these powers to charter and operate federal banks, the clause was linked to the [General Welfare clause](#) and the constitutional powers of tax collection and the ability to borrow money to give the federal government virtually complete control over currency.[6]

## Later applications

The clause has been paired with the [Commerce Clause](#) to provide the constitutional basis for a wide variety of [federal laws](#). For instance, various reforms involved in the [New Deal](#) were found to be necessary and proper enactments of the objective of regulating interstate commerce.[7]

Indeed, the influence of the Necessary and Proper Clause and its broader interpretation under [McCulloch vs. Maryland](#) can be seen in cases generally thought to simply involve the Commerce Clause. For instance, in [United States v. Darby Lumber Co.](#) (1941), the court upheld the [Fair Labor Standards Act](#) under the Commerce Clause, but it cited [McCulloch vs. Maryland](#) in justifying its ruling.

The [Supreme Court](#) in [Wickard v. Filburn](#) (1942), upheld a federal statute making it a crime for a farmer to produce more wheat than was allowed under [price controls](#) and production controls, even if the excess production was for the farmer's own personal consumption. The Necessary and Proper Clause was used to justify the regulation of production and consumption.

In addition to this combination of clauses being used to uphold federal laws affecting economic activity, they also were used to justify federal [criminal laws](#). For example, Congress in the [Federal Kidnapping Act](#) made it a [Federal crime](#) to transport a [kidnapped](#) person across state lines, because the transportation would be an act of interstate activity over which the Congress has power. It has also provided justification for a wide range of criminal laws relating to interference with the federal government's rightful operation, including federal laws against assaulting or murdering federal employees.

## Other information

The specific term "Necessary and Proper Clause" was coined in 1926 by [Associate Justice Louis Brandeis](#), writing for the majority in the Supreme Court decision in [Lambert v. Yellowley, 272 U.S. 581 \(1926\)](#), wherein the court upheld a law restricting medicinal use of alcohol as a necessary and proper exercise of power under the 18th Amendment establishing [Prohibition in the United States](#).

This phrase has become the label of choice for this constitutional clause, and it was universally adopted by the courts, and it received Congress's imprimatur in [Title 50 of the United States Code](#), section 1541(b) (1994), in the purpose and policy of the [War Powers Resolution](#).[8]

Although the court in [McCulloch v. Maryland](#) [5] held that all Federal laws need not be "absolutely necessary" to be necessary and proper and noted "The clause is placed among the powers of Congress, not among the limitations on those powers," it also noted "Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the Government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land." Whether various federal laws are necessary and proper exercises of Constitutional power or violations of Constitutional limits on federal power and whether the

Supreme Court has ruled properly in cases where this question is at issue seems a constant matter of deep controversy.

## References

1. <sup>^</sup> "Constitutional Clauses & Their Nicknames." marian gould gallagher law library. 05 Oct 2004. 4 Dec 2006 <<http://lib.law.washington.edu/ref/consticlauses.html>>.
2. <sup>^</sup> Watkins Jr., William J. (2004). *Reclaiming the American Revolution*.
3. <sup>^</sup> Chernow, Ron (2004). *Alexander Hamilton*.
4. <sup>^</sup> Allgor, Katherine (2006). *A Perfect Union*. McMillan.
5. <sup>^</sup> *a b* "McCulloch v. Maryland 17 U. S. 316 (1819)". Justia. <http://supreme.justia.com/us/17/316/case.html>.
6. <sup>^</sup> "U.S. Constitution: Article 1". FindLaw. <http://caselaw.lp.findlaw.com/data/constitution/article01/44.html>.
7. <sup>^</sup> Gardbaum, Steven (1996). "Rethinking Constitutional Federalism".
8. <sup>^</sup> "US CODE: Title 50,1541. Purpose and policy". Law.cornell.edu. [http://www.law.cornell.edu/uscode/html/uscode50/usc\\_sec\\_50\\_00001541----000-.html](http://www.law.cornell.edu/uscode/html/uscode50/usc_sec_50_00001541----000-.html). Retrieved 2008-09-06.