

Constitutional Authority Statements and the Powers of Congress: An Overview

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The House of Representatives and Senate Explained

Congressional Procedure

A Practical Guide to the Legislative Process in the U.S. Congress

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On January 5, 2011, the House of Representatives adopted an amendment to House Rule XII to require that a Member state the constitutional basis for Congress’s power to enact the proposed legislation when introducing a bill or joint resolution. (The amendment does not pertain to concurrent or simple resolutions.) This Constitutional Authority Statement (CAS) rule, found at House Rule XII, clause 7(c), has been incorporated in the standing rules of each subsequent Congress.

A CAS is fundamentally a congressional interpretation of the Constitution in that House Rule XII requires each Member introducing a piece of legislation to attach a statement that cites the power(s) enabling Congress to enact the legislation. Article I’s Vesting Clause provides Congress only specified or “enumerated” powers, and every law Congress enacts must be based on one or more of its powers enumerated in the Constitution. While the Supreme Court’s 1803 decision in *Marbury v. Madison* firmly cemented the judicial branch’s role in interpreting the Constitution—and the theory of judicial supremacy in constitutional interpretation is now widely accepted—a number of legal scholars and government officials have promoted the view that the political branches of government possess the independent and coordinate authority to interpret the Constitution. In support of this view, some point to (1) the Constitution itself requiring all Members of Congress to be bound by an oath to support the Constitution; (2) the presumption of constitutionality that courts afford legislation enacted by Congress; and (3) the wide range of questions the Constitution requires Congress to resolve.

Under House Rule XII, the submitted CAS appears in the *Congressional Record* and is published on Congress.gov. The House Rules Committee has indicated that Members have significant discretion in determining whether particular CASs comply with the rule. The CAS rule is enforced only insofar as “the House clerk ... acts to verify that each bill has a justification” and “not [in judging] the adequacy of the justification itself.” The most common means of complying with the rule is to cite to a specific clause in Article I, Section 8, such as the Taxing and Spending Clause. The CAS rule has itself been subject to much debate, with proponents arguing that the rule promotes constitutional dialogue in the House, while critics contend that the rule provides minimal benefits and is administratively costly.

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On January 5, 2011, the House of Representatives adopted an amendment to House Rule XII to require that a Member of the House state the constitutional basis for Congress’s power to enact the proposed legislation when introducing a bill or joint resolution.¹ (The amendment does not pertain to concurrent or simple resolutions.)² The Constitutional Authority Statement (CAS) rule, found at House Rule XII, clause 7(c),³ has been incorporated in the standing rules of each subsequent Congress.⁴ The CAS requirement continues to be a topic of congressional debate and inquiry, as Members of the House contemplate how to comply with the rule prior to every submission of a bill or joint resolution.⁵

This report aims to aid in understanding the CAS requirement. It begins by providing a broad overview of (1) Congress’s powers under the Constitution and (2) Congress’s role in interpreting the Constitution. The report then specifically addresses House Rule XII, clause 7(c), discussing its key requirements and limits, the legal effect of a CAS, and the debate over the rule’s value. The report concludes by discussing historical trends with regard to the House’s recent CAS practices and by providing considerations for congressional personnel drafting such statements. The report contains two tables: **Table 1** provides a snapshot of the constitutional provisions most commonly cited during a sample period in the 114th and 115th Congresses, and **Table 2** lists suggested constitutional authorities for various types of legislation.

Scope of Congress’s Powers Under the Constitution

Understanding the purpose and logic of the CAS rule first requires an understanding of both the powers provided to the Congress under the Constitution and Congress’s role in interpreting the Constitution. The Framers of the Constitution feared tyranny as the result of the “accumulation of all powers” of government “in the same hands”⁶ and, thus, “sought to guard against it by dispersing federal power to three interdependent branches of Government.”⁷ Reflecting this fear, the federal Constitution divides the government’s power among the legislative, executive, and judicial branches, with Congress exercising the legislative power, the President exercising the executive power, and the federal courts exercising the judicial power.⁸ “It is a breach of the National fundamental law” if Congress “gives up its legislative power” to one of the other branches or if Congress “attempts to invest itself or its members with either executive power or judicial power.”⁹

¹ See H.R. Res. 5, 112th Cong. (2011) (adopting the rules for the 112th Congress, which included the Constitutional Authority Statement (CAS) requirement).

² *Id.*

³ See RULES OF THE HOUSE OF REPRESENTATIVES XII cl. 7(c)(1), 118th Congress (2023) [hereinafter HOUSE RULE].

⁴ See H.R. Res. 5, 113th Cong. (2013) (adopting the rules for the 113th Congress, which were based on the “constituted rules of the House at the end of the” 112th Congress and did not alter the CAS requirement). At the start of a new Congress, the House typically adopts the constituted rules in effect at the end of the last Congress, with specified modifications. The House has not altered the CAS requirement since its original adoption. See H.R. Res. 5, 114th Cong. (2015); H.R. Res. 5, 115th Cong. (2017); H.R. Res. 6, 116th Cong. (2019); H.R. Res. 8, 117th Cong. (2021); H.R. Res. 5, 118th Cong. (2023).

⁵ See *infra* “House Rule XII, Clause 7(c), and Constitutional Authority Statements.”

⁶ See THE FEDERALIST NO. 47, at 269 (James Madison) (Clinton Rossiter ed., 1999).

⁷ See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 594 (1985) (Brennan, J., concurring).

⁸ *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

⁹ *Id.*

Congress's legislative power is cabined by the terms of the Constitution. Article I, Section 1 of the Constitution vests "all legislative Powers herein granted ... in a Congress of the United States," with the phrase "herein granted" indicating that the Congress's authority to legislate is "confined to those powers expressly identified in the document."¹⁰ As a result, the Supreme Court has interpreted Article I's Vesting Clause as providing Congress only specified or "enumerated powers."¹¹ As the Court noted in *United States v. Morrison*, "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."¹²

Congress's Powers

Congress's specified powers are primarily, but not exclusively, found in Section 8 of Article I of the Constitution. This section contains eighteen clauses, seventeen of which enumerate relatively specific powers granted to the Congress.¹³ Among the powers enumerated in Article I, Section 8, are Congress's powers to:

- impose taxes,¹⁴ and spend the money collected to pay debts and provide for the "common Defence" and "general Welfare;"¹⁵
- regulate commerce;¹⁶
- establish laws respecting naturalization and bankruptcy;¹⁷
- regulate currency;¹⁸
- establish post offices and roads;¹⁹
- promote the "Progress of Science and useful Arts" by giving authors and inventors "exclusive rights" to their writings and discoveries (i.e., copyright and patent protections);²⁰ and
- establish a judicial system.²¹

¹⁰ U.S. CONST. art. 1, § 1; *see* *Zivotofsky v. Kerry*, 576 U.S. 1, 34–35 (2015) (Thomas, J., concurring in part and dissenting in part); *Printz v. United States*, 521 U.S. 898, 919 (1997) (noting that the Constitution conferred upon Congress "not all governmental powers, but only discrete, enumerated ones."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined, and limited....").

¹¹ *Kansas v. Colorado*, 206 U.S. 46, 81 (1907); *see also* *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018) ("The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers.").

¹² 529 U.S. 598, 607 (2000).

¹³ *See* U.S. CONST. art. I, § 8.

¹⁴ *Id.* art. I, § 8, cl. 1. The taxing power of Article I is limited by the requirements that money collected be spent to "pay the Debts and provide for the common Defence and general Welfare of the United States"; and taxes must be "uniform throughout the United States." *Id.* The Sixteenth Amendment to the Constitution further empowers Congress to lay and collect taxes on incomes. *See id.* amend. XVI.

¹⁵ *See id.* art. I, § 8, cl. 1.

¹⁶ *Id.* art. I, § 8, cl. 3.

¹⁷ *Id.* art. I, § 8, cl. 4.

¹⁸ *Id.* art. I, § 8, cls. 5–6.

¹⁹ *Id.* art. I, § 8, cl. 7.

²⁰ *Id.* art. I, § 8, cl. 8.

²¹ *Id.* art. I, § 8, cl. 9.

In addition, six of the clauses in Article I, Section 8, deal exclusively with wartime and military matters and include Congress's power to declare war and provide for an Army and a Navy.²²

Outside of Article I, Section 8, the Constitution contains several other provisions providing Congress with a specified power. For example, Article IV of the Constitution empowers Congress to enact laws regulating the validity of state "public Acts, Records, and judicial Proceedings"²³ and rules respecting the territory and property belonging to the United States.²⁴ Article V authorizes Congress to propose amendments to the Constitution.²⁵ Several constitutional amendments also provide Congress with the power to enact certain legislation. For instance, the Thirteenth, Fourteenth, and Fifteenth Amendments, adopted following the Civil War, empower Congress to "enforce" the amendments' provisions prohibiting slavery,²⁶ preventing the deprivation of certain civil rights,²⁷ and outlawing the denial or abridgment of the right to vote on account of "race, color, or previous condition of servitude."²⁸

The Necessary and Proper Clause

The final clause of Article I, Section 8, the Necessary and Proper Clause, supplements Congress's enumerated powers, providing the legislative branch the power to adopt measures that assist in the achievement of ends contemplated by other provisions in the Constitution.²⁹ Specifically, that clause provides Congress with the 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."³⁰ The Supreme Court has interpreted the scope of Congress's power under the Necessary and Proper Clause as "broad,"³¹ in that the clause leaves to "Congress a large discretion as to the means that may be employed in executing a given power."³² In so holding, the Court has described the clause as providing the broad power to enact laws that are "'convenient, or useful' or 'conducive'" to the exercise of another constitutional authority.³³ For example, the Court has upheld legislation criminalizing perjury and witness tampering as an extension of Congress's power to constitute federal tribunals.³⁴ Similarly, the Court upheld legislation prohibiting the bribery of officials who receive federal funds, as an extension of Congress's power to "appropriate federal moneys to promote the general welfare."³⁵ The Court has also taken the view that other powers, such as the

²² *Id.* art. I, § 8, cls. 11–16 (defining Congress's power to declare war and to raise, support, and regulate the military and militia).

²³ *Id.* art. IV, § 1.

²⁴ *Id.* art. IV, § 3, cl. 2.

²⁵ *Id.* art. V.

²⁶ *Id.* amend. XIII.

²⁷ *Id.* amend. XIV.

²⁸ *Id.* amend. XV.

²⁹ For example, the Court has recognized that Congress, through the Necessary and Proper Clause, has the power to enact legislation to implement U.S. treaty obligations, as such legislation that may be necessary to give effect to the federal government's power to make treaties under Article II, Section 2, clause 2. *See Missouri v. Holland*, 252 U.S. 416 (1920); *Neely v. Hinkel*, 180 U.S. 109 (1901).

³⁰ *See U.S. CONST.* art. I, § 8, cl. 18.

³¹ *United States v. Kebodeaux*, 570 U.S. 387, 394 (2013); *United States v. Comstock*, 560 U.S. 126, 133 (2010).

³² *Lottery Case*, 188 U.S. 321, 355 (1903).

³³ *See Comstock*, 560 U.S. at 134 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819)).

³⁴ *Jinks v. Richland Cnty.*, 538 U.S. 456, 462 (2003).

³⁵ *Sabri v. United States*, 541 U.S. 600, 605 (2004).

power to conduct oversight, are implied from the general vesting of legislative powers in Congress.³⁶

Importantly, however, courts have not construed the Necessary and Proper Clause as an independent source of power for Congress that, standing in isolation, permits Congress to enact legislation. As the Supreme Court has noted, the clause is “not itself a grant of power, but a *caveat* that the Congress possesses all the means necessary to carry out the specifically granted ‘foregoing’ powers of § 8 ‘and all other Powers vested by this Constitution.’”³⁷ Instead, in legislating, Congress “must rely upon its independent (though quite robust) Article I, § 8, powers” or on other powers implicitly or explicitly vested elsewhere in the Constitution to Congress.³⁸ Importantly as well, the Necessary and Proper Clause authorizes Congress not only to take action to assist in the execution of its own powers under the Constitution, but also to provide support for the execution of “all other Powers vested by this Constitution in the Government of the United States.”³⁹ Pursuant to this authority, Congress may enact legislation to assure the proper exercise of powers given to other branches of the federal government.⁴⁰ For example, the Supreme Court has characterized immigration legislation as necessary and proper to carry out the enumerated constitutional powers of the political branches and also as giving effect to the federal government’s “inherent” sovereign power to decide when foreign subjects may enter the country.⁴¹

Limits on Congress’s Powers

While the Constitution affirmatively grants Congress the authority to legislate on certain matters, its powers are not unlimited. The Supreme Court has held that the Constitution imposes limits on Congress’s exercise of its enumerated powers.⁴² For instance, in *United States v. Lopez*, the Supreme Court interpreted the Commerce Clause as empowering Congress to regulate “three

³⁶ See, e.g., *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 435 (1977); *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491 (1975); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957); *McGrain v. Daugherty*, 273 U.S. 135 (1927). See also *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2019) (recognizing that while Congress has “no enumerated constitutional power to conduct investigations or issue subpoenas,” it has the power to “secure needed information in order to legislate,” which is an “essential and appropriate auxiliary to the legislative function”) (internal quotation marks and citations omitted).

³⁷ *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960) (emphasis in original).

³⁸ *Bond v. United States*, 572 U.S. 844, 875 (2014) (Scalia, J., concurring).

³⁹ See U.S. CONST. art. I, § 8, cl. 18.

⁴⁰ See, e.g., *Jinks v. Richland Cnty.*, 538 U.S. 456, 462 (2003) (recognizing judicial tolling provision in federal statute as being necessary and proper for carrying into execution both Congress’s power under Article I to constitute tribunals inferior to the Supreme Court and to assure that federal courts could “fairly and efficiently exercise ‘the judicial Power of the United States’” under Article III); *Neely v. Hinkel*, 180 U.S. 109, 121 (1901) (recognizing congressional authority to enact legislation that is necessary and proper to carry out the stipulations of a treaty made by the President with the advice and consent of the Senate); *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 506 (1871) (“The President is the commander-in-chief of the army and navy, and of the militia of the several States, when called into the service of the United States, and it is made his duty to take care that the laws are faithfully executed. Congress is authorized to make all laws necessary and proper to carry into effect the granted powers.”); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 22 (1825) (recognizing congressional authority to enact measures necessary and proper for carrying into execution federal court judgments).

⁴¹ *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892). See generally Cong. Rsch. Serv., *Overview of Congress’s Immigration Powers*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C18-8-1/ALDE_00001255/ (last visited Feb. 15, 2023).

⁴² See CRS Report R45323, *Federalism-Based Limitations on Congressional Power: An Overview*, coordinated by Kevin J. Hickey.

Pocket Constitution



The Declaration of Independence
The Constitution of the United States
The Bill of Rights
Amendments XI–XXVII
Gettysburg Address



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broad categories of activities”: (1) “channels of interstate commerce,” like roads and canals; (2) “persons or things in interstate commerce,” and (3) activities that substantially affect interstate commerce.⁴³ Having determined those limits to the clause, the Court held that Congress’s power over commerce did not permit it to enact legislation prohibiting the possession of guns near a school (absent a connection to commercial activity) because such legislation does not regulate an economic activity that substantially affects interstate commerce.⁴⁴ Likewise, the Court has interpreted the Fourteenth Amendment’s Enforcement Clause as necessarily requiring a “congruence and proportionality” between the injury to be prevented or remedied by congressional legislation and the means that Congress adopted to that end.⁴⁵ Applying this standard in *City of Boerne v. Flores*, the Court held that Congress exceeded the scope of its enforcement power under the Fourteenth Amendment by enacting the Religious Freedom Restoration Act insofar as that law unduly invaded the sovereign rights of the states.⁴⁶

Beyond the limits on Congress’s enumerated powers, the Constitution also imposes additional constraints on congressional action.⁴⁷ Within the text of the Constitution, Article I, Section 9, lists specific constraints on the power of the federal government. Section 9 prohibits Congress from suspending the writ of habeas corpus in peacetime;⁴⁸ passing bills of attainder or ex post facto laws;⁴⁹ imposing taxes or duties on exports “from any state”;⁵⁰ and granting titles of nobility.⁵¹ Section 9 also provides that Congress can suspend the writ of habeas corpus only in “cases of rebellion or invasion” when “public safety may require” such a suspension.⁵² Similarly, money can be drawn from the Treasury only upon an appropriation made by law.⁵³

Other constitutional constraints prohibit congressional interference with the rights that individuals retain under the Constitution,⁵⁴ including under the first ten amendments, more commonly known as the Bill of Rights. The First Amendment, for example, prohibits Congress from enacting a law

⁴³ 514 U.S. 549, 558 (1995).

⁴⁴ *Id.* at 567–68. Congress subsequently amended the statute to expressly provide that, in order for the possession of a firearm in a school zone to be a federal offense, the government must demonstrate that the firearm “moved in or that otherwise affects interstate or foreign commerce.” 18 U.S.C. § 922(q)(2). This amended version of the statute has been upheld in the face of constitutional challenges. *See, e.g.,* United States v. Dorsey, 418 F.3d 1038, 1046 (9th Cir. 2005), *overruled in part by* Arizona v. Gant 556 U.S. 332, 342 (2009); United States v. Danks, 221 F.3d 1037, 1039 (8th Cir. 1999).

⁴⁵ *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), superseded by statute, Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U.S.C. § 2000cc, *as recognized in* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 695–696 (2014); CRS Report R45323, *supra* note footnote 42.

⁴⁶ *City of Boerne*, 521 U.S. at 520.

⁴⁷ *See* United States v. Comstock, 560 U.S. 126, 135 (2010) (noting that “a federal statute, in addition to being authorized by Art. I, § 8, must also ‘not [be] prohibited’ by the Constitution.”) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)); *see also* *Saenz v. Roe*, 526 U.S. 489, 508 (1999) (“[L]egislative powers are, however, limited not only by the scope of the Framers’ affirmative delegation, but also by the principle ‘that they may not be exercised in a way that violates other specific provisions of the Constitution.’”).

⁴⁸ *See* U.S. CONST. art. I, § 9, cl. 2.

⁴⁹ *Id.* art. I, § 9, cl. 3.

⁵⁰ *Id.* art. I, § 9, cl. 5.

⁵¹ *Id.* art. I, § 9, cl. 8.

⁵² *Id.* art. I, § 9, cl. 3.

⁵³ *Id.* art. I, § 9, cl. 7.

⁵⁴ *See, e.g.,* U.S. CONST. art. III, § 2, cl. 3 (providing for the right to a trial by jury in all criminal cases).

that abridges the freedom of speech.⁵⁵ Congress cannot pass a law that violates that prohibition even if it is plainly legislating pursuant to one of its enumerated powers.⁵⁶

More broadly, Congress's powers are also constrained by principles undergirding the Constitution such as federalism and separation of powers. Federalism constraints are grounded in states' status as separate and distinct sovereign entities⁵⁷ and seek to preserve states' retained prerogatives under the U.S. constitutional system by enforcing certain limits on the federal government's jurisdiction.⁵⁸ For instance, the Supreme Court has identified federalism-based constraints stemming from the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁵⁹ The Tenth Amendment prevents the federal government from "commandeering" or requiring state executive officers or state legislators to carry out federal directives.⁶⁰ Similarly, the Court has held that Congress cannot indirectly commandeer state governments by imposing limits on monetary grants that functionally coerce states, leaving them with no choice but to comply with a federal directive.⁶¹

Similarly, separation of powers constraints are concerned with the proper allocation of authority among the three branches within the federal government.⁶² The Constitution assigns each branch of government distinct, but interrelated, roles, and one branch may not aggrandize its power by attempting to exercise powers assigned to another branch.⁶³ For example, the Appointments Clause of the Constitution gives the President the authority to appoint principal officers of the United States with the Senate's advice and consent.⁶⁴ Thus, when Congress purported to reserve to itself the right to appoint certain members of the Federal Election Commission in 1971, the Supreme Court struck down that law as being in violation of the Appointments Clause.⁶⁵

⁵⁵ See U.S. CONST. amend. I.

⁵⁶ See, e.g., *United States v. Alvarez*, 567 U.S. 709 (2012) (holding that the federal Stolen Valor Act constituted a content-based restriction on free speech in violation of the First Amendment).

⁵⁷ *Shelby Cnty. v. Holder*, 570 U.S. 529, 543 (2013) ("Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives."); *Gamble v. United States*, 139 S. Ct. 1960, 1968 (2019) ("When the original States declared their independence, they claimed the powers inherent in sovereignty The Constitution limited but did not abolish the sovereign powers of the States, which retained 'a residuary and inviolable sovereignty.'" (citing *THE FEDERALIST* NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961))).

⁵⁸ See Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297 (1993). For a primer on the various federalism limits on Congress's powers, see CRS Report R45323, *supra* note footnote 42.

⁵⁹ See U.S. CONST. amend. X.

⁶⁰ *Printz v. United States*, 521 U.S. 898, 935 (1997); see also *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018) (describing commandeering as "the power to issue orders directly to the States").

⁶¹ Compare, e.g., *South Dakota v. Dole*, 483 U.S. 203, 211 (1987), with *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581–582 (2012).

⁶² See *Clinton v. Jones*, 520 U.S. 681, 699 (1997).

⁶³ See *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam) ("The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81. The Court has allowed Congress to confer decisionmaking authority upon executive agencies so long as the legislature "lay[s] down ... an intelligible principle to which the person or body authorized to [act] is directed to conform." *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

⁶⁴ See U.S. CONST. art. II, § 2, cl. 2.

⁶⁵ See *Buckley*, 424 U.S. at 140. See also *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197, 2211 (2020) (by establishing the Consumer Financial Protection Bureau's leadership "by a single individual removable only

Role of Congress in Interpreting the Constitution

Given the powers of Congress and the limits on those powers under the Constitution, the question remains as to which branch of the federal government may interpret the scope of Congress's powers. The question is one that has been debated from the early years of the Republic. In its 1803 decision in *Marbury v. Madison*, the Supreme Court held that the logic of having a written Constitution that enumerates the legal limits imposed on the federal government, coupled with the tenure protections provided to the federal judiciary under the Constitution,⁶⁶ confirmed the Supreme Court's role in interpreting the Constitution.⁶⁷ Pursuant to *Marbury*'s famous command, it is "the province and duty of the judicial department to say what the law is."⁶⁸

Marbury firmly established that the judicial branch has a role in interpreting the Constitution, including the power to strike down laws held to be incompatible with the founding document. It did not, however, expressly state that the judiciary has a *final* or even *exclusive* role in defining the basic powers and limits of the federal government. To the contrary, the early history of the United States is replete with examples of all three branches of the federal government playing a role in constitutional interpretation. Both Congress and the Executive openly questioned the Supreme Court's pronouncements on constitutional law, such as the Court's rulings on the National Bank or slavery.⁶⁹ Thomas Jefferson believed that "each of the three departments has equally the right to decide for itself what is its duty under the Constitution, without any regard to what the others may have decided for themselves under a similar question."⁷⁰ Indeed, Congress spent "a considerable amount of time" "debating the constitutional limitations on" legislation during the first 100 years of the nation.⁷¹

In the mid-twentieth century, however, the Supreme Court began articulating a theory of judicial supremacy wherein the Court no longer shared its role in interpreting the Constitution with the other branches of the federal government and instead characterized itself as the preeminent arbiter of the Constitution's meaning. For example, in *Cooper v. Aaron*, the Court read *Marbury* as "declaring the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and [this] principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."⁷² This view implies that constitutional interpretations by other actors, including Congress, lack the same force as the judiciary's interpretations.⁷³ Supporters of the judicial supremacy view assert that it promotes

for inefficiency, neglect, or malfeasance" Congress violated separation of powers principles because the Constitution grants executive power to the President to "supervise and remove the agents who wield executive power in his stead").

⁶⁶ See, e.g., U.S. CONST. art. III, § 1 (providing that judges shall hold their offices during "Good Behavior" and that their compensation shall not be diminished during their continuance in office).

⁶⁷ See 5 U.S. (1 Cranch) 137, 177–78 (1803).

⁶⁸ See *id.* at 177.

⁶⁹ See generally CRS Report R43706, *The Doctrine of Constitutional Avoidance: A Legal Overview*, by Andrew Nolan, at 4–5 (providing an overview of various debates between the three branches over the meaning of the Constitution).

⁷⁰ Letter from Thomas Jefferson to Judge Spencer Roane Poplar Forest (Sept. 6, 1819), <http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl257.php>.

⁷¹ See Russ Feingold, *The Obligation of Members of Congress to Consider Constitutionality While Deliberating and Voting: The Deficiencies of House Rule XII and A Proposed Rule for the Senate*, 67 VAND. L. REV. 837, 846–49 (2014); see generally DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS* 120 nn.25–27 (1997) (cataloging various constitutional debates during early Congresses).

⁷² 358 U.S. 1, 18 (1958).

⁷³ The Court has, at times, grounded this principle in the concern that if Congress were the "final judge of its own power under the Constitution," such a system would run contrary to notions of a limited and checked government.

stability and uniformity in constitutional interpretation,⁷⁴ as well as preserves constitutional norms from majoritarian pressures.⁷⁵ The Court's decision in *Cooper*, coupled with broader institutional factors that may further constrain Congress's ability to engage in constitutional interpretation, may have led the coordinate branches of government to recede from the role of constitutional interpretation.⁷⁶ As a result, while Congress certainly continues to debate about the Constitution during the legislative process,⁷⁷ in the modern era, the Court's views on the Constitution are generally more influential than those of the other branches of government.

The theory of judicial supremacy is far from a consensus view,⁷⁸ and several aspects of the American constitutional system may counsel for a more robust role for Congress in constitutional interpretation. In recent decades, a number of legal scholars and government officials have criticized the judicial supremacy view.⁷⁹ This view suggests that Congress and others outside of the government possess independent and coordinate authority to interpret the Constitution. Supporters of this view point to the Constitution's requirement that all Members of Congress "be

Baltimore & O. R. Co. v. United States, 298 U.S. 349, 364 (1936).

⁷⁴ See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1369–81 (1997) (defending judicial supremacy because finality in constitutional interpretation provides stability and coordination in a constitutional democracy).

⁷⁵ See Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CALIF. L. REV. 1013, 1018–24 (2004) (arguing for judicial supremacy because of concerns that a majoritarian Congress might interpret the Constitution in such a way as to not adequately protect minority rights).

⁷⁶ See Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57 (1986) ("By the second half of the twentieth century, both the House and the Senate had abandoned the tradition of deliberating over ordinary constitutional issues."); Hanah Metchis Volokh, *Constitutional Authority Statements in Congress*, 65 FLA. L. REV. 173, 185 (2013) (noting that some Members of Congress have "tak[en] the judicial supremacy position," "claiming that the Constitution is the domain of the courts."); See also Feingold, *supra* note 71, at 849–850 (noting the decline of constitutional interpretation by Members of Congress following *Cooper v. Aaron* and the "rise of judicial supremacy"). See also Feingold, *supra* note 71, at 851 (arguing that Members of Congress lack "the time and technical sophistication" to understand the constitutional complexities of each bill, as well as the "political incentive to inquire into the constitutionality of each piece of legislation."); see also Abner Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 587 (1983) (concluding that Congress has neither the institutional nor the political capacity to engage in effective constitutional interpretation); but see Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 708 (1985) (arguing that "Congress can perform an essential, broad, and ongoing role in shaping the meaning of the Constitution.").

⁷⁷ See Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959–2001*, 29 L. & SOC. INQUIRY 127, 148 (2004) (noting that "today's [Members of Congress] ... seek advice on constitutional questions within Congress itself, turning to colleagues, committees, and respected institutions like the [Congressional Research Service].")

⁷⁸ See Volokh, *supra* note 76, at 179 ("Most scholars believe that the Supreme Court is not the sole authorized interpreter of the Constitution.").

⁷⁹ Gary Lawson, *What Lurks Beneath: NSA Surveillance and Executive Power*, 88 B.U. L. REV. 375, 381 n.30 (2008) ("[T]here is no good reason to think that Supreme Court opinions are better evidence of that meaning than are the pronouncements of the Department of Justice, the Congressional Research Service, or Gary Lawson—and there are good reasons to think them worse."); see also Mark V. Tushnet, *The Constitution Outside the Courts: A Preliminary Inquiry*, 26 VAL. U. L. REV. 437, 437–38 (1992) (arguing that "Constitutional law is obsessed with the Supreme Court," and there is a "much richer terrain to explore" with regard to non-Court actors and their interpretations of the Constitution); Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 899 (2005) (describing a "growing body of scholarship" discussing the concept of "popular constitutionalism," the idea that "the People and their elected representatives should—and often do—play a substantial role in the creation, interpretation, evolution, and enforcement of constitutional norms."); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985–86 (1987) ("The Supreme Court, then, is not the only interpreter of the Constitution. Each of the three coordinate branches of government created and empowered by the Constitution—the executive and legislative no less than the judicial—has a duty to interpret the Constitution in the performance of its official functions.").

bound by Oath or Affirmation ... to support [the] Constitution.”⁸⁰ The Supreme Court has accounted for that constitutional duty both explicitly⁸¹ and in affording a presumption of constitutionality to laws passed by Congress.⁸² In addition, if Congress opts not to engage in interpreting the Constitution, a vacuum could arise in constitutional dialogue⁸³ because various judicially crafted doctrines generally serve to keep the courts from making pronouncements on a wide range of constitutional questions.⁸⁴ Indeed, as Justice Anthony Kennedy observed in his concurring opinion in the 2018 case of *Trump v. Hawaii*, because there are “numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention,” it is “imperative” for public officials to “adhere to the Constitution and to its meaning and promise.”⁸⁵

House Rule XII, Clause 7(c), and Constitutional Authority Statements

Originally adopted as an amendment to House Rule XII on January 5, 2011,⁸⁶ the CAS rule prohibits Members from introducing a bill or joint resolution without a “statement citing as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution.”⁸⁷ The current CAS rule functionally replaced a requirement that existed during the 105th through 111th Congresses, mandating that committee reports for bills reported out of committee “include a statement citing the specific powers granted to the Congress in the Constitution to enact the law proposed by the bill or joint resolution.”⁸⁸ A CAS is not part of the text of the legislation; instead, it “accompanie[s]” the legislation.⁸⁹ The CAS must be “submitted at the time the bill or joint resolution” is presented for introduction and referral, that

⁸⁰ See U.S. CONST. art. VI, § 1, cl. 3.

⁸¹ Cf. *Boumediene v. Bush*, 553 U.S. 723, 738 (2008) (“The usual presumption is that Members of Congress, in accord with their oath of office, considered the constitutional issue and determined the amended statute to be a lawful one....”); see also *Trump v. Hawaii*, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring) (remarking that the “oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do”); see generally Volokh, *supra* note 76, at 183–84.

⁸² See *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 184 (1980) (“The enactments of Congress are entitled to a presumption of constitutionality....”); see also Volokh, *supra* note 71, at 182–83.

⁸³ See *Fritz*, 449 U.S. at 181–82.

⁸⁴ See Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1278 (2001) (“Consider the large domain of constitutional decisionmaking over which the Supreme Court has essentially ceded control to the political branches by articulating deferential standards of review, limits on standing and justiciability, and the political-question doctrine. Impeachments and many issues involving electoral processes generally lie within this domain, and other questions do as well.”).

⁸⁵ 138 S. Ct. at 2424 (Kennedy, J., concurring).

⁸⁶ See H.R. Res. 5, 112th Cong. (2011) (adopting the rules for the 112th Congress).

⁸⁷ See HOUSE RULE XII cl. 7(c)(1). The Rule does not extend to concurrent or simple resolutions. *Id.* The House Rules permit the chair of a committee of jurisdiction to submit a CAS with regard to any Senate bill or joint resolution before that committee. See *id.* XXII cl. 7(c)(2).

⁸⁸ See H.R. Res. 5, § 13, 105th Cong. (1997).

⁸⁹ See HOUSE RULE XII cl. 7(c)(1).

is, when the legislation is dropped in the “hopper.”⁹⁰ The submitted CAS appears in the *Congressional Record* and is published electronically on Congress.gov.⁹¹

Compliance with the CAS Rule

While the rule, on its face, requires Members to provide as “specific[] as practicable” “a statement citing ... the power or powers granted to Congress in the Constitution to enact the bill or joint resolution,” it is silent on various details.⁹² For example, the rule does not prescribe any particular format or level of detail for CASs. Shortly after the rule was adopted, the House Committee on Rules (Rules Committee) provided the following five examples of citations to constitutional authority:

1. “The constitutional authority on which this bill rests is the power of Congress to make rules for the government and regulation of the land and naval forces, as enumerated in Article I, Section 8, Clause 14 of the United States Constitution.”
2. “This bill is enacted pursuant to Section 2 of Amendment XV of the United States Constitution.”
3. “This bill is enacted pursuant to the power granted to Congress under Article I, Section 8, Clause 3 of the United States Constitution.”
4. “The Congress enacts this bill pursuant to Clause 1 of Section 8 of Article I of the United States Constitution and Amendment XVI of the United States Constitution.”
5. “This bill makes specific changes to existing law in a manner that returns power to the States and to the people, in accordance with Amendment X of the United States Constitution.”⁹³

This guidance suggests that compliant CASs should generally discuss the affirmative constitutional authority that empowers Congress to enact particular legislation but need *not* discuss other constraints on Congress’s powers to enact the legislation. For example, under this guidance, a CAS for a bill that proposed to ban all interstate shipments of religious pamphlets could be seen as compliant if it cited the Commerce Clause as the source of congressional power, even if it did not address whether the bill was consistent with the Free Exercise and Free Speech Clauses of the First Amendment. Nonetheless, the last example provided by the Rules Committee suggests that a citation to a provision of the Constitution that does not explicitly grant power to the Congress—such as the Tenth Amendment, which preserves the powers of the states⁹⁴—may suffice to comply with the rule.

⁹⁰ See *Constitutional Authority Statement Forms*, U.S. HOUSE OF REPRESENTATIVES, OFF. OF LEGIS. COUNS., https://legcoun.house.gov/members/HOLC/Resources/const_auth_statement.html (last accessed Feb. 22, 2023). House Legislative Counsel has prepared a form to facilitate submission of CASs. See *Constitutional Authority Statement*, U.S. HOUSE OF REPRESENTATIVES, OFF. OF LEGIS. COUNS., <https://legcoun.house.gov/members/HOLC/Resources/casform.pdf> (last visited Feb. 22, 2023).

⁹¹ See HOUSE RULE XII cl. 7(c)(1).

⁹² *Id.*

⁹³ See *New Constitutional Authority Requirement for Introduced Legislation*, COMM. ON RULES, HOUSE OF REPRESENTATIVES (Jan. 5, 2011), <https://web.archive.org/web/20110406150854/http://www.rules.house.gov/about/PolicyDetail.aspx?NewsID=72> [hereinafter COMM. ON RULES- CAS REQUIREMENT].

⁹⁴ See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

More broadly, the Rules Committee guidance indicates that Members have significant discretion in determining what is necessary to satisfy the rule. It is ultimately “the responsibility of the bill sponsor to determine what authorities [he or she] wish[es] to cite and to provide that information to the Legislative Counsel staff.”⁹⁵ According to the Rules Committee, “[t]he adequacy and accuracy of the citation of constitutional authority is a matter for debate in the committees and in the House.”⁹⁶ This suggests that the CAS rule is enforced only insofar as “the House clerk ... acts to verify that each bill has a justification” and “not [in judging] the adequacy of the justification itself.”⁹⁷ In practice,⁹⁸ outside commentators have noted that Members have generally made good-faith efforts to comply with House Rule XII, clause 7(c).⁹⁹ Such observations may be the result of how the rule is enforced.

Studies of CAS Practices

Practices with Regard to Specificity of CASs

Studies of past practices under House Rule XII, clause 7(c), support the view that Members have considerable leeway and discretion in crafting CASs. Professor Hanah Volokh of Emory University conducted a study of CAS practices early in the 112th Congress, aggregating more than 1,700 statements submitted during the first four months of 2011.¹⁰⁰ According to Professor Volokh, a “handful” of these statements “engage[d],” in her opinion, “in a thorough and highly detailed explanation of the constitutional ramifications of the proposed legislation” by discussing the Federalist Papers or Supreme Court doctrine, among other things.¹⁰¹ The remainder, however, were less specific in their identification of Congress’s powers. For example, 8% of the statements reviewed by Professor Volokh generally cited Article I, Section 8—without providing any further specificity as to the particular clauses within that section providing constitutional support for the proposed legislation.¹⁰²

CRS has also studied CAS practices using statements from the 114th and 115th Congresses.¹⁰³ First, in 2017, CRS staff examined the 937 statements submitted between July 1, 2016, and

⁹⁵ See COMM. ON RULES- CAS REQUIREMENT, *supra* note 93.

⁹⁶ See *id.*

⁹⁷ See COMM. ON RULES, HOUSE OF REPRESENTATIVES, TEXT AND SECTION-BY-SECTION ANALYSIS OF THE 112TH CONGRESS HOUSE RULES PACKAGE (2011), <https://rules.house.gov/publication/text-and-section-section-analysis-112th-congress-house-rules-package>. An early dispute in the Subcommittee on Health of the Energy and Commerce Committee over the sufficiency of a CAS was resolved by the Chair of the Subcommittee, acting on advice from the Parliamentarian and the House Rules Committee, in favor of a fairly lenient interpretation of what is required to comply with the CAS rule. See Volokh, *supra* note 76, at 194–96. Specifically, the Chair ruled that a point of order “cannot be used to object that the content of a CAS was incorrect or insufficient.” *Id.* at 196. This ruling prompted one commentator to suggest that “The fact that the CAS document [is] filed with something written on it is enough to fulfill the requirement in the House Rules.” See *id.*

⁹⁸ For additional discussion on the procedural requirements related to the CAS rule, see CRS Report R44001, *Introducing a House Bill or Resolution*, by Mark J. Oleszek.

⁹⁹ See Feingold, *supra* note 71, at 843 (“The early scholarship on these new CASs shows substantial compliance with the new rule....”); see also Volokh, *supra* note 76, at 174 (noting that CASs are “flowing through Congress at the rate of several hundred per month.”). In the CRS studies conducted for this report, see *infra* “Studies of CAS Practices,” of the 2,047 bills and joint resolutions examined, all had a corresponding CAS.

¹⁰⁰ See Volokh, *supra* note 76, at 178.

¹⁰¹ *Id.* at 198.

¹⁰² *Id.* (noting that 142 of 1,709 statements “cite Article I, Section 8 without further specificity”).

¹⁰³ Professor Volokh’s survey of initial practices with regard to the CAS rule may have reflected an initial zealotness

January 1, 2017, consisting of thirteen joint resolutions and 924 bills.¹⁰⁴ In 2019, CRS staff examined 1,110 statements submitted between July 1, 2018, and January 2, 2019, consisting of ten joint resolutions and 1,100 bills.¹⁰⁵ Most commonly, in 58% of cases, the CAS cited to a specific clause in Article I, Section 8, such as the Taxing and Spending Clause or the Commerce Clause.¹⁰⁶ Few of the submissions consisted of more than a bare citation to an affirmative power granted to Congress in the Constitution. For example, four statements examined from 2016 and six from 2018 explicitly discussed Supreme Court case law that purportedly support the bill or joint resolution. Forty-four of the statements from 2016 and thirteen statements from 2018 cited to provisions of the Constitution that constrain rather than empower Congress or one of the other federal branches, such as the restrictions in Article I, Section 9, or the Bill of Rights. It was uncommon for a CAS to go beyond the scope of the rule to detail why the constitutional provision cited empowers Congress to enact the proposed legislation.

In line with the study from the 112th Congress, CRS found that numerous statements submitted during the sample periods in the 114th and 115th Congresses contained general, rather than specific, references to the Constitution. As **Table 1** below indicates, the most frequent constitutional authority cited for legislation during the sample period was a general reference to Article I, Section 8, of the Constitution.¹⁰⁷ This occurred in 32% of all CASs during the sample period, a marked increase from the Volokh study of the 112th Congress.¹⁰⁸ Similarly, the seventh most frequently cited constitutional provisions during the sample period was even broader: a general reference to Article I of the Constitution.¹⁰⁹

Table 1. Most Frequently Cited Constitutional Sources in CASs in Legislation Introduced During the 114th and 115th Congresses

Based on a Review of 2,047 Bills and Joint Resolutions Introduced from July 1, 2016, to January 1, 2017, and from July 1, 2018, to January 2, 2019

| | Number of Times Cited |
|--|-----------------------|
| General reference to Article I, Section 8 | 654 |
| Article I, Section 8, clause 18 (Necessary and Proper Clause) | 500 |
| Article I, Section 8, clause 1 (Taxing and Spending Clause) | 416 |
| Article I, Section 8, clause 3 (Commerce Clause) | 372 |
| Article IV, Section 3, clause 2 (Property Clause) | 85 |

by Members in complying with the rule. See Volokh, *supra* note 76, at 178. CRS's survey, in part, may provide insight into whether compliance with the rule decreased over time or whether compliance improved "as Representatives and their staff bec[a]me more familiar with constitutional analysis." See *id.*

¹⁰⁴ Of the 937 CASs examined from the 114th Congress, 611, or 65%, cited a specific provision within the Constitution, as opposed to a general section or article of the Constitution. See **Table 1**.

¹⁰⁵ Of the 1,110 CASs examined from the 115th Congress, 693, or 62%, cited a specific provision within the Constitution, as opposed to a general section or article of the Constitution. See **Table 1**.

¹⁰⁶ Of the 937 examined CASs from the 114th Congress, 542, or 58%, cited to a specific clause in Article I, Section 8. See **Table 1**. Of the 1,110 examined CASs from the 115th Congress, 649, or 58%, cited to a specific clause in Article I, Section 8.

¹⁰⁷ See **Table 1**.

¹⁰⁸ Of the 937 CASs examined from the 114th Congress, 284 had a general reference to Article I, Section 8. Of the 1,110 CASs examined from the 115th Congress, 370 had a general reference to Article I, Section 8.

¹⁰⁹ See **Table 1**.

| | Number of Times Cited |
|---|-----------------------|
| Article I, Section 8, clause 4 (Naturalization Clause) | 44 |
| General reference to Article I | 43 |
| Article I, Section 9, clause 7 (Appropriations Clause) | 36 |
| Article I, Section 8, clause 7 (Postal Clause) | 34 |
| Article I, Section 8, clause 14 (Military Regulation Clause) | 32 |

Source: Congressional Research Service, based on a search of Congress.gov for bills and joint resolutions introduced in the House from July 1, 2016, to January 1, 2017, and from July 1, 2018, to January 2, 2019.

Notes: A single CAS may cite multiple sources of constitutional authority.

In 342 cases, the Necessary and Proper Clause was the sole authority source cited.

Practices with Regard to Particular Clauses Cited in CASs

The content of CASs with regard to particular clauses has, at times, spurred criticism from a wide range of commentators.¹¹⁰ One notable issue is that in some cases, Members appear to rely on particular clauses in a way that suggests their interpretation diverges from historical understandings or judicial interpretations of that clause.

Necessary and Proper Clause

One of the most frequently cited clauses in CASs during the sample periods was the Necessary and Proper Clause, which allows Congress to “make all Laws which shall be necessary and proper for carrying into Execution” the powers enumerated in Article I and “all other Powers vested by [the] Constitution in the Government of the United States, or in any Department or Officer thereof.”¹¹¹ About a quarter of all CASs in the CRS studies contained a citation to that clause, with 14% of the 2016 CASs and 19% of the 2018 CASs citing the Necessary and Proper Clause as the sole power to enact the underlying legislation.¹¹² The Framers and the Supreme Court, however, have not generally characterized that clause as a source of power for Congress to do whatever is “necessary and proper” but only as an authorization of congressional action that is “‘incidental to [an enumerated] power, and conducive to its beneficial exercise.’”¹¹³

¹¹⁰ See, e.g., HORACE COOPER & NATHANIEL STEWART, CONSTITUTIONAL AUTHORITY STATEMENTS: IN DEFENSE OF HOUSE RULE XII (2012), <http://www.constitutingamerica.org/docs/WhitePaper.pdf> (“Members on both sides of the aisle have made a number of common, substantive mistakes in drafting their Constitutional Authority Statements.”); Ilya Shapiro, *Whither Constitutional Authority Statements?*, CATO AT LIBERTY (Oct. 18, 2011), <https://www.cato.org/blog/whither-constitutional-authority-statements> (describing the CASs surveyed by the Republican Study Committee as “[p]retty thin gruel”).

¹¹¹ See U.S. CONST. art. I, § 8, cl. 18.

¹¹² See Table 1.

¹¹³ *United States v. Kebodeaux*, 570 U.S. 387, 401–3 (2013) (Roberts, C.J., concurring) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420–21 (1819)); see *Kansas v. Colorado*, 206 U.S. 46, 88 (1907) (“The last paragraph of the section which authorizes Congress 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 office thereof, is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned.”); *McCulloch*, 17 U.S. (4 Wheat.) at 420–21 (noting that the Necessary and Proper Clause is not a “great substantive and independent power” like the “power of making war, or levying of taxes, or of regulating commerce”). See also THE FEDERALIST No. 33, at 171 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (“[T]he sweeping clause ... authorizes the national legislature to pass all necessary and proper laws. If there is anything exceptionable, it must be sought for in the specific powers upon which this general

General Welfare Clause

Another frequently cited provision, the “General Welfare Clause,” is a specific phrase within Article I, Section 8, clause 1, that empowers Congress to levy certain taxes and spend the money collected from taxation. Specifically, the first clause of Section 8 of Article I affords Congress the power to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and *general Welfare of the United States*.”¹¹⁴ This clause, which is sometimes referred to as the “Taxing and Spending Clause,”¹¹⁵ was the third most frequently cited clause by CASs in CRS’s study.¹¹⁶ Not infrequently, however, Members also referred to this clause in their statements as the “General Welfare Clause” and cited it for legislation unrelated to the spending of money by the federal government. Importantly, the phrase *general Welfare* does not exist in isolation in the clause but is instead tied to the preceding language in the clause regarding the raising of revenue.¹¹⁷ The clause thus requires Congress to spend the money it collects from taxation to promote the general welfare.¹¹⁸ While this power is considerable,¹¹⁹ it is necessarily tied to spending legislation.¹²⁰

Military Regulation Clause

The constitutional provision affording Congress with the power to “make rules for the Government and Regulation of the land and naval forces”¹²¹ is another frequently cited clause in CASs from the sample periods.¹²² Some of the bills citing that provision do not purport to regulate only the United States’ armed forces but instead prescribe broad regulations for the government as a whole. Such references to the Military Regulation Clause appear to stem from reading the first phrase of the clause—“make rules for the Government”—in isolation from the

declaration is predicated. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless.”); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960) (“The [Necessary and Proper Clause] is not itself a grant of power, but a *caveat* that the Congress possesses all the means necessary to carry out the specifically granted ‘foregoing’ powers of § 8 ‘and all other Powers vested by this Constitution....’”) (emphasis in original).

¹¹⁴ See U.S. CONST. art. I, § 8, cl. 1 (emphasis added).

¹¹⁵ See, e.g., *Flast v. Cohen*, 392 U.S. 83, 102 (1968).

¹¹⁶ See **Table 1**.

¹¹⁷ See *United States v. Butler*, 297 U.S. 1, 64 (1936) (“The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted.”); see also 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 904 (Leonard W. Levy ed., 1970) (stating that if the “generality of the words to ‘provide for the ... general welfare’” constituted a “distinct and substantial power” in the Constitution, “it is obvious” that the government of the United States would be transformed into one of “general and unlimited powers....”); THE FEDERALIST NO. 41, at 230 (James Madison) (Clinton Rossiter ed., 1999) (rejecting the view that the Taxing and Spending Clause “amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare.”).

¹¹⁸ See *United States v. Butler*, 297 U.S. 1, 64 (1936) (holding that “the only thing granted [by the Taxing and Spending Clause] is the power to tax for the purpose of providing funds for payment of the nation’s debts and making provision for the general welfare.”).

¹¹⁹ See *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 213 (2013) (“The Clause provides Congress broad discretion to tax and spend for the ‘general welfare’....”); see also *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937) (holding that the “discretion” to decide how to “spend money in aid of the ‘general welfare’” “belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.”).

¹²⁰ See *Butler*, 297 U.S. at 64.

¹²¹ See U.S. CONST. art. I, § 8, cl. 14.

¹²² See **Table 1** (ranking the Military Regulation Clause as the tenth most frequently cited clause during the respective study periods).

rest of the clause, as an independent power. However, that understanding is inconsistent with traditional interpretations of the clause, which view it as solely related to Congress's power over the military.¹²³ This interpretation also runs contrary to traditional rules of legal interpretation that counsel for reading phrases in a legal text in their context and not in isolation from the rest of the text.¹²⁴ More broadly, interpreting the Military Regulation Clause to allow Congress to direct the actions of the federal government generally in whatever manner Congress wishes would allow the clause to be read as an open-ended police power, something otherwise rejected by the Framers of the Constitution.¹²⁵

Appropriations Clause

A number of CASs from the sample periods cite provisions in Article I, Section 9, including several that cite the Appropriations Clause as the authority for Congress to provide money for a particular project.¹²⁶ The Appropriations Clause states, in relevant part, that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”¹²⁷ Like other provisions found in Section 9 of Article I, this clause has generally not been interpreted to grant Congress any affirmative power.¹²⁸ Instead, the Appropriations Clause has been seen to function as a *restriction* on the powers of the federal government, ensuring that when the federal government spends money, “the payment of money from the Treasury must be authorized by a

¹²³ Traditionally, the Military Regulation Clause is viewed as a “natural incident” to Article I’s preceding powers to make war, raise armies, and provide for and maintain a navy. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1192 (Leonard W. Levy ed., 1970). In practice, the Military Regulation Clause has been viewed by the Supreme Court to allow Congress to regulate matters like the discipline of servicemembers. *See, e.g.,* *United States v. Kebodeaux*, 570 U.S. 387, 395 (2013) (“[U]nder the authority granted to it by the Military Regulation and Necessary and Proper Clauses, Congress could promulgate the Uniform Code of Military Justice.”); *Carter v. Roberts*, 177 U.S. 496, 497–98 (1900) (“The eighth section of Art. I of the Constitution provides that the Congress shall have power ‘to make rules for the government and regulation of the land and naval forces’ and in the exercise of that power Congress has enacted rules for the regulation of the army known as the Articles of War.”) *See also* Dakota S. Rudesill, *The Land and Naval Forces Clause*, 86 U. CIN. L. REV. 391, 441 (2018).

¹²⁴ *See* *Deal v. United States*, 508 U.S. 129, 132 (1993) (noting a “fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.”), *superseded by statute*, First Step Act of 2018, PUB. L. NO. 115-391, § 403(a), 132 Stat. 5221, *as recognized in* *United States v. Davis*, 139 S. Ct. 2319, 2324 n.1 (2019).

¹²⁵ *See* *United States v. Morrison*, 529 U.S. 598, 619 n.8 (2000) (“With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate.”).

¹²⁶ *See* **Table 1** (ranking the Appropriations Clause as the eighth most frequently cited clause during the respective study periods).

¹²⁷ *See* U.S. CONST. art. I, § 9, cl. 8.

¹²⁸ *See* *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1851) (“It is a well-known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress.”); *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) (“The provision of the Constitution ... that ‘No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law’ was intended as a restriction upon the disbursing authority of the Executive department ... It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.”); *see generally* Robert G. Natelson, *Federal Land Retention and the Constitution’s Property Clause: The Original Understanding*, 76 U. COLO. L. REV. 327, 363 (2005) (noting that the Appropriation Clause does “not actually authorize appropriations” and instead appropriations are “authorized by other parts of the document.”); *Panel Discussion, The Appropriations Power and the Necessary and Proper Clause*, 68 WASH. U. L.Q. 623, 651 (1990) (remarks of then-Assistant Attorney General William Barr) (“The appropriations clause is not an independent ‘power’ of Congress. It is not a power clause.... The appropriations clause is simply a procedural provision—a requirement that Congress pass a law before it can take money out of the treasury.”).

statute.”¹²⁹ As discussed above, Congress’s power to spend money derives from the Taxing and Spending Clause.¹³⁰

Bill of Rights

While not among the most frequent citations in CASs, occasionally one of the first ten amendments to the Constitution—the Bill of Rights—has been cited in support of Congress’s power to enact legislation. These amendments do not themselves empower Congress to take any action; they instead consist of “negative rights” protecting individuals from certain government conduct.¹³¹ The Bill of Rights often *prohibits* congressional action.¹³² Congress may certainly have an interest in legislation intended to support the individual liberties protected by the Constitution, but the constitutional authority for such legislation may more appropriately be found in an affirmative power of Congress, such as the powers provided in Article I, Section 8, of the Constitution. Likewise, the Fourteenth Amendment allows Congress to “enact so-called prophylactic legislation” aimed at “prevent[ing] and deter[ing] unconstitutional conduct.”¹³³ Nonetheless, the House Rules Committee has suggested that a citation to a provision of the Constitution that does not explicitly grant power to Congress may suffice to comply with the CAS rule.¹³⁴ For example, a Member seeking to rescind or narrow the scope of an existing law could arguably believe it appropriate to identify constitutional principles found in the Bill of Rights or elsewhere that the Member believes are advanced by the proposed legislation.¹³⁵

Legal Implications of a CAS

CASs have limited legal import in that the CAS of a bill enacted into law will likely not alter a court’s view of the constitutionality of the legislation. At bottom, a CAS is a statement by one Member of Congress (i.e., the sponsor) when a piece of legislation is introduced. It is not formally part of a bill or joint resolution, and it is not subject to the approval of both houses of Congress, or presented to the President, as required by Article I, Section 7.¹³⁶ Instead, a CAS is a

¹²⁹ *OPM v. Richmond*, 496 U.S. 414, 424 (1990).

¹³⁰ See *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937) (holding that the Taxing and Spending Clause provides Congress with the “discretion” to decide how to “spend money in aid of the ‘general welfare’”); see *supra* “General Welfare Clause.”

¹³¹ See *Daniel v. Cook Cnty.*, 833 F.3d 728, 733 (7th Cir. 2016) (“The individual rights in our Bill of Rights have long been understood as negative rights, meaning that the Constitution protects individuals from some forms of government intrusions upon their liberty, without imposing affirmative duties on governments to care for their citizens.”); see generally *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1989).

¹³² See, e.g., U.S. CONST. amend. I (“*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”) (emphasis added).

¹³³ See *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 727–28 (2003); *Allen v. Cooper*, 140 S. Ct. 994, 1004 (2020).

¹³⁴ See COMM. ON RULES- CAS REQUIREMENT, *supra* note 93 (providing, as an example of a CAS, “This bill makes specific changes to existing law in a manner that returns power to the States and to the people, in accordance with Amendment X of the United States Constitution.”).

¹³⁵ See *id.*

¹³⁶ *Zedner v. United States*, 547 U.S. 489, 509–10 (2006) (Scalia, J., concurring in part and concurring in the judgment) (“[T]he only language that constitutes ‘a Law’ within the meaning of the Bicameralism and Presentment Clause of Article I, § 7, and hence the only language adopted in a fashion that entitles it to our attention, is the text of the enacted statute.”); see also *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005) (“As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material.”), *superseded by statute*, Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

type of legislative history material that describes the initial thoughts of an individual Member as to Congress's power to enact the bill.¹³⁷ In this sense, one might view a CAS as akin to a statement in the *Congressional Record* or a statement issued by the sponsor of a bill, which courts have regarded as “weak” forms of legislative history when considering Congress's intent in passing a law.¹³⁸

In practice, in the few court cases that cite to a law's CAS, the underlying statement is mentioned merely in passing and had no apparent effect on the decision, as courts have independently evaluated the constitutionality of the legislation in question notwithstanding the existence of the CAS.¹³⁹ This practice is in keeping with broader principles of judicial supremacy discussed above.¹⁴⁰ A court that would conclude that a law is unconstitutional will not disregard that conclusion merely because Congress believes the provision to be within its powers.¹⁴¹

Debate over the Rule

The seeming ease of compliance with House Rule XII, clause 7(c),¹⁴² and the tendency of some statements to cite to general¹⁴³ or arguably inapplicable provisions of the Constitution,¹⁴⁴ may lead some to wonder, “why have this Rule at all?”¹⁴⁵ Critics have argued for its repeal, contending that the rule is symbolic and has little impact on congressional debate or dialogue about Congress's authority under the Constitution.¹⁴⁶ In addition, some have asserted that Congress

¹³⁷ See Volokh, *supra* note 76, at 204 (“As currently structured, CASs are a form of legislative history, and a very weak form at that.”); see also COMM. ON RULES- CAS REQUIREMENT, *supra* note 93 (“To the extent that a court looks at the legislative history of an Act, the Constitutional Authority Statement would be part of that history.”).

¹³⁸ Landgraf v. USI Film Prods., 511 U.S. 244, 262 n.15 (1994) (“[A] court would be well advised to take with a large grain of salt floor debate and statements placed in the Congressional Record which purport to create an interpretation for the legislation that is before us.”) (quoting 137 CONG. REC. S15325 (daily ed. Oct. 29, 1991) (statement of Sen. Danforth)); see generally Zachary M. Ista, *No Vacancy: Why Congress Can Regulate Senate Vacancy-Filling Elections Without Amending (or Offending) the Constitution*, 61 AM. U. L. REV. 327, 360 (2011) (describing statements made by a bill's supporters during floor debate as one of the “least persuasive” forms of legislative history).

¹³⁹ See, e.g., *United States v. Bollinger*, 798 F.3d 201, 207 (4th Cir. 2015) (independently evaluating the constitutionality of a law after noting that the CAS for the law cited the Commerce Clause); *United States v. Clark*, 435 F.3d 1100, 1104 (9th Cir. 2006) (same).

¹⁴⁰ See *supra* “Role of Congress in Interpreting the Constitution.”

¹⁴¹ See *City of Rome v. United States*, 446 U.S. 156, 207 (1980) (Rehnquist, J., dissenting) (“While the presumption of constitutionality is due to any act of a coordinate branch of the Federal Government or of one of the States, it is this Court which is ultimately responsible for deciding challenges to the exercise of power by those entities.”), *superseded by statute*, Voting Rights Amendments of 1982, § 2(b), 96 Stat. 131 (codified at 42 U.S.C. § 1973b(a)(1)), as recognized in *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 209–210 (2009).

¹⁴² See *supra* “Compliance with the CAS Rule.”

¹⁴³ See *supra* “Practices with Regard to Specificity of CASs.”

¹⁴⁴ See *supra* “Practices with Regard to Particular Clauses Cited in CASs.”

¹⁴⁵ See COMM. ON RULES- CAS REQUIREMENT, *supra* note 93 (“Q. So why have this Rule at all? A. Just as a cost estimate from the Congressional Budget Office informs the debate on a proposed bill, a statement outlining the power under the Constitution that Congress has to enact a proposed bill will inform and provide the basis for debate. It also demonstrates to the American people that we in Congress understand that we have an obligation under our founding document to stay within the role established therein for the legislative branch.”).

¹⁴⁶ See Feingold, *supra* note 71, at 842 (“[C]ritics have suggest that this new House rule is symbolic at best and meaningless at worst....”); see also Volokh, *supra* note 76, at 176 (“CASs are so unobjectionable that the main argument against them is that they are useless.”); Norman Ornstein, as quoted in Abby Brownback & Louis Jacobson, *Lawmakers Abiding by New Constitutional Justification Rule*, ST. PETERSBURG TIMES (Mar. 18, 2011), <http://www.politifact.com/truth-o-meter/promises/gop-pledge-o-meter/promise/665/require-bills-to-include-a-clause-citingits-auth/> (“Frankly, this is just symbolic, so I have no real feelings one way or the other.”).

By Bradford Fitch

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To Influencing Elected Officials

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lacks the institutional capacity to interpret the Constitution,¹⁴⁷ and the rule has prompted few meaningful debates in Congress over the scope of Congress's powers.¹⁴⁸ Others contend that the administrative costs of complying with the rule outweigh any benefits from the CAS requirement.¹⁴⁹

Others characterize the rule as an extension of the broader debate over Congress's role in interpreting the Constitution, providing a limited means by which Members of Congress may expressly engage in constitutional interpretation.¹⁵⁰ As one commentator notes, "[f]undamentally, a [CAS] is a congressional interpretation of the Constitution,"¹⁵¹ and supporters of the rule see several benefits to having the House of Representatives engage in this limited form of constitutional interpretation. In their view, statements submitted under House Rule XII are a "simple and straightforward self-monitoring mechanism" to ensure that Congress does not "usurp" powers not granted to it in the Constitution.¹⁵² In this sense, proponents believe the CAS rule serves to remind Members of the limits on Congress's institutional power.¹⁵³

Additionally, supporters of the CAS rule argue that it enhances constitutional dialogue outside of the judiciary and promotes constitutional literacy within Congress by formally requiring Members to engage in even limited constitutional interpretation when introducing legislation.¹⁵⁴

¹⁴⁷ See Feingold, *supra* note 71, at 851 (arguing that Members of Congress lack "the time and technical sophistication" to understand the constitutional complexities of each bill, as well as the "political incentive to inquire into the constitutionality of each piece of legislation."); see also Abner Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 587 (1983) (concluding that Congress has neither the institutional nor the political capacity to engage in effective constitutional interpretation); but see Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 708 (1985) (arguing that "Congress can perform an essential, broad, and ongoing role in shaping the meaning of the Constitution.").

¹⁴⁸ See Stephen Dinan, *Congress Has a Constitution Problem—Many Don't Understand Document*, WASH. TIMES (Jan. 14, 2013), <http://www.washingtontimes.com/news/2013/jan/14/defenders-of-constitution-dont-always-use-it-for-l/> ("Many lawmakers ignored the rule, while others sliced and diced the clauses to justify what they were trying to do. One thumbed his nose at the exercise altogether, saying it's up to the courts, not Congress, to determine what is constitutional. Most striking of all is how little the statements mattered in the debates on the bills. They were mentioned just a handful of times on the floor, and didn't foster the constitutional conversation that Republican lawmakers said they wanted to spark.").

¹⁴⁹ See Pete Kasperowicz, *Democrat: Citing Constitution Will Cost Taxpayers \$570K*, THE HILL (Jan. 10, 2011), <http://thehill.com/blogs/floor-action/house/136995-democrat-citing-constitutional-authority-in-bills-will-cost-you> (quoting one opponent of the rule who argued that the "requirement that lawmakers cite the Constitution in each bill they introduce will cost \$570,000 in additional printing costs."); see also Feingold, *supra* note 71, at 844 (arguing that requiring a CAS at the introduction of a bill that may not advance in the legislative process is "unnecessary and bureaucratic.").

¹⁵⁰ See Feingold, *supra* note 71, at 842–43 (arguing that the CAS rule has "generated some interesting discourse in the House on specific pieces of legislation.").

¹⁵¹ See Volokh, *supra* note 76, at 178.

¹⁵² *Id.* at 176.

¹⁵³ See COOPER & STEWART, *supra* note 110, at 3 ("Rule XII reminds Congress—even if subtly—that the Constitution has meaning and should be respected ... it reinforces the principle that Congress has limited, enumerated powers derived from a specific, foundational source.").

¹⁵⁴ See Marc Spindelman, *House Rule XII: Congress and the Constitution*, 72 OHIO ST. L.J. 1317, 1340 (2011) ("Through engagement with the Constitution and constitutional deliberations of the sort that the new House Rule calls for, members of the House may come to share, whatever their political affiliation, a political desire for full fluency and literacy in constitutional deliberation and debate. Following and flowering from that desire could well come a desire to change ... the wider political culture, which has for so long left the Constitution so firmly and finally in the hands of the courts."); see also COOPER & STEWART, *supra* note 110, at 3 ("[T]he Rule allows Congress to engage the other federal branches in a conversation about the meaning of the laws and the Constitution itself."); Spindelman, *supra*, at 1339 (arguing that the rule promotes Congress as "not only a co-equal branch of the federal government, but a co-equal

Proponents of the rule have further contended that the rule could enhance the institutional credibility and reputation of Congress by making clear to constituents that Members “take seriously the constitutionality of their actions.”¹⁵⁵ According to one former Member,

Congress’s reputational problems partially relate to a belief that Congress is not really debating or deliberating in good faith but is simply retreating to partisan battle lines. This concern has been exacerbated by Congress abdicating and leaving to the courts its historical responsibility to consider constitutionality on its own. In this respect, the House Rule ... is a foot in the door. Under the House Rule, all members of the House are required, essentially for the first time, to take at least one aspect of their obligation to consider constitutionality more seriously.¹⁵⁶

CAS Rule Reform Proposals

Even among proponents of the rule, informal suggestions have been made to improve the constitutional dialogue surrounding CASs. The primary proposals include enhancing the content of the statements, better enforcement of the CAS rules, and changing other CAS procedures.

Enhancing the Content of CASs

Prompted by criticisms about how “thin many of [the CASs] are,”¹⁵⁷ some have suggested that the House rules be altered to require more formal and robust debate over the constitutionality of proposed legislation. One proposal called for time to be set aside for formal debate on the House floor about the constitutionality of legislation upon the motion of a single Member.¹⁵⁸ Other proposals focus on requiring more expansive statements that discuss the relationship between the cited provision of the Constitution and the bill itself.¹⁵⁹ In addition, others have advocated that the CAS rule formally require that the statement discuss “[w]ith some depth” any “precedent germane to the authority to enact the” legislation.¹⁶⁰ Finally, several commentators have proposed altering the rule so that Members must not only cite to the Constitution’s *affirmative* grants of authority to Congress, but also discuss any potential *limitations* the Constitution may impose on Congress’s power to legislate.¹⁶¹

interpreter of the federal Constitution.”).

¹⁵⁵ See Feingold, *supra* note 71, at 872.

¹⁵⁶ *Id.*

¹⁵⁷ See Neil Siefring, *Three Commitments Conservatives Should Get from a New Speaker*, PJ MEDIA (Oct. 2, 2015), <https://pjmedia.com/blog/what-conservatives-should-ask-from-a-new-speaker/>.

¹⁵⁸ *Id.* Currently, Members may send a written request to the chair of the Rules Committee for debate on the constitutionality of the proposed measure. If at least twenty-five Members sign the request, the chair will schedule up to twenty minutes of floor debate, evenly divided between a member specified in the letter and the majority bill manager. See Oleszek, *supra* note 98, at 4–5.

¹⁵⁹ See COOPER & STEWART, *supra* note 110, at 21 (“Second, to increase transparency and accessibility, the Rule should require that each Statement be accompanied by a short description of the bill’s purpose.”).

¹⁶⁰ See Feingold, *supra* note 71, at 870.

¹⁶¹ See *id.* at 845 (“By merely requiring a statement describing the *source* of Congress’s constitutional authority but not a *limit* to that authority, the House Rule addresses at best only half of the constitutional equation.”); see also Volokh, *supra* note 76, at 216 (“The current CAS rule focuses Congress’s attention only on its grants of authority, not on other clauses of the Constitution that set limits on the exercise of its powers. For a full debate of constitutionality, Congress must consider both.”).

Better Enforcement of the CAS Rule

Given the large number of statements that lack specificity or cite seemingly inapplicable clauses of the Constitution, supporters of the rule have argued that Members must be held accountable for ensuring that submitted CASs comply with both the letter and spirit of the requirement.¹⁶² One early version of the current CAS rule proposed in the 111th Congress would have deemed general citations to the “common defense clause, the general welfare clause, or the necessary and proper clause” insufficient to satisfy House Rule XII, clause 7(c).¹⁶³ In addition, this proposal would have allowed a Member to initiate a point of order challenging the adequacy of a CAS, thereby subjecting the measure to a short debate that would resolve whether the submitted statement complied with House Rule XII.¹⁶⁴ Others have urged that the Clerk of the House or a designee be empowered to “evaluate the content” of a submitted statement formally and “add a note indicating that the Statement submitted does not properly satisfy the Rule’s specificity requirement.”¹⁶⁵ Under this proposal, any bill with such a notation could be “subject to a special privileged motion by a Member to recommit the bill for failure to follow the Rule.”¹⁶⁶

Changing Other CAS Procedures

Currently, the CAS focuses on a single moment: the initial introduction of a bill or joint resolution. Viewing this focus as a shortcoming, several proponents of the CAS rule have argued that the rule should apply during all stages of the legislative process, including during committee deliberations, so that the constitutionality of a bill or resolution is subject to broader consideration.¹⁶⁷ Relatedly, because the CAS rule applies only at the beginning of the legislative process, the only Member who must formally assess Congress’s authority to enact the legislation in question is the Member who introduces the legislation.¹⁶⁸ In order to ensure that Members, who must ordinarily decide how to vote on *another* Member’s bill, consider the constitutional implications of the legislation in question, some have suggested that the House Rule “explicitly acknowledge” the independent “obligation” of Members to be “mindful of any constitutional objections” regarding the bill that is the subject of a vote.¹⁶⁹ At least one commentator has considered (but ultimately does not recommend) a change to the House Rule that would make the CAS part of the text of a bill, as opposed to a statement attached to the bill.¹⁷⁰ Such an approach could, at least in theory, formalize and elevate the role of the CAS because when a bill that

¹⁶² See Volokh, *supra* note 76, at 199 (“Some critics might say that citing these very general, open-ended clauses defeats the purpose of the rule.”).

¹⁶³ See H.R. Res. 1754, 111th Cong. (2010).

¹⁶⁴ *Id.*

¹⁶⁵ See COOPER & STEWART, *supra* note 110, at 20.

¹⁶⁶ *Id.* at 21.

¹⁶⁷ *Id.* (“Rule XII should ensure that at each step in the legislative labyrinth, from submission to the floor, the bill and its Authority Statement are attached thereto and immediately available to Members for their consideration and debate.”); see also Feingold, *supra* note 71, at 864–65 (noting that one “area[] that need[s] expansion and improvement” with regard to the CAS rule is that the rule “requires a CAS only at the time the bill is introduced” and has “no rules regarding proposed amendments that may be attached to any legislation.”); Volokh, *supra* note 76, at 215 (“CASs should be required *both* at introduction *and* in the committee report.”) (emphasis in original).

¹⁶⁸ See Feingold, *supra* note 71, at 865.

¹⁶⁹ *Id.*; see also Volokh, *supra* note 76, at 218 (“Changes could be made to the rule that would turn CASs into statements of the entire House of Representatives or the entire Congress.”).

¹⁷⁰ See Volokh, *supra* note 76, at 220. Notably, Professor Volokh concludes that the “costs of putting CASs in statutory text,” such as the risks of the statement being watered down, “are substantial, and probably outweigh the benefits.” *Id.* at 226.

contains a CAS in its text is put to a vote, multiple Members could potentially voice their agreement or disagreement with the bill's language assessing Congress's power to enact the underlying legislation.¹⁷¹

Each of the proposed modifications to the CAS rule could raise new concerns, however. For example, if House Rule XII were modified to require more robust discussions of the constitutionality of a given piece of legislation throughout the legislative process, such a modification could amplify the criticisms that the CAS rule requires considerable resources to ensure compliance.¹⁷² Moreover, if the rule were modified to require that CASs include additional content, without any changes to its current enforcement regime, the additional requirements could, in the view of at least one commentator, be ignored.¹⁷³

Potential Considerations for Drafting CASs

To aid drafters of CASs, **Table 2** provides a list of suggested citations that could potentially be submitted in a CAS pursuant to House Rule XII, clause 7(c), for various types of commonly introduced legislation. In addition, a CAS might cite the Necessary and Proper Clause along with one or more enumerated powers below as constitutional support for the proposed legislation.¹⁷⁴

¹⁷¹ See *id.* at 220. Nonetheless, even if placing a CAS in the legislative text would satisfy the Presentment Clause of the Constitution, it is unclear what effect the statement would have with regard to constitutional interpretation by the courts. See *supra* note 141 and accompanying text.

¹⁷² See *supra* "Compliance with the CAS Rule," "Practices with Regard to Specificity of CASs," "Practices with Regard to Particular Clauses Cited in CASs," notes 145–149 and accompanying text.

¹⁷³ See Feingold, *supra* note 71, at 871 (noting, but ultimately rejecting, the argument that "members of the Congress may still not take seriously their obligations to consider constitutionality"). Ultimately, Senator Feingold suggests that "members [would] take [their] obligations seriously" even if there were no enforcement mechanism for a more robust CAS rule. *Id.* at 872 ("Nevertheless, anecdotal evidence suggests that, at least in the case of similar rules governing the behavior of senators, many members take such obligations seriously.").

¹⁷⁴ See *supra* "The Necessary and Proper Clause."

Useful Links

Congress by the Numbers

CongressByTheNumbers.com

Leadership of Congress

CongressLeaders.com

Congressional Schedule

CongressSchedules.com

Congress Seating Charts

CongressSeating.com

Terms and Sessions of Congress

TermsofCongress.com

Senate Classes: Terms of Service

SenateClasses.com

Congressional Glossary

CongressionalGlossary.com

You have 2 cows

YouHave2Cows.com

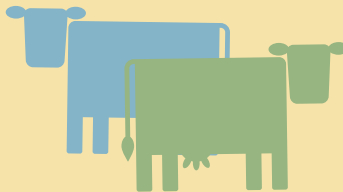


Table 2. Suggested CAS Citations for Commonly Introduced Legislation

| Subject Matter of Legislation | Suggested Citation |
|--|--|
| Appropriations (i.e., legislation that sets aside a sum of money for a specific purpose) | <p>Article I, Section 8, clause 1, provides Congress with the power to “lay and collect Taxes, Duties, Imposts and Excises” in order to “provide for the ... general Welfare of the United States.”</p> <p>Note that Article I, Section 9, clause 7, <i>prohibits</i> money from being drawn from the Treasury absent an appropriation made by law.</p> |
| Appropriations Related to the Military | <p>Article I, Section 8, clause 1, provides Congress with the power to “lay and collect Taxes, Duties, Imposts and Excises” in order to “provide for the common Defence ... of the United States.”</p> <p>Article I, Section 8, clause 12, provides Congress with the power to raise and support armies.</p> <p>Article I, Section 8, clause 13, provides Congress with the power to “provide and maintain” a navy.</p> |
| Appropriations that Place Conditions on an Expenditure (e.g., a grant to the states) | <p>Article I, Section 8, clause 1, provides Congress with the power to “lay and collect Taxes, Duties, Imposts and Excises” in order to “provide for the ... general Welfare of the United States.”</p> <p>Article I, Section 8, clause 18, allows Congress to make all laws “which shall be necessary and proper for carrying into execution” any of Congress’s enumerated powers.</p> <p>According to the Supreme Court, that authority includes the ability for Congress to “attach conditions on the receipt of federal funds.” See <i>South Dakota v. Dole</i>, 483 U.S. 203, 207 (1987).</p> |
| Awards—Military Awards (e.g., Congressional Medal of Honor) | <p>Article I, Section 8, clause 14, provides Congress with the power to make rules for the government and regulation of the land and naval forces.</p> |
| Awards—Non-Military Awards (e.g., Congressional Gold Medal) | <p>Article I, Section 8, clause 5, empowers Congress to coin money. The U.S. Treasury through the United States Mint has historically exercised its power over coinage to strike national medals.</p> |

| Subject Matter of Legislation | Suggested Citation |
|---|---|
| Civil Rights Legislation | <p>A variety of constitutional provisions have been utilized with regard to civil rights legislation, depending on the nature of the legislation, including the following:</p> <p>Article I, Section 8, clause 3, provides Congress with the power to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” The Supreme Court has held that the “power of Congress to promote interstate commerce also includes the power to regulate ... local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce,” including local discriminatory activities that have a “disruptive effect ... on commercial intercourse.” See <i>Heart of Atlanta Motel v. United States</i>, 379 U.S. 241, 257–58 (1964).</p> <p>Thirteenth Amendment, Section 2, provides Congress the power “to enforce” the substantive guarantees of the Amendment, which prohibits slavery and involuntary servitude, by enacting “appropriate legislation.” The Supreme Court has recognized that the Thirteenth Amendment provides Congress with the authority to pass laws for abolishing all “badges or incidents” of slavery or servitude. See <i>Jones v. Alfred H. Mayer Co.</i>, 392 U.S. 409, 437–44 (1968).</p> <p>Fourteenth Amendment, Section 5, provides Congress the power “to enforce” the substantive guarantees of the amendment, including the Due Process and Equal Protection Clauses, by enacting “appropriate legislation.” The Supreme Court has recognized that, under Section 5, Congress may proscribe unconstitutional conduct by states by enacting legislation that remedies and deters violations of rights guaranteed under the Fourteenth Amendment. See <i>Nev. Dep’t of Human Res. v. Hibbs</i>, 538 U.S. 721, 728 (2003).</p> <p>Fifteenth Amendment, Section 2, provides Congress the power to enforce the substantive guarantees of the amendment, namely, that the right to vote shall not be denied or abridged on account of race or color, by enacting “appropriate legislation.” The Supreme Court has recognized that “Congress has full remedial powers [under the Fifteenth Amendment] to effectuate the constitutional prohibition against racial discrimination in voting.” See <i>South Carolina v. Katzenbach</i>, 383 U.S. 301, 326 (1966).</p> |
| Constitutional Amendment | <p>Article V authorizes Congress, whenever two-thirds of both houses “deem it necessary,” to propose amendments to the Constitution.</p> |
| Courts—Regulation of the Jurisdiction of Federal Courts | <p>Article I, Section 8, clause 9, provides Congress with the power to constitute “Tribunals inferior to the Supreme Court.”</p> <p>Article III, Section 2, allows Congress to make “Exceptions” to the Supreme Court’s appellate jurisdiction.</p> |
| Courts—Procedures, Practices, and Rules of Federal Courts | <p>Article III, Section 1, vests the judicial power of the United States in the Supreme Court and any inferior courts Congress establishes.</p> <p>Article I, Section 8, clause 18, allows Congress to make all laws “which shall be necessary and proper for carrying into execution” any “other” powers vested by the Constitution in the Government of the United States.</p> <p>According to the Supreme Court, the Necessary and Proper Clause gives Congress the “power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce” (<i>Wayman v. Southard</i>, 23 U.S. (10 Wheat.) 1, 22 (1825)), and, thereby, Congress has “undoubted power to regulate the practice and procedure of federal courts.” See <i>Sibbach v. Wilson & Co.</i>, 312 U.S. 1, 9 (1941).</p> |

| Subject Matter of Legislation | Suggested Citation |
|--|---|
| Economic Regulations (e.g., regulations regarding a particular business; regulations pertaining to labor standards) | <p>Article I, Section 8, clause 3, provides Congress with the power to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”</p> <p>According to the Supreme Court, the Commerce Clause authorizes Congress to regulate the use of the channels of interstate commerce; the instrumentalities of interstate commerce, or persons or things in interstate commerce; and those activities having a substantial relation to or affecting interstate commerce. See <i>United States v. Lopez</i>, 514 U.S. 549, 558–59 (1995).</p> |
| Election Regulations | <p>Article I, Section 4, clause 1, allows states to prescribe the “Time, Places and Manner of holding Elections for Senators and Representatives,” but allows Congress “at any time” to “make or alter such regulations.”</p> |
| Federal Land Regulation (e.g., selling federal lands; creating rules for national parks) | <p>Article IV, Section 3, clause 2, provides Congress with the power to “dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States.”</p> <p>The Supreme Court has described this power to be “without limitations,” holding that “Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy.” See <i>United States v. San Francisco</i>, 310 U.S. 16, 29 (1940).</p> |
| Immigration—Naturalization (i.e., granting of citizenship to a foreign-born person) | <p>Article I, Section 8, clause 4, provides Congress with the power to establish a “uniform Rule of Naturalization.”</p> <p>The Supreme Court has recognized that the power to establish a uniform rule of naturalization can, in part, be more broadly viewed to provide Congress power “over the subject of immigration and the status of aliens.” See <i>Arizona v. United States</i>, 567 U.S. 387, 394 (2012).</p> |
| Immigration—Outside of Naturalization (e.g., granting of temporary visas to nonimmigrants, regulating the entry and deportation of aliens) | <p>According to the Supreme Court, the formulation of immigration policy is “entrusted exclusively to Congress.” See <i>Galvan v. Press</i>, 347 U.S. 522, 531 (1954); see also <i>Fiallo v. Bell</i>, 430 U.S. 787, 792 (1977) (“This Court has repeatedly emphasized that ‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.”). Notwithstanding such language, the Constitution does not directly address the sources of federal power to regulate which non-U.S. nationals (aliens) may enter and remain in the United States or to establish the conditions of their continued presence within the country. The Supreme Court has often described Congress’s power over immigration as flowing, at least in part, from the federal government’s “inherent power as sovereign.” <i>Arizona</i>, 567 U.S. at 396. In addition, several of the enumerated powers in the Constitution, have been construed as authorizing immigration legislation, including the following:</p> <p>Article I, Section 8, clause 3, provides Congress with the power to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” The Supreme Court has held that Congress’s power to regulate foreign commerce includes the power to regulate the entry of persons into the country. See <i>Henderson v. Mayor of New York</i>, 92 U.S. 259, 270–71 (1876).</p> <p>Article I, Section 8, clauses 11–16, which collectively provide Congress with various authorities related to foreign affairs, have been cited as providing support for congressional regulation of immigration. See <i>Toll v. Moreno</i>, 458 U.S. 1, 10 (1982).</p> |
| Internal Rules of the House | <p>Article I, Section 5, clause 2, provides that each house of Congress “may determine the Rules of its Proceedings.”</p> |

| Subject Matter of Legislation | Suggested Citation |
|--|---|
| Intellectual Property—Patents and Copyright | Article I, Section 8, clause 8 , provides Congress with the power to promote the “Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” |
| Military Rules and Regulations (e.g., amending the Uniform Code of Military Justice) | Article I, Section 8, clause 14 , provides Congress with the power to make rules for the government and regulation of the land and naval forces. |
| Post Offices (e.g., naming post offices; creating honorary stamps) | Article I, Section 8, clause 7 , provides Congress with the power to establish post offices and post roads. |
| Taxes, Duties, Imposts, and Excises | Article I, Section 8, clause 1 , provides Congress with the power to “lay and collect Taxes, Duties, Imposts and Excises.” |
| Taxes (Income) | Sixteenth Amendment provides Congress with the power to “lay and collect taxes on incomes.” |

Source: Congressional Research Service.

The Library of Congress, through the Congressional Research Service, regularly publishes and updates *The Constitution of the United States of America: Analysis and Interpretation* (popularly known as the Constitution Annotated or CONAN). CONAN contains an in-depth, accessible, and objective record of how each provision in the Constitution has been interpreted by the Supreme Court and other entities.¹⁷⁵ More information about any of the provisions in **Table 2**, including its history of interpretation by the Supreme Court, is available in CONAN.

Given the broader trends with regard to CAS practices discussed above,¹⁷⁶ it may also be helpful to consider the following questions before submitting a CAS:

Does the CAS cite to a specific clause of the Constitution? While some CASs cite to an entire article or section of the Constitution, such as “Article 1” or “Article I, Section 8,” the prevailing customary practice has been to cite to a *specific* clause of the Constitution, such as the Commerce Clause found in Article I, Section 8, clause 3. To the extent a Member wishes to cite to a specific clause in a CAS, **Table 2** may be a helpful resource to consult. A CAS may include more than one of these sources of constitutional authority for a bill, either because the bill as a whole is supported by more than one constitutional provision or because different parts of the bill require Congress to exercise different authorities.

Does the CAS cite to a clause that affirmatively empowers Congress to take an action? Article I, Section 9, of the Constitution (which contains limitations on the powers of the federal government) and the first ten constitutional amendments (also known as the Bill of Rights) are commonly understood as *restrictions* on the powers of the federal government rather than affirmative grants of power. These provisions might help explain a bill’s purpose (for example, supporting the freedom of speech) but alone are unlikely to establish Congress’s authority to enact legislation. In contrast, Article I, Section 8, contains the majority of commonly cited clauses that provide Congress the affirmative power to legislate with respect to various subjects.

Does the CAS cite to a clause that relates to and authorizes the underlying legislation? A Member may wish to cite to a constitutional provision that, based on either historical

¹⁷⁵ See Cong. Rsch. Serv., CONSTITUTION ANNOTATED, <https://www.congress.gov/constitution-annotated/> (last visited Feb. 22, 2023).

¹⁷⁶ See *supra* “House Rule XII, Clause 7(c), and Constitutional Authority Statements.”

understandings or judicial interpretations, has some relationship with the subject matter of the legislation. Citations to constitutional provisions such as the General Welfare Clause and the Military Regulation Clause, for example, may not provide the necessary authority to support all the provisions of a multifaceted bill. Attorneys in CRS’s American Law Division can provide advice with regard to specific CAS citations for proposed legislation.

Does the CAS cite only to the Necessary and Proper Clause? To the extent that a Member wishes to cite exclusively to the Necessary and Proper Clause (Article I, Section 8, clause 18), it may be helpful to remember that courts have understood the Necessary and Proper Clause to supplement Congress’s enumerated powers under the Constitution but have not construed the clause as an independent source of power. Importantly, the Necessary and Proper Clause authorizes Congress not only to take action to assist in the execution of its legislative powers but also to provide support for the execution of “all other Powers vested by this Constitution in the Government of the United States,” including to assist the executive and judicial branches in carrying out their constitutional functions. As noted above, the Necessary and Proper Clause might be identified in a CAS in combination with an enumerated power identified in **Table 2** as support for a piece of legislation.

Conclusion

A House Rule XII, clause 7(c), statement regarding the constitutionality of legislation is required only when a Member of the House *introduces* legislation. The CAS, by design, is just the starting point for constitutional dialogue respecting a bill or joint resolution. Nothing in the rule prohibits further discussions about the constitutional issues that a piece of legislation may implicate. While the customary practice with regard to CASs, to date, has been to provide a short citation to the provision in the Constitution that affirmatively grants Congress the authority to enact the underlying legislation,¹⁷⁷ it is not unprecedented for Members to cite sources beyond the text of the Constitution, such as Supreme Court case law, primary source materials on the Constitution, or a constitutional law treatise.¹⁷⁸ Other CASs have gone beyond citing to the affirmative powers that the Constitution provides Congress and have discussed potential restraints the Constitution imposes that may prohibit the enactment of the underlying legislation.¹⁷⁹

Outside of a CAS, Members can request a formal floor debate respecting the constitutionality of pending legislation,¹⁸⁰ and constitutional debate and dialogue can occur in a host of other contexts, including voting to enact legislation, committee hearings, committee reports, and more “informal practices, norms, and traditions.”¹⁸¹ Also, Members of Congress have a variety of resources available to help inform their participation in constitutional debate, including “expert witnesses at hearings, their legally trained staff, [and] constitutional experts at the [CRS].”¹⁸² In

¹⁷⁷ See *supra* note 104.

¹⁷⁸ See COOPER & STEWART, *supra* note 110, at 9–10 (providing examples of more detailed CASs); see also Volokh, *supra* note 76, at 198 (noting that a “handful of CASs engage in a thorough and highly detailed explanation of the constitutional ramifications of the proposed legislation,” such as including “several paragraphs of discussion about the Federalist Papers and Supreme Court doctrine as well as three particular clauses of the Constitution.”).

¹⁷⁹ See COOPER AND STEWART, *supra* note 110, at 11 (noting an example of a CAS that discussed why the underlying legislation was “consistent with” various constitutional provisions).

¹⁸⁰ See *supra* note 158.

¹⁸¹ See Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 738–39 (2008) (chronicling the various contexts in which Congress interprets the Constitution).

¹⁸² See Volokh, *supra* note 76, at 189; see generally Fisher, *supra* note 147, at 729–30 (discussing Congress’s various “sources of legal assistance” to aid in constitutional interpretation).

particular, CRS’s American Law Division regularly provides legal advice to Members and their staff on constitutional questions regarding pending legislation, whether by providing suggestions for a CAS or by formally rendering an opinion on the constitutionality of pending legislation.¹⁸³ Using these resources, Members and their staff have the capability to meaningfully participate in ongoing debates over the interpretation of the Constitution, beginning with the CAS.

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¹⁸³ See Fisher, *supra* note 147, at 730 (“Committee staff can analyze constitutional questions and call on the American Law Division of the Library of Congress....”).

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