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Constitutional Authority Statements and the Powers of Congress: An Overview

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Summary

On January 5, 2011, the House of Representatives adopted an amendment to House Rule XII to require that Members of the House state the constitutional basis for Congress's power to enact the proposed legislation when introducing a bill or joint resolution. This Constitutional Authority Statement (CAS) rule, found at House Rule XII, clause 7(c), was subsequently adopted in the 113th, 114th, and 115th Congresses.

Understanding 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 founding document. Article I's Vesting Clause creates a Congress of specified or "enumerated" powers, and every law Congress enacts must be based on one or more of its powers enumerated in the Constitution. The Constitution creates two central types of limitations on Congress's powers: (1) internal limits and (2) external limits. Internal limits are the restrictions inherent in the constitutional grants of power themselves, such as the limits on the scope of Congress's powers under the Commerce Clause. External limits, on the other hand, are the constraints contained in affirmative prohibitions found elsewhere in the text or structure of the document, such as the First Amendment's prohibition on Congress abridging the freedom of speech. While the Court's 1803 decision in *Marbury v. Madison* firmly cemented the judicial branch's role in interpreting the Constitution by recognizing the power of the Court to strike down legislation as unconstitutional, the early history of the nation is replete with examples of all three government branches playing a substantial role in constitutional interpretation. By the mid-20th century, however, the Supreme Court began articulating a theory of judicial supremacy that became widely accepted, wherein the federal judiciary is the final and exclusive arbiter of the Constitution's meaning. Nonetheless, in recent decades, a number of legal scholars and government officials have criticized this theory, instead promoting 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.

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 which cites the power(s) that allows Congress to enact the legislation. 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.

This report provides an overview of Congress's powers under the Constitution and Congress's role in interpreting the nation's founding document. The report then examines House Rule XII, clause 7(c), discussing the results of a recent study conducted by CRS of CASs that were submitted during the last six months of the 114th Congress. The report concludes by discussing trends with regard to the House's recent CAS practices and by providing considerations for congressional personnel drafting CASs. The report contains two tables: one that identifies the most commonly cited provisions in recent CASs, and a second that lists suggested constitutional bases for various types of legislation.

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Introduction

On January 5, 2011, the House of Representatives adopted an amendment to House Rule XII to require that Members 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 Constitutional Authority Statement (CAS) rule, found at House Rule XII, clause 7(c),[2] was subsequently adopted in the 113th, 114th, and 115th Congresses.[3] As the CAS rule begins its seventh year, the 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.[4]

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 this document. 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 trends with regard to the House's recent CAS practices and by providing considerations for congressional personnel drafting CASs. The report contains two tables: **Table 1** identifies the constitutional provisions most commonly cited in CASs during the last six months of the 114th Congress, 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"[5] and, thus, "sought to guard against it by dispersing federal power to three interdependent branches of Government."[6] Reflecting this fear, the federal Constitution divides the government's power among the legislative, executive, and judicial branches, with the Congress exercising the legislative power, the President exercising the executive power, and the federal courts exercising the judicial power.[7] "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."[8]

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

[2] *See* HOUSE RULE XII cl. 7(c)(1).

[3] *See* H.R. Res. 5, 113th Cong. (1st Sess. 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); H.R. Res. 5, 114th Cong. (1st Sess. 2015) (adopting the rules for the 114th Congress, which were based on the "constituted rules of the House at the end of the" 113th Congress and did not alter the CAS requirement); H.R. Res. 5, 115th Cong. (1st Sess. 2017) (adopting the rules for the 115th Congress, which were based on the "constituted rules of the House at the end of the" 114th Congress and did not alter the CAS requirement).

[4] *See infra* "House Rule XII, Clause 7(c), and Constitutional Authority Statements."

[5] *See* THE FEDERALIST NO. 47, at 269 (James Madison) (Clinton Rossiter ed., 1999).

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

[7] J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928).

[8] *Id.*

While only Congress may exercise the legislative power,[9] this power, like those belonging to the other branches of the federal government, 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 creating a Congress of 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 18 clauses, 17 of which enumerate relatively specific powers granted to the Congress.[13] Among the powers enumerated 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]

[9] While Congress may not delegate its legislative powers to another branch, *see Field v. Clark,* 143 U.S. 649, 692 (1892), the Supreme Court has recognized that Congress can "obtain[] the assistance of its coordinate Branches" to help refine its general directives set forth in legislation. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) (noting that "our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."). To avoid an unlawful delegation of legislative authority, the Supreme Court has stated that "when Congress confers decisionmaking authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting *J. W. Hampton, Jr.,* 276 U.S. at 409). In the history of the Supreme Court, the Court has "found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Id.* at 474 (citing A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)); *see generally* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315 (2000) ("It is often said that the nondelegation doctrine is dead.").

[10] *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2098 (2015) (Thomas, J., concurring in part and dissenting in part); Printz v. United States, 521 U.S. 898, 919 (1997) ("[T]he Constitution[] confer[ed] upon Congress of not all governmental powers, but only discrete, enumerated ones."); Marbury v. Madison, 5 U.S. (Cranch) 137, 176 (1803) ("The powers of the legislature are defined, and limited.... ").

[11] Kansas v. Colorado, 206 U.S. 46, 81 (1907).

[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." 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.

- 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]

In addition, six of the clauses in Article I, Section 8, defining the substantive legislative jurisdiction of Congress, deal exclusively with wartime and military matters and include Congress's power to declare war and provide for an Army and 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] And Article V authorizes Congress to propose amendments to the Constitution.[25] Outside of the original constitutional text, many of the amendments to the Constitution explicitly restrict the power of Congress.[26] Several of the Constitution's amendments, however, 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,[27] preventing the deprivations of certain civil rights,[28] and outlawing the denial or abridgement of the right to vote on account of "race, color, or previous condition of servitude."[29]

The final clause of Article I, Section 8, the Necessary and Proper Clause,[30] 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.[31] 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

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[19] *Id.* art. I, §8, cl. 7.

[20] *Id.* art. I, §8, cl. 8.

[21] *Id.* art. I, §8, cl. 9.

[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] *See, e.g., id.* 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.").

[27] *Id.* amend. XIII.

[28] *Id.* amend. XIV.

[29] *Id.* amend. XV.

[30] The Necessary and Proper Clause is also referred to as the "Elastic Clause" or the "Sweeping Clause." *See* Devotion Garner & Cheryl Nyberg, *Popular Names of Constitutional Provisions*, UNIV. OF WASH. GALLAGHER LAW LIBRARY (September 30, 2013), http:// lib.law.washington.edu/ref/consticlauses.html.

[31] 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 may be necessary to give effect to the federal government's power to make treaties, which is found in Article II, Section 2, clause 2. *See* Missouri v. Holland, 252 U.S. 416 (1920); Neely v. Hinkel, 180 U.S. 109 (1901).

vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[32] The Supreme Court has interpreted the scope of Congress's power under the Necessary and Proper Clause as "broad,"[33] in that the clause leaves to "Congress a large discretion as to the means that may be employed in executing a given power."[34] 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" a more specific authority's "beneficial exercise."[35] Consistent with this view, the Court has upheld legislation criminalizing perjury and witness tampering as an extension of Congress's power to constitute federal tribunals.[36] 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."[37] More broadly, the Court has taken the view that other powers, such as the power to conduct oversight, are implied from the general vesting of legislative powers in Congress.[38]

Importantly, however, the Necessary and Proper Clause is *not* an independent source of power for Congress that, standing in isolation, permits it to exercise the legislative power. 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....'"[39] Instead, in legislating, Congress "must rely upon its independent (though quite robust) Article I, § 8, powers" or in other powers implicitly or explicitly vested elsewhere in the Constitution to Congress.[40] Importantly as well, the Necessary and Proper Clause authorizes Congress to not only 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."[41] Pursuant to this authority, Congress may permissibly enact legislation to assure the proper exercise of powers given to other branches of the federal government.[42]

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[32] *See* U.S. CONST. art. I, §8, cl. 18.

[33] United States v. Kebodeaux, 133 S. Ct. 2496, 2503 (2013); United States v. Comstock, 560 U.S. 126, 133 (2010).

[34] *Lottery Case*, 188 U.S. 321, 355 (1903).

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

[36] Jinks v. Richland Cty., 538 U.S. 456, 462 (2003).

[37] Sabri v. United States, 541 U.S. 600, 605 (2004).

[38] *See, e.g.*, Nixon v. Adm'r of Gen. Servs., 433 U.S. 435 (1977); Eastland v. United States 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).

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

[40] Bond v. United States, 134 S. Ct. 2077, 2099 (2014) (Scalia, J., concurring).

[41] *See* U.S. CONST. art. I, §8, cl. 18.

[42] *See, e.g.*, Jinks v. Richland Cty., 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. 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. 1, 22 (1835) (recognizing congressional authority to enact measures necessary and proper for carrying into execution federal court judgments).

Limits on Congress's Powers

The Constitution imposes two central types of limitations on the powers of Congress. First, the concept of enumerated powers creates what is often referred to as an "internal limit" on Congress's powers—that is, Congress's powers are restricted by and to the terms of their express grant.[43] For instance, in *United States v. Lopez*, the Supreme Court interpreted the Commerce Clause as empowering Congress to regulate "three 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.[44] Having determined those limits to the clause, the Court held that Congress's power over commerce does 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.[45] 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.[46] 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 (RFRA) insofar as that law unduly invaded the sovereign rights of the states.[47] Adopted to protect the constitutional right to the free exercise of religion, RFRA, in relevant part, invalidated any state law that imposed a "substantial burden" on a religious practice without sufficient justification and narrow tailoring.[48] Describing RFRA's operative standard as imposing a "stringent test" that amounted to a "considerable intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens," the Court concluded that there was "a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved" by RFRA.[49]

Second, beyond the internal limits on Congress's powers, the Constitution also imposes "external" constraints on congressional action, or affirmative prohibitions found elsewhere in the text or structure of the document.[50] 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

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[43] *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 794-95 (3d ed. 2000) (distinguishing internal and external limitations on the federal legislative power).

[44] 514 U.S. 549, 558 (1995).

[45] *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); United States v. Danks, 221 F.3d 1037, 1039 (8th Cir.1999).

[46] City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

[47] *Id.*

[48] *Id.* at 533.

[49] *Id.* While the Supreme Court struck down RFRA's application to the states in *City of Boerne,* RFRA has been held to still apply to the actions of the federal government. *See* United States v. Israel, 317 F.3d 768, 770 (7th Cir. 2003).

[50] *See* United States v. Comstock, 560 U.S. 126, 135 (2010) (noting that a "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. (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.").

in peacetime;[51] passing bills of attainder or ex post facto laws;[52] imposing taxes or duties on exports "from any state";[53] and granting titles of nobility.[54] 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.[55] Similarly, money can be drawn from the Treasury only upon an appropriation made by law.[56]

More broadly, Congress's powers are constrained by three principles undergirding the Constitution: federalism, separation of powers, and individual rights. Federalism constraints are grounded in states' status as separate and distinct sovereign entities[57] 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—the provision of the Bill of Rights that reads, "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."[59] More specifically, the Court has interpreted the Tenth Amendment to prevent 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 go so far as to functionally coerce states, leaving them with no choice but to comply with a federal directive.[61]

Second, 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

[51] *See* U.S. CONST. art. I, §9, cl. 2.

[52] *Id.* art. I, §9, cl. 3.

[53] *Id.* art. I, §9, cl. 5.

[54] *Id.* art. I, §9, cl. 8.

[55] *Id.* art. I, §9, cl. 3.

[56] *Id.* art. I, §9, cl. 7.

[57] Shelby Cty. v. Holder, 133 S. Ct. 2612, 2623 (2013) ("Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives.").

[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).

[59] *See* U.S. CONST. amend. X.

[60] Printz v. United States, 521 U.S. 898, 935 (1997).

[61] South Dakota v. Dole, 483 U.S. 203, 211 (1987). In *South Dakota v. Dole*, the Supreme Court upheld legislation requiring states to raise their legal drinking age or lose 5% of federal highway funds, viewing the condition as amounting to "relatively mild encouragement to the States to enact higher minimum drinking ages.... " *See id.* In contrast, in *National Federal of Independent Businesses (NFIB) v. Sebelius*, the Court invalidated provisions of the Patient Protection and Affordable Care Act of 2010 that required states to expand their Medicaid programs or risk losing their current Medicaid funding, describing the Medicaid expansion as "accomplish[ing] a shift in kind, not merely degree." *See* 132 S. Ct. 2566, 2605 (2012) (opinion of Roberts, C.J.); *see also id.* at 2667-68 ("Seven Members of the Court agree that the Medicaid Expansion, as enacted by Congress, is unconstitutional.") (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). For the controlling plurality opinion in *NFIB*, the threatened loss of funds in *Dole* preserved the states' voluntary choices, while the threat of losing "over 10 percent of a State's overall budget … is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion." *Id.* at 2605 (opinion of Roberts, C.J.).

[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

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]

Finally, constraints based on individual rights serve to prohibit congressional interference with the rights that individuals retain under the Constitution[66] and, in particular, under the first 10 amendments to the Constitution, the Bill of Rights.[67] The First Amendment, for example, prohibits Congress from enacting a law that abridges the freedom of speech.[68] The Supreme Court has interpreted the First Amendment to mean that speech restrictions promulgated as a result of the *content* of the speech are presumptively unconstitutional.[69] In keeping with this presumption, in *United States v. Alvarez*, the Court struck down a law that made it a crime to falsely claim that one had received military medals or decorations on the grounds that the law risked "significant First Amendment harm" by broadly empowering prosecutions of speech based on its content, without any notable limitations.[70]

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 very beginnings of the country. 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,[71] confirmed the Supreme Court's role in interpreting the Constitution and invalidating acts of other branches of government that contravene this document.[72] Pursuant to *Marbury's* famous command, it is "the province and duty of the judicial department to say what the law is."[73]

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aggrandizement of one branch at the expense of the other."). The Court has allowed Congress to confer decisionmaking authority upon executive agencies so long as the legislature lays "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). For further discussion on the intelligible principle test, see *supra* note 9.

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

[65] *See Buckley*, 424 U.S. at 140.

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

[67] *See* Lawson & Granger, *supra* note 58, at 297; *see* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed or disparage others retained by the people.").

[68] *See* U.S. CONST. amend. I.

[69] *See* Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 660 (2004).

[70] *See* 132 S. Ct. 2537, 2555 (2012).

[71] The key sources of the judiciary's insulation from the political process are the Good Behavior Clause and the Compensation Clause of Article III. *See, e.g.,* U.S. CONST. art. III, §1. The Good Behavior Clause, by creating a "permanent tenure of judicial offices," ensures an "independent spirit in judges," *see* THE FEDERALIST NO. 78, at 437 (Alexander Hamilton) (Clinton Rossiter ed., 1999). Likewise, the Compensation Clause, by creating a "fixed provision for [the judiciary's] support," prevents the political branches from having power over a judge's subsistence and, with that, "power over his will." *See* THE FEDERALIST NO. 79, at 440 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

[72] *See* 5 U.S. (1 Cranch) 137, 177-78 (1803); *see generally* Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2707 (2003) (criticizing the widely held belief that judicial review was established by *Marbury* and instead pointing out that *Marbury* merely applied well-established principles respecting the Court's powers).

[73] *See* 5 U.S. (1 Cranch) at 177.

While *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, with Congress and the Executive openly questioning the Supreme Court's pronouncements on constitutional law, such as the Court's rulings on the National Bank or slavery.[74] As these examples show, *Marbury* was not seen to interfere with the ability of either Congress or the President to interpret the Constitution. Rather, *Marbury* only asserted the judiciary's power to act as the ultimate expositor of the Constitution in the limited context of cases that were properly before the Court.[75] Instead, Thomas Jefferson's view 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,"[76] appears to have prevailed in Congress during the early days of the United States. This is evidenced by the fact that Members of Congress spent "a considerable amount of time" "debating the constitutional limitations on" legislation during the first 100 years of the nation.[77]

In the mid-20th 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, but rather characterized its role as being 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."[78] In other words, the *Cooper* Court concluded that the "interpretation[s] of the [Constitution] enunciated by this Court ... [are] the supreme law of the land,"[79] with constitutional interpretations by other actors, including Congress, necessarily lacking the same force.[80] Supporters of the judicial supremacy view assert that it promotes stability and uniformity in constitutional interpretation,[81] as well as preserves constitutional norms from majoritarian pressures.[82] The Court's decision in *Cooper*,

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[74] *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).

[75] *See, e.g.*, Edward Corwin, Marbury v. Madison *and the Doctrine of Judicial Review*, 12 MICH. L. REV. 538, 571 (1914).

[76] Letter from Thomas Jefferson to Judge Spencer Roane Poplar Forest (September 6, 1819), *available at* http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl257.php.

[77] *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).

[78] 58 U.S. 1, 16-17 (1958).

[79] *Id.* at 18.

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

[81] *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).

[82] *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

coupled with broader institutional factors that may further constrain Congress's ability to engage in constitutional interpretation,[83] has provided support for the notion of judicial supremacy in constitutional interpretation within the coordinate branches of government.[84] As a result, while Congress certainly continues to debate about the Constitution during the legislative process,[85] in the modern era, the Court's views on the Constitution appear to have taken on an elevated role vis-á-vis those views of the other branches of government.[86]

The theory of judicial supremacy is far from a consensus view,[87] however, 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,[88] instead advancing the view that the Constitution should more regularly be the subject of interpretation by those outside of the judicial branch.[89] This view posits that Congress and others outside of the government possess

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Constitution in such a way as to not adequately protect minority rights).

[83] *See* Feingold, *supra* note 77, 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* Hon. 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.").

[84] *See generally* 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."); *see also* Feingold, *supra* note 77, at 849-850 (noting the decline of constitutional interpretation by Members of Congress following *Cooper v. Aaron* and the "rise of judicial supremacy").

[85] *See* Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959-2001*, 29 LAW & 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].")

[86] This view has, at times, been articulated by Members of Congress. *See generally* Feingold, *supra* note 77, at 839-40 (collecting statements of a number of Senators in the wake of the Court's ruling in *Shelby County v. Holder*); *see also* 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.").

[87] *See* Volokh, *supra* note 86, at 179 ("Most scholars believe that the Supreme Court is not the sole authorized interpreter of the Constitution.").

[88] Gary Lawson, *What Lurks Beneath: NSA Surveillance and Executive Power*, 88 B.U. L. REV. 375, 381 n.30 (2008) ("The standard tendency in the legal academy is to treat Supreme Court decisions as privileged pronouncements on constitutional meaning. It is a very, very bad tendency. There is nothing in the Constitution on which to ground any such idea, nor does the Supreme Court's actual track record as a constitutional interpreter inspire much confidence.... [A]s a matter of objective constitutional meaning, there 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).

[89] *See* LARRY KRAMER, THE PEOPLE THEMSELVES 8 (2004) ("Both in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution. Final interpretive authority rested with 'the people themselves,' and courts no less than elected representatives were subordinate to their judgments."); *see generally* 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

independent and coordinate authority to interpret the Constitution.[90] Supporters of this view point to the fact that the Constitution requires all Members of Congress to "be bound by Oath or Affirmation ... to support [the] Constitution ... ,"[91] a requirement that presumes Senators and Representatives must understand and interpret the Constitution in their work in Congress.[92] Similarly, courts' practice of affording a presumption of constitutionality to laws passed by Congress[93] necessarily assumes that Members of Congress engage in constitutional interpretation during the legislative process.[94] In addition, if Congress opts not to engage in interpreting the Constitution, a vacuum could arise in constitutional dialogue[95] because various judicially crafted doctrines generally serve to keep the courts from making pronouncements on a wide range[96] of constitutional questions.[97] These arguments can be seen as relevant to the current CAS requirement imposed under the House rules insofar as they suggest that Congress should have some role in interpreting the Constitution.[98]

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

Originally adopted as an amendment to House Rule XII on January 5, 2011,[99] 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."[100] The current CAS rule functionally replaced a requirement that existed during the 105th through 111th Congresses, mandating that committee reports for bills

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of constitutional norms.").

[90] *See* 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."); *see also* Hon. David H. Coar, *"It Is Emphatically the Province and Duty of the Judicial Department to Say" Who the President Is*?, 34 LOY. U. CHI. L.J. 121, 129-30 (2002) ("While it is beyond question that within its sphere, it is the duty of the Supreme Court to determine the constitutionality of laws passed by Congress, the Supreme Court is not the only branch of government entrusted with the power to interpret the Constitution.").

[91] *See* U.S. CONST. art. VI, §1, cl. 3.

[92] *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 generally* Volokh, *supra* note 86, at 183-84.

[93] *See* U.S. R. Ret. Bd. v. Fritz, 449 U.S. 166, 184 (1980) ("The enactments of Congress are entitled to a presumption of constitutionality.... ").

[94] *See* Volokh, *supra* note 86, at 182-83.

[95] *See id.* at 181-82.

[96] *See* Michael J. Gerhardt, *The Constitution Outside the Courts*, 51 DRAKE L. REV. 775, 777 (2003) ("It is hard to overstate the range or significance of constitutional decision making that occurs outside the Court.").

[97] *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.").

[98] *See infra* "Debate over the Rule."

[99] *See* H.R. Res. 5, 112th Cong. (1st Sess. 2011) (adopting the rules for the 112th Congress).

[100] *See* HOUSE RULE XII cl. 7(c)(1). 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).

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."[101] A CAS is not part of the text of the legislation; instead, it "accompanie[s]" the legislation.[102] The CAS must be "submitted at the time the bill or joint resolution" is presented for introduction and referral, that is, when the legislation is dropped in the "hopper."[103] The submitted CAS appears in the *Congressional Record* and is published electronically on Congress.gov.[104]

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 to Congress in the Constitution to enact the bill or joint resolution," the CAS rule itself is silent on various issues.[105] For example, the rule does not prescribe any particular format or level of detail for CASs. Guidance provided by the House Committee on Rules (Rules Committee) soon after the rule was adopted 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."[106]

This guidance suggests that compliant CASs should generally discuss the affirmative constitutional authority that empowers Congress to enact particular legislation, but need *not* discuss any external 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 though the bill may run afoul of the Free Exercise and Free Speech

[101] *See* H.R. Res. 5, §13, 105th Cong (1st Sess. 1997).

[102] *See* HOUSE RULE XII cl. 7(c)(1).

[103] *See Constitutional Authority Statement Forms,* U.S. HOUSE OF REPRESENTATIVES, OFFICE OF LEGISLATIVE COUNSEL, https://legcoun.house.gov/members/HOLC/Resources/const_auth_statement.html (last accessed January 5, 2017). House Legislative Counsel has prepared a form to facilitate submission of CASs. *See Constitutional Authority Statement,* U.S. HOUSE OF REPRESENTATIVES, OFFICE OF LEGISLATIVE COUNSEL, https://legcoun.house.gov/members/HOLC/Resources/casform.pdf (last accessed Jan. 5, 2017).

[104] *See* HOUSE RULE XII cl. 7(c)(1).

[105] *Id.*

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

Clauses of the First Amendment.[107] 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 states[108]—may suffice to comply with the rule. More broadly, the Rules Committee guidance indicates that Members have significant discretion in determining whether particular CASs comply with the rule. The Rules Committee guidance notes that 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."[109]

In practice,[110] outside commentators have noted that Members have generally complied with House Rule XII, clause 7(c).[111] Such observations may be the result of how the rule is enforced. The Rules Committee has noted, "The adequacy and accuracy of the citation of constitutional authority is a matter for debate in the committees and in the House."[112] This statement 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."[113]

Studies of CAS Practices

Practices with Regard to Specificity

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

[107] *See* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 533 (1993) (noting that laws targeting religious practices are "never permissible"); Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) ("This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment.").

[108] *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.").

[109] *See* COMM. ON RULES- CAS REQUIREMENT, *supra* note 106

[110] 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.

[111] *See* Feingold, *supra* note 77, at 843 ("The early scholarship on these new CASs shows substantial compliance with the new rule ... "); *see also* Volokh, *supra* note 86, at 174 (noting that CASs are "flowing through Congress at the rate of several hundred per month."). In the CRS study conducted for this report, *see infra* note 119, of the 937 pieces of legislation examined, all had a corresponding CAS.

[112] *See* COMM. ON RULES- CAS REQUIREMENT, *supra* note 106.

[113] *See* COMM. ON RULES, HOUSE OF REPRESENTATIVES, TEXT AND SECTION-BY-SECTION ANALYSIS OF THE 112TH CONGRESS HOUSE RULES PACKAGE (2011), *available at* https://rules.house.gov/sites/republicans.rules.house.gov/files/other%20home%20files/HRes%205%20Sec-by-Sec.pdf. 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, to have a fairly broad interpretation of what is required to comply with the CAS rule. *See* Volokh, *supra* note 86, at 194-96 (detailing a debate that occurred at a hearing whose transcript and video are no longer publicly available). 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; *see generally* Abby Brownback & Louis Jacobson, *Lawmakers Abiding by New Constitutional Justification Rule*, ST. PETERSBURG TIMES (March 18, 2011), http://www.politifact.com/trutho-meter/promises/gop-pledge-o-meter/promise/665/require-bills-to-include-a-clause-citingits-autho/. 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* Volokh, *supra* note 86, at 196.

1,700 statements submitted during the first four months of 2011.[114] According to Professor Volokh, a "handful" of these CASs "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.[115] 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.[116] A study of the CASs for "every bill and joint resolution introduced" from January 5, 2011, to January 5, 2012, of that same Congress reported similar findings.[117] According to the House Republican Study Committee, 15% of submitted CASs relied on Article I, Section 8 alone.[118]

In preparing this report, CRS conducted a similar study of CASs from the 114th Congress.[119] Specifically, CRS staff examined the 937 statements submitted between July 1, 2016, and January 1, 2017, consisting of 13 joint resolutions and 924 bills.[120] 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.[121] Few submitted CASs consisted of more than a bare citation to an affirmative power granted to Congress in the Constitution. For example, four CASs explicitly discussed Supreme Court case law that purportedly support the bill or joint resolution. Forty-four of the statements also 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. Few CASs went beyond the scope of the rule to detail why the constitutional provision cited empowers Congress to enact the proposed legislation.

In line with the studies on CASs in the 112th Congress, CRS found that numerous statements submitted during the sample period contained general, rather than specific, references to the Constitution. As **Table 1** below indicates, the most frequent citation in CASs accompanying recent legislation was a general reference to Article I, Section 8, of the Constitution.[122] This occurred in 30% of all CASs during the sample period, a marked increase from the House Republican Study Committee and Volokh studies of the 112th Congress.[123] Similarly, the ninth most frequently cited constitutional provision in submitted statements during the sample period was even broader: a general reference to Article I of the Constitution.[124]

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[114] *See* Volokh, *supra* note 86, at 178.

[115] *Id.* at 198.

[116] *Id.* (noting that 142 of 1,709 statements "cite Article I, Section 8 without further specificity.").

[117] *See Constitution Authority Statements,* REPUBLICAN STUDY COMM. (Jan. 5, 2012), *available at* https://web.archive.org/web/20121213105104/http://rsc.jordan.house.gov/uploadedfiles/rsc_one_pager_-_constitutional_authority_statements—01-05-12.pdf.

[118] *Id.* (noting that of the 3,865 CASs examined, 617 cited "only Article I, Section 8.").

[119] In part, CRS's survey arguably provides an insight into whether initial practices with regard to the CAS rule may have reflected an initial zealousness of Members, or whether "compliance might improve as Representatives and their staff become more familiar with constitutional analysis." *See* Volokh, *supra* note 86, at 196.

[120] Of the 937 CASs examined, 611 or 65% cited a specific provision within the Constitution, as opposed to a general section or Article of the Constitution. *See* **Table 1**.

[121] Of the 937 examined CASs, 542 or 58% cited to a specific clause in Article I, Section 8. *See* **Table 1**.

[122] *See* **Table 1**.

[123] Of the 937 CASs examined, 249 had a general reference to Article I, Section 8.

[124] *See* **Table 1**.

Table 1. Top 10 Most Frequently Cited Constitutional Sources in Constitutional Authority Statements (CASs) in Recent Legislation
Based on a Review of 937 Pieces of Legislation Introduced from July 1, 2016, to January 1, 2017

Section or Clause	Number of Times Cited
General reference to Article I, Section 8	284
Article I, Section 8, clause 18 (Necessary and Proper Clause)	226[a]
Article I, Section 8, clause 1 (Taxing and Spending Clause)	205
Article I, Section 8, clause 3 (Commerce Clause)	174
Article IV, Section 3, clause 2 (Property Clause)	40
Article I, Section 8, clause 4 (Naturalization Clause)	30
Article I, Section 9, clause 7 (Appropriations Clause)	23
Article I, Section 8, clause 14 (Military Regulation Clause)	19
General reference to Article I	17
Article I, Section 8, clause 7 (Postal Clause)	15

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.

Note: A single bill may have multiple sources cited in the bill's CAS.

a. In 133 cases, the Necessary and Proper Clause was the sole authority source cited.

Practices with Regard to Particular Clauses

Beyond CAS practices with regard to specificity, the sample of recently submitted Rule XII statements is also noteworthy in that it highlights the specific clauses of the Constitution that Members have most frequently relied upon in submitted CASs.[125] In particular, numerous recently submitted CASs are notable in that the statements raise certain questions about how a particular clause has been interpreted, both as a matter of historical practice and by the courts, and how that same clause is being cited by the relevant CAS.[126] Among the most prominent examples of CASs that could be seen as adopting an interpretation of the Constitution that potentially diverges from historical understandings or judicial interpretations of a particular clause include statements that cite to the following clauses:

- **Necessary and Proper Clause:** One of the most frequently cited clauses in recent CASs 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]

[125] *See id.*

[126] The content of CASs with regard to particular clauses has, at times, spurred criticism from a wide range of commentators. *See, e.g.*, HORACE COOPER & NATHANIEL STEWART, CONSTITUTIONAL AUTHORITY STATEMENTS: IN DEFENSE OF HOUSE RULE XII, 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 (October 18, 2011), https://www.cato.org/blog/whither-constitutional-authority-statements (describing the CASs surveyed by the Republican Study Group as "[p]retty thin gruel"); *Constitutional Authority Statements in the 112th Congress: How Did the Members Do?*, CONSTITUTIONAL ACCOUNTABILITY CTR., (Jan. 15, 2013), http://theusconstitution.org/text-history/1771/constitutional-authority-statements-112th-congress-how-did-members-do (noting several perceived errors in submitted CASs).

Constitution in the Government of the United States, or in any Department or Officer thereof."[127] About 24% of all CASs in the CRS study contained a citation to that clause, with 14% of all CASs citing the Necessary and Proper Clause as the sole power to enact the underlying legislation.[128] Citations to the Necessary and Proper Clause in isolation could be seen as somewhat anomalous, as that clause has never been viewed by the Court or by the Framers of the Constitution as a general source of power for Congress to do whatever is "necessary and proper."[129] Instead, "[w]hile the Necessary and Proper Clause authorizes congressional action 'incidental to [an enumerated] power, and conducive to its beneficial exercise,'"[130] it does not provide Congress with "great substantive and independent power."[131]

- **General Welfare Clause:** The General Welfare Clause refers to a specific phrase contained within the language in Article I, Section 8, clause 1 empowering Congress to enact 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*...."[132] In CRS's study, the Taxing and Spending Clause was the third most frequently cited clause by CASs.[133] Not infrequently, a citation to this clause—commonly described in CASs as the "General Welfare Clause"—was used 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, which might otherwise empower Congress to enact laws that broadly promote the general welfare of the nation.[134] Instead, the phrase "general Welfare" in Article I,

[127] *See* U.S. CONST. art. I, §8, cl. 18.

[128] *See* **Table 1**.

[129] *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 v. Maryland, 17 U.S. (Wheat.) 316, 420-21 (1819) (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 declaration is predicated. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless.").

[130] *See* United States v. Kebodeaux, 133 S. Ct. 2496, 2507 (2013) (Roberts, C.J., concurring) (citing McCulloch v. Maryland, 17 U.S. (Wheat.) 316, 420-21 (1819)).

[131] *See McCulloch*, 17 U.S. at 418; *see also* 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).

[132] *See* U.S. CONST. art. I, §8, cl. 1 (emphasis added).

[133] *See* **Table 1**.

[134] *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

Section 8, clause 1, is tied to the preceding language in the clause regarding the raising of revenue, and thus requires Congress to spend the money it collects from taxation to promote the general welfare.[135] While this power is considerable,[136] it is necessarily tied to spending legislation.[137]

- **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"[138] is another frequently cited clause in recent CASs.[139] Several of the bills to which such CASs are attached, however, do not purport to regulate 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 rest of the clause, as an independent power. However, such an understanding of the clause is inconsistent with traditional interpretations of the scope of that clause, which view it as solely related to Congress's power over the military.[140] 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.[141] More broadly, interpreting the Military Regulation Clause to allow Congress to direct the

be alleged to be necessary for the common defense or general welfare.").

[135] *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.").

[136] *See* Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2327-28 (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.").

[137] *See Butler*, 297 U.S. at 64.

[138] *See* U.S. CONST. art. I, §8, cl. 14.

[139] *See* **Table 1** (ranking the Military Regulation Clause as the eighth most frequently cited clause).

[140] 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). By placing the power to govern and regulate the military among Congress's powers, the Constitution can be seen to have rejected British precedents that allowed the King, on his own authority, to impose military rules unilaterally. *See id.* ("In Great Britain, the king, in his capacity of generalissimo of the whole kingdom, has the sole power of regulating fleets and armies.... The whole power is far more safe in the hands of congress, than of the executive; since otherwise the most summary and severe punishments might be inflicted at the mere will of the executive."). In practice, the Military Regulation Clause has been viewed by the Supreme Court to allow Congress to regulate matters like the discipline of service members. *See, e.g.*, United States v. Kebodeaux, 133 S. Ct. 2496, 2503 (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.... Every officer, before he enters on the duties of his office, subscribes to these articles, and places himself within the power of courts martial to pass on any offence which he may have committed in contravention of them.").

[141] *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."). In this context, reading the phrase "make rules for the Government" as a separate and distinct power from the rest of the clause would render the last phrase in the clause, regarding "Regulation of the Land and Naval Forces," meaningless. *Cf.* United States v. 144,744 pounds of Blue King Crab, 410 F.3d 1131, 1134 (9th Cir. 2005) ("It is an accepted canon of statutory interpretation that we must interpret the statutory phrase as a whole, giving effect to each word and not interpreting the provision as to make other provisions meaningless or superfluous.").

actions of the federal government generally in whatever manner Congress wishes would arguably transform the clause from a narrow power, confined to matters related to the armed forces, to an open-ended police power, something otherwise rejected by the Framers of the Constitution.[142]

- **Appropriations Clause:** A number of recent CASs cite provisions in Article I, Section 9, including several CASs that cite the Appropriations Clause as the authority for Congress to provide money for a particular project.[143] The Appropriations Clause states, in relevant part, that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[144] Like other provisions found in Section 9 of Article I,[145] this clause generally has not been interpreted to grant Congress any affirmative power.[146] Instead, in keeping with other provisions in Section 9, the Appropriations Clause has been seen to function as a *restriction* on the powers of the federal government.[147] Specifically, the Appropriations Clause ensures that when the federal government spends money, "the payment of money from the Treasury must be authorized by a statute."[148] It thus serves as an affirmative restriction on the power of the Executive and makes Congress's "power over the purse" exclusive in nature.[149]

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[142] *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.").

[143] *See* **Table 1** (ranking the Appropriations Clause as the seventh most frequently cited clause).

[144] *See* U.S. CONST. art. I, §9, cl. 8.

[145] *See* North American Co. v. SEC, 327 U.S. 686, 704-05 (1946) (noting that the powers of the federal government under Section 8 of Article I are limited by "express provisions" of other sections of the Constitution, such as "[Section] 9 of Article I and the Bill of Rights."); *see also* Warren v. Paul, 22 Ind. 276, 277 (1864) ("The powers delegated to the general government are specified in sec. 8 of art. 1. Section 9 of the same article contains restrictions and limitations on the powers granted generally in section 8, and section 10 of the same article contains the prohibitions upon the States.").

[146] *See* 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, and is without significance here. 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."); *id.* ("Rather, the Appropriations Clause (a) assumed as a background fact that there would be federal funds and appropriations arising from the exercise of other powers and (b) established rules for them."); *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.").

[147] 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.... However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.").

[148] OPM v. Richmond, 496 U.S. 414, 424 (1990).

[149] *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1342 (Leonard W. Levy ed., 1970) ("As all the taxes raised from the people, as well as the revenues arising from other sources, are to be applied to the discharge of the expenses, and debts, and other engagements of the government, it is highly proper, that congress should possess the power to decide, how and when any money should be applied for these purposes. If it were otherwise, the executive would possess an unbounded power over the public purse or the nation; and might apply all its monied resources at his pleasure. The power to control, and direct the appropriations, constitutes a most useful and

As discussed above, Congress's power to spend money derives from the Taxing and Spending Clause.[150]

- **Bill of Rights:** While not among the most frequent citations in CASs, occasionally one of the first 10 amendments to the Constitution—the Bill of Rights—has been cited in support of Congress's power to enact legislation. Congress may certainly have an interest in protecting the rights listed in the Bill of Rights, but it should be noted that the first 10 amendments to the Constitution do not themselves empower Congress to take any action, and they instead consist of "negative rights" protecting individuals from certain government conduct.[151] The Bill of Rights often *prohibits* congressional action.[152] As a result, if a sponsor proposes legislation intended to support individual liberties protected by the Constitution, the CAS for such legislation could instead rely on an affirmative power of the Congress, such as the powers provided in Article I, Section 8 of the Constitution. Another alternative would be the enforcement power of the Fourteenth Amendment, which the Supreme Court has held allows "Congress [to] enact so-called prophylactic legislation" aimed at "prevent[ing] and deter[ing] unconstitutional conduct."[153] Nonetheless, it should be noted that 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.[154] 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.[155]

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. Therefore, even if the underlying legislation is enacted into law, the CAS would have no formal legal effect because the CAS was not subject to the approval of both houses of Congress, or presented to the President, as is required by Article I, Section 7.[156] Instead, CASs are a type of legislative history material that describes the initial

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salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation.").

[150] *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'").

[151] *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 Cty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989).

[152] *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).

[153] *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 727-28 (2003).

[154] *See* COMM. ON RULES- CAS REQUIREMENT, *supra* note 106 (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.").

[155] *See id.*

[156] Zedner v. United States, 547 U.S. 489, 509-10 (2006) (Scalia, J., concurring) ("[T]he only language that constitutes

thoughts of a single Member as to Congress's power to enact the bill.[157] In this sense, one might view a CAS as akin to an isolated statement in the *Congressional Record* or a statement issued by the sponsor of a bill, which courts generally regard as "weak" forms of legislative history when considering Congress's intent in passing a law.[158]

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.[159] This practice is in keeping with broader principles of constitutional law as adopted by the courts. One such principle holds that Congress generally may not independently and without further scrutiny in the context of a case or controversy before a court define its own powers under the Constitution.[160] Another principle holds that an otherwise unconstitutional law will not be found to be permissible by a court merely because Congress believes the provision to be within its powers.[161]

Debate over the Rule

Given the seeming ease of compliance with House Rule XII, clause 7(c),[162] and the tendency of some CASs to cite to general[163] or arguably inapplicable constitution provisions,[164] questions might be raised about the desirability of the CAS rule.[165] Critics have argued for its repeal,

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'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.").

[157] *See* Volokh, *supra* note 86, 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 106 ("To the extent that a court looks at the legislative history of an Act, the Constitutional Authority Statement would be part of that history.").

[158] 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. October 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 the "hierarchy of the extrinsic sources of legislative history, ranging from the most persuasive to the least persuasive: conference committee reports; regular committee reports; earlier versions of a bill, including rejected amendments; statements made by the bill's supporters during its floor debate, with special consideration sometimes given to the bill's drafters and sponsors; and, finally, statements made by the bill's opponents during floor debate").

[159] *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).

[160] *See* City of Boerne v. Flores, 521 U.S. 507, 529 (1997) ("If Congress could define its own powers ... no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts, ... alterable when the legislature shall please to alter it.'") (quoting *Marbury*, 5 U.S. (1 Cranch) at 177); *see also Marbury*, 5 U.S. (1 Cranch) at 177 (holding that in a case or controversy properly before a federal court that it is "the province and duty of the judicial department to say what the law is").

[161] *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.").

[162] *See supra* "Compliance with the CAS Rule."

[163] *See supra* "Practices with Regard to Specificity."

[164] *See supra* "Practices with Regard to Particular Clauses."

[165] The Rules Committee addressed the question of the CAS rule's value in its initial guidance on the rule. *See* COMM. ON RULES- CAS REQUIREMENT, *supra* note 106 ("Q. So why have this Rule at all? A. Just as a cost estimate from the

contending that the rule is symbolic and has little impact on congressional debate or dialogue about Congress's authority under the Constitution.[166] In addition, some have asserted that Congress lacks the institutional capacity to interpret the Constitution,[167] and the CAS rule demonstrates this insofar as there have been few meaningful debates in Congress over the scope of Congress's powers under the rule.[168] Others contend that the administrative costs of complying with the rule outweigh any benefits from the CAS requirement.[169]

On the other hand, proponents characterize House Rule XII, clause 7(c), as an extension of the broader debate[170] over Congress's role in interpreting the Constitution, providing a limited means by which Members of Congress may expressly engage in constitutional interpretation.[171] As one commentator notes, "[f]undamentally, a [CAS] is a congressional interpretation of the Constitution,"[172] and supporters of the rule see several benefits to having the House of Representatives engage in a limited form of constitutional interpretation through the submission of CASs. According to the rule's proponents, 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.[173] In this sense, according to its proponents, the CAS rule serves to remind Members of the limits on Congress's institutional power.[174]

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.").

[166] *See* Feingold, *supra* note 77, at 842 ("[C]ritics have suggest that this new House rule is symbolic at best and meaningless at worst.... "); *see also* Volokh, *supra* note 86, at 176 ("CASs are so unobjectionable that the main argument against them is that they are useless."); Norman Ornstein, as quoted in Brownback & Jacobson, *supra* note 113 ("Frankly, this is just symbolic, so I have no real feelings one way or the other.... Of course, you could offer a bill that repeals the Internal Revenue Code, or Medicare, by claiming it is unconstitutional as your basis, and be utterly wrong. But what difference does it really make? You can also justify almost any bill you want by claiming a broad constitutional authority under the health and welfare clause or the commerce clause. So I see the disagreements here as being just as symbolic as the promise in the first place."); *see also* David W. Rohde, as quoted in Brownback & Jacobson, *supra* note 113 (describing the rule as "utterly trivial.").

[167] *See supra* note 83.

[168] *See* Stephen Dinan, *Congress Has a Constitution Problem—Many Don't Understand Document*, WASH. TIMES (Jan. 14, 2013), *available at* 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.").

[169] *See* Pete Kasperowicz, *Democrat: Citing Constitution Will Cost Taxpayers $570K*, THE HILL (Jan. 10, 2011), *available at* 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 77, 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.").

[170] *See supra* "Role of Congress in Interpreting the Constitution."

[171] *See* Feingold, *supra* note 77, at 842-43 (arguing that the CAS rule has "generated some interesting discourse in the House on specific pieces of legislation.").

[172] *See* Volokh, *supra* note 86, at 178.

[173] *Id.* at 176.

[174] *See* COOPER & STEWART, *supra* note 126, 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.").

Additionally, supporters of House Rule XII, clause 7(c), argue that the rule 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.[175] According to one commentator, the CAS rule could

> provide a foundation for a new sense within ... [Congress] ... that there is both reason and need for its members to develop deeper and broader understandings of the Constitution and constitutional interpretation—in the direction of Congress becoming ... not only a co-equal branch of the federal government, but a co-equal interpreter of the federal Constitution, if not more.[176]

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."[177] 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.[178]

Nonetheless, even amongst proponents of the rule, informal suggestions have been made to improve the constitutional dialogue surrounding CASs. Among the primary changes proposed are the following:

- **Enhancing the Content of CASs:** Prompted by criticisms about how "thin many of [the CASs] are,"[179] 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.[180] Other proposals focus on changing the content of the CASs themselves by requiring more expansive statements that discuss the relationship

[175] *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 126, 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.").

[176] *See* Spindelman, *supra* note 175, at 1339.

[177] *See* Feingold, *supra* note 77, at 872.

[178] *Id.*

[179] *See* Neil Siefring, *Three Commitments Conservatives Should Get from a New Speaker*, PJ MEDIA (October 2, 2015), https://pjmedia.com/blog/what-conservatives-should-ask-from-a-new-speaker/?print=true&singlepage=true.

[180] *Id.* ("To reform this process, a new speaker should commit to change the rules of the House to require that during general debate, the minority and the majority shall each be allowed one specific 'motion regarding constitutional authority.' This motion would allow a House member to ask the bill's sponsor, or the sponsor's designee, to respond on the floor to questions about the constitutional authority statement attached to the bill. The motion would allow for up to ten minutes of back-and-forth discussion about the statement."). 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 25 Members sign the request, the chair will schedule up to 20 minutes of floor debate, evenly divided between a member specified in the letter and the majority bill manager. *See* Oleszek, *supra* note 110, at 4-5.

between the cited provision of the Constitution and the bill itself.[181] 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.[182] 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.[183]

- **Better Enforcing the CAS Rule:** Given the large number of CASs 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.[184] 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).[185] 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.[186] 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."[187] 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."[188]
- **Changing Other Procedures Regarding CASs:** Currently, the CAS focuses on a single moment: the initial introduction of a bill or joint resolution. Viewing this limitation on the use of a CAS as a shortcoming that prevents more robust constitutional debate, 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.[189] Relatedly, because the CAS rule only applies

[181] *See* COOPER & STEWART, *supra* note 126, 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.").

[182] *See* Feingold, *supra* note 77, at 870.

[183] *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 86, 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.").

[184] *See* Volokh, *supra* note 86, at 199 ("Some critics might say that citing these very general, open-ended clauses defeats the purpose of the rule.").

[185] *See* H.Res. 1754, 111th Cong. (2010).

[186] *Id.*

[187] *See* COOPER & STEWART, *supra* note 126, at 20.

[188] *Id.* at 21.

[189] *Id.* ("But 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 77, 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

> at the beginning of the legislative process, the only Member who currently assesses Congress's authority to enact the legislation in question is the Member who introduced the legislation.[190] In order to ensure that Members, who ordinarily must 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.[191] In what may be the broadest means to allow more Members to weigh in on the constitutional implications of a bill, at least one commentator has suggested (but ultimately rejects) changing the House rule so that the CAS is part of the text of a bill, as opposed to a statement attached to the bill.[192] Such an approach could, at least in theory, formalize and elevate the role of the CAS because when a bill that 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.[193]

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.[194] 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.[195]

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has "no rules regarding proposed amendments that may be attached to any legislation."); Volokh, *supra* note 86, at 215 ("CASs should be required *both* at introduction *and* in the committee report.") (emphasis in original).

[190] *See* Feingold, *supra* note 77, at 865.

[191] *Id.*; *see also* Volokh, *supra* note 86, 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.").

[192] *See* Volokh, *supra* note 86, 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.

[193] *See id.* at 220 (describing the proposal to place CASs in a bill's text as "the strongest way for Congress to make its constitutional views binding.... "). Nonetheless, even if placing a CAS in the legislative text would elevate congressional dialogue about the Constitution by requiring each Member to participate in a vote on the constitutional basis for the act, it is unclear what effect the statement would have with regard to constitutional interpretation by other branches, particularly the courts. *See supra* note 161 and accompanying text. Moreover, the argument for placing the CAS in the text of a bill is based on the assumption that a Member's vote on a bill is necessarily an endorsement or rejection of the entire bill, which may not reflect the realities of modern legislation. *See* Cindy G. Buys & William Isasi, *An "Authoritative" Statement of Administrative Action: A Useful Political Invention or a Violation of the Separation of Powers Doctrine?*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 73, 100 n.135 (2004) ("While we may hold legislators responsible for the statutes they vote on, given the number and complexity of bills before Congress, it is a fiction to assume they are familiar with every provision of every bill.").

[194] *See supra* notes 162-169 and accompanying text.

[195] *See* Feingold, *supra* note 77, 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.").

Potential Resources and Considerations for Drafting CASs

This section of the report identifies issues that Members and congressional staffers may find useful to consider when assessing whether and how a constitutional provision may provide a source of authority for legislation. First, the section notes available resources that may aid in interpreting the Constitution. Second, the section suggests potential constitutional bases for various types of legislation.

Resources on the Constitution That May Be Relevant for CASs

There are numerous resources that Members and staff could use to learn more about the affirmative powers afforded Congress by the Constitution and the limitations on those powers. The Constitution and its current amendments contain a little more than 7,500 words,[196] and Congress regularly authorizes the printing and distribution of pocket versions of the Constitution for Members and staff.[197] Moreover, a host of primary historical documents from the founding era are available electronically for those interested, including the following:

- **Farrand's Records:** Documentary records from the Constitutional Convention, including the notes gathered by various attendees, complied by historian Max Farrand.[198]
- ***The Federalist Papers*:** A series of newspaper articles written by Alexander Hamilton, John Jay, and James Madison urging the ratification of the Constitution.[199]
- ***Founder's Constitution*:** A joint venture of the University of Chicago Press and the Liberty Fund, providing various primary sources for each clause of the Constitution.[200]
- ***Constitutional Sources Project (ConSource):*** *ConSource* provides free access to a "digital library of historical sources related to the creation, ratification, and amendment of the United States Constitution."[201]

In addition to these primary sources, Members and staff may wish to consult a number of secondary sources that are publicly available explaining the various clauses of the Constitution, including the following:

- ***Constitution Annotated (CONAN*):** The Library of Congress, through the Congressional Research Service, regularly publishes and updates *The*

[196] *See* Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 399 (2008) ("Overall, the U.S. Constitution is exceptional among written constitutions both in its age and its brevity. It is the oldest currently in effect and ... is among the shortest at 7591 words including amendments.... ").

[197] *See, e.g.,* H.Con.Res. 54, 114th Cong. (2015).

[198] *See Farrand's Records,* LIBRARY OF CONGRESS (last accessed January 5, 2017), https://memory.loc.gov/ammem/amlaw/lwfr.html.

[199] *See The Federalist Papers,* CONGRESS.GOV (last accessed January 5, 2017), https://www.congress.gov/resources/display/content/The+Federalist+Papers .

[200] *See* THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner, eds., 1987), *available at* http://press-pubs.uchicago.edu/founders.

[201] *See Welcome to ConSource,* CONSOURCE (last accessed January 5, 2017), http://www.consource.org/.

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.[202]

- ***Commentaries on the Constitution of the United States*:** *Commentaries on the Constitution of the United States* is a three-volume treatise written by Associate Justice Joseph Story in 1833. It is widely cited as an authoritative understanding of the Constitution.[203]
- ***Interactive Constitution*:** For an overview of the Constitution, the congressionally chartered National Constitution Center has created the *Interactive Constitution* wherein "scholars of different perspectives discuss what they agree upon, and what they disagree about" with regard to broad concepts in constitutional law.[204]
- **The Heritage Foundation's *Guide to the Constitution*:** The Heritage Foundation's *Guide to the Constitution* provides a clause-by-clause analysis of the Constitution with a series of explanatory essays from a number of legal scholars.[205]
- **The American Constitution Society's *Keeping Faith With the Constitution*:** The American Constitution Society's *Keeping Faith With the Constitution* examines the text and history of the Constitution with a view toward how the Constitution's "words and principles" have been interpreted throughout U.S. history.[206]

In addition, beginning in 2017, the American Law Division of CRS will offer a seminar for Members and staff on the "Powers of Congress," which will serve as an introductory course on Congress's powers under the Constitution and strategies for crafting CASs.[207]

Additional Considerations in Crafting 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.

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[202] *See* CONG. RESEARCH SERV., LIBRARY OF CONG., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 112-9, 112th Cong., 2d Sess. 1611-16 (2016), *available at* https://www.congress.gov/constitution-annotated/.

[203] *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Leonard W. Levy ed., 1970). Several versions of Story's *Commentaries* are available online, including at http://www.constitution.org/js/js_005.htm.

[204] *See Interactive Constitution,* NAT'L CONSTITUTION CTR., (last accessed January 5, 2017), *available at* http://constitutioncenter.org/interactive-constitution/index_no_flash.php.

[205] *See The Heritage Guide to the Constitution,* HERITAGE FOUND., 2012, *available at* http://www.heritage.org/constitution.

[206] *See* Goodwin Liu, Pamela S. Karlan, & Christopher H. Schroeder, Keeping Faith with the Constitution (2009), *available at* https://www.acslaw.org/pdf/ACS_KeepFaith_FNL.pdf.

[207] To request information about this seminar, please contact Jeanne Dennis.

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)	**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." * Note: **Article I, Section 9, clause 7** *prohibits* money from being drawn from the Treasury absent an appropriation made by law.
Appropriations Related to the Military	**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." **Article I, Section 8, clause 12** provides Congress with the power to raise and support armies. **Article I, Section 8, clause 13** provides Congress with the power to "provide and maintain" a navy.
Appropriations that Place Conditions on an Expenditure (e.g., a grant to the states)	**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." **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, including Congress's powers over appropriations. * Note: According to the Supreme Court, "[i]ncident to Congress's [spending] power, Congress may attach conditions on the receipt of federal funds.... " *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987).
Awards—Military Awards (e.g., Congressional Medal of Honor)	**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.
Awards—Non-Military Awards (e.g., Congressional Gold Medal)	**Article I, Section 8, clause 6** 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.

Subject Matter of Legislation	Suggested Citation
Civil Rights Legislation	* Note: A variety of constitutional provisions have been utilized with regard to civil rights legislation, depending on the nature of the legislation, including the following: **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* Heart of Atlanta Motel v. United States, 379 U.S. 241, 257-58 (1964). **Thirteenth Amendment, Section 2** provides Congress the power "to enforce" the substantive guarantees of the Amendment, which centrally 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* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437-44 (1968). **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 both proscribe unconstitutional conduct, as well as enact legislation that remedies and deters violations of rights guaranteed under the Fourteenth Amendment. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003). **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* South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966).
Constitutional Amendment	**Article V** authorizes Congress, whenever two-thirds of both houses "deem it necessary," to propose amendments to the Constitution.
Courts—Regulation of the Jurisdiction of Federal Courts	**Article I, Section 8, clause 9** provides Congress with the power to constitute "Tribunals inferior to the Supreme Court." * Note: **Article III, Section 2** allows Congress to make "Exceptions" to the Supreme Court's appellate jurisdiction.
Courts—Procedures, Practices, and Rules of Federal Courts	**Article III, Section 1** vests the judicial power of the United States in the Supreme Court and any inferior courts Congress establishes. **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. * Note: 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" (Wayman v. Southard, 10 Wheat. 1, 22 (1825)), and, thereby, Congress has "undoubted power to regulate the practice and procedure of federal courts." *See* Sibbach v. Wilson & Co., 312 U.S. 1, 9 (1941).

Subject Matter of Legislation	Suggested Citation
Economic Regulations (e.g., regulations regarding a particular business; regulations pertaining to labor standards)	**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." * Note: 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* United States v. Lopez, 514 U.S. 549, 558-59 (1995).
Election Regulations	**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."
Federal Land Regulation (e.g., selling federal lands; creating rules for national parks)	**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." * Note: 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* United States v. San Francisco, 310 U.S. 16, 29 (1940).
Immigration—Naturalization (i.e., granting of citizenship to a foreign-born person)	**Article I, Section 8, clause 4** provides Congress with the power to establish a "uniform Rule of Naturalization." * Note: 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* Arizona v. United States, 132 S. Ct. 2492, 2498 (2012).

Subject Matter of Legislation	Suggested Citation
Immigration—Outside of Naturalization (e.g., granting of temporary visas to nonimmigrants, regulating the entry and deportation of aliens)	* Note: According to the Supreme Court, the formulation of immigration policy is "entrusted exclusively to Congress." *See* Galvan v. Press, 347 U.S. 522, 531 (1954); *see also* Fiallo v. Bell, 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. Several of the enumerated powers in the Constitution, however, have been construed as authorizing such regulations, including the following: **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* Henderson v. Mayor of New York, 92 U.S. 259, 270-71(1876). **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* Toll v. Moreno, 458 U.S. 1, 10 (1982). Other cases from the Supreme Court have looked beyond the powers in Article I, Section 8 for support for Congress's power over immigration. *See The Chinese Exclusion Case,* 130 U.S. 581, 604 (1889) (listing the powers to "declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship" as authorizing Congress to enact legislation excluding Chinese laborers); Fong Yue Ting v. United States, 149 U.S. 698, 705-09 (1893) (relying on the same sources to affirm Congress's power to deport noncitizens).
Internal Rules of the House	**Article I, Section 5, clause 2** provides that each house of Congress "may determine the Rules of its Proceedings."
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 the power to "lay and collect taxes on incomes."

Source: Congressional Research Service.

Beyond these suggestions for citations to specific provisions of the Constitution,[208] given the broader trends with regard to CAS practices discussed above,[209] 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 several recent CASs have adopted the practice of citing to an entire Article of the Constitution or a section of the Constitution, such as Article I, Section 8,[210] the prevailing customary practice has been to cite to a specific clause of the Constitution.[211] To the extent a Member wishes to cite to a specific clause in a CAS, **Table 2** may be a helpful resource to consult.
- **Does the CAS cite only to the Necessary and Proper Clause?** While a considerable number of CASs cite exclusively to the Necessary and Proper Clause,[212] such a citation may raise questions with regard to whether the clause is intended to do more than supplement Congress's other enumerated powers under the Constitution.[213] To the extent a Member may wish to cite to Congress's other, more specific enumerated powers for support for a given piece of legislation, **Table 2** may be a helpful resource to consult.
- **Does the CAS cite to a clause that affirmatively empowers Congress to take an action?** Citations in CASs to clauses in Article I, Section 9 of the Constitution, which contains a list of limitations on the powers of the federal government, or the Bill of Rights, which consists of a number of rights retained vis-á-vis the federal government, may suggest a broader interpretation of such clauses. To the extent a Member prefers to cite to a clause that is more generally recognized to grant an affirmative power to Congress, Article I, Section 8 contains the vast majority of commonly cited clauses that provide Congress the power to legislate with respect to various subjects.
- **Does the CAS cite to a clause that relates to and authorizes the underlying legislation?** Perhaps most importantly, a Member may wish cite to a provision of the Constitution whose power, based on either historical understandings or judicial interpretations of a particular clause, has some relationship with the subject matter of the legislation. As discussed earlier in this report, citations to constitutional provisions like the General Welfare Clause and the Military Regulation Clause may be more limited than the language of the Constitution might suggest at first blush.[214] To the extent a Member may want to confirm that a particular CAS citation relates to and authorizes the underlying legislation, attorneys in CRS's American Law Division (x7-6006) can provide advice with regard to specific CAS citations.

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[208] *See supra* notes 120-121 for a discussion of the primary means by which Members comply with the CAS rule.

[209] *See supra* "House Rule XII, Clause 7(c), and Constitutional Authority Statements."

[210] *See* **Table 1**.

[211] *See supra* notes 120-121 for a discussion of the primary means by which Members comply with the CAS rule.

[212] *See* **Table 1**.

[213] McCulloch v. Maryland, 17 U.S. (Wheat.) 316, 418 (1819); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 247 (1960).

[214] *See supra* "Practices with Regard to Particular Clauses."

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 its nature, 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,[215] 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.[216] 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.[217]

Outside of a CAS, Members can request a formal floor debate respecting the constitutionality of pending legislation,[218] 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."[219] 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]."[220] In 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.[221] In this vein, 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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[215] *See supra* note 120.

[216] *See* COOPER & STEWART, *supra* note 126, at 9-10 (providing examples of more detailed CASs); *see also* Volokh, *supra* note 86, 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."); *supra* at 13 (noting that four CASs of the 937 examined by CRS explicitly discussed Supreme Court case law supporting the bill or joint resolution.).

[217] *See* COOPER AND STEWART, *supra* note 126, at 11 (noting an example of a CAS that discussed why the underlying legislation was "consistent with" various constitutional provisions).

[218] *See supra* note 180.

[219] *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).

[220] *See* Volokh, *supra* note 86, at 189; *see generally* Fisher, *supra* note 83, at 729-30 (discussing Congress's various "sources of legal assistance" to aid in constitutional interpretation).

[221] *See* Fisher, *supra* note 83, at 730 ("Committee staff can analyze constitutional questions and call on the American Law Division of the Library of Congress.... ").

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