

# ARTICLES

## THE AGENCY LAW ORIGINS OF THE NECESSARY AND PROPER CLAUSE

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*The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*<sup>1</sup>

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<sup>1</sup> U.S. CONST., Art. 1, § 8, cl. 18.

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<sup>2</sup> REPEATEDLY REFERENCED WORKS: For convenience, this note collects alphabetically by author or editor sources cited more than once in this Article. The editions and short form citations used are as follows:

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## I. INTRODUCTION

Commentators continue to struggle with the meaning of the Constitution's Necessary and Proper Clause. Some have given up, and pronounced the Clause meaningless. Professor Mark A. Graber writes that, "[T]he necessary and proper clause satisfies historical tests for stupidity: The framers did not seriously consider its meaning, and prominent defenders of the constitution subsequently confessed that the provision was unnecessary and unintelligible."<sup>3</sup> Among the unanswered questions about the Clause are how "necessary" a law must be to the exercise of an enumerated power;<sup>4</sup> what the meaning of "proper" is;<sup>5</sup> and whether the provision is an affirmative grant of power, a limitation on power, or a mere rule of construction.<sup>6</sup>

The *doubts* are understandable because, read in isolation, the Clause is not. Although some uncertainties can be resolved by textual analysis,<sup>7</sup> others defy it. For example, Chief Justice John Marshall's classic exposition of the Clause in *McCulloch v. Maryland*<sup>8</sup> seems open to challenge because its definition of "necessary" is so at odds with common usage.<sup>9</sup> For this reason, some have attempted to reconstruct the historical meaning of the Clause, but their interpretations seem incomplete.<sup>10</sup> Others find the historical case hopeless.<sup>11</sup>

THE COMPLEAT CLERK AND SCRIVENER'S GUIDE (H. Twyford, London 1655) [hereinafter COMPLEAT CLERK];

THE DIGEST OF JUSTINIAN (4 vols.) (Alan Watson et al. eds., 1985) [hereinafter JUSTINIAN, DIGEST] (all translations of this work are by the Watson group);

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GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE (Vintage Books 1979) (1978) [hereinafter WILLS].

<sup>3</sup> Graber, *supra* note 2, at 167.

<sup>4</sup> *Id.* at 168 ("No one besides John Marshall and Alexander Hamilton, however, seriously contends that 'necessary . . . means no more than needful, requisite, incidental, useful or conducive to'."). See also Eugene Gressman, *Some Thoughts on the Necessary and Proper Clause*, 31 SETON HALL L. REV. 37 (2001).

<sup>5</sup> *Id.* at 167 ("The phrase 'necessary and proper' also obliterates the distinction between constitutionality and wisdom . . ."); LYNCH, *supra* note 2, at 20 ("Did 'necessary and proper' mean the same as 'necessary'?").

<sup>6</sup> See, e.g., Engdahl, *supra* note 2.

<sup>7</sup> See *infra* Part II.

<sup>8</sup> 17 U.S. (4 Wheat.) 316 (1819) (Marshall, C.J.).

<sup>9</sup> See Graber, *supra* note 2, at 168.

<sup>10</sup> E.g., Lawson & Granger, *supra* note 2, at 297 (suggesting a jurisdictional meaning of "proper," but seeming to concede other limitations of "proper" by stating that the term limited

In this Article, I respectfully submit that the meaning of the Clause has seemed unclear because commentators, especially modern ones, have not been looking in the right place. The lawyers who drafted the Necessary and Proper Clause took its language directly out of contemporary agency law and usage. The purpose of the Clause was to reinforce the role of Congress as the agent of the people, exercising implied incidental (“necessary,” as a legal term of art) powers “for carrying into Execution” their written instructions (the Constitution), subject to prevailing fiduciary norms (“proper”). Moreover, during the ensuing struggle over whether to adopt the Constitution, this was the meaning (without most of the legal jargon, of course) that the federalists sold to the ratifying public.

In this, or any other, study of the original meaning of an uncertain constitutional provision, I operate under a few premises. The first is that the legally relevant issue is not the “original intent” of the drafters, but the objective meaning to (or understanding of) the *ratifiers*. The principle is closely analogous to that applied in contract law: If the subjective, hidden intent of an offeror is not reflected in the offer and is different from the understanding of the offeree, then generally it is not part of the ensuing contract.<sup>12</sup> This premise, which reflects the view that the Constitution (as amended by the Bill of Rights), was a political bargain among contending factions, has been gaining acceptance among scholars across the political spectrum.<sup>13</sup>

My second premise is about the relative reliability of various kinds of historical evidence. I generally do not give much credence to post-

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Congress in “at least” three ways).

<sup>11</sup> E.g., Graber, *supra* note 2, at 168-69:

The records of the Constitutional Convention provide no help. The Committee on Detail gave no hint why it chose the language it did, and the Convention in turn apparently perceived these particular alterations to prior drafts as merely stylistic . . . Delegates who thought the phrase “necessary and proper” would clearly demonstrate that Congress did not have an unlimited authority to pass laws were quickly disabused of that foolish notion by anti-Federalist commentators . . . Constitutional defenders proved unable to respond to these anti-Federalist criticisms.

<sup>12</sup> Cf. E. ALLEN FARNSWORTH, CONTRACTS 114 (1982) (objective theory of contracts generally prevails); BARNETT, RESTORING, *supra* note 2, at 100-03.

<sup>13</sup> Compare RAKOVE, *supra* note 2, at 8-9, 17-18, who leans toward “progressive” views, with Barnett, *supra* note 2, at 187, who leans toward “libertarian” views. As Professor Barnett points out, the focus on secret intent rather than meaning/understanding limits the legal (although not necessarily the historical) value of Professor Joseph Lynch’s recent work on the clause. Barnett, *supra* note 2, at 187; Cf. LYNCH, *supra* note 2.

For other treatments of original meaning and how it is contrasted with original intent and original understanding, see, e.g., BARNETT, RESTORING, *supra* note 2, at 89-117; Vasan Kesavan & Michael Stokes Paulsen, *The Interpretative Force of the Constitution’s Secret Drafting History*, 91 GEORGETOWN L. REV. 1113, 1124-48 (2003).

ratification material;<sup>14</sup> particularly unreliable are controverted allegations of constitutional meaning made from memory or in the heat of battle. I resort to post-ratification material only when confirmatory of other evidence and generally uncontradicted. Instead, I tend to rely more on statements, representations, and known background facts (such as the state of the law) during the ratification process. The intent of delegates at the federal convention, to the extent it can be retrieved, also is very useful, because it often sheds light on the understanding of the ratifiers.

This Article consists of nine Parts, of which Part I is this Introduction. In Part II, I subject the Necessary and Proper Clause to textual analysis, incorporating in that analysis the eighteenth century definitions of words. I thereby resolve a few questions, but also show why textual analysis alone cannot clarify other uncertainties.

Part III examines the drafting history of the Clause at the federal constitutional convention. I conclude that the primary drafters—four distinguished lawyers—intended it to incorporate concepts from contemporary agency law, specifically the doctrine of implied incidental agency powers and the limitations of fiduciary duty. Part IV surveys the development and content of the agency concepts that the drafters intended the Necessary and Proper Clause to embody.

Part V examines proceedings in the federal convention after the Clause was drafted. Part VI surveys the ratification process. Because of the importance of the ratification process in revealing original meaning, Part VI is particularly detailed. It shows that the intent of the drafters, without undue use of legal technical terms, was fairly represented to the ratifying public. The public then approved the Constitution, although with the expectation of speedy amendment to ensure that the doctrine of incidental agency powers would not be applied too broadly.

Part VII shows how the 1791 debates over the first national bank—as contentious as they were on application of the Clause—still reflected a consensus as to its essential meaning. As befits the treatment of post-ratification material, the focus in Part VII is not on issues under dispute, but on the disputants' fundamental agreement on matters of principle.

Part VIII suggests some interpretative implications arising from this study, while Part IX is a short conclusion.

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<sup>14</sup> Post-ratification materials are relied on heavily by some writers. See, e.g., Lawson & Granger, *supra* note 2, at 294-97.

## II. QUESTIONS ABOUT THE CLAUSE AND THE LIMITS OF TEXTUAL ANALYSIS

There are fundamental questions that must be answered before one can understand the Necessary and Proper Clause. The first of these is whether the Clause establishes an objective (judicially reviewable) standard for legislation or leaves legislation solely to congressional discretion. The second is the role of the Clause in the Constitution: Is it a grant of power, a limitation on power, or a rule of construction? The third is the meaning of “necessary”—just how restrictive a term is it? The fourth question is: What is the meaning, in this context, of the term “proper”? The fifth question is whether “and” is used in a conjunctive or disjunctive sense.

This Part examines each of these questions using traditional textual analysis. Textual analysis requires that we ascertain the ordinary eighteenth century meanings of key words in the Clause and then make “logical inferences from the structure and general purposes of the text.”<sup>15</sup> I conclude that textual analysis can resolve only the first of the five questions with any certainty, although it does provide some guidance for resolving the remainder.

### A. *Does the Necessary and Proper Clause Establish an Objective or Subjective Test of a Law’s Validity?*

Some have described the Necessary and Proper Clause as an “Elastic Clause,”<sup>16</sup> adding a reservoir of otherwise unspecified federal powers to the Congressional store. This view has its antecedents during the ratification debates, when anti-federalists claimed that the Clause would grant Congress the power to pass whatever laws it “deemed necessary” or “thought proper”<sup>17</sup>—that is, to legislate at discretion.<sup>18</sup>

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<sup>15</sup> Cf. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 621 (1999) (describing “original meaning analysis” as “references to dictionaries, common contemporary meanings, and logical inferences from the structure and general purposes of the text.”).

<sup>16</sup> See *About the Constitution*, available at [http://dhillman.com/const/about\\_the\\_constitution.htm](http://dhillman.com/const/about_the_constitution.htm) (last visited Aug. 29, 2004); see also RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* 87-88 (1987) (paraphrasing several arguments of this type).

<sup>17</sup> See, e.g., *An Old Whig II*, PHILADELPHIA INDEPENDENT GAZETTEER (October 17), in 13 DOCUMENTARY HISTORY, *supra* note 2, at 402 (“An Old Whig”):

Under such a clause as this, can anything be said to be reserved and kept back from Congress? Can it be said that the Congress have no power but what *is expressed*? “To make all laws which shall be necessary and proper” is in other words to make all such laws which *the Congress shall think necessary and proper*,—for who shall judge for the legislature what is necessary and proper?—Who shall set themselves above the sovereign?—What inferior legislature shall set itself above the supreme legislature?—To me it appears that no other power on earth can dictate to them, or

Textual analysis demonstrates this view to be unsupportable. The Clause provides that a law “shall be” necessary and proper. When the drafters wished to communicate a grant of unreviewable discretion, they used phrases such as “shall think proper,”<sup>19</sup> “the Congress may,”<sup>20</sup> and “as he shall judge necessary and expedient.”<sup>21</sup> The Necessary and Proper Clause, unlike those others, suggests that congressional choices are subject to judicial review.<sup>22</sup> Moreover, the Clause clearly restricts the purposes for which laws may be adopted: It vali-

control them, unless by force . . . for surely it cannot justly be said that they have no power but what is expressly given to them, when by the very terms of their creation they are vested with the powers of making laws in all cases necessary and proper; when from the nature of their power, they must necessarily be the judges, what laws are necessary and proper . . . . And in such cases it is not of a farthing consequence whether they really are of opinion that the law is necessary and proper, or only *pretend to think so*, for who can overrule their pretensions? (emphasis in original).

See also Brutus I, New York Journal (October 18), reprinted in 13 DOCUMENTARY HISTORY, *supra* note 2, at 413:

A power to make all laws, which shall be *necessary and proper*, for carrying into execution, all powers vested by the Constitution in the government of the United States, or any department or officer thereof, is a power very comprehensive and definite, and may, for ought I know, be exercised in such manner as entirely to abolish the state legislatures. Suppose the legislature of a state should pass a law to raise money to support their government and pay the state debt, may the Congress repeal this law, because it may prevent the collection of a tax which they may think proper and necessary to lay, to provide for the general welfare of the United States? (Emphasis in original).

See also Brutus V, NEW YORK JOURNAL (December 13), in 14 DOCUMENTARY HISTORY, *supra* note 2, at 423 (“The inference is natural that the legislature will have an authority to make all laws which they shall judge necessary for the common safety, and to promote the general welfare. This amounts to a power to make laws at discretion . . . .”); 2 ELLIOT’S DEBATES, *supra* note 2, at 338 (John Williams, speaking at the New York ratifying convention).

<sup>18</sup> For examples of the contemporary use of such phrases to mean “at discretion,” see Notes of Madison (May 29, 1787), in 1 Farrand, *supra* note 2, at 22 (quoting the Virginia Plan: “13. Resd. that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary . . . .”); Notes of Madison (June 15, 1787), in 1 Farrand, *supra* note 2, at 243 (quoting the New Jersey Plan, “to be applied to such federal purposes as they shall deem proper & expedient”).

<sup>19</sup> See U.S. CONST. art. I, § 9, cl. 1 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress.”). See also *id.* at art. II, § 3 (“and in Case of Disagreement between them [the Houses of Congress], with Respect to the Time of Adjournment, he [the President] may adjourn them to such Time as he shall think proper”); *id.* at art. V (“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . .”).

*Cf.* 1 BLACKSTONE, *supra* note 2, at 400 (“annually judged necessary by our legislature”); 3 *id.* at 74 (“They may also assess such rates, or scots, upon the owners of lands within their district, as they shall judge necessary.”).

<sup>20</sup> U.S. CONST. art. II, § 2, cl. 2 (“but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

<sup>21</sup> *Id.* at art. II, § 3 (“He [the President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . . .”).

<sup>22</sup> Lawson & Granger, *supra* note 2, at 276-77.



dates only laws enacted to “carry[] into Execution” powers granted elsewhere in the document.<sup>23</sup>

The conclusion that congressional decisions under the Necessary and Proper Clause are reviewable judicially was adopted by Chief Justice Marshall in *McCulloch*. Despite Marshall’s broad interpretation of the Clause, he affirmed that Congress may not use the enumerated powers as “pretexts” to achieve unlisted purposes.<sup>24</sup>

### B. *Is the Clause a Grant, Limitation, or Recital of Power?*

Some refinements aside,<sup>25</sup> there are three possible roles for the Necessary and Proper Clause. The first of these is as a grant of power not given in other parts of the Constitution. Arguing for this interpretation are two textual observations: the Clause is in the form of a grant (“The Congress shall have Power . . . To make all Laws”) and the drafters placed it in Article I, Section 8, which otherwise consists entirely of grants and accompanying qualifications.<sup>26</sup> Arguing against this interpretation is that the powers “granted” by the Necessary and Proper Clause all are bestowed elsewhere in the document. They are inherent in Article I, Section 1, which states that “All legislative Powers herein granted shall be vested in a Congress of the United States,” since the essence of “legislative Powers” is to pass laws.<sup>27</sup> The “powers herein granted” are, of course, those in the first seventeen clauses of Article I, Section 8 and scattered elsewhere throughout the Constitution.<sup>28</sup>

<sup>23</sup> *Id.* at 274-75.

<sup>24</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Marshall, C.J.):

Nor does the rule of interpretation we contend for, sanction any usurpation, on the part of the national government; since, if the argument be, that the implied powers of the constitution may be assumed and exercised, for purposes not really connected with the powers specifically granted, under color of some imaginary relation between them: the answer is, that this is nothing more than arguing from the abuse of constitutional powers, which would equally apply against the use of those that are confessedly granted to the national government; that the danger of the abuse will be checked by the judicial department, which, by comparing the means with the proposed end, will decide, whether the connection is real, or assumed as the pretext for the usurpation of powers not belonging to the government . . . .

*Id.* at 358-59.

<sup>25</sup> For example, one can argue that the Necessary and Proper Clause is a grant followed by a limitation or a rule of construction followed by a limitation.

<sup>26</sup> *Cf. Engdahl, supra* note 2, at 107-08 (“This is an *enumerated* power; the term ‘implied powers’ is a misnomer . . . . As regards the other two branches, the Clause acts as a ratchet to enhance, but not diminish, each branch’s discretion.”).

<sup>27</sup> *McCulloch*, 17 U.S. (4 Wheat.) at 412; THE FEDERALIST NO. 33, *supra* note 2, at 159 (Alexander Hamilton).

<sup>28</sup> *E.g.*, U.S. CONST. art. II, § 1, cl. 4 (“The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”); *id.* at art. II, § 2, cl. 2 (“The Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts

Another possible interpretation of the provision is that it *limits* (or qualifies) Congressional power.<sup>29</sup> Under this view, the Necessary and Proper Clause invalidates any law not necessary, not proper, or not an exercise of an enumerated power.<sup>30</sup> Contending for this view is the fact, already noted, that the power to pass laws in execution of enumerated powers is granted elsewhere.<sup>31</sup> The principal textual arguments to the contrary are the form of the Clause and its placement in the same section with seventeen other grants.

A third interpretation of the Clause is that it adds no powers of substance, but serves only as a rule of construction. By this view, its function is much the same as the function some see for the Ninth and Tenth Amendments<sup>32</sup>—as a statement of interpretative principle. By these lights, the Clause was placed in the Constitution to communicate to the ratifying public, to officers of the new government, to the states, and to the courts that the powers of the new Congress were not to be limited to those expressly delegated, as under the Articles of Confederation.<sup>33</sup> Congressional powers encompassed implied authority as well.<sup>34</sup>

Considerations militating in favor of the “rule of construction” approach are: the apparent grant of the same powers elsewhere in the Constitution, and the unlikelihood that a pure limitation would be located in Article I, Section 8 instead of in Article I, Section 9.<sup>35</sup> The principal drawback of the “rule of construction” view is that it leaves the Clause as substantive surplus—which, of course, offends a well-

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of Law, or in the Heads of Departments.”).

<sup>29</sup> Cf. Gressman, *supra* note 4, at 40 (stating that “this *McCulloch* three-part test has placed an important limitation on the power of Congress to enact laws that are ‘necessary and proper’”).

<sup>30</sup> Cf. Lawson & Granger, *supra* note 2, at 332 (concluding that *Wickard v. Filburn*, 317 U.S. 111 (1942) sustaining a federal agricultural program was wrongly decided because not “proper” to the federal commerce power).

<sup>31</sup> *Supra* notes 27-28 and accompanying text.

<sup>32</sup> Opinion on the scope of the Ninth Amendment is sharply divided, but practically all writers agree that whatever else it may do, it certainly serves as a rule of construction against the conclusion that federal power covers the entire field outside the exceptions in the Bill of Rights. For a collection of views, see *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* (Randy E. Barnett ed., 1989). For the view that the Tenth Amendment is but a “truism,” see *United States v. Darby*, 312 U.S. 100, 124 (1941).

<sup>33</sup> ARTS. OF CONFED., art. II (“Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation, expressly delegated to the United States, in Congress assembled.”).

<sup>34</sup> THE FEDERALIST NO. 33, *supra* note 2, at 159 (Alexander Hamilton).

<sup>35</sup> See U.S. CONST. art. I, § 9 (containing the primary limitations on Congress in the initial Constitution, including bans on limiting the slave trade until 1808, suspending the writ of habeas corpus, passing bills of attainder and ex post facto laws, assessing direct taxes without apportionment, imposing duties on exports, granting preferences to ports in some states, spending money without legislative appropriations, and granting titles of nobility).

established constructional preference.<sup>36</sup> Moreover, the resulting surplus is not merely a short phrase, but an independent provision thirty-nine words long.

These considerations are balanced closely enough so that it seems, to me at least, that there is no purely textual way to determine the Clause's precise role in the Constitution.

### C. What is the Meaning of "Necessary?"

The first major controversy after ratification concerning the word "necessary" arose in the debates over the constitutionality of Congress chartering a national bank. Some Bank opponents argued that "necessary" meant "absolutely necessary"—that is, indispensable. By way of example, in rejoinder to President Washington's request for his opinion on the Bank's constitutionality, Secretary of State Thomas Jefferson wrote—

The second general phrase [in Article I, Section 8] is, "to make all laws *necessary* and proper for carrying into execution the enumerated powers." But they can all be carried into execution without a bank. A bank, therefore, is not necessary, and, consequently, not authorised [*sic*] by this phrase.<sup>37</sup>

The premise for the argument that "necessary" means "indispensable" is that the Clause granted only so much implied power as required to prevent the enumerated powers from being nugatory.<sup>38</sup> Jefferson and other bank opponents maintained that Congress may adopt a measure only if there is no other way of executing one of the powers expressly granted.

In response, bank proponents pointed out that the drafters had used the phrase "absolutely necessary" in another part of the Constitution.<sup>39</sup> This implied that, when unmodified, "necessity" need not be absolute.<sup>40</sup> Bank proponents did *not* mention that on two occasions the drafters had used the unmodified word "necessary" in contexts where it could mean only "indispensable." One of these occurrences

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<sup>36</sup> For the preference, see Lawson & Granger, *supra* note 2, at 290 (detailing how prominent leaders of that era distinguished between the words "necessary" and "proper").

<sup>37</sup> Thomas Jefferson, *Opinion of Thomas Jefferson, Secretary of State*, in BANK HISTORY, *supra* note 2, at 92 (emphasis in original).

<sup>38</sup> *Id.* at 93.

<sup>39</sup> U.S. CONST. art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's [*sic*] inspection Laws.").

<sup>40</sup> Chief Justice Marshall adopted this position in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 387-88 (1819).

was the Constitution's reference to the requisite majority in the House of Representatives for electing the President;<sup>41</sup> the other was the requirement that both houses of Congress concur in a bill before it goes to the President for signature.<sup>42</sup>

Still, the proponents of the bank had the better of this argument because both of the constitutional provisions where "necessary" means "indispensable" involve legal-procedural requirements rather than vaguer issues of policy. The records of the constitutional debates and contemporary legal sources such as Blackstone's *Commentaries* confirm that the term "necessary" often meant "indispensable" in the legal-procedural context,<sup>43</sup> while in the policy context the term could, and often did, signify something less demanding.<sup>44</sup> Thus, when the drafters sought to specify indispensability in policy, they employed the phrase, "absolutely necessary." By using that phrase, they signaled, that, in the absence of Congressional consent, a state could impose a tax on imports or exports only when "but for" the tax, the state's inspection laws were impossible to execute.<sup>45</sup>

Supporters of the bank also pointed out that requiring any particular law to be indispensable would, in many cases, itself render enumerated powers nugatory.<sup>46</sup> This is because in many situations adopting one of several options is indispensable to executing a power, but no *single* choice is indispensable.<sup>47</sup> Suppose that executing Congress' power to regulate the value of money<sup>48</sup> requires that Congress adopt one of three bills: a bill chartering a national bank, a bill creating a government-owned financial clearing house, or a proposal to super-

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<sup>41</sup> U.S. CONST. art. II, § 1, cl. 3 (in a House of Representatives election for the President, the delegations shall vote by states and "a Majority of all the States shall be necessary to a Choice").

<sup>42</sup> U.S. CONST. art. I, § 7, cl. 3 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States.").

<sup>43</sup> E.g., 1 BLACKSTONE, *supra* note 2, at 76 ("To make a particular custom good, the following are necessary requisites . . ."); *id.* at 107 ("The word, heirs, is necessary in the grant or donation in order to make a fee, or inheritance. For if land be given to a man for ever, or to him and his assigns for ever, this vests in him but an estate for life."); Notes of Paterson (June 16, 1787), in 1 Farrand, *supra* note 2, at 272 (quoting James Wilson, discussing the constitution of Holland: "the Vote of every Province necessary").

<sup>44</sup> For examples of a sliding scale in policy matters, see *infra* notes 64-79 and accompanying text.

<sup>45</sup> U.S. CONST. art. I, § 10, cl. 2.

<sup>46</sup> This seems to be Congressman Sedgwick's point, made during the congressional debate on the first Bank of the United States. 2 ANNALS, *supra* note 2, at 1962 (February 4, 1791) ("Such a construction would be infinitely too narrow and limited; and to apply the meaning strictly, it would prove, perhaps, that all the laws which had been passed were unconstitutional; for few, if any of them, could be proved indispensable to the existence of the Government.").

<sup>47</sup> See, e.g., Graber, *supra* note 2, at 167 ("There is, for example, no necessary way of leaving a room with two doors.").

<sup>48</sup> U.S. CONST. art. I, § 8, cl. 5 ("To coin Money, regulate the Value thereof . . .").

wise state-chartered banks. Congress must adopt one of the three in order to execute the power, but no one is indispensable because either of the other two could do the job. So if “necessary” means “indispensable,” Congress could enact none of the three, and the express power of the regulating the value of money would remain unexecuted.

Bank supporters missed another clue that “necessary” does not mean “indispensable.” The provision immediately preceding the Necessary and Proper Clause gives Congress the power “to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other *needful* Buildings.”<sup>49</sup>

“Needful” was an acknowledged synonym for “necessary,”<sup>50</sup> and in fact an earlier draft of that provision had used the word “necessary” instead of “needful.”<sup>51</sup> While it is absolutely necessary (needful) for Congress to authorize forts, magazines, arsenals, and dock yards, it would be a rare event for any *single* installation to be indispensable. An interpretation makes no sense if it would render unconstitutional a law establishing a dock-yard at Charleston because an alternative proposal for Newport News kept the Charleston site from being indispensable.

Written in rebuttal to Jefferson’s view that a bank could not be “necessary” because it was not indispensable was Secretary of the Treasury Alexander Hamilton’s *Opinion on the Constitutionality of the National Bank*. There, Hamilton equated “necessary” with expedient: “It is certain,” he wrote, “that neither the grammatical, nor popular sense of the term, requires that construction [i.e., indispensable].” On the contrary, “*necessary* often means no more than *needful*, *requisite*, *incidental*, *useful*, or *conducive to*.”<sup>52</sup> In *McCulloch*,<sup>53</sup>

<sup>49</sup> U.S. CONST. art. I, § 8, cl. 17 (emphasis added). See also 3 BLACKSTONE, *supra* note 2, at 241 (“No assise of novel disseisin, for common, shall lie against a lord for erecting on the common any windmill, sheephouse, or other necessary buildings therein specified.”).

<sup>50</sup> 2 JOHNSON, *supra* note 2 (unpaginated) (defining “necessary”); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 356 (1819) (“‘Necessary and proper’ are, then, equivalent to *needful* and *adapted*.”); Alexander Hamilton, *Opinion of Alexander Hamilton on the Constitutionality of the National Bank*, in BANK HISTORY, *supra* note 2, at 97.

<sup>51</sup> Journal (August 18, 1787), in 2 Farrand, *supra* note 2, at 321, 325.

<sup>52</sup> Alexander Hamilton, *Opinion of Alexander Hamilton Opinion on the Constitutionality of a National Bank*, in BANK HISTORY, *supra* note 2, at 97 (emphasis in original).

Later in the opinion, Hamilton virtually read the word “necessary” out of the Clause: The degree in which a measure is necessary, can never be a test of the *legal right* to adopt it. That must be a matter of opinion, and can only be a test of expediency. The relation between the *measure* and the *end*; between the *nature* of the *mean* employed towards the execution of the power, and the *object* of that power; must be the criterion of constitutionality . . . [T]he powers contained in a constitution of government . . . ought to be construed liberally in advancement of the public good.

Chief Justice Marshall substantially agreed, stating that “necessary” could mean merely “convenient, or useful, or essential.”<sup>54</sup>

Yet textual analysis in the light of common eighteenth century usage leaves one puzzled by Hamilton and Marshall’s interpretation. How could “necessary” mean merely “convenient,” “useful” or “expedient?”<sup>55</sup> The leading dictionary of the time lists multiple entries for “necessary,” but *not a single one* of these entries comes close to “expedient,” “convenient,” or “useful.”<sup>56</sup> The Constitution uses the term “expedient” in contrast to “necessary” under circumstances that would create surplusage if they meant the same thing.<sup>57</sup> Contemporary writers regularly treated necessity as a different—and contrasting—concept from convenience. John Adams, for example, wrote that “[one] can . . . lose none of his property, or the necessities, conveniences, or ornaments of life.”<sup>58</sup> Richard Price, a favorite commentator among American Whigs<sup>59</sup>—in speaking of Americans in 1785—wrote that, “[t]he country they inhabit includes soils and climates of all sorts, producing *not only every necessary, but every convenience* of life.”<sup>60</sup> William Blackstone frequently distinguished necessity from concepts less demanding.<sup>61</sup> Delegates to the various

*Id.* at 98 (emphasis in original).

<sup>53</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>54</sup> *Id.* at 413 (“If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another.”).

<sup>55</sup> Johnson’s dictionary offers the following as the primary definition of “expedient”: “Proper; fit; convenient; suitable.” The only other definition seems confined to Shakespeare. 1 JOHNSON, *supra* note 2 (unpaginated).

<sup>56</sup> Thus, Samuel Johnson’s Dictionary contains the following first definition of “necessary”: “1. Needful, indispensably requisite.” *Id.* Then follow three literary selections, the first two using “necessary” in the sense of absolutely necessary, but the last quoting Swift: “The Dutch would go on to challenge the military government and the revenues, and reckon them among what shall be thought *necessary* for their barrier.” *Id.* The dictionary continues: “2. Not free; fatal; impelled by fate. 3. Conclusive; decisive by inevitable consequence.” *Id.*

<sup>57</sup> U.S. CONST., art. II, § 3. This section is discussed *infra* note 106 and accompanying text.

<sup>58</sup> The Earl of Clarendon to William Pym, in *THE REVOLUTIONARY WRITINGS OF JOHN ADAMS* 56 (C. Bradley Thompson ed., 2000).

<sup>59</sup> Price was regularly cited during the constitutional debates. See, e.g., Notes of Yates (June 27, 1787), in 1 Farrand, *supra* note 2, at 441 (quoting Luther Martin); Luther Martin, Genuine Information IV (January 8), *BALTIMORE MARYLAND GAZETTE*, in 15 DOCUMENTARY HISTORY, *supra* note 2, at 301 (Luther Martin, then an anti-federalist); Tamony, VIRGINIA INDEPENDENT CHRONICLE (January 9), in 15 DOCUMENTARY HISTORY, *supra* note 2, *id.* at 323 (referencing “the celebrated Dr. Price”); 17 DOCUMENTARY HISTORY, *supra* note 2, at 265 (“Fabius IX,” Pennsylvania Mercury (May 1), reprinted in 17 DOCUMENTARY HISTORY, *supra* note 2, at 265).

<sup>60</sup> Richard Price, *Of the Importance of the Revolution which has Established the Independence of the United States* (1785), available at <http://www.constitution.org/price/price.txt> (last visited Aug. 29, 2004) (emphasis added).

<sup>61</sup> E.g. 1 BLACKSTONE, *supra* note 2, at 121 (“necessary and expedient”); 3 BLACKSTONE,

federal and state conventions—including Hamilton himself<sup>62</sup>—used the terms in a similar way.<sup>63</sup>

It is true that contemporary usage in the policy arena reveals a spectrum of meanings for “necessary.” At its strongest, the word meant “indispensable.”<sup>64</sup> Besides the phrases “absolutely necessary,”<sup>65</sup> and “indispensably necessary,”<sup>66</sup> one encounters many weaker

*supra* note 2, at 300 (same); 3 BLACKSTONE, *supra* note 2, at 408 (“King Edward, on his return from his French dominions in the seventeenth year of his reign, after upwards of three years absence, found it necessary (or convenient) to prosecute his judges”); 3 BLACKSTONE, *supra* note 2, Supplement, at iii (“neither necessary nor convenient”). Cf. 4 BLACKSTONE, *supra* note 2, at 352 (“prudent and necessary”).

<sup>62</sup> E.g., 2 ELLIOT’S DEBATES, *supra* note 2, at 355 (quoting Hamilton at the New York ratifying convention: “necessary and useful”).

<sup>63</sup> E.g., Notes of Madison (August 15, 1787), in 2 Farrand, *supra* note 2, at 297 (“Mr. Gouverneur Morris opposed it as unnecessary and inconvenient.”); Notes of Madison (August 18, 1787), in 2 Farrand, *supra* note 2, at 327:

Mr. Rutledge’s [*sic*] motion was referred—He then moved that a Grand Committee <be appointed to> consider the necessity and expediency of the U- States assuming all the State debts—A regular settlement between the Union & the several States would never take place. The assumption would be just as the State debts were contracted in the common defence. It was necessary, as the taxes on imports the only sure source of revenue were to be given up to the Union. It was politic, as by disburdening the people of the State debts it would conciliate them to the plan.

See also Caleb Strong to Alexander Hodgden (July 30, 1787), in Hutson, SUPPLEMENT, *supra* note 2, at 199 (“it will be very convenient and even necessary for me that the Order should be answered”); James Wilson, *Ratification Speech* (Oct. 6, 1787), available at <http://www.lexrex.com/enlightened/writings/jwilson.htm> (“yet I do not know a nation in the world which has not found it necessary and useful to maintain the appearance of strength in a season of the most profound tranquility.”); 2 ELLIOT’S DEBATES, *supra* note 2, at 282 (John Jay, at the New York ratifying convention, “it is both necessary and practicable”); *id.* at 308 (John Lansing, at the same convention: “unnecessary and useless”).

<sup>64</sup> JOHNSON, *supra* note 2 (unpaginated) (defining “necessary” in part as “indispensably requisite”); see U.S. CONST. art. II, § 1, cl. 2; *id.* art. I, § 7, cl. 3; Notes of Madison (June 6, 1787), in 1 Farrand, *supra* note 2, at 132-33 (“The Legislature ought to be the most exact transcript of the whole Society. Representation is made necessary only because it is impossible for the people to act collectively.”); Notes of King (June 6, 1787), in 1 Farrand, *supra* note 2, at 143 (quoting Dickinson, “We cannot form a national Govt. as is proposed unless we draw a Br. from the people, & a Br. from the legislature—it is necessary in theory—And essential to the success of the project . . .”).

<sup>65</sup> E.g., 1 BLACKSTONE, *supra* note 2, at 26; Notes of Madison (June 1, 1787), in 1 Farrand, *supra* note 2, at 67 (discussing Madison’s position at the federal convention); Notes of Madison (June 8, 1787), in 1 Farrand, *supra* note 2, at 164 (same); Notes of Yates (June 11, 1787), in 1 Farrand, *supra* note 2, at 207 (discussing speech of Randolph); Richard Price, *Observations on the Nature of Civil Liberty, the Principles of Government, and the Justice and Policy of the War with America* (1776), available at <http://www.constitution.org/price/price.txt> (last visited Aug. 29, 2004) (“All government, even within a state, becomes tyrannical as far as it is a needless and wanton exercise of power, or is carried farther than is absolutely necessary to preserve the peace and to secure the safety of the state.”).

<sup>66</sup> E.g., 4 BLACKSTONE, *supra* note 2, at 225; S.C. CONST. pmbl. (1776), available at <http://www.yale.edu/lawweb/avalon/states/sc01.htm> (last visited Aug. 29, 2004); Notes of Madison (June 8, 1787), in 1 Farrand, *supra* note 2, at 164 (discussing speech of Charles Pinckney: “He urged that such a universality of the power was indispensably necessary to render it effectual . . .”); 2 ELLIOT’S DEBATES, *supra* note 2, at 293 (R.R. Livingston, speaking at the

meanings: "extremely necessary,"<sup>67</sup> "highly necessary,"<sup>68</sup> "more necessary,"<sup>69</sup> "less necessary,"<sup>70</sup> "too necessary,"<sup>71</sup> "so necessary,"<sup>72</sup> "in some degree necessary,"<sup>73</sup> and "equally necessary."<sup>74</sup> That having been said, in ordinary usage, I have been able to find no meaning weaker than that approximating, "without which the particular result would be difficult."<sup>75</sup>

To select only one of many good contemporary writers, consider how "Agrippa," an anti-federalist, used "necessary." In his first "letter," Agrippa wrote: "It is a fact justified by the experience of all mankind from the earliest antiquity down to the present time, that freedom is *necessary* to industry."<sup>76</sup> (The sense here is "indispensable.") In his fourth "letter," he claimed: "The inhabitants of warmer climates are more dissolute in their manners, and less industrious, than in colder countries. A degree of severity is, therefore, *necessary* with one which would cramp the spirit of the other."<sup>77</sup> (The sense is quite strong—either indispensable or reasonably necessary.) In his ninth Letter, Agrippa used the word more comparatively, but still firmly:

Three restrictions appear to me to be *essentially necessary* to preserve the equality of rights to the states . . . . The third seems to be *equally necessary*.

New York ratifying convention).

<sup>67</sup> 1 BLACKSTONE, *supra* note 2, at 181; Notes of Madison (June 1, 1787), in 1 Farrand, *supra* note 2, at 197 (quoting paper written by Benjamin Franklin for the Committee).

<sup>68</sup> E.g., 1 BLACKSTONE, *supra* note 2, at 15, 25.

<sup>69</sup> 3 BLACKSTONE, *supra* note 2, at 137; Notes of Madison (June 21, 1787), in 1 Farrand, *supra* note 2, at 357 (speech by Madison); Notes of Madison (August 9, 1787), in 2 Farrand, *supra* note 2, at 239 (describing speech by Williamson).

<sup>70</sup> Notes of Madison (June 11, 1787), in 1 Farrand, *supra* note 2, at 251 (describing speech by Paterson).

<sup>71</sup> Notes of Madison (September 15, 1787), in 2 Farrand, *supra* note 2, at 627-28 ("The motion being lost by the equal division <of votes,> It was urged that it be put a second time, some such provision being too necessary, to be omitted, and on a second question it was agreed to *nem. con.*") (*Nem. con.* means unanimously (by states)—*nemine contradicente.*).

<sup>72</sup> 1 BLACKSTONE, *supra* note 2, at 55; 4 BLACKSTONE, *supra* note 2, at 63.

<sup>73</sup> 4 BLACKSTONE, *supra* note 2, at 43.

<sup>74</sup> 1 BLACKSTONE, *supra* note 2, at 257; Notes of Madison (July 2, 1787), in 1 Farrand, *supra* note 2, at 512 (describing speech by Gouverneur Morris).

<sup>75</sup> Compare Notes of Madison (June 2, 1787), in 1 Farrand, *supra* note 2, at 88 (quoting Randolph: "2. that a unity [in the executive] was unnecessary a plurality being equally competent to all the objects of the department") with Notes of Pierce (June 2, 1787), in 1 Farrand, *supra* note 2, at 92 ("Mr. Butler was of opinion that a unity of the Executive would be necessary in order to promote dispatch.").

<sup>76</sup> Agrippa I, Massachusetts Gazette (November 23), reprinted in 4 DOCUMENTARY HISTORY, *supra* note 2, at 305 (emphasis added).

<sup>77</sup> Agrippa IV, Massachusetts Gazette (December 4), reprinted in 4 DOCUMENTARY HISTORY, *supra* note 2, at 382 (emphasis added).



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To promote the happiness of the people it is *necessary* that there should be local laws; and it is *necessary* that those laws should be made by the representatives of those who are immediately subject to the want of them. By endeavouring to suit both extremes, both are injured.<sup>78</sup>

I have placed more examples from policy contexts in the footnote, some of them comparative in nature.<sup>79</sup>

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<sup>78</sup> Agrippa IX, Massachusetts Gazette (December 28), reprinted in 5 DOCUMENTARY HISTORY, *supra* note 2, at 540 (emphasis added).

<sup>79</sup> See, e.g., 1 BLACKSTONE, *supra* note 2, at 153 (communicating something between absolute necessity and common convenience):

The distinction of rank and honours is *necessary* in every well-governed state; in order to reward such as are eminent for their services to the public, in a manner the most desirable to individuals, and yet without burthen to the community; exciting thereby an ambitious yet laudable ardor, and generous emulation in others. And emulation, or virtuous ambition, is a spring of action which, however dangerous or invidious in a mere republic or under a despotic sway, will certainly be attended with good effects under a free monarchy; where, without destroying it's [*sic*] existence, it's [*sic*] excesses may be continually restrained by that superior power, from which all honour is derived.

\* \* \* \*

A body of nobility is also *more peculiarly necessary* in our mixed and compounded constitution, in order to support the rights of both the crown and the people, by forming a barrier to withstand the encroachments of both. (emphasis added).

Cf. 1 BLACKSTONE, *supra* note 2, at 312 ("rendered necessary by the great abuses crept into the practice of franking"). See also SIDNEY, *supra* note 2, at 390 ("a most necessary curb to the fury of bad princes, preventing them from bringing destruction upon the people"); 1 BLACKSTONE, *supra* note 2, at 547 ("Pontius the Samnite said as truly as bravely to his countrymen, That *those arms were just and pious that were necessary, and necessary when there was no hope of safety by any other way.*") (emphasis in original).

Some examples from the constitutional convention:

Mr. Mason observed that the present confederation was not only deficient in not providing for coercion & punishment agst. delinquent States; but argued very cogently that punishment could not <in the nature of things be executed on> the States collectively, and therefore that such a Govt. was necessary as could directly operate on individuals, and would punish those only whose guilt required it.

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Mr. Sherman who took his seat to day, admitted that the Confederation had not given sufficient power to Congs. and that additional powers were necessary. . . .

Notes of Madison (May 30, 1787), in 1 FARRAND, *supra* note 2, at 34. See also Notes of Madison (May 31, 1787), in 1 FARRAND, *supra* note 2, at 53 ("This being the end of all our deliberations, all the necessary means for attaining it must, however reluctantly, be submitted to.") (speech by Madison).

Mr. Gerry, according to previous notice given by him, moved: that the National Executive should be elected by the Executives of the States . . . . If the appointmt. should be made by the Natl. Legislature, it would lessen that independence <of the Executive> which ought to prevail, would give birth to intrigue and corruption between the Executive & Legislature previous to the election, and to partiality in the Executive afterwards to the friends who promoted him. Some other mode therefore appeared to him necessary.

Notes of Madison (June 9, 1787), in 1 FARRAND, *supra* note 2, at 175.

One also is puzzled by the manner in which Hamilton and Marshall presented their definitions of "necessary." Hamilton placed "useful, or conducive to" at the end of a string of adjectives that began with "needful, requisite." Marshall's formulation mixed "convenient and useful" with the very different term, "essential." It is easy to suspect that both were trying to bury the more controversial definitions (convenient, useful) amid those less controversial (needful, requisite, essential). If one is initially skeptical of their motives, one might conclude that they were dissembling.<sup>80</sup>

Thus, textual analysis suggests rejection of both the Jeffersonian and Hamiltonian views. It implies that the truth is somewhere between those views; but exactly where, textual analysis does not tell us.

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Col. Mason. This is a valuable & necessary part of the plan. In this extended Country, embracing so great a diversity of interests, it would be dangerous to the distant parts to allow a small number of members of the two Houses to make laws. The Central States could always take care to be on the Spot and by meeting earlier than the distant ones, or wearying their patience, and outstaying them, could carry such measures as they pleased. He admitted that inconveniences might spring from the secession of a small number: But he had also known good produced by an apprehension of it.

Notes of Madison (August 10, 1787), in 2 Farrand, *supra* note 2, at 252 (observing that Mason subscribes to a "necessary" measure although it might produce "inconveniences").

<sup>80</sup> Hamilton was, on the spectrum of the founding generation's political views, an extreme consolidationist—hostile to the concept of limited government, and perhaps to republicanism. At the federal convention, he had proposed a plan for an unlimited national authority, *see* Notes of Madison (June 18, 1787), in 1 Farrand, *supra* note 2, at 291-93 (quoting the text of Hamilton's plan), and of the finished Constitution, he admitted: "No man's ideas were more remote from the plan than his own were known to be." Notes of Madison (September 17, 1787), in 2 Farrand, *supra* note 2, at 645-46. Moreover, we now know from Hamilton's private papers that around the time he was promoting the first National Bank, he was carrying on a conscious campaign to undermine the constitutional limitations on the federal government: One of his unpublished papers written in September, 1787 (within two weeks of the time the national convention adjourned on the 17th), reveals him to be looking forward to a Washington presidency in which the national government may "triumph altogether over the state governments and reduce them to an entire subordination, dividing the large states into smaller districts." Alexander Hamilton, *Conjectures About the Constitution*, in 13 DOCUMENTARY HISTORY, *supra* note 2, at 278.

Marshall can be accused of no bad faith, but his opinion in *McCulloch* was composed more than 30 years after his role in the ratification, after long and vicious battles against the same people who opposed the bank. There are many accounts of the party battles of the time. Two recent ones that feature Marshall and the battles up to the time of *McCulloch* are R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* 69-302 (2001) and HERBERT A. JOHNSON, *THE CHIEF JUSTICESHIP OF JOHN MARSHALL: 1801-1835* 53-75 (1997).

### D. What is the Meaning of "Proper"?

Previous commentators have had only limited success in defining "proper." We can be reasonably certain that "proper" means something different from "necessary,"<sup>81</sup> but the rest is quite uncertain.

"Proper" (Latin: *proprius*),<sup>82</sup> is related closely to "property"<sup>83</sup> (*proprietas*).<sup>84</sup> The word's earliest definition is "unique to," "peculiar to"—not common with other things.<sup>85</sup> This is the meaning in the

<sup>81</sup> See Lawson & Granger, *supra* note 2, at 289-91 (providing some examples of distinct uses of the two words). See also BARNETT, RESTORING, *supra* note 2, at 185.

There is a multitude of other examples of how the founding generation used "necessary" and "proper" in contrasting ways. See, e.g., Notes of Madison (May 28, 1787), in 1 Farrand, *supra* note 2, at 10 (discussing speech by quoting Rufus King, at the federal convention: "He urged that as the acts of the Convention were not to bind the Constituents it was unnecessary to exhibit this evidence of the votes; and improper as changes of opinion would be frequent in the course of the business & would fill the minutes with contradictions."); Notes of Madison (June 4, 1787), in 1 Farrand, *supra* note 2, at 111 (quoting George Mason: "It is unnecessary, if not improper, to examine this part of the subject now."); Notes of Madison (June 11, 1787), in 1 Farrand, *supra* note 2, at 202 ("[S]everal members did not see the necessity of the <Resolution> at all, nor the propriety of making the consent of the Natl. Legisl. unnecessary."); Notes of Madison (September 15, 1787), in 2 Farrand, *supra* note 2, at 623 ("Mr Sherman concurred in the opinion that an address was both unnecessary and improper."); Jonathan Dayton to William Livingston, Jul. 13, 1787, in Hutson, SUPPLEMENT, *supra* note 2, at 167 (stating, "It is unnecessary and would perhaps be improper, to relate here the causes of this delay."); Hugh Hughes, A Country Man III (December 3, 1787), in 19 DOCUMENTARY HISTORY, *supra* note 2, at 350 ("A Necessity or even a Propriety"). See also Notes of Madison (August 4, 1787), in 2 Farrand, *supra* note 2, at 235-36:

Mr. <Madison> was not averse to some restrictions on this subject; but could never agree to the proposed amendment. He thought any restriction <however> in the Constitution unnecessary, and improper; because the Natl. Legislre. is to have the right of regulating naturalization, and can by virtue thereof fix different periods of residence as conditions of enjoying different privileges of Citizenship: Improper: because it will give a tincture of illiberality to the Constitution . . .

See also Notes of Madison (August 13, 1787), in 2 Farrand, *supra* note 2, at 268:

Mr. Wilson & Mr. Randolph moved to strike out "7 years" and insert "4 years," as the requisite term of Citizenship to qualify for the House of Reps. Mr. Wilson said it was very proper the electors should govern themselves by this consideration; but unnecessary & improper that the Constitution should chain them down to it.

<sup>82</sup> LEWIS & SHORT, *supra* note 2, at 1472 ("not common with others, one's own, special, particular, proper"—in opposition to *communis*).

<sup>83</sup> Indeed, the neuter substantive, *proprium*, can mean property. LEWIS & SHORT, *supra* note 2, at 1472.

<sup>84</sup> Recall that educated people in the founding generation were devoted to Latin and the classics, and thoroughly grounded in them, and would have internalized theses connections. CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT (Harvard University Press 1994). On the Latinate English of the Framers, see WILLS, *supra* note 2, at 93; FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (University Press of Kansas 1985), *passim*.

<sup>85</sup> The Institutes of Justinian, familiar to the better-educated founders, often used *proprius* in this way: J. INST. 1.14.1 ("Sed et servus proprius testamento cum libertate recte tutor dari potest"); See also *id.* at I. 2.12.pr ("Quod in castris adquisierit miles qui in potestate patris est, neque ipsum patrem adimere posse . . . sed scilicet proprium eius esse id quod in castris adquisierit."); *id.* at I. 1.2.pr ("Ius naturale est quod natura omnia animalia docuit. Nam ius istud non humani generis proprium est, sed omnium animalium."); *id.* at I.2.1.27 ("Sed si diversae materiae sint et ob id propria species facta sit, forte ex vino et melle mulsum aut ex auro et argento

phrase, “proper name.”<sup>86</sup> The founders often used “proper” in this original sense, as when Roger Sherman argued at the federal convention that it was “improper” to allow the federal legislature to intrude into the laws “connected with the states,”<sup>87</sup> or when James Wilson opined that executive exercise of legislative powers was not “proper.”<sup>88</sup> A closely related meaning of the adverb “properly” (Latin: *proprie*) was “strictly speaking.” This usage appeared not just in English but in Latin texts popular with the founding generation.<sup>89</sup>

*electrum, idem iuris est.”*)

<sup>86</sup> *Id.* at: I. 2.13.1 (“*Nominatim autem exheredari quis videtur sive ita exheredetur TITIUS FILIUS MEUS EXHERES ESTO, sive ita FILIUS MEUS EXHERES ESTO, non adiecto proprio nomine*”) (emphasis in original).

<sup>87</sup> *E.g.*, Notes of McHenry (May 31, 1787), in 1 Farrand, *supra* note 2, at 60.

<sup>88</sup> Notes of Madison (June 1, 1787), in 1 Farrand, *supra* note 2, at 65-66. *See also id.* at 67 (discussing speech by General Pinckney); Notes of Pierce (June 4, 1787), in 1 Farrand, *supra* note 2, at 109 (quoting Benjamin Franklin); Notes of Madison (June 6, 1787), in 1 Farrand, *supra* note 2, at 139 (speech by Madison); *id.* at 140 (referencing speech by quoting Dickinson); Notes of King (June 6, 1787), in 1 Farrand, *supra* note 2, at 144-45 (quoting Dickinson, “It will require as great Talents, Firmness, & Abilities, to discharge the proper Duties of the Executive”); Notes of Madison (July 17, 1787), in 2 Farrand, *supra* note 2, at 27 (referencing speech by Luther Martin, “Mr. L. Martin considered the [proposed Congressional veto of state laws] as improper & inadmissible. Shall all the laws of the States be sent up to the Genl. Legislature before they shall be permitted to operate?”).

*See also* Notes of Yates (June 22, 1787), in 1 Farrand, *supra* note 2, at 378-79 (quoting Hamilton):

A state government will ever be the rival power of the general government. It is therefore highly improper that the state legislatures should be the paymasters of the members of the national government. All political bodies love power, and it will often be improperly attained.

For a similar use of the word by an anti-federalist author, see Brutus, VI, New York Journal (December 27), in 15 DOCUMENTARY HISTORY, *supra* note 2, at 112 (“Brutus,” stating, “The fear of this, will, it is presumed, restrain the general government, for some time, within proper bounds . . .”).

*See also* Richard Price, *Two Tracts on Civil Liberty, the War with America, and The Debts and Finances of the Kingdom: with A General Introduction and Supplement* (1778), available at <http://www.constitution.org/price/price.txt> (last visited Aug. 29, 2004). (“If the former account is right, the people (that is, the body of independent agents in every community) are their own legislators. All civil authority is properly their authority.”) For similar sentiments by the same author, see *The Evidence for a Future Period of Improvement in the State of Mankind* (1787), available at <http://www.constitution.org/price/price.txt> (last visited Aug. 29, 2004) (“Free governments . . . give a feeling of dignity and consequence to the governed, and to the governors a feeling of responsibility which has a tendency to keep them within the bounds of their duty, and to teach them that they are more properly the servants of the public than its governors.”).

<sup>89</sup> J. INST. 3.2.2 (“*Per adoptionem quoque adgnationis ius consistit, veluti inter filios naturales et eos quos pater eorum adoptavit nec dubium est, quin proprie consanguinei appellantur.*”) (emphasis added); *id.* at 3.6.3 (“*Avunculus est matris frater, qui apud Graecos proprie μητρώς appellatur et promiscue θείοις dicitur.*”) (emphasis added).

Thus, strictly (“properly”) speaking, Justinian taught us that a quasi contract was not a contract. *Id.* at 3.27.pr (“*Post genera contractuum enumerata dispiciamus etiam de his obligationibus quae non proprie quidem ex contractu nasci intelleguntur, sed tamen, quia non ex maleficio substantiam capiunt, quasi ex contractu nasci videntur.*”).

LEWIS & SHORT, *supra* note 2, at 1472, confirms that “strictly speaking” is one definition

In an important investigation of the subject, Gary Lawson and Patricia B. Granger relied on the Founders' use of the earliest sense of "proper" (without mentioning the Latin) to argue that a "proper" law was one that respected the legal terrain belonging to the other branches of government, the states, and the people.<sup>90</sup> That conclusion may be correct as far as it goes, but substantively, it mostly reaffirms the rather obvious point that Congress may not pass an unconstitutional law.<sup>91</sup> Moreover, it does not come fully to grips with the fact that the founding generation commonly—indeed, usually—employed "proper" and its derivatives in different and broader ways. Adam Smith had devoted a major part of his influential *Theory of Moral Sentiments* to "propriety"—a value that required one to act in ways duly proportioned and temperate,<sup>92</sup> harmonious,<sup>93</sup> and impartial.<sup>94</sup>

of *proprie*.

<sup>90</sup> See generally Lawson & Granger, *supra* note 2.

<sup>91</sup> Thus, the federalists represented certain powers as being outside federal jurisdiction, Lawson & Granger, *supra* note 2, at 316-23; cf. Natelson, *Enumerated*, *supra* note 2, but this representation certainly did not depend on the Necessary and Proper Clause.

Another weakness is the lack of contemporaneous pre-ratification evidence for the "jurisdictional" interpretation. Most of the evidence cited by Professors Lawson and Granger for this position consists of post-ratification statements—some of it decades after ratification. See Lawson & Granger, *supra* note 2, at 291-308. Their pre-ratification evidence is subject to other interpretations. For example, the extract they cite from the essay by the "Impartial Citizen"—a federalist writer—is more consonant with a fiduciary meaning of "proper" than with a purely "jurisdictional" meaning. *Id.* at 298-99. Cf. *infra* notes 315-319 and accompanying text.

<sup>92</sup> SMITH, *supra* note 2, at 25-26 ("[R]educe the violence of the passions to that pitch of moderation, in which the impartial spectator can entirely enter into them"); *id.* at 27 ("The propriety of every passion excited by objects peculiarly related to ourselves, the pitch which the spectator can go along with, must lie, it is evident, in a certain mediocrity. If the passion is too high, or if it is too low, he cannot enter into it."); *id.* at 28 ("In the command of those appetites of the body consists that virtue which is properly called temperance . . . . But to confine them within those limits, which grace, which propriety, which delicacy, and modesty require, is the office of temperance."). Cf. Notes of Madison (June 9, 1787), in 1 Farrand, *supra* note 2, at 179 (discussing speech by James Wilson):

[James Wilson] entered elaborately into the defence of a proportional representation, stating for his first position that as all authority was derived from the people, equal numbers of people ought to have an equal no. of representatives, and different numbers of people different numbers of representatives. This principle had been improperly violated in the Confederation, owing to the urgent circumstances of the time.

See Notes of Madison (June 30, 1787), 1 Farrand, *supra* note 2, at 484 (quoting Wilson on proportionate representation, "If the minority of the people of America refuse to coalesce with the majority on just and proper principles, if a separation must take place, it could never happen on better grounds.").

<sup>93</sup> SMITH, *supra* note 2, at 16 ("When the original passions of the person principally concerned are in perfect concord with the sympathetic emotions of the spectator, they necessarily appear to this last just and proper . . ."); *id.* at 25:

And hence it is, that to feel much for others and little for ourselves, that to restrain our selfish, and to indulge our benevolent affections, constitutes the perfection of human nature; and can alone produce among mankind that harmony of sentiments and passions in which consists their whole grace and propriety.

Cf. Notes of Madison (July 17, 1787), in 2 Farrand, *supra* note 2, at 28 ("A power of nega-

Contemporaries often employed "proper" to mean fair,<sup>95</sup> suitable<sup>96</sup>—even "expedient" or "convenient."<sup>97</sup> Sometimes when one reads a contemporary statement to the effect that a course was "proper," one gets the impression that the author simply meant the course was a good idea.<sup>98</sup> Naturally enough, some speakers employed multiple meanings of "proper" in the same paragraph.<sup>99</sup>

tiving the improper laws of the States is at once the most mild & certain means of preserving the harmony of the system.").

<sup>94</sup> At least one supporter represented that "partial" government actions, such as chartering monopolies, would not be invalid because not "proper" under the Necessary and Proper Clause. *An Impartial Citizen V* (February 28), in 8 DOCUMENTARY HISTORY, *supra* note 2, at 431.

On the value of impartiality to the founding generation, see Natelson, *Public Trust*, *supra* note 2.

<sup>95</sup> See, e.g., Notes of Madison (August 13, 1787), in 2 Farrand, *supra* note 2, at 273 (quoting Mason: "the Senate did not represent the *people*, but the *States* in their political character. It was improper therefore that it should tax the people."). Of course, this usage also could be treated as meaning "proportionate," "suitable," or even "within their proper sphere."

<sup>96</sup> See, e.g., Notes of Madison (May 29, 1787), in 1 Farrand, *supra* note 2, at 20 (quoting resolutions proposed by Randolph: "Resolved. that the members of the second branch of the National Legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual Legislatures."); Notes of Pierce (May 31, 1787), in 1 Farrand, *supra* note 2, at 59 ("Mr. Mason was of opinion that it would be highly improper to draw the Senate out of the first branch; that it would occasion vacancies which would cost much time, trouble, and expence to have filled up,—besides which it would make the Members too dependent on the first branch."); Notes of King (June 1, 1787), in 1 Farrand, *supra* note 2, at 70-71 (quoting Elbridge Gerry: "I am in favr. of a council to advise the Ex—they will be the organs of information of the persons proper for offices . . ."); Notes of Madison (June 4, 1787), in 1 Farrand, *supra* note 2, at 99 ("<Mr.> M<adison> supposed that if a proper proportion of each branch should be required to overrule the objections of the Executive, it would answer the same purpose as an absolute negative."). These are just four of many examples.

<sup>97</sup> E.g., Notes of Madison (June 7, 1787), in 1 Farrand, *supra* note 2, at 151 (quoting Wilson: "the people might be divided into proper districts for the purpose"); Notes of McHenry (September 4, 1787), in 2 Farrand, *supra* note 2, at 509 (describing speech of Gerry: "Nor was this a proper time for such an innovation. The people would not bear it.").

<sup>98</sup> See, e.g., Notes of Madison (May 28, 1787), in 1 Farrand, *supra* note 2, at 10 (describing speech by quoting Rufus King: "He urged that as the acts of the Convention were not to bind the Constituents it was unnecessary to exhibit this evidence of the votes; and improper as changes of opinion would be frequent in the course of the business & would fill the minutes with contradictions."); Notes of Madison (June 1, 1787), in 1 Farrand, *supra* note 2, at 66 ("Mr. <Madison>—<thought> it would be proper, before a choice shd. be made between a unity and a plurality in the Executive, to fix the extent of the Executive authority . . ."). These are just two of many examples.

<sup>99</sup> E.g., Notes of Madison (August 10, 1787), in 2 Farrand, *supra* note 2, at 249 (describing speech by Oliver Ellsworth, a member of the committee of detail):

Mr. Ellsworth. The different circumstances of different parts of the U.S. and the probable difference between the present and future circumstances of the whole, render it *improper* to have either *uniform* or *fixed* qualifications. Make them so high as to be *useful* in the S. States, and they will be *inapplicable* to the E. States. *Suit* them to the latter, and they will *serve no purpose* in the former. In like manner what may be *accommodated* to the existing State of things among us, may be very *inconvenient* in some future state of them. He thought for these reasons that it was better to leave this matter to the Legislative discretion than to attempt a provision for it in the Constitution. (emphases added).

Samuel Johnson's *Dictionary* reflected the diversity of meanings of "proper." The word was defined by ten entries. Five of these were plainly inapplicable to the Constitution,<sup>100</sup> but none of the others can be ruled out textually. The five plausible meanings include two overlapping entries partaking of the original restrictive denotation,<sup>101</sup> one signifying "suitable,"<sup>102</sup> one related to Smith's usage ("Exact; accurate; just"),<sup>103</sup> and one signifying "original, natural."<sup>104</sup>

Thus, in interpreting the word "proper," textual analysis can eliminate some possibilities but cannot, unaided, provide us with an authoritative meaning of the word in the Necessary and Proper Clause.

### E. What is the Meaning of "And"?

Even the middle word in the phrase "necessary and proper" is open to dispute. The definition of "necessary" and the definition of "proper" might depend on (to paraphrase a former President) "what the meaning of 'and' is." At first glance, "and" appears to be a conjunctive—a law must be "necessary *plus* proper." But as Professor Scott Burnham has pointed out, "and" can have a disjunctive meaning as well.<sup>105</sup> One might read the Necessary and Proper Clause as saying that a law must be necessary *or* proper.

Such an interpretation would not be unique in the constitutional text, because in several other parts of the Constitution "and" can be read as disjunctive. One section provides that, "He [the President]

<sup>100</sup> JOHNSON, *supra* note 2 (unpaginated). They include these definitions:

2. Noting an individual. "A *proper* name may become common, when given to several beings of the same kind; as Caesar. *Watts*"

7. Not figurative.

8. It seems in *Shakespeare* to signify, mere; pure.

9. [*Propre*, Fr.] Elegant; pretty.

10. Tall; lusty; handsome with bulk.

<sup>101</sup> *Id.* The first entry reads: "1. Peculiar; not belonging to more; not common." As an example, Johnson quotes Hooker: "As for the virtues that belong unto moral righteousness and honesty of life, we do not mention them, because they are not *proper* unto christian men as they are christian, but do concern them as they are men."

The third entry reads: "3. One's own. It is joined with any of the possessives: as, *my* proper, *their* proper."

<sup>102</sup> *Id.* This is the fifth entry: "5. Fit; accommodated; adapted; suitable; qualified."

<sup>103</sup> *Id.* ("6. Exact; accurate; just.").

<sup>104</sup> *Id.* ("4. Natural; original. 'In our *proper* motion we ascend/Up to our native seat'. *Milton*"; cf. Notes of Madison (June 7, 1787), in 1 Farrand, *supra* note 2, at 153 (describing speech by Dickinson: "He compared the proposed National System to the Solar System, in which the States were the planets, and ought to be left to move freely in their proper orbits."); *id.* at 153-54 (quoting Wilson: "Within their proper orbits they must still be suffered to act for subordinate purposes . . .").

<sup>105</sup> SCOTT J. BURNHAM, DRAFTING AND ANALYZING CONTRACTS 95 (3d ed. 2003). At some points, Professor Lynch seems to assume it has a disjunctive meaning. See LYNCH, *supra* note 2, at 20 (suggesting that the committee of detail's addition of "proper" accommodated James Wilson by expanding the scope of federal power).

shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge *necessary and expedient*.”<sup>106</sup> Since necessary measures are, by definition, expedient, treating “and” as conjunctive results in surplus. What the text must mean is that the President may recommend measures “he shall judge necessary” and measures “he shall judge . . . expedient.” One would expect a chief executive to recommend both kinds of measures.

Another example of the Constitution’s use of a disjunctive “and” appears in the provision that empowers Congress, “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.”<sup>107</sup> The final “and” must mean “or.” Otherwise, the drafters would be referring to authors’ “Writings and Discoveries” and inventors’ “Writings and Discoveries.”

Under what circumstances, might “and” in the Necessary and Proper Clause be read disjunctively? If one assumes that the term “necessary” means “absolutely necessary” or nearly so, and that the term “proper” is relatively weak—signifying something like “suitable” or “expedient”—then it would be hard to think of a necessary law pursuant to legitimate powers that was not also proper.<sup>108</sup> In that case, the constructional canon against surplus argues in favor of a disjunctive “and.”

Suppose, while keeping a strong meaning for “necessary,” we now select a more restrictive definition for “proper”—for example, if we read the phrase as requiring that a law be “absolutely necessary and impartial.” As Madison once pointed out, when the text is unclear, it is fair to test interpretation by the consequences.<sup>109</sup> Such an interpretation with a conjunctive “and” would make it very difficult for Congress to conduct national affairs. So this instance of very strict interpretation for “necessary” argues for a disjunctive “and.”

Just as the meanings we assign to “necessary” and “proper” help determine whether “and” is disjunctive or conjunctive, the meaning we assign to “and” helps determine the meanings of the two adjectives that surround it. Specifically, a disjunctive “and” renders more plausible an interpretation in which the meanings of both adjectives are very restrictive. A conjunctive “and” suggests that (1) at least one

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<sup>106</sup> U.S. CONST. art. II, § 3 (emphasis added).

<sup>107</sup> *Id.* at art. I, § 8, cl. 8.

<sup>108</sup> *Cf.* 2 ELLIOT’S DEBATES, *supra* note 2, at 383 (Chancellor Livingston, speaking at the New York ratifying convention: “This was undoubtedly proper; for it was necessary to his argument.”).

<sup>109</sup> 2 ANNALS, *supra* note 2, at 1946 (February 2, 1791).



of the two is relatively permissive, although (2) not so permissive that complying with one adjective automatically satisfies the other (as in “necessary and expedient”). It is clear, though, that the meaning of “and” cannot be resolved by textual analysis alone.

*F. Summary: What We Have Learned—and Not Learned—From Textual Analysis*

Textual analysis has told us that the Necessary and Proper Clause sets up an objective test, subject to judicial review. Congressional laws may be enacted only for the purpose of executing powers granted elsewhere in the Constitution. We do not know, however, whether the Necessary and Proper Clause is a grant of power, a limitation on power, or a rule of construction only. “Necessary” cannot mean “indispensable,” but we are not sure what it does mean. The requirement of “propriety” is different from that of “necessity,” and presumably one cannot be a mere subset of the other, particularly if “and” is conjunctive. Whether “and” is conjunctive or disjunctive may depend on how restrictive its surrounding adjectives are. If both are very restrictive, “and” is probably disjunctive. If one or both are fairly lenient, then “and” is more likely conjunctive.

### III. DRAFTING THE NECESSARY AND PROPER CLAUSE

*“The life of the law has not been logic: it has been experience.”*

*Oliver Wendell Holmes, Jr.*<sup>110</sup>

*“Experience must be our only guide. Reason may mislead us.”*

*John Dickinson, at  
the Federal Convention*<sup>111</sup>

#### A. Introduction

It has always appeared to me that in making these remarks both Holmes and Dickinson overstated their case. The life of the law has been logic as well as experience, and experience without rational examination is a poor guide. Many animals can recall past experiences. What gives mankind a decisive edge in nature is an ability to submit experience to the light of logic and reason.

Nevertheless, logic has limits. The previous Part on textual analysis well demonstrates the point. Understanding the Necessary and

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<sup>110</sup> OLIVER WENDELL HOLMES, THE COMMON LAW (1881), Lecture I, available at [http://www.law.harvard.edu/library/collections/special/collections/common\\_law/Lecture01.php](http://www.law.harvard.edu/library/collections/special/collections/common_law/Lecture01.php) (last visited Oct. 5, 2004).

<sup>111</sup> Notes of Madison (August 13, 1787), in 2 Farrand, *supra* note 2, at 278.

Proper Clause requires understanding the relevant experience of the people who wrote it and ratified it. With that end in mind, we turn to the drafting of the Clause at the federal constitutional convention.

### B. *Pinckney and Dickinson*

The federal constitutional convention commenced in May, 1787, and over the next few weeks adopted a series of resolutions that contemplated a national government of expansive, but rather vague, powers.<sup>112</sup> During that early period, advocates of a narrower, more defined enumeration were in the minority.<sup>113</sup>

Among the minority was young Charles Pinckney of South Carolina, who submitted a plan for a government of enumerated powers only.<sup>114</sup> The Pinckney Plan also incorporated the formula for decentralization set forth in the Articles of Confederation: "Each State retains its Rights not expressly delegated."<sup>115</sup>

<sup>112</sup> Committee of Detail, I, in 1 Farrand, *supra* note 2, at 131-32:

Resolved that the Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation; and moreover to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.

<sup>113</sup> See Natelson, *Dickinson*, *supra* note 2, at 472-73 (describing the progress of the convention from undefined to enumerated powers).

<sup>114</sup> Committee of Detail, III, in 2 Farrand, *supra* note 2, at 135-36:

The S. & H. D. in C. ass. [Senate and the House of Delegates in Congress Assembled] shall have the exclusive Power of regulating Trade and levying Imposts—Each State may lay Embargoes in Time of Scarcity

13. of establishing Post-Offices

14. S. & H. D. in C. ass. shall be the last Resort on Appeal in Disputes between two or more States; which Authority shall be exercised in the following Manner &c

15. S. & H. D. in C. ass. shall institute Offices and appoint Officers for the Departments of for. Affairs, War, Treasury and Admiralty—

They shall have the exclusive Power of declaring what shall be Treason & Misp. of Treason agt. U. S.—and of instituting a federal judicial Court, to which an Appeal shall be allowed from the judicial Courts of the several States in all Causes wherein Questions shall arise on the Construction of Treaties made by U. S.—or on the Law of Nations—or on the Regulations of U. S. concerning Trade & Revenue—or wherein U. S. shall be a Party—The Court shall consist of Judges to be appointed during good Behaviour—S. & H. D. in C. ass shall have the exclusive Right of instituting in each State a Court of Admiralty, and appointing the Judges &c of the same for all maritime Causes which may arise therein respectively.

16. S & H. D. in C. ass. shall have the exclusive Right of coining Money—regulating its Alloy & Value—fixing the Standard of Weights and Measures throughout U. S.

<sup>115</sup> Committee of Detail, III, in 2 Farrand, *supra* note 2, at 135; cf. ARTS. OF CONFED., art

#### II.

Later in life, Pinckney claimed authorship of a plan that contained something very similar to the Necessary and Proper Clause, but the latter plan was almost certainly a later invention. For that plan, the reconstructed original, and discussion, see Appendix D, The Pinckney Plan, in 3 Farrand, *supra* note 2, at 595-609.

Another advocate for enumeration was John Dickinson of Delaware, a much more seasoned and influential delegate. In June, Dickinson crafted his own scheme for a government featuring enumerated powers. Interestingly, this plan was unknown to most constitutional scholars until its publication in 1983.<sup>116</sup> It contained a forerunner—perhaps the embryo—of the Necessary and Proper Clause: the Legislature of the United States ought to be authorized to “*pass Acts for enforcing*” various enumerated powers.<sup>117</sup> Dickinson agreed with Pinckney that the new government ought to be limited to specific objects. Unlike Pinckney, he visualized a role for implied powers as well.

### C. The Committee of Detail

On July 23, 1787, Elbridge Gerry of Massachusetts offered a motion to establish a “committee of detail” to organize into a draft constitution all resolutions previously agreed to.<sup>118</sup> The convention approved Gerry’s motion without dissent,<sup>119</sup> and voted to set the number of committee members at five.<sup>120</sup> The following day the convention elected the membership.<sup>121</sup> The convention then provided the committee with copies of its prior resolutions and a copy of the Pinckney Plan.<sup>122</sup> There is no written record of the committee having the Dickinson Plan, but in view of Dickinson’s influence and presence, it is unlikely the members were ignorant of it.<sup>123</sup>

The membership of the committee of detail was carefully balanced by region, but the roster was significant for another reason as well: It was laden with legal talent. Only Nathaniel Gorham, former president of Congress and chairman of the committee of the whole<sup>124</sup>—likely selected for his political skills<sup>125</sup>—was not a lawyer. The other four members were, as the saying goes, Pillars of the Bar.

<sup>116</sup> It was published in James H. Hutson, *John Dickinson at the Federal Constitutional Convention*, 40 WM. & MARY Q. 256, 262-69 (1983).

<sup>117</sup> Hutson, SUPPLEMENT, *supra* note 2, at 89 (emphasis added) (“[T]he Legislature of the United States ought to be authorized to pass Acts for enforcing an Observance of the Laws of Nations and an Obedience to their own Laws—for raising a Revenue by levying Duties . . . for the Regulation of Trade and Commerce.”) (emphasis added); *see also id.* at 86.

<sup>118</sup> Notes of Madison (July 23, 1787), in 2 Farrand, *supra* note 2, at 86, 95.

<sup>119</sup> *Id.* at 95.

<sup>120</sup> *Id.* at 96.

<sup>121</sup> Journal (July 24, 1787), in 2 Farrand, *supra* note 2, at 97.

<sup>122</sup> Committee of Detail, I, in 2 Farrand, *supra* note 2, at 129-37.

<sup>123</sup> For Dickinson’s influence at the Convention and a discussion of his plan, *see* Natelson, *Dickinson*, *supra* note 2, at 449-76. It used to be thought that Dickinson was absent from the convention for over a month. We now know that this was not the case. *Id.* at 426 n.59.

<sup>124</sup> Journal (May 30, 1787), in 11 Farrand, *supra* note 2, at 29.

<sup>125</sup> Cf. LYNCH, *supra* note 2, at 18-19 (suggesting Gorham was selected to represent the shipping interests of New England).

Virginia Governor Edmund Randolph had taken over Thomas Jefferson's clients,<sup>126</sup> represented George Washington in his business affairs,<sup>127</sup> and had served as attorney-general of Virginia for ten years.<sup>128</sup> After the Constitution was ratified, President Washington would select Randolph to be the first attorney general of the United States.<sup>129</sup> John Rutledge of South Carolina had (like Dickinson) been educated at London's Middle Temple,<sup>130</sup> had served as governor,<sup>131</sup> as the primary drafter of his state's 1776 constitution,<sup>132</sup> and as state chancellor.<sup>133</sup> Washington would one day place Rutledge on the United States Supreme Court and unsuccessfully nominate him for Chief Justice.<sup>134</sup> James Wilson was a scholarly, Scots-trained Pennsylvania lawyer and a former student of Dickinson.<sup>135</sup> As part of the Connecticut governor's council, Oliver Ellsworth had been a member of that state's highest court, and at the time of the convention was a judge of the superior court.<sup>136</sup> Like Rutledge, both Wilson and Ellsworth eventually served on the U.S. Supreme Court—Ellsworth as Chief Justice.<sup>137</sup> As lawyers, the four represented the elite among a convention generally notable for the quality of its legal expertise.<sup>138</sup>

Another significant aspect of all four men was the nature of their law practice. Although all had enjoyed long experience in public service, they were not mere "government lawyers." Each had been an extremely busy private practitioner, immersed in the normal routine of the early American attorney: private litigation, business, real estate, wills, trusts, decedent estates, and the issues of agency law that

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<sup>126</sup> REARDON, *supra* note 2, at 15.

<sup>127</sup> *Id.* at 73-74.

<sup>128</sup> *Id.* at 34 (discussing Randolph's election to attorney general in 1776); *id.* at 87 (discussing Randolph's election to governor in 1786).

<sup>129</sup> ROSSITER, *supra* note 2, at 306.

<sup>130</sup> *Id.* at 130-31. For Dickinson, *see id.* at 110; BARRY, *supra* note 2, at 27.

<sup>131</sup> BARRY, *supra* note 2, at 242.

<sup>132</sup> *Id.* at 191.

<sup>133</sup> *Id.* at 303.

<sup>134</sup> ROSSITER, *supra* note 2, at 306.

<sup>135</sup> *See* CHARLES PAGE SMITH, *supra* note 2, at 37 (discussing Dickinson's role as Wilson's sponsor); *id.* at 50 (describing Dickinson as Wilson's teacher).

<sup>136</sup> BROWN, *supra* note 2, at 108.

<sup>137</sup> ROSSITER, *supra* note 2, at 306.

<sup>138</sup> For example, seven of the fifty-five delegates to the federal convention had been trained in London's Inns of Court. E. ALFRED JONES, *AMERICAN MEMBERS OF THE INNS OF COURT* (1924). *See id.* at 21-22 (John Blair); *id.* at 61-63 (John Dickinson); *id.* at 102 (William Houston); *id.* at 104 (Jared Ingersoll); *id.* at 134-3536 (William Livingston); *id.* at 170-71 (Charles Pinckney); *id.* at 171-72 (Charles Cotesworth Pinckney). Other Inns of Court alumni, while not federal convention delegates, became leading proponents of ratification. *See id.* at 124-25 (Henry Lee, a federalist speaker at the Virginia ratifying convention); *id.* at 216-17 (Alexander White, author of one of the published enumerations of state powers and a leading federalist spokesman in Virginia); Biographical Gazetteer, in 8 DOCUMENTARY HISTORY, *supra* note 2, at 525 (Francis Corbin, leading federalist spokesman at the Virginia ratifying convention).

arose in those areas of practice. Randolph reputedly had enjoyed the busiest private practice in Virginia.<sup>139</sup> Rutledge, who seems to have been virtually born to the law, was one of the top three practitioners in Charleston by the 1760s.<sup>140</sup> Wilson had been a familiar and frequent figure at the Pennsylvania bar.<sup>141</sup> Ellsworth, in addition to his judicial duties, had profited from an extremely large practice. His biographer reports that, despite his public responsibilities, "Throughout the Revolution, and until the new national government was organized under the Constitution, he was always either actively in practice or else on the bench."<sup>142</sup> One can understand why, therefore, these lawyers—like other key founders—sometimes thought of government in private law terms.<sup>143</sup>

Whether on their own motion or by previous suggestion, the committee of detail decided to adopt the Pinckney-Dickinson approach of enumerating legislative powers rather than stating them broadly.<sup>144</sup> To at least a pair the committee's members, the process must have seemed familiar: In 1781, Randolph and Ellsworth had served on the three-man congressional committee that proposed a detailed enumeration of additional powers for Congress.<sup>145</sup>

As the committee got to work, Randolph apparently took the first swipe at organizing a charter, working either alone or under the direction of the rest. A crude draft in his handwriting is still extant. The

<sup>139</sup> REARDON, *supra* note 2, at 70. "Enjoyed" is a bit of a stretch, because Randolph worked himself into a frazzle. *See id.* at 70-78 (describing Randolph's practice in the years before the convention).

<sup>140</sup> BARRY, *supra* note 2, at 65. Rutledge's uncle was an influential lawyer, and Rutledge showed interest early. *Id.* at 9.

<sup>141</sup> *See* CHARLES PAGE SMITH, *supra* note 2, at 37, 46, 49, 116-28 (describing Wilson's large practice).

<sup>142</sup> BROWN, *supra* note 2, at 31. On Ellsworth's large practice, *see id.* at 30-33.

<sup>143</sup> Another example is Edmund Pendleton, the chief judge on Virginia's court of chancery, and the president of the Virginia ratification convention. One of Pendleton's extant letters shows him comparing the Constitution's delegation of powers to (a) conveyance of a term of years, (b) conveyance of a fee tail or life estate, (c) conveyance of a fee simple, and (d) agency. Edmund Pendleton to Richard Henry Lee (Jun. 14, 1788), in 10 DOCUMENTARY HISTORY, *supra* note 2, at 1625-26.

<sup>144</sup> Committee of Detail, IV, in 2 Farrand, *supra* note 2, at 142-44.

One writer has argued that the change arose from the personal beliefs of the members of the Committee of Detail, beliefs not typical of the convention, but which the convention accepted because of the press of time. John C. Hueston, Note, *Altering The Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Powers*, 100 YALE L. J. 765 (1990). While not ruling out that possibility, noted historian Jack N. Rakove suggests the convention may have viewed the sweeping "federal powers" language in the Virginia Plan as a place-holder for a subsequent, more detailed enumeration. RAKOVE, *supra* note 2, at 177-78. His views have some support from comments made at the convention. *See, e.g.*, Notes of Madison (May 31, 1787), in 1 Farrand, *supra* note 2, at 53 (Randolph, disclaiming any intention for indefinite federal powers).

<sup>145</sup> 21 J. CONT. CONG. 893-96 (1781). The other committee member was James Mitchell Varnum of Rhode Island. *Id.* at 896 n.1.

draft addresses potential conflicts between state and federal powers in this way: "All laws of a particular state, repugnant hereto, shall be void, and in the decision thereon, which shall be vested in the supreme judiciary, all incidents without which the general principles cannot be satisfied shall be considered, as involved in the general principle."<sup>146</sup>

The language was awkward, but its core meaning was clear: (a) within the federal sphere, inconsistent state laws would be invalid; (b) the determination as to whether state laws infringed on the federal sphere would be a question for the judiciary; and (c) in making their decisions, the courts were to be guided by the common law of principals and incidents. This provision was a supremacy clause, a grant of jurisdiction, and an instruction to the courts—all in one.

Rutledge then undertook a revision. Either Rutledge or Randolph lined out the original wording, and Rutledge replaced it with the phrase: "and a right to make all Laws necessary to carry the foregoing Powers into Execu--."<sup>147</sup> (The committee later inserted a supremacy clause in another part of the document.<sup>148</sup>) Four years later, Randolph confirmed that this language, like his original draft, was intended to incorporate the doctrine of implied incidental powers, drawn from the law of agency.<sup>149</sup>

The committee next added the phrase "and proper." The final committee draft, extant in Wilson's hand with emendations by Rutledge, was very similar to the Necessary and Proper Clause in the finished Constitution. It read: "And to make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested, by this Constitution, in the government of the United States, or in any department or officer thereof."<sup>150</sup>

<sup>146</sup> Committee of Detail, IV, in 2 Farrand, *supra* note 2, at 144.

<sup>147</sup> *Id.* at 144.

<sup>148</sup> Committee of Detail, IX, in 2 Farrand, *supra* note 2, at 169:

The Acts of the Legislature of the United States made in Pursuance of this Constitution, and all Treaties made under the Authority of the United States shall be the supreme Law of the several States, and of their Citizens and Inhabitants; and the Judges in the several States shall be bound thereby in their Decisions, any Thing in the Constitutions or Laws of the several States to the Contrary notwithstanding.

This clause later became U.S. CONST. art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

<sup>149</sup> Opinion of Edmund Randolph, Attorney General of the United States, to President Washington, in BANK HISTORY, *supra* note 2, at 89. See *infra* note 364 and accompanying text.

<sup>150</sup> Notes of Madison (August 2, 1787), in 2 Farrand, *supra* note 2, at 182.

The committee members' notes do not tell us why they added the words "and proper." Wilson had been dallying with a clause in the New Jersey Plan that would have granted Congress authority to raise revenue, "to be applied to such foederal [*sic*] Purposes *as they shall deem proper and expedient*."<sup>151</sup> Professor Joseph M. Lynch contends that this was the source of "and proper."<sup>152</sup> Another possibility is that the words were adapted from the Northwest Ordinance, which had authorized the governor and judges of the "Territory of the United States northwest of the River Ohio" to enact "such laws of the original States, criminal and civil, *as may be necessary and best suited* to the circumstances of the district."<sup>153</sup> We shall see, however, that "and proper" more likely had the same agency law origin as "necessary."<sup>154</sup>

#### IV. THE DOCTRINE OF INCIDENTAL AGENCY POWERS IN THE EIGHTEENTH CENTURY

##### A. *Why the Drafters Resorted to Agency Law*

As noted in the last Part, the four lawyers on the committee of detail all had practiced extensively in the private sector, where they dealt with agency arrangements and employed agency agreements. They, together with the rest of the founders, had a stubborn way of thinking of public officials as "agents" (or servants, guardians or trustees) of the people. The proceedings of the federal convention contain repeated references by delegates—including, specifically, Wilson and Ellsworth—to officials or branches of government as the people's "agents."<sup>155</sup> Similar references pepper the Virginia ratifying convention speeches of Edmund Randolph,<sup>156</sup> the Federalist Papers,<sup>157</sup> and

<sup>151</sup> Committee of Detail, VII, in 2 Farrand, *supra* note 2, at 157 (emphasis added).

<sup>152</sup> Thus, he states that "the committee adopted the substance of Wilson's suggestion." LYNCH, *supra* note 2, at 20. This is not really correct, however, because although the committee inserted the word "proper," it rejected the bulk of the New Jersey Plan clause, "such foederal [*sic*] Purposes as they shall deem proper and expedient." Committee of Detail, VII, in 2 Farrand, *supra* note 2, at 157. Unlike the language adopted, the New Jersey Plan clause would have granted Congress nearly plenary power. Cf. *supra* notes 19-22 and accompanying text and *infra* note 162 and accompanying text.

<sup>153</sup> NORTHWEST ORDINANCE, §5 (1787), available at <http://www.yale.edu/lawweb/avalon/nworder.htm> (emphasis added).

<sup>154</sup> *Infra* Part IV(D).

<sup>155</sup> E.g., Notes of Madison (August 11, 1787), in 2 Farrand, *supra* note 2, at 260 ("Mr. Wilson [referring to Congress] thought the expunging of the clause would be very improper. The people have a right to know what their Agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings."); Notes of Madison (August 22, 1787), in 2 Farrand, *supra* note 2, at 377 ("Mr. Elsworth argued that they were unnecessary. The U—S— heretofore entered into Engagements [i.e., debts] by Congs who were their Agents. They will hereafter be bound to fulfil them by their new agents.").

<sup>156</sup> E.g., 3 ELLIOT'S DEBATES, *supra* note 2, at 70-71 ("A less degree will defeat the inten-

many other contemporary political documents.<sup>158</sup> Concomitant with the analogy between public officials and agents (or servants, guardians or trustees) was the notion that public officials were subject to fiduciary norms similar to those imposed in the private sector.<sup>159</sup> I was not surprised to learn, therefore, that the committee of detail apparently drew the wording of the Necessary and Proper Clause from contemporary agency forms. My only surprise was finding that commentators have not recognized this earlier—especially since at the North Carolina ratifying convention James Iredell (later associate justice of the U.S. Supreme Court) explicitly drew the connection between a private power of attorney and the Article I, Section 8 list of congressional powers.<sup>160</sup>

In the eighteenth century, an English or American power of attorney often was called a “letter of attorney.” It customarily outlined specific powers granted the agent, and then bestowed incidental powers according to one of three common formulae. The first of these granted the agent all powers that the principal might execute if he or she were present.<sup>161</sup> The second gave the agent the power to act *as the agent deemed* needful, necessary, fit, proper, meet, or words of like import.<sup>162</sup> The third formula was more objective in nature, and

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tion, and a greater will subject the people to the depravity of rulers, who, though they are but the agents of the people, pervert their powers to their emoluments and ambitious views.”); *id.* at 117 (“It has too often happened that powers delegated for the purpose of promoting the happiness of a community have been perverted to the advancement of the personal emoluments of the agents of the people . . .”).

<sup>157</sup> *E.g.*, THE FEDERALIST NO. 14, *supra* note 2, at 63 (James Madison) (stating that Congress is to be the people’s “representatives and agents”); *id.* NO. 46, at 243 (James Madison) (“The federal and state governments are in fact but different agents and trustees of the people . . .”); *id.* NO. 78, at 404 (Alexander Hamilton) (“If there should happen to be an irreconcilable variance between the two . . . the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.”).

<sup>158</sup> See generally Natelson, *Public Trust*, *supra* note 2 (outlining the repeated characterization, during the founding generation, of republican officials as the people’s agents, guardians, and trustees). See also BARNETT, *RESTORING*, *supra* note 2, at 72-73 (identifying the founders’ belief in an agency theory of government).

<sup>159</sup> *Id.* at 1095-1168.

<sup>160</sup> 4 ELLIOT’S DEBATES, *supra* note 2, at 148. See also *id.* at 166 (repeating same argument).

<sup>161</sup> See, e.g., COCKER, *supra* note 2, at 36 (“in as large and ample a manner as I might do”). This book is in the Biddle Law Library, University of Pennsylvania Law School, and was used in an American lawyer’s practice.

<sup>162</sup> See, e.g., COCKER, *supra* note 2, at 38 (as “shall be until my said Attorney thought fit to be done”); VADE MECUM, *supra* note 2, at 53 (as the agent “shall think fit and expedient”) (a “*vade mecum*” is a student’s handbook; the Latin expression means “Walk with me.”); SCRIVENER’S GUIDE, *supra* note 2, at 146-47 (“which . . . shall to my said Attorney seem fit to be done”) (called by the author “a very General Letter of Attorney”). All three of these books are in the Biddle Law Library, University of Pennsylvania Law School, and were used in an American lawyer’s practice.



therefore arguably more restrictive, since there was less focus on the agent's discretion. There is an extremely close linguistic fit between provisions following the third formula and the Necessary and Proper Clause. One can see this by examining a few common clauses following the third formula:

- “and also to do, execute and perform all other Things whatsoever, which are *necessary and proper*, in and about the executing of these Presents, according to the Tenor and true Intention thereof.”<sup>163</sup>
- “to enter into and execute [all documents] as shall be *necessary or proper*”<sup>164</sup>
- “and also to execute and perform all other Things whatsoever, that shall be necessary or fit in and about the Execution of these Presents, according to the Tenor and true Intent thereof.”<sup>165</sup>
- “to do and perform all Things requisite and necessary to be done in and about the Execution of these Presents”<sup>166</sup>

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See also POCKET-BOOK, *supra* note 2, at 171 (“as my said Attorney shall think fit”) & 175 (“in such Manner as my said Attorney shall think fit”) and Howard, *supra*, 2 H. Bl. at 625, 126 Eng. Rep. at 741 (“as . . . shall be thought advisable [*sic*] and proper”) & 2 H. Bl. at 626, 126 Eng. Rep. at 742 (“as . . . shall seem meet”). See also EDWARD WOOD, A COMPLEAT BODY OF CONVEYANCING IN THEORY AND PRACTICE 124 (1749) (“in Case the same shall be thought necessary and proper to make such Conveyance”) (articles of agreement). See also ANONYMOUS, THE LAWYER’S LIBRARY: A NEW BOOK OF INSTRUMENTS 102 (2d. 1710) [hereinafter NEW BOOK] (“which my said Attorney shall think meet”); *id.* at 104 (“as he shall think fit”); ORLANDO BRIDGMAN, CONVEYANCES: BEING SELECT PRECEDENTS OF DEEDS AND INSTRUMENTS CONCERNING THE MOST CONSIDERABLE ESTATES IN ENGLAND 23 (1702) (“and to do all and every Act, Matter, and thing whatsoever, that may be necessary and convenient for making as many good and lawful entries, as he shall think fit”).

The fifth edition of this book is in the Biddle Law Library, University of Pennsylvania Law School, since it was used in an American lawyer’s practice.

<sup>163</sup> SCRIVENER’S GUIDE, *supra* note 2, at 158 (emphasis added). See also GILBERT HORSMAN, PRECEDENTS IN CONVEYANCING 243 (1744) (“and for that Purpose for me, and in my Name, and as my Act and Deed to make, seal, deliver and execute any Lease or Leases, or other lawful Deeds or Instruments whatsoever, to any Person or Persons whomsoever as shall be *necessary and proper* in that Behalf”) (emphasis added).

<sup>164</sup> Howard v. Baillie, 2 H. Bl. 618, 625, 126 Eng. Rept. 737, 741 (1796) (emphasis added). Cf. SCRIVENER’S GUIDE, *supra* note 2, at 160 (“necessary or expedient”).

<sup>165</sup> SCRIVENER’S GUIDE, *supra* note 2, at 157.

<sup>166</sup> POCKET-BOOK, *supra* note 2, at 173. See also COMPLEAT CLERK, *supra* note 2, at 473 (“requisite and necessary”), also in the same library for the same reason. The same wording appears in SCRIVENER’S GUIDE, *supra* note 2, at 156. See also VADE MECUM, *supra* note 2, at 49 (“requisite and needful”).

- “to do, execute and accomplish all and whatsoever shall be needful and necessary to be done in or about the Premises”<sup>167</sup>
- “to execute, seal and deliver such Conveyances and Assurances of the said Premises [sic] . . . as shall be needful and requisite for the doing thereof . . . granting unto my said Attorney full Power and absolute Authority to do, execute and perform any Act or Acts, Thing or Things whatsoever, that shall be needful and necessary to be done.”<sup>168</sup>

The fact that the drafters rejected the more subjective first and second formulae in favor of the third further confirms the textual conclusion that congressional discretion was to be reviewable judicially.<sup>169</sup>

Incidentally, the Constitution was by no means the only eighteenth century political document to adopt similar language from the law of agency, although most of the ones I have seen adopted the broader, second formula.<sup>170</sup>

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<sup>167</sup> POCKET-BOOK, *supra* note 2, at 174; VADE MECUM, *supra* note 2, at 49 (“needful and necessary”); COCKER, *supra* note 2, at 38 (“necessary and needful”).

<sup>168</sup> POCKET-BOOK, *supra* note 2, at 174-75. Many other examples appear in NEW BOOK, *supra* note 162. *See, e.g., id.* at 91 (“to do and perform all and whatsoever shall be needful or requisite”); 92 (“whatsoever . . . shall be needful, necessary or convenient to be done”); 126 (“needful or necessary”); 131 (“needful or requisite”); 178 (“necessary or convenient”). The last appears in a trust form, thereby highlighting the fiduciary connection between trust and agency law. *See also* JOB MILL, THE PRESENT PRACTICE OF CONVEYANCING 238 (1745) (empowering a trustee in a bargain and sale deed) (“and every Part thereof, as shall be needful, necessary and proper”).

*See also* COMPLEAT CLERK, *supra* note 2, at 478 (“like power and authority to do all acts and things, to be needfull [sic] to be done”) (a letter of substitution rather than a letter of attorney) and SCRIVENER’S GUIDE, *supra* note 2, at 137 (“to do and execute all and every Matter and Thing necessary to be done”), 138 (“and generally to do and perform all other Matters necessary”), 145, 149 & 153 (“needful and necessary”), 151 (“needful”), 152 (“expedient”).

<sup>169</sup> *See supra* notes 19-23 and accompanying text.

<sup>170</sup> *See, e.g., An Act for Draining and Preserving Certain Fen Lands and Low Grounds in the Parishes of Somersham and Pidley with Fenton, and the Parish of Colne, in the County of Huntington* (one of many such Parliamentary acts, empowering commissions to spend as much money for maintenance and other services as they “shall judge necessary or proper”), and *An Act for Dividing and Inclosing the Open and Common Fields, Common Meadows, and Commonable Lands, within the Parish of Longmarston, in the County of Gloucester*, in 2 William Newnam, THE COMPLETE CONVEYANCER 517, 520 (1786) (“as they shall judge necessary and proper”). *See also* LAWS OF THE STATE OF NEW YORK PASSED BY THE LEGISLATURE OF SAID STATE AT THEIR ELEVENTH SESSION 107 (1788) (“as to them shall appear necessary and proper”). *Id.* at 183 (“as they shall deem it necessary and proper”).

### B. Evolution of the Incidental Agency Doctrine to the Founding Era

English courts of law and equity had developed their agency jurisprudence from the law of master and servant,<sup>171</sup> bailments,<sup>172</sup> and property<sup>173</sup>—and most particularly from the Roman law of *mandate*. Mandate was a gratuitous relationship<sup>174</sup> in which a principal authorized an agent to undertake an act or assume a course of management. The relation was consensual on both sides,<sup>175</sup> and continued to exist only while consent remained.<sup>176</sup> The duties of agent to principal under the jurisprudence of mandate will be familiar to anyone knowledgeable about modern agency law: The agent was required to remain within the scope of the agency.<sup>177</sup> Mandates for immoral purposes were void.<sup>178</sup> The agent was bound to the principal by obligations of good faith<sup>179</sup> and loyalty.<sup>180</sup> Conflicts of interest between agent and principal were discouraged.<sup>181</sup> The agent had a duty of care<sup>182</sup> and a duty to account to the principal.<sup>183</sup> When the agent was working on behalf of more than one person, that agent had an obligation to act impartially.<sup>184</sup> If the mandate did not direct to the contrary, the agent enjoyed an implied power—a choice of methods for obtain-

<sup>171</sup> PALEY, *supra* note 2, at 118. See also *Randal v. Harvey*, Godb. 358, 359, 78 Eng. Rep. 211 (K.B. 1623) (referring to incidental power of a pipe-layer to dig).

<sup>172</sup> E.g., *Clarke v. Perrier*, 2 Eq. Cal. Abr. 707, 22 Eng. Rep. 594 (Ch. 1679) (referring to bailment law). See also 1 LIVERMORE, *supra* note 2, at 333.

<sup>173</sup> 1 LIVERMORE, *supra* note 2, at 105-06 (citing various examples of property conveyances by attorneys in fact, including commentary in Co. Litt. 52b and *Slaning's Case*, Poph. 102, 103, 79 Eng. Rep. 1212 (K.B. 1595); *Brent's Case*, 3 Dyer 339b, 340a, 73 Eng. Rep. 766 (K.B. 1574); and *Hill v. Granger*, 2 Dyer 130b, 131a, 73 Eng. Rep. 284, 286 (K.B. 1554-55)). See also *Randal*, Godb. 358, 359, 78 Eng. Rep. 211 (K.B. 1623) (referring to incidental conveyance of right to use nets when conveying all fish in a pond).

<sup>174</sup> DIG. 17.1.4 (Gaius, *Rerum Cottidianarum* 2).

<sup>175</sup> DIG. 17.1.1 (Paul, *Ad Edictum* 32) ("*Obligatio mandati consensu contrahentium consistit.*"); 2 JUSTINIAN, DIGEST, *supra* note 2, at 479 ("The obligation of the agency rests on the consent of the contracting parties.").

<sup>176</sup> However, withdrawal could require notice. DIG. 17.1.22.11 (Paul, *Ad Edictum* 32); 2 JUSTINIAN, DIGEST, *supra* note 2, at 487.

<sup>177</sup> See DIG. 17.1.5.pr, -5.1 (Paul, *Ad Edictum* 32); DIG. 17.1.41 (Gaius, *Ad Edictum Provinciale* 3). Cf. J. INST. 3.26.8 ("*Is qui exsequitur mandatum non debet excedere fines mandati.*") That is, "He who carries out a mandate should not exceed the borders of the mandate." (author's translation).

<sup>178</sup> DIG. 17.1.6.3 (Ulpian, *Ad Edictum* 31); see also DIG. 17.1.22.6 (Paul, *Ad Edictum* 32).

<sup>179</sup> DIG. 17.1.8.10 (Ulpian, *Ad Edictum* 31); see also DIG. 17.1.10pr (Ulpian, *Ad Edictum* 31).

<sup>180</sup> See DIG. 17.1.6.6 (Ulpian, *Ad Edictum* 31); DIG. 17.1.8.1 (Ulpian, *Ad Edictum* 31).

<sup>181</sup> DIG. 17.1.7 (Papinian, *Responsorum* 3).

<sup>182</sup> 1 LIVERMORE, *supra* note 2, at 336-39 (discussing the views of several Roman jurists on the duty of care and comparing those with common law duty imposed on agents when undertaking tasks related to professional skills).

<sup>183</sup> See DIG. 17.1.10.3 (Ulpian, *Ad Edictum* 31); DIG. 17.1.42 (Ulpian, *Ad Edictum* 11).

<sup>184</sup> DIG. 17.1.35 (Neratius, *Membranarum* 5); DIG. 17.1.36pr, 36.1 (Javolenus, *Ex Cassio* 7).

ing the goals of the mandate. In the words of the Roman jurist Paulus:

[A]s long as the mandate is for something definite, there should be no departure from its scope; but whenever [it is] indefinite or [deals with] more than one matter, then, even though the terms of the mandate were discharged by acts other than those included in the mandate itself, yet provided that this was in the mandator's interest, [*si tamen hoc mandatori expedierit*] there will be an action on mandate [i.e., the agent may sue for reimbursement].<sup>185</sup>

When the English courts incorporated this doctrine of agency discretion into their own jurisprudence, it was, of course, recast into English legal terms. The agent's implied powers were thought of as a branch of the doctrine of principals and incidents.

An "incident" was a right, power, or characteristic of a larger legal concept (the principal) that the law presumed adhered to the principal. The principal could be an interest in land, such as a reversion; or a license, such as a corporate charter; or an agency arrangement. Lawyers generally did not determine the scope of a principal by focusing on the incidents. Rather, the usual procedure was to fix the nature and scope of the incidents from the nature of the principal.<sup>186</sup> Once one knew the principal, the incidents followed it by—to use a common eighteenth century phrase<sup>187</sup>—"necessary consequence."<sup>188</sup>

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<sup>185</sup> DIG. 17.1.46 (Paul, Ad Edictum 74):

[*Quotiens certum mandatum sit, recedi a forma non debeat: at quotiens incertum uel plurium causarum, tunc, licet aliis praestationibus exsoluta sit causa mandati quam quae ipso mandato inerant, si tamen hoc mandatori expedierit, mandati erit actio.*]

Mark the use of the Latin forebear of the word "expedient"—meaning in this case expedient for the principal.

<sup>186</sup> This is not invariably true. For example, in so-called "fee vs. easement" cases (better called "possessory interest vs. easement" cases), courts frequently try to determine whether a possessory interest or an easement has been created by examining the incidents of the interest. The incidents help determine which category the interest fits into. See, e.g., *Machado v. S. Pac. Transp. Co.*, 284 Cal. Rptr. 560 (1991).

<sup>187</sup> 2 BLACKSTONE, *supra* note 2, at 55 ("so necessary a consequence"); *id.* at 63 ("necessary consequence"); *id.* at 218 (same); *id.* at 409 (same); 3 BLACKSTONE, *supra* note 2, at 209 (same); 4 BLACKSTONE, *supra* note 2, at 78 ("the consequence necessarily follows"); *id.* at 171 ("necessary consequence"); Notes of Madison (June 5, 1787), in 1 Farrand, *supra* note 2, at 119 ("Mr. Wilson opposed the appointmt <of Judges by the> national Legisl: Experience shewed the impropriety of such appointmts. by numerous bodies. Intrigue, partiality, and concealment were the necessary consequences.").

This meaning of "necessary" was the subject of the second and third entries in Johnson's dictionary: "2. Not free; fatal; impelled by fate. 3. Conclusive; decisive by inevitable consequence." JOHNSON, *supra* note 2 (unpaginated).

<sup>188</sup> Cf. 2 BLACKSTONE, *supra* note 2, at 337 ("a trust-estate either when expressly declared or resulting by necessary implication").

They accompanied the principal just as, as in Latin a citizen's *necessarius*, a close associate, accompanied the citizen.<sup>189</sup>

How the founding generation thought of this consequent form of "necessary" has been described by historian Garry Wills: "It was the proudest boast of the world opened by Newton's *Principia* that men could discern necessity at work, invariable, in the flow of apparent chance . . . . Out of a sequence of observed results, a pattern emerges, and is stated as a law."<sup>190</sup>

Anterior to the law of agency, an incident was deemed a necessary consequent to the principal<sup>191</sup> in at least three different situations. First, a thing was an incident if it was *indispensable* to the principal. Thus, Blackstone observed that the grazing rights known as "commons appendant" were inseparable incidents of certain lands because:

[W]hen lords of manors granted out parcels of land to tenants, for services either done or to be done, these tenants could not plough or manure the land without beasts; these beasts could not be sustained without pasture; and pasture could not be had but in the lord's wastes, and on the unclosed fallow grounds of themselves and the other tenants. The law therefore annexed this right of common, as inseparably incident, to the grant of the lands; and this was the original [*sic*] of common appendant.<sup>192</sup>

Second, even if not absolutely necessary, a thing might be an incident if without it the principal might suffer great damage. This is one species of what we might call *reasonable necessity*. Blackstone again: "But deer in a real authorized park, fishes in a pond, doves in a

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<sup>189</sup> LEWIS & SHORT, *supra* note 2, at 1195. Cf. 3 BLACKSTONE, *supra* note 2, at 434 (calling interest on loans "the necessary companion of commerce").

<sup>190</sup> WILLS, *supra* note 2, at 94.

<sup>191</sup> Cf. 2 BLACKSTONE, *supra* note 2, 347 ("A subject's grant shall be construed to include many things, besides what are expressed, if necessary for the operation of the grant.")

<sup>192</sup> 1 BLACKSTONE, *supra* note 2, at 33. Compare the treatment of fealty and rent: And hence the usual incidents to reversions are said to be *fealty* and *rent*. When no rent is reserved on the particular estate, fealty however results of course [i.e., of necessity], as an incident quite inseparable . . . being frequently the only evidence that the lands are holden at all. Where rent is reserved, it is also incident, though not inseparably so, to the reversion. The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the rent; by special words: but by a general grant of the reversion, the rent will pass with it, as incident thereunto; though by the grant of the rent generally, the reversion will not pass. The incident passes by the grant of the principal, but not *e converso*: for the maxim of law is, "*accessorium non ducit, sed sequitur, suum principale*."

2 BLACKSTONE, *supra* note 2, at 176 (emphasis in original). See also 1 COKE, *supra* note 2, at folio 93a.

dove-house, &c, though in themselves personal chattels, yet they are so annexed to and so necessary to the well-being of the inheritance, that they shall accompany the land wherever it vests . . . .”<sup>193</sup>

Third, common practice could make up for a low level of necessity and create at least a “separable” incident. Thus, Blackstone pointed out that *common usage* justified the seal and by-laws as incidents of a corporation sole, even though the necessity was slight.<sup>194</sup>

Initially, the courts may have required that for an incidental agency power to be implied, it had to be indispensably necessary to carry out the express powers. In *Randal and Harvey’s Case*,<sup>195</sup> decided by King’s Bench in 1623, Randal had given Harvey a power of attorney to “demand, receive, and recover” a debt that one Brown owed to Randal. Harvey arranged for the debtor’s-arrest of Brown. Subsequently, however, Harvey engaged to pay Brown’s debt if Randal would agree to Brown’s release. Randal so agreed, but then sued Harvey when Brown did not pay.

Harvey argued that his promise to pay Brown’s debt was unenforceable for lack of consideration. He contended that his arrest of Brown had not been authorized by the power that Randal had given him. Because the arrest was invalid, when Randal agreed to its termination, he was not giving up any legal right. Randal, on the other hand, argued that as a means of collecting the debt, ordering the arrest was a valid exercise of the agent’s implied authority. The report of the case cites two earlier examples of incidental powers: first, when one grants the fish in one’s pond, one also grants the right to catch them with nets; second, when one authorizes the laying of pipes through one’s land, he also grants the right to dig there.

Chief Justice Ley was of the opinion that the arrest was valid because the agent had authority to choose between two means of collection: arrest or declaration of outlawry. The other judges seem to have accepted the defendant’s argument that in the former cases of incidental powers, “the one thing cannot be done without the other, viz. the fish cannot be taken without nets; but in this case, the partie might have come by his money by *outlawrie*, and so there needed no arresting of the partie.”<sup>196</sup> In other words, an incidental power was implied only if indispensable.

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<sup>193</sup> 2 BLACKSTONE, *supra* note 2, at 427-28.

<sup>194</sup> 1 BLACKSTONE, *supra* note 2, at 464 (“[F]or two of them, though they may be practised, yet are very unnecessary to a corporation sole; viz. to have a corporate seal to testify his sole assent, and to make statutes for the regulation of his own conduct.”).

<sup>195</sup> Godb. 358, 78 Eng. Rep. 211 (K.B. 1623).

<sup>196</sup> *Randal*, Godb. at 359, 78 Eng. Rep. at 211.

Yet about the same time, Sir Francis Bacon (1561-1626) suggested that reasonable necessity could be sufficient to justify an incidental power. His view was thus summarized by a later commentator:

[A] general bailiff of a manor may make leases at will without any special authority; the reason assigned for which in the books is, because great prejudice and inconvenience would ensue to the lord by absence, sickness, or other incapacity, if he had not that power.<sup>197</sup>

Certainly by the eighteenth century, a power could be implied as incidental even without reasonable necessity. Customary usage was sufficient. In 1701, Lord Holt, one of the more notable of England's chief justices, held that a factor had implied authority to extend credit on behalf of his principal, if such was the custom in the factor's business. If such was not the custom, the factor had no such authority.<sup>198</sup> Similarly, *Ekins v. MacKlish*,<sup>199</sup> decided by chancery in 1753, held that a general factor who endorsed and sold a bill of exchange acted within the scope of implied authority because he had complied with the custom of the industry.<sup>200</sup>

In 1776, the Court of King's Bench reaffirmed, and perhaps strengthened, incidental agency powers. *Moore v. Mourgue*<sup>201</sup> was a suit by a merchant against his London agent, whom he had directed to insure a cargo of fruit, but had not instructed how or with whom. The agent purchased from an established insurance company, The London Insurance-Office, a policy with an exception for "particular average," a kind of partial loss due to unavoidable accident. The agent could have acquired a policy from either of two other established insurance offices and thereby avoided the exception. When part of the cargo was lost, the insurance company invoked the exception and denied liability. The merchant claimed the agent had violated his duty by not acquiring a broader policy. The case went to a jury, which was instructed by Chief Justice Mansfield (perhaps the greatest of eighteenth century judges) to find for the defendant-agent if the jury concluded the agent had acted with due care and in good faith. On appeal to the full bench, Mansfield announced a unanimous decision sustaining the jury and his own instructions.

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<sup>197</sup> PALEY, *supra* note 2, at 137.

<sup>198</sup> See Anonymous, 12 Mod. 514, 88 Eng. Rep. 1487 (K.B. 1701).

<sup>199</sup> Ambler 184, 27 Eng. Rep. 125 (Ch. 1753).

<sup>200</sup> See also PALEY, *supra* note 2, at 149 ("In the absence of particular instructions, a general power to sell implies a power to sell in the usual way."); 15 CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY 312 (1751) (usage creates implied authority).

<sup>201</sup> 2 Cowp. 479, 98 Eng. Rep. 1197 (K.B. 1776).

The plaintiff, if he pleased, might have given orders to the defendant not to insure at the London Insurance-Office, but at some other office where this exception would not have been insisted on. But he gave no directions at all. Therefore he left it to the discretion of his correspondent who, if he meant no fraud, was at liberty to elect between the underwriters.<sup>202</sup>

*Moore* brought English doctrine completely in line with the old Roman rule. Samuel Livermore's treatise on agency referenced the Roman rule in summarizing English law this way:

When the business, which makes the object of the agency, may, with advantage to the principal, be done in two or more different ways, the agent may in general do either, provided a particular mode has not been prescribed to him.<sup>203</sup>

Consequently, when the constitutional convention met in 1787, the doctrine of implied incidental powers allowed an agent to exercise considerable discretion. Yet the term of art for the doctrine remained the word *necessary*. This is apparent from the explanation by Attorney General Randolph, while discussing the Necessary and Proper Clause in his 1791 opinion on the proposed national bank: "To be necessary is to be incidental, or, in other words, may be denominated the natural means of executing a power."<sup>204</sup> It also is apparent from a reading of *Howard v. Baillie*,<sup>205</sup> decided by King's Bench nine years after the convention met.

In *Howard*, an executrix had endowed two attorneys in fact with express powers to conduct the business of the estate, including the power to pay debts. The agents entered into an agreement to settle a debt of the estate, which the executrix claimed was beyond their power. The court held that the agents had implied authority to do what they did:

[I]t will also be found, without the assistance of general words, that an authority of this nature necessarily includes medium powers, which are not expressed. By medium powers, I mean *all the means necessary* to be used, in order to attain the accomplishment of the object of the principal power,

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<sup>202</sup> *Moore*, 2 Cowp. at 480-81, 98 Eng. Rep. at 1198.

<sup>203</sup> 1 LIVERMORE, *supra* note 2, at 103-04 (citing DIG. 17.1.46 (Paul, Ad Edictum 74) for support).

<sup>204</sup> Opinion of Edmund Randolph, Attorney General of the United States, to President Washington, in BANK HISTORY, *supra* note 2, at 89.

<sup>205</sup> 2 H. Bl. 618, 126 Eng. Rep. 737 (Ch. 1796).



which in this case is the paying, satisfying and discharging the testator's debts . . . . These and many other subordinate powers, though not expressly given . . . must be understood to be included in this power to pay debts; and I take it to be clear that in the construction of such powers they are included. Our books say that these kind of authorities are to be pursued strictly . . . But our books also say, that they are to be so construed as to include *all the necessary means* of executing them with effect.<sup>206</sup>

In the early nineteenth century, some authors tried to capture the doctrine of incidental powers more precisely by adding other terms or qualifiers to the word "necessary." In his 1812 treatise on agency, William Paley wrote: "An authority is to be so construed as to include all necessary *or usual means* of executing it with effect."<sup>207</sup> At another point, Paley added that an agent could undertake actions that were "necessary to effectuate the object *in the best manner*,"<sup>208</sup> and at still another, he characterized implied powers as "usually incident to or necessary."<sup>209</sup> In his own treatise on agency, Justice Joseph Story used the term "necessary and proper" when defining the doctrine of incidental powers.<sup>210</sup> However, at the time of the Founding, it was the word "necessary" alone that connoted a *legally incident* power. The term "proper," as we shall see, served other purposes.

### C. *Summary of the Incidental Agency Doctrine During the Founding Era*

During the Founding Era, if a principal granted an agent express powers, then in absence of direction or custom to the contrary, the principal also granted the right to carry out the express powers by:

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<sup>206</sup> Howard, 2 H. Bl. at 619-20, 126 Eng. Rep. at 738 (emphasis added). See also 1 LIVERMORE, *supra* note 2, at 105 (citing much older cases, particularly examples of conveyances by attorneys in fact: Slaning's Case, Poph. 102, 103, 79 Eng. Rep. 1212 (K.B. 1596); Brent's Case, 3 Dyer 339b, 340a, 73 Eng. Rep. 766 (K.B. 1574); and Hill v. Granger, 2 Dyer 130b, 131a, 73 Eng. Rep. 284, 286 (K.B. 1554-55); and citing to Coke's commentary on Littleton, § 52b).

<sup>207</sup> PALEY, *supra* note 2, at 137 (emphasis added).

<sup>208</sup> *Id.* at 147-48 (emphasis added). See also *id.* at 146 ("But insasmuch as a power to do any act comprizes a power to do all such subordinate acts as are usually incident to or are necessary to effectuate the principal act in the best and most convenient manner.").

<sup>209</sup> *Id.* at 146.

<sup>210</sup> STORY, *supra* note 2, at 74 ("And not only are the means necessary and proper for the accomplishment of the end included in the authority, but also all the various means, which are justified or allowed by the usages of trade."). See also *id.* at 81 ("necessary and proper"); *id.* at 89 ("usual and appropriate").

- Performing an act indispensable to exercising an express power (absolute necessity);
- Performing an act necessary to prevent “great prejudice”—that is, an act without which execution of the express powers would be difficult (reasonable necessity); and
- Selecting among alternative methods of performing an express power, especially if the alternative selected was a customary method (implication by usage).

#### D. Inference as to the Role of “and Proper”

The conclusion that the wording of the Necessary and Proper Clause was drawn from contemporary agency law enables us to infer what the committee of detail meant by “proper.” By the time of the Founding, the courts had adopted enough of the Roman law of mandate that an agent’s “necessary” actions were constrained by fiduciary obligations. An agent was required to act, not only within the scope of authority,<sup>211</sup> but also in good faith,<sup>212</sup> while maintaining undivided loyalty to the principal,<sup>213</sup> accounting to the principal,<sup>214</sup> and using

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<sup>211</sup> Clarke v. Perrier, 2 Eq. Cal. Abr. 707, 22 Eng. Rep. 594 (Ch. 1679); KNIGHTLY D’ANVERS, 1 A GENERAL ABRIDGMENT OF THE COMMON LAW 609 (2d. ed. 1725). This volume is in the Biddle Law Library, University of Pennsylvania Law School, since it was used in an American lawyer’s practice.

See also DIG. 17.1.5 pr.-5.1 (Paul, Ad Edictum 32) (“*Diligenter igitur fines mandati custodiendi sunt: nam qui excessit, aliud quid facere uidetur et, si susceptum non impleuerit, teneatur.*”); 2 JUSTINIAN, DIGEST, *supra* note 2, at 480 (“Consequently, the limits placed on the mandate [i.e., agency agreement] must be scrupulously observed, for a man who has gone beyond them is held to do something other [than he was charged to do], and if he does not carry out the task he has undertaken, he is liable [i.e., to his principal.]”); DIG. 14.3.11.5 (Ulpian, Ad Edictum 28) (“*Conditio autem praepositionis seruanda est: quid enim si certa lege vel interuentu cuiusdam personae uel sub pignore uoluit cum eo contrahi uel ad certam rem? aequissimum erit id seruari, in quo praepositus est.*”); 1 JUSTINIAN, DIGEST, *supra* note 2, at 424:

The terms of the appointment should be respected. For example, the person making the appointment may have wished the manager to enter transactions only on certain terms or with the approval of a particular person or if security was given or only within a certain limit. The fairest thing is to abide by the terms of the appointment.

These prescriptions and others like them were cited by Justice Story in his treatise on agency some decades later. STORY, *supra* note 2, at 83 and *passim* (2d ed. 1844).

<sup>212</sup> See Moore 2 Cowp. 479, 98 Eng. Rep. 1197.

<sup>213</sup> PALEY, *supra* note 2, at 9 (“[A]n agent cannot make himself an adverse party to his principal.”).

<sup>214</sup> *Id.* at 40-41.

“diligence and care in the execution of his trust.”<sup>215</sup> If an agent represented more than one person, he was obliged to remain impartial among them.<sup>216</sup> A natural way to express such constraints was to say that an agent’s actions had to be “proper.”<sup>217</sup>

Consider the following example:

A Principal, P, is in the widgets business. P charges an agent, A, with insuring goods. A has a choice among three established (customary) insurance providers: Company X, Company Y, and Company Z. Unfortunately, Company X has its own widgets division, which is in fierce competition with P. Company Y’s proffered insurance contract is much less favorable to P than the others.<sup>218</sup> Under the incidental powers doctrine, the agent could select Company X, Company Z, or perhaps Company Y. However, because of the agent’s fiduciary duties of loyalty and care, only the selection of Company Z would be “proper.”

A similar interpretation of the phrase “and proper” in the Congressional context would mean that while acting within its incidental powers, Congress must also honor fiduciary obligations of care, impartiality, and the rest.

#### V. CONFIRMATION OF THE AGENCY LAW MEANING OF THE CLAUSE: THE FEDERAL CONVENTION

As already observed, the founding generation viewed government officials as agents and fiduciaries.<sup>219</sup> Further, it was standard Whig theory that governmental violations of fiduciary standards were *ultra vires*—and thus outside government’s proper sphere.<sup>220</sup> The four

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<sup>215</sup> *Id.* at 4. *Cf. id.* at 8 (“the mere absence of fraud or bad motive, is not sufficient to justify an act detrimental to the employer’s interest, unless it is sanctioned by the usual course of business”). See also *Russell v. Palmer*, 2 Wils. K.B. 325, 95 Eng. Rep. 837 (K.B. 1767); *Moore, Cowp.* 479, 98 Eng. Rep. 1197 (K.B. 1776); 1 LIVERMORE, *supra* note 2, at 331-74 (describing at length gratuitous and paid agents’ duties of care).

<sup>216</sup> See *supra* note 183 and accompanying text. For the eighteenth century fiduciary ideals of impartiality, see Natelson, *Public Trust*, *supra* note 2, at 1097-1123 & 1150-58.

<sup>217</sup> See *Howard v. Baillie*, 2 H. Bl. 618, 625 126 Eng. Rep. 737, 741 (Ch. 1796) (indicating repeated use of the word “proper” in the letter of attorney reproduced in *Howard*, 2 H. Bl. 618, 625, 126 Eng. Rep. 737, 741 (1796)).

<sup>218</sup> Presumably the disparity had to be greater than in *Moore*, 2 Cowp. 479, 98 Eng. Rep. 1197 (K.B. 1776).

<sup>219</sup> See *supra* notes 155-158 and accompanying text.

<sup>220</sup> FRANCIS HUTCHESON, AN INQUIRY INTO THE ORIGINAL OF OUR IDEAS OF BEAUTY AND VIRTUE IN TWO TREATISES 192 (Wolfgang Leidhold ed. 2004) (1725) (“So that whenever the Governours openly profess a Design of destroying the State or act in such manner as will neces-

lawyers who drafted the clause at the federal convention would have been aware of fiduciary concerns, because they all knew their equity jurisprudence. All four were among the most respected and knowledgeable attorneys in their home states,<sup>221</sup> and one of them—John Rutledge—was the chancellor of South Carolina, that is, the chief equity officer of the state.<sup>222</sup> In this context, they would naturally think of a “necessary” law as an embodiment of incidental powers<sup>223</sup> and “proper” law as one that accorded with the lawmakers’ fiduciary responsibilities.<sup>224</sup>

Did the other convention delegates concur in this meaning of the term “proper”? Most probably did. Their commitment to fiduciary standards of government is evidenced throughout the Constitution.<sup>225</sup>

sarily do it; the essential Trust suppos’d in all conveyance of Civil Power, is violated, and the Grant thereby made void.”); RICHARD PRICE, OBSERVATIONS ON THE NATURE OF CIVIL LIBERTY, THE PRINCIPLES OF GOVERNMENT, AND THE JUSTICE AND POLICY OF THE WAR WITH AMERICA (1776), available at <http://www.constitution.org/price/price3.htm> (last visited Oct. 12, 2004) (“[Parliaments] possess no power beyond the limits of the trust for the execution of which they were formed. If they contradict this trust, they betray their constituents and dissolve themselves.”).

Cf. JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT 106 (1690), available at <http://www.constitution.org/jl/2ndtr09.htm> (last visited Oct. 12, 2004):

[T]he power of the society, or legislative constituted by them, can never be supposed to extend farther, than the common good; but is obliged to secure every one’s property, by providing against those three defects above mentioned, that made the state of Nature so unsafe and uneasy.

John Dickinson expressed similar sentiments, Natelson, *Dickinson*, *supra* note 2, at 437 (2003). See also James Madison, *Memorial and Remonstrance against Religious Assessments* (1785), available at [http://press-pubs.uchicago.edu/founders/documents/amendL\\_religions43.html](http://press-pubs.uchicago.edu/founders/documents/amendL_religions43.html) (last visited Aug. 12, 2004):

Because if Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the co-ordinate departments, more necessarily is it limited with regard to . . . the constituents. The preservation of a free Government requires not merely, that the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants.

<sup>221</sup> *Supra* notes 126-137 and accompanying text.

<sup>222</sup> BARRY, *supra* note 2, at 303.

<sup>223</sup> *Supra* notes 146-149 and accompanying text.

<sup>224</sup> The point was confirmed by the convention and ratification process. *Infra passim*.

The two principal competing hypotheses as to the meaning of “proper” suffer from grave objections. Giving “proper” the broad meaning of “suitable” or “advisable” would require the courts to reviewing the merits of challenged statutes. Giving the term a narrow, jurisdictional meaning, *cf.* Lawson & Granger, *supra* note 2, captures only part of the truth, since an agent’s actions can be manifestly improper, yet not violate jurisdictional boundaries.

<sup>225</sup> Natelson, *Public Trust*, *supra* note 2, at 1136-68 (discussing how the fiduciary ideal influenced the drafting of numerous clauses, and how the ratification debates often centered on

In addition, various comments at the convention suggest that the framers often thought of “proper” in a fiduciary sense.

For example, an agent, then as now, had a duty to remain within the scope of authority. In a study already alluded to, Gary Lawson and Patricia B. Granger concluded that “proper” frequently referred to the obligation of Congress to respect jurisdictional boundaries.<sup>226</sup> This usage appeared often in the convention debates.<sup>227</sup> In addition, an agent had a duty to keep his principal informed. During the federal convention, amid the discussion of whether to retain a clause requiring Congress to publish its proceedings, the following colloquy took place between two delegates who were also members of the committee of detail:

Mr. Elseworth [*sic*]. As the clause is objectionable in so many shapes, it may as well be struck out altogether. The Legislature will not fail to publish their proceedings from time to time—The <people> will call for it if it should be *improperly* omitted.

Mr. Wilson thought the expunging of the clause would be very *improper*. The people have a right to know what their Agents are doing or have done . . . .<sup>228</sup>

Similarly, an agent representing several principals had a duty of impartiality. As stated earlier,<sup>229</sup> an important meaning, or component, of eighteenth century propriety was impartiality. At the convention, the delegates denounced as “improper” situations that interfered with the impartiality of government officials, particularly dependence

how effective the Constitution would be in promoting that ideal).

<sup>226</sup> See generally Lawson & Granger, *supra* note 2.

<sup>227</sup> See, e.g., Notes of James Madison (June 1, 1787), in 1 Farrand, *supra* note 2, at 65-66:

Mr. Wilson preferred a single magistrate, as giving most energy dispatch and responsibility to the office. He did not consider the Prerogatives of the British Monarch as a *proper* guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c. The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not <appertaining to and> appointed by the Legislature.

Notes of James Madison (June 6, 1787), in 1 Farrand, *supra* note 2, at 139. (emphasis added); *id.* at 139 ( “There wd. in truth however be no improper mixture of these distinct powers in the present case.”); *id.* at 140 ( “He thought too a junction of the Judiciary to it, involved an improper mixture of powers.”).

<sup>228</sup> Notes of James Madison (Aug. 11, 1787), in 2 Farrand, *supra* note 2, at 260 (emphasis added).

<sup>229</sup> *Supra* note 94 and accompanying text.

of one branch of government on another.<sup>230</sup> Roger Sherman “regarded the Supreme Court as *improper* to try the President, because the Judges would be appointed by him.”<sup>231</sup> James Madison questioned, “What was to be done after *improper* Verdicts in State tribunals obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury?”<sup>232</sup> John Dickinson, in a subsequent letter on the convention, argued that election of the President by the legislature might have resulted in “an *improper* Dependence and Connection.”<sup>233</sup> Elbridge Gerry thought it “improper” for the Vice-President to preside in the Senate because his necessary intimacy with the President could result in legislative dependence on the President.<sup>234</sup>

Agents had to avoid conflicts of interest. Hence, Hamilton thought it “highly improper” for the state legislatures to pay federal officials,<sup>235</sup> and Madison questioned whether any officials ought to “fix their own wages, or their own privileges.”<sup>236</sup> Similar conflict of interest concerns induced Pierce Butler of South Carolina to argue that new immigrants serving in the Senate would be “improper agent[s]” for the people.<sup>237</sup> George Mason argued that, “the Senate did not rep-

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<sup>230</sup> The founders’ value of independence is explored in Robert G. Natelson, *A Reminder: The Constitutional Values of Sympathy and Independence*, 91 KY L. J. 353 (2003).

<sup>231</sup> Notes of James Madison (Sept. 8, 1787), in 2 Farrand, *supra* note 2, at 551 (emphasis added).

<sup>232</sup> Notes of James Madison (July 26, 1787), in 2 Farrand, *supra* note 2, at 124 (emphasis added). See also Notes of James Madison (July 18, 1787), in 2 Farrand, *supra* note 2, at 44 (“improper dependence in the Judges”); Notes of James Madison (Aug. 10, 1787), in 2 Farrand, *supra* note 2, at 250 (“It was as improper as to allow them to fix their own wages, or their own privileges. It was a power also, which might be made subservient to the views of one faction agst. another.”); Notes of James Madison (Sept. 8 1787), in 2 Farrand, *supra* note 2, at 551 (“The President under these circumstances was made improperly dependent.”); Notes of James Madison (Aug. 13, 1787), in 2 Farrand, *supra* note 2, at 270 (“Who are to form the New Constitution by which the condition of that class of citizens is to be made worse than the other class? Are not the States ye agents?”).

<sup>233</sup> Hutson, SUPPLEMENT, *supra* note 2, at 301 (John Dickinson to George Logan, Jan. 16, 1802) (emphasis added).

See also Notes of William Pierce (May 31, 1787), in 1 Farrand, *supra* note 2, at 59 (“Mr. Mason was of opinion that it would be highly improper to draw the Senate out of the first branch; that it would occasion vacancies which would cost much time, trouble, and expence to have filled up, besides which it would make the Members too dependent on the first branch.”).

<sup>234</sup> Notes of James Madison (Sept. 7, 1787), in 2 Farrand, *supra* note 2, at 536-37:

‘The vice President shall be ex officio President of the Senate [sic].’

Mr. Gerry opposed this regulation. We might as well put the President himself at the head of the Legislature. The close intimacy that must subsist between the President & vice-president makes it absolutely improper.”

<sup>235</sup> Notes of Robert Yates (June 22, 1787), in 1 Farrand, *supra* note 2, at 378-79 (“A state government will ever be the rival power of the general government. It is therefore highly improper that the state legislatures should be the paymasters of the members of the national government.”).

<sup>236</sup> Notes of James Madison (Aug. 10, 1787), in 2 Farrand, *supra* note 2, at 250.

<sup>237</sup> Notes of James Madison (June 13, 1787), in 1 Farrand, *supra* note 2, at 236 (speech by

resent the *people*, but the *States* in their political character. It was *improper* therefore that it should tax the people.”<sup>238</sup>

On August 20, 1787, convention delegates offered various amendments to the proposal of the committee of detail. Butler, an advocate of enumerated powers,<sup>239</sup> had prepared a motion to remove “proper,” but he never introduced it. Professor Lynch has suggested as a reason for his restraint that Butler decided not to jeopardize what his state already had won at the convention.<sup>240</sup> Perhaps. But a more natural explanation is that someone pointed out to Butler that the effect of the word “proper” was to confine rather than expand the scope of congressional authority.

That same day, Madison offered a proposal of his own:

Mr. Madison and Mr. Pinkney moved to insert between “laws” and “necessary” “and establish all offices” it [sic] appearing to them liable to cavil that the latter was not included in the former.

Mr. Govr. Morris. Mr. Wilson, Mr Rutledge and Mr. Elseworth [all members of the committee of detail.] urged that the amendment could not be necessary.

On the motion for inserting ‘and establish all offices’

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Butler):

Mr. Butler was decidedly [sic] opposed to the admission of foreigners without a long residence in the Country. They bring with them, not only attachments to other Countries; but ideas of Govt. so distinct from ours that in every point of view they are dangerous. He acknowledged that if he himself had been called into public life within a short time after his coming to America, his foreign habits opinions & attachments would have rendered him an *improper* agent in public affairs.

<sup>238</sup> Notes of James Madison (Aug. 13, 1787), in 2 Farrand, *supra* note 2, at 273 (emphasis added to “improper”).

<sup>239</sup> On May 31, Butler had questioned the broad scope of federal powers under the Virginia Plan.

Mr. Butler apprehended that the taking so many powers out of the hands of the States as was proposed, tended to destroy all that balance and security of interests among the States which it was necessary to preserve; and called on Mr. Randolph the mover of the propositions, to explain the extent of his ideas.

Notes of James Madison (May 31, 1787), in 1 Farrand, *supra* note 2, at 53 (speech by Butler). See also *id.* at 168 (Butler, opposing Congressional veto of state laws). See also Notes of James Madison (June 8, 1787), in 1 Farrand, *supra* note 2, at 168; Notes of James Madison (July 16, 1787), in 2 Farrand, *supra* note 2, at 17 (discussing comments by Butler, which questioned the grant of power to Congress “to legislate in all cases to which the separate States are incompetent”).

<sup>240</sup> LYNCH, *supra* note 2, at 20.

N. H. no. Mas. ay. Ct. no. N. J. no. Pa. no. Del. no. Md. ay.  
Va. no. N- C- no. S. C. no. Geo. no. [Ayes -- 2; noes -- 9.]

The clause as reported was then agreed to *nem con.*<sup>241</sup>

Thus, as the convention neared its end, most delegates thought the Clause sufficient to accomplish its purposes and were reasonably satisfied.

Only three delegates were not. On September 10, just a week before adjournment, Randolph announced that he would not sign the Constitution. Although his Virginia Plan had contemplated a consolidated government and he had helped draft the Necessary and Proper Clause, he apparently had undergone a conversion of some kind. One of his many "objections to the System" was the "general clause concerning necessary and proper laws."<sup>242</sup>

Note that Randolph did *not* dissent from the view that the Necessary and Proper Clause was an expression of the doctrine of implied incidental powers. Rather, he was determined to protect himself politically and to force the friends of the Constitution to agree to an amendment that would assure that the incidental powers doctrine was not stretched too far. In his letter a month later to the speaker of the Virginia House of Delegates,<sup>243</sup> Randolph made the latter point explicit:

[I]t is better to amend, while we have the constitution in our power, while the passions of designing men are not yet enlisted, and while a bare majority of the States may amend than to wait for the uncertain assent of three fourths of the States . . . .

I should now conclude this letter, which is already too long, were it not incumbent on me, from having contended for amendments, to set forth the particulars, which I conceive to require correction . . . .

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5. In drawing a line between the powers of congress and individual States; and in defining the former, so as to leave no

<sup>241</sup> Notes of James Madison (Aug. 20, 1787), in 1 Farrand, *supra* note 2, at 345.

<sup>242</sup> Notes of James Madison (Sept. 10, 1787), in 1 Farrand, *supra* note 2, at 563.

<sup>243</sup> Letter from Edmund Randolph to the Speaker of the Virginia House of Delegates (Oct. 10, 1787), in 3 Farrand, *supra* note 2, at 123-27.



clashing of jurisdictions nor dangerous disputes; and to prevent the one from being swallowed up by the other, under cover of general words, *and implication*.<sup>244</sup>

The two other convention dissenters were Elbridge Gerry of Massachusetts and George Mason of Virginia, and they were more skeptical than Randolph. On September 15, Gerry offered his list of objections, and then added that he

could however . . . get over all these, if the rights of the Citizens were not rendered insecure 1. by the general power of the Legislature to make what laws they may please to call necessary and proper. 2. raise armies and money without limit. 3. to establish a tribunal without juries, which will be a Star-chamber as to Civil cases.<sup>245</sup>

Thus, Gerry, a non-lawyer, was convinced that the Necessary and Proper Clause not only would give broad discretion to Congress, but *unreviewable* discretion. George Mason, a lawyer who seems to have soured on the whole constitutional project,<sup>246</sup> agreed. He stated his objections to the convention,<sup>247</sup> and then wrote an essay on the subject that became an important part of anti-federalist literature. In his essay, Mason expressed dismay at the discretion vested in Congress:

Under their own construction of the general clause, at the end of the enumerated powers, the Congress may grant monopolies in trade and commerce, constitute new crimes, inflict unusual and severe punishments, and extend their powers . . . as far as they shall think proper; so that the State legislatures have no security for the powers now presumed to remain to them, or the people for their rights.<sup>248</sup>

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<sup>244</sup> Letter from Edmund Randolph to the Speaker of the Virginia House of Delegates (Oct. 10, 1787), in 3 Farrand, *supra* note 2, at 127 (emphasis added).

<sup>245</sup> Notes of James Madison (Sept. 15, 1787), in 2 Farrand, *supra* note 2, at 632-33.

<sup>246</sup> Mason offered a host of objections and amendments to the document, generally without a consistent theme. For example, he wanted to increase federal authority by authorizing Congress to pass sumptuary laws, Notes of James Madison (Sept. 13, 1787), in 2 Farrand, *supra* note 2, at 606; Notes of James Madison (Sept. 14, 1787), in 2 Farrand, *supra* note 2, at 617 (discussing ex post facto laws), and ex post facto laws, *id.* at 617, yet complained of the “dangerous power and structure of the Government.” Notes of James Madison (Sept. 15, 1787), in 2 Farrand, *supra* note 2, at 632.

<sup>247</sup> Notes of James Madison (Sept. 15, 1787), in 2 Farrand, *supra* note 2, at 632-33. *Id.* at 632.

<sup>248</sup> Mason’s Objections to the Constitution of Government Formed by the Convention, in 13 DOCUMENTARY HISTORY, *supra* note 2, at 350.

The dissent of these three delegates, however, must not divert us from the fact that the other 39 still present seem to have accepted the Necessary and Proper Clause as an appropriate statement of the incidental powers doctrine and its limits.

## VI. CONFIRMATION OF THE AGENCY LAW MEANING OF THE CLAUSE: RATIFICATION

*"Implication is dangerous, because it is unbounded . . . If we trust our dearest rights to implication, we shall be in a very unhappy situation."*

— Patrick Henry<sup>249</sup>

### A. The Anti-Federalist Position

In the ensuing struggle over ratification, anti-federalists made the Necessary and Proper Clause a highly contentious issue. Comments such as the foregoing by Patrick Henry, their leading spokesman at the Virginia ratifying convention, show that they understood the broad meaning of "necessary" in the implied incidental powers doctrine—and they feared it. Further, many anti-federalists agreed with Gerry and Mason that the necessity and propriety of federal legislation would be unreviewable.

As elaborated by their spokesmen during the weeks following the national convention, the standard anti-federalist argument against the Necessary and Proper Clause developed into the following:

- The Constitution will grant to Congress the power to provide for the common defense and general welfare, if not by the Preamble,<sup>250</sup> then by the Taxation Clause;<sup>251</sup>
- The Necessary and Proper Clause will grant Congress power to pass all laws that it shall deem necessary and proper to execute the foregoing powers;<sup>252</sup>

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<sup>249</sup> Patrick Henry, VIRGINIA CONVENTION DEBATES, in 3 ELLIOT'S DEBATES, *supra* note 2, at 149-150 (speaking at the Virginia ratifying convention).

<sup>250</sup> Letter from Massachusetts Gentleman to his Friend, N.Y.J., Nov. 23, 1787, in 19 DOCUMENTARY HISTORY, *supra* note 2, at 293-94 ("A Customer").

<sup>251</sup> U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have 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; but all Duties, Imposts and Excises shall be uniform throughout the United States.").

<sup>252</sup> See, e.g., Notes of James Madison (Sept. 15, 1787), in 2 Farrand, *supra* note 2, at 640 (comments by Madison); *An Old Whig II*, PHILADELPHIA INDEP. GAZETTEER, Oct. 17, 1787, in 13 DOCUMENTARY HISTORY, *supra* note 2, at 402; *Brutus I*, NEW YORK JOURNAL, Oct. 18, 1787, in 13 DOCUMENTARY HISTORY, *supra* note 2, at 416; *Brutus V*, NEW YORK JOURNAL, Dec. 13, 1787, in 14 DOCUMENTARY HISTORY, *supra* note 2, at 423-27; *Brutus VI*, NEW YORK JOURNAL,

- There would be no effective judicial review of such laws;<sup>253</sup>
- Therefore, Congress would enjoy the unlimited power to legislate at its discretion;<sup>254</sup> and

Dec. 27, 1787, in 15 DOCUMENTARY HISTORY, *supra* note 2, at 111-12.

<sup>253</sup> *An Old Whig II*, PHILADELPHIA INDEP. GAZETTEER, Oct. 17, 1787, in 13 DOCUMENTARY HISTORY, *supra* note 2, at 402 ("Who shall judge for the legislature what is necessary and proper? Who shall set themselves above the sovereign?"). The lack of judicial review is implied in many anti-federalist treatments of the Necessary and Proper Clause. See, e.g., A Federal Republican, A Review of the Constitution Proposed by the Late Convention Held at Philadelphia (Nov. 28, 1787), in 14 DOCUMENTARY HISTORY, *supra* note 2, at 269-70; Robert Whitehall, Pennsylvania Convention Debates (Nov. 28, 1787), in 2 DOCUMENTARY HISTORY, *supra* note 2, at 399 (questioning, "Who are to be judges of what is *necessary* and *proper*?"); John Smilie, Pennsylvania Convention Debates (Nov. 28, 1787), in 2 DOCUMENTARY HISTORY, *supra* note 2, at 410 (making the same point).

See also John Williams, Virginia Convention Debates, in 2 ELLIOT'S DEBATES, *supra* note 2, at 338 (speaking at the New York ratifying convention):

I also observed, that the powers granted by it were indefinite, since the Congress are authorized to provide for the common defence and general welfare, and to pass all laws necessary for the attainment of those important objects. The legislature is the highest power in a government. Whatever they judge necessary for the proper administration of the powers lodged in them, they may execute without any check or impediment.

"Brutus" offered a reason why there would be no effective judicial review of legislative usurpations: "every extension of power of the general legislature . . . will increase the powers of the courts." He also discussed how the British Court of Exchequer had used various pretexts to increase its powers. *Brutus XI*, N. Y. J., Jan. 31, 1788, in 15 DOCUMENTARY HISTORY, *supra* note 2, at 516.

<sup>254</sup> See, e.g., *Brutus V*, N. Y. J., Dec. 13, 1787, in 14 DOCUMENTARY HISTORY, *supra* note 2, at 423:

The design of the constitution is expressed in the preamble, to be, "in order to form a more perfect union, to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and posterity." These are the ends this government is to accomplish, and for which it is invested with certain powers, among these is the power "to make all laws which are *necessary* and *proper* for carrying into execution the foregoing powers and *all other* powers vested by this constitution in the government of the United States, or in any department or officer thereof." It is a rule in construing a law to consider the objects the legislature had in view in passing it, and to give it such an explanation as to promote their intention. The same rule will apply in explaining a constitution. The great objects then are declared in this preamble in general and indefinite terms to be to provide for the common defense, promote the general welfare, and an express power being vested in the legislature to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the general government. The inference is natural that the legislature will have an authority to make all laws which they shall judge necessary for the common safety, and to promote the general welfare. This amounts to a power to make laws at discretion: No terms can be found more indefinite than these, and it is obvious, that the legislature alone must judge what laws are proper and necessary for the purpose.

See also *Cincinnatus III*, N. Y. J., Nov. 15, 1787, in 14 DOCUMENTARY HISTORY, *supra* note 2, at 128 ("I suppose that, as well as every thing else, is included in the power 'to make all laws which shall be necessary and proper'"); *Centinel V*, PHILADELPHIA INDEP. GAZETTEER, Dec. 4, 1787, in 14 DOCUMENTARY HISTORY, *supra* note 2, at 345-46; *Centinel VIII*,

- Congress would then be able to emasculate or abolish the state legislatures,<sup>255</sup> abolish state taxes,<sup>256</sup> destroy state governments,<sup>257</sup> render itself perpetual or hereditary,<sup>258</sup> impose a draft,<sup>259</sup> abolish the rights of the people,<sup>260</sup> create a king,<sup>261</sup> and do many other nefarious things.<sup>262</sup>

PHILADELPHIA INDEP. GAZETTEER, Jan. 2, 1788, in 15 DOCUMENTARY HISTORY, *supra* note 2, at 232; Letter from William Russell to William Flemming (Jan. 25, 1788), in 15 DOCUMENTARY HISTORY, *supra* note 2, at 468; *Brutus XIII*, NEW YORK JOURNAL, Feb. 21, 1787, in 16 DOCUMENTARY HISTORY, *supra* note 2, at 174; Letter from James Bowdoin to James de Caledonia, PHILADELPHIA INDEP. GAZETTEER, Feb. 27, 1788, in 16 DOCUMENTARY HISTORY, *supra* note 2; Cumberland County Petition to Pennsylvania Convention, CARLISLE GAZETTE, Dec. 5, 1787, in 2 DOCUMENTARY HISTORY, *supra* note 2, at 310; Robert Whitehall, Pennsylvania Convention Debates (Nov. 28, 1787), in 2 DOCUMENTARY HISTORY, *supra* note 2, at 359 ("We find in this Constitution an authority is given to make all laws that are necessary to carry it effectually into operation, and what laws are necessary is a consideration left for Congress to decide."); Letter IV from the Federal Farmer to the Republican (Oct. 12, 1787), in 19 DOCUMENTARY HISTORY, *supra* note 2, at 233; Letter from Massachusetts Gentleman to his Friend, NEW YORK JOURNAL, Nov. 23, 1787, in 19 DOCUMENTARY HISTORY, *supra* note 2, at 293-95; John Williams, New York Convention (June 26, 1788), in 2 ELLIOT'S DEBATES, *supra* note 2, at 330-32 (repeating a close paraphrase of the fifth essay of "Brutus" at the New York ratifying convention); Melancton Smith, New York Convention (July 1, 1788), in 2 ELLIOT'S DEBATES, *supra* note 2, at 377 (speaking at the New York ratifying convention).

*See also* Patrick Henry, Virginia Convention Debates, in 3 ELLIOT'S DEBATES, *supra* note 2, at 436 ("By this they have a right to pass any law that may facilitate the execution of their acts.").

<sup>255</sup> *Brutus I*, NEW YORK JOURNAL, Oct. 18, 1787, in 13 DOCUMENTARY HISTORY, *supra* note 2, at 416.

<sup>256</sup> *An Old Whig VI*, PHILADELPHIA INDEP. GAZETTEER, Nov. 24, 1787, in 14 DOCUMENTARY HISTORY, *supra* note 2, at 216-17; The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents, PENNSYLVANIA PACKET, Dec. 18, 1787, in 15 DOCUMENTARY HISTORY, *supra* note 2, at 22; *A Farmer*, PHILADELPHIA FREEMANS JOURNAL, Apr. 16, 23, 1788, in 17 DOCUMENTARY HISTORY, *supra* note 2, at 142; John Williams, New York Convention (June 27, 1788), in 2 ELLIOT'S DEBATES, *supra* note 2, at 339.

<sup>257</sup> Letter from George Lee Turberville to James Madison (Dec. 11, 1787), in 14 DOCUMENTARY HISTORY, *supra* note 2, at 407.

<sup>258</sup> *A Customer*, N. Y. J., Nov. 23, 1787, in 19 DOCUMENTARY HISTORY, *supra* note 2, at 296.

<sup>259</sup> *Brutus VIII*, N. Y. J., Jan. 10, 1788, in 15 DOCUMENTARY HISTORY, *supra* note 2, at 336.

<sup>260</sup> James Monroe, Virginia Convention Debates, in 3 ELLIOT'S DEBATES, *supra* note 2, at 218 (fearing abolition of trial by jury and freedom of the press); George Mason, Virginia Convention Debates, in 3 ELLIOT'S DEBATES, *supra* note 2, at 442 (making the same argument at the same convention).

<sup>261</sup> John Tyler, Virginia Convention Debates, in 3 ELLIOT'S DEBATES, *supra* note 2, at 455 ("Suppose, says he, that the time should come that a king should be proposed by Congress. Will they not be able, by the sweeping clause, to call in foreign assistance, and raise troops, and do whatever they think proper to carry this proposition into effect?").

<sup>262</sup> *See* George Mason, Objections to the Constitution of Government Formed By the Convention (Oct. 7, 1787), in 13 DOCUMENTARY HISTORY, *supra* note 2, at 348-51. *See also* Speech by Patrick Henry at the Virginia Convention on the Adoption of the Federal Constitution

To hammer home their point, anti-federalists dubbed the Necessary and Proper Clause the “Sweeping Clause”<sup>263</sup> and, sometimes, the “Omnipotent Clause.”<sup>264</sup>

There were a few variations on these themes. Some anti-federalists suggested that the drafters did not intend such unlimited power, but that they had chosen language that invited abuse.<sup>265</sup> Patrick Henry advanced the novel contention that a plenary interpretation of Congressional powers “was warranted . . . by the addition of the word *department*, at the end of the clause, and that they could make any laws which they might think necessary to execute the powers of any department or officer of the government.”<sup>266</sup>

Nonetheless, on the whole anti-federalists spokesmen merely repeated the themes listed above.

Of course, a lawyer considering the document objectively can see that, other than the discretion imported by the word “necessary,” the anti-federalist position had little textual basis. A preamble grants no power; it is an expression of purpose only.<sup>267</sup> The “general welfare”

(Jun. 2, 1788), in 3 ELLIOT’S DEBATES, *supra* note 2, at 56 (fearing suspension of state laws); *Agrippa X*, MASS. GAZETTE (Jan. 1, 1788), in 5 DOCUMENTARY HISTORY, *supra* note 2, at 576 (predicting that the federal government could seize control of all civil cases); *Brutus V*, N. Y. J., Dec. 13, 1787, in 14 DOCUMENTARY HISTORY, *supra* note 2, at 424-25 (claiming that the Taxation Clause and Necessary and Proper Clause could result in taxes on cider and just about everything else); *Brutus VI*, N. Y. J., Dec. 27, 1787, in 15 DOCUMENTARY HISTORY, *supra* note 2, at 113-14 (explaining the danger of Mason’s objections); Robert Whitehill, Address at the Pennsylvania Convention (Nov. 30, 1787), in 2 DOCUMENTARY HISTORY, *supra* note 2, at 426 & 428 (suggesting that Congress could abolish the states’ role in federal elections); 19 DOCUMENTARY HISTORY, *supra* note 2, at 576 (predicting that federal government could seize control of all civil cases).

<sup>263</sup> Speech by Patrick Henry at the Virginia Convention on the Adoption of the Federal Constitution (Jun. 9, 1788), in 3 ELLIOT’S DEBATES, *supra* note 2, at 150.

<sup>264</sup> *The Federal Republican VI*, MASS. CENTINEL, Feb. 2, 1788, in 5 DOCUMENTARY HISTORY, *supra* note 2, at 846.

<sup>265</sup> *Brutus I*, N. Y. J., Oct. 18, 1787, in 13 DOCUMENTARY HISTORY, *supra* note 2, at 416 (stating, “It is not meant, by stating this case, to insinuate that the Constitution would warrant a law of this kind!”).

<sup>266</sup> See also *Brutus XII*, N. Y. J., Feb. 14, 1787, in 16 DOCUMENTARY HISTORY, *supra* note 2, at 120:

A voluminous writer in favor of this system [meaning “Publius,” the putative author of the Federalist Papers - ed.], has taken great pains to convince the public, that this clause means nothing: for that the same powers expressed in this, are implied in other parts of the constitution. Perhaps it is so, but still this will undoubtedly be an excellent auxiliary to assist the courts to discover the spirit and reason of the constitution, and when applied to any and every of the other clauses granting power, will operate powerfully in extracting the spirit from them.

In Publius’ view, arguments from usurpation were not fair. THE FEDERALIST NO. 31, *supra* note 2, at 153 (Hamilton).

<sup>267</sup> Patrick Henry at the Virginia Convention on the Adoption of the Federal Constitution (Jun. 15, 1788), in 3 ELLIOT’S DEBATES, *supra* note 2, at 439.

<sup>268</sup> Cf. 2 ANNALS, *supra* note 2, at 1990-91 (Rep. William Branch Giles, making this point

language of the taxation clause is not a grant; it is a qualification on the immediately preceding grant.<sup>268</sup> The incidental powers doctrine, while it grants considerable discretion, does not bestow unreviewable discretion—as shown by the decided cases in which judges did, in fact, review it.<sup>269</sup>

### *B. How the Federalists Responded*

It took several months for friends of the Constitution to react to the anti-federalist assault on the Necessary and Proper Clause. We find little by way of rejoinder before November 26, 1787, when William Cranch wrote to John Quincy Adams that if Congress had not been given authority to make laws necessary and proper to execute the other powers, “the powers would be of no service.”<sup>270</sup> When the federalists finally responded, they did so by presenting their version of what the Necessary and Proper Clause meant. This version included non-technical expositions of the incidental powers doctrine, as limited by agents’ fiduciary duties. Federalists also enumerated certain exclusive *state* powers to illustrate the limits of implication, and they eventually agreed to a Bill of Rights, including the Ninth and Tenth Amendments to define further those limits in the Constitution.<sup>271</sup>

#### *1. Federalist Representations of Meaning*

The first major clash over the Necessary and Proper Clause occurred at the Pennsylvania ratifying convention, held from November 20 through December 15, 1787. There, leading federalists secured approval of the Constitution by pointing out that statutes authorized by the Clause could serve only those powers expressly enumerated. James Wilson argued:

The gentleman in opposition strongly insists that the general clause at the end of the eighth section gives to Congress a

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in the congressional debate over the first national bank); *id.* at 2009 (Rep. James Madison, making the same point).

<sup>268</sup> Anti-federalists sometimes obliquely conceded this. See *Brutus I*, N. Y. J., Oct. 18, 1787, in 13 DOCUMENTARY HISTORY, *supra* note 2, at 414 (conceding it only as to form, not substance); 14 DOCUMENTARY HISTORY, *supra* note 2, at 270; A Federal Republican, A Rev. of the Const. (Nov. 28, 1787), in 14 DOCUMENTARY HISTORY, *supra* note 2, at 270 (making the same point). I addressed fully the role of the General Welfare Clause as a limitation in Natelson, *General Welfare*, *supra* note 2.

<sup>269</sup> *Supra* Part IV(B).

<sup>270</sup> Letter from William Cranch to John Quincy Adams (Nov. 26, 1787) in 14 DOCUMENTARY HISTORY, *supra* note 2, at 224, 226.

<sup>271</sup> Natelson, *Enumerated*, *supra* note 2, at 476.

power of legislating generally; but I cannot conceive by what means he will render the words susceptible of that expansion. Can the words, "The Congress shall have power to make all laws which shall be necessary and proper to carry into execution the foregoing powers," be capable of giving them general legislative power? . . . *On the contrary, I trust it is meant that they shall have the power of carrying into effect the laws which they shall make under the powers vested in them by this Constitution.*<sup>272</sup>

On another occasion, Wilson added that the Necessary and Proper Clause does not "in any degree, go beyond the Particular enumeration . . . . It is saying no more than that the powers we have already particularly given, shall be effectually carried into execution."<sup>273</sup> This point was echoed by his ally, Thomas McKean.<sup>274</sup>

What should happen if Congress went beyond its authority? Wilson emphasized that legislative discretion was not unlimited; it was subject to judicial review:

If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void; for the power of the Constitution predominates.<sup>275</sup>

On January 2, 1787 an anonymous Massachusetts essayist ("A.B."), responding to the influential anti-federalist essays of "Brutus,"<sup>276</sup> wrote that the powers pursuant to which Congress must

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<sup>272</sup> Speech by James Wilson at the Pennsylvania Convention on the Adoption of the Federal Constitution (Dec. 2, 1788), in 2 ELLIOT'S DEBATES, *supra* note 2, at 448-49 (emphasis added).

<sup>273</sup> Speech by James Wilson at the Pennsylvania Convention on the Adoption of the Federal Constitution (Dec. 4, 1788), in 2 ELLIOT'S DEBATES, *supra* note 2, at 468. A more complete extract is:

I leave it to every gentleman to say whether the [enumerated] powers are not as accurately and minutely defined, as can be well done on the same subject, in the same language . . . nor does it, in any degree, go beyond the particular enumeration; for, when it is said that Congress shall have power to make all laws which shall be necessary and proper, those words are limited and defined by the following, "for carrying into execution the foregoing powers." It is saying no more than that the powers we have already particularly given, shall be effectually carried into execution.

<sup>274</sup> Speech by Thomas M'Kean at the Pennsylvania Convention on the Adoption of the Federal Constitution (Dec. 11, 1788), in 2 ELLIOT'S DEBATES, *supra* note 2, at 537 (saying that the Necessary and Proper Clause "gives to Congress no further powers than those already enumerated").

<sup>275</sup> Speech by James Wilson at the Pennsylvania Convention on the Adoption of the Federal Constitution (Dec. 7, 1788), in 2 ELLIOT'S DEBATES, *supra* note 2, at 489.

<sup>276</sup> On the disputed authorship of the "Brutus" essays, see 13 DOCUMENTARY HISTORY,

act were limited—confined to certain objects—“and these objects particularly stated and clearly defined by the constitution.”<sup>277</sup> To underscore the point, “A.B.” offered an enumeration of powers that the federal government would *not* have, and that would remain in the states.<sup>278</sup> These included “jurisdiction over murder [*sic*], adultery, theft, robbery, burglary, lying, perjury, defamation,” land titles, possession of men’s “houses, wives, children and many other objects . . . .”<sup>279</sup>

Consequently, we see Wilson, McKean, and “A.B.” all affirming two of our conclusions from textual analysis.<sup>280</sup> Congressional laws must be based on one or more enumerated powers, and this requirement is reviewable judicially. I should add that, anti-federalist concern notwithstanding, the ratifiers generally accepted that all constitutional provisions would be subject to judicial review.<sup>281</sup>

*supra* note 2, at 411 (editor’s note) (listing possible authors of the “Brutus” essays).

<sup>277</sup> A.B., HAMPSHIRE GAZETTE, Jan. 2, 1788, in 5 DOCUMENTARY HISTORY, *supra* note 2, at 596-97.

<sup>278</sup> *Id.* at 599.

<sup>279</sup> *Id.*

<sup>280</sup> *Supra* Part II(A).

<sup>281</sup> The prospective power of the courts to invalidate unconstitutional federal actions was repeatedly referenced during the ratification debates. See, e.g., THE FEDERALIST NO. 16, *supra* note 2, at 117 (Alexander Hamilton), NO. 44, at 285-86 (James Madison); Letter from James Madison to Thomas Jefferson, (Oct. 24, 1787, ), in 1 THE FOUNDERS’ CONSTITUTION, ch.17, doc. 22, available at <http://press-pubs.uchicago.edu/founders/documents/v1ch8s14.html> (last visited Aug. 29, 2004); THE FEDERALIST NO. 16, *supra* note 2, at 117 (Hamilton), NO. 44, at 285-86 (Madison); James Sullivan as “Cassius XI,” in THE MASS. GAZETTE (Dec. 25, 1787), in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, 43 & 46 (Paul Leicester Ford ed., 1892).

See also the comments of Oliver Ellsworth, later chief justice of the United States, at the Connecticut ratifying convention:

If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the general government, the law is void; and upright, independent judges will declare it to be so.

Speech by Oliver Ellsworth at Connecticut’s Convention on the Adoption of the Constitution (Jan. 4, 1788), in 2 ELLIOT’S DEBATES, *supra* note 2, at 196.

For still further examples, see Speech by Patrick Henry at the Virginia Convention on the Adoption of the Federal Constitution (Jun. 12, 1788), in 3 ELLIOT’S DEBATES, *supra* note 2, at 324-25 (praising the practice of the Virginia courts in invalidating unconstitutional legislation, and wondering whether the federal judiciary would have the fortitude to do the same); Speech by George Nicholas at the Virginia Convention on the Adoption of the Federal Constitution (Jun. 15, 1788), in 3 ELLIOT’S DEBATES, *supra* note 2, at 443 (“[If Congress] exceed these powers, the judiciary will declare it void.”); Speech by Patrick Henry at the Virginia Convention on the Adoption of the Federal Constitution (Jun. 20, 1788), in 3 ELLIOT’S DEBATES, *supra* note 2, at 541; Speech by Edmund Pendleton at the Virginia Convention on the Adoption of the Federal Constitution (Jun. 20, 1788), in 3 ELLIOT’S DEBATES, *supra* note 2, at 548 (speaking on the same topic); Speech by John Marshall at the Virginia Convention on the Adoption of the



Pennsylvania was the second state (after Delaware) to ratify the Constitution, and New Jersey and Georgia followed in quick succession. With the Connecticut convention about to meet, Oliver Ellsworth wrote a series of articles under the name of "A Landholder." On December 3, 1787, he addressed the second of the five central questions I posed earlier: What was role of the Necessary and Proper Clause in the Constitution? Was it a grant, a limitation, or a rule of construction?<sup>282</sup> Ellsworth implied it was merely a rule of construction—a desirable protection against those who would misrepresent the Constitution to destroy the central authority: "[Congress]," he wrote, "must have authority to enact any laws for executing their own powers or those powers will be evaded by the artful and unjust, and the dishonest trader will defraud the public of its revenue."<sup>283</sup>

On December 18, 1787, in Federalist No. 23, Alexander Hamilton implicitly answered our third question—What is the meaning of "necessary"?<sup>284</sup>—by adopting a deferential test for how connected a law must be with an enumerated power:

If the circumstances of our country are such as to demand a compound instead of a simple . . . a confederate instead of a sole, government, the essential point which will remain to be adjusted will be to discriminate the OBJECTS, as far as it can be done, which shall appertain to the different provinces or departments of power; allowing to each the most ample authority for fulfilling the objects committed to its charge. Shall the Union be constituted the guardian of the common safety? Are fleets and armies and revenues necessary to this purpose? The government of the Union must be empowered to pass all laws, and to make all regulations which *have relation to them*. The same must be the case in respect to commerce, and to every other matter to which its jurisdiction is permitted to extend.<sup>285</sup>

Ellsworth's Connecticut ratified in January, 1788, but by that time the writings of "Brutus" were beginning to affect the debate in other

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Federal Constitution (Jun. 20, 1788), in 3 ELLIOT'S DEBATES, *supra* note 2, at 541, 553; Speech by John Steele at the North Carolina Convention on the Adoption of the Federal Constitution (Jul. 25, 1788), 4 ELLIOT'S DEBATES, *supra* note 2, at 71. For additional discussion of the founders' expectation of judicial review, see BARNETT, RESTORING, *supra* note 2, at 131-39.

<sup>282</sup> *Supra* Part II(B).

<sup>283</sup> 14 DOCUMENTARY HISTORY, *supra* note 2, at 338 (Dec. 3, 1787).

<sup>284</sup> *Supra* Part II(C).

<sup>285</sup> THE FEDERALIST NO. 23, *supra* note 2, at 114 (Alexander Hamilton) (emphasis added.).

states. On January 3, Hamilton published Federalist No. 33 in response. Hamilton rendered explicit what Ellsworth had implied: the Necessary and Proper Clause gave Congress no power. It was a rule of construction. Hamilton also strongly suggested an answer to another of our questions:<sup>286</sup> The word “and” is conjunctive rather than disjunctive; a law must be necessary AND proper—a predictable result, given Hamilton’s lenient definition of “necessary.”<sup>287</sup>

[The Necessary and Proper Clause and Supremacy Clauses] are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers.

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What is a power, but the ability or faculty of doing a thing? What is the ability to do a thing, but the power of employing the *means* necessary to its execution?<sup>288</sup> What is a LEGISLATIVE power, but a power of making LAWS? What are the MEANS to execute a LEGISLATIVE power but LAWS? What is the power of laying and collecting taxes, but a *legislative power*, or a power of MAKING LAWS, to lay and collect taxes? What are the proper means of executing such a power, but *necessary* and *proper* laws?

. . . [A] power to lay and collect taxes must be a power to pass all laws *necessary* and *proper* for the execution of that power . . . If there is any thing exceptionable, it must be sought for in the specific powers upon which this general declaration is predicated. The declaration itself, though it

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<sup>286</sup> *Supra* Part II(E).

<sup>287</sup> *Supra* notes 108-109 and accompanying text.

<sup>288</sup> This means-end argument sometimes was expressed by the maxim: “*Qui dat finem, dat media ad finem necessaria*”—who gives the end, gives the means necessary for the end. See, e.g., the sarcastic reference in *Timoleon*, NEW YORK JOURNAL, Nov. 1, 1787, in 13 DOCUMENTARY HISTORY, *supra* note 2, at 534, 535 (“Timoleon”).

The maxim appears in SIDNEY, *supra* note 2, at 529. As of this writing, I have been unable to locate prior judicial use of it. Sidney cited Grotius for it, but Grotius said something very different, for he was speaking of the duty of a parent to support a child:

*Quia dat formam, dat quae ad formam sunt necessaria, dictum est Aristotelis: quare qui causa est ut homo existat, is quantum in se est, et quantum necesse est, prospicere ei debet de his quae ad vitam humanam, id est naturalem ac socialem, nam ad eam natus est homo, sunt necessaria.*

Hugonis Grotii, *De Jure Belli et Pacis* 356 (Cambridge Univ. ed. 1853) (1625).

may be chargeable with tautology or redundancy, is at least perfectly harmless.

But SUSPICION may ask, Why then was it introduced? The answer is, that it could only have been done for greater caution, and to guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union. The Convention probably foresaw, what it has been a principal aim of these papers to inculcate, that the danger which most threatens our political welfare is that the State governments will finally sap the foundations of the Union; and might therefore think it necessary, in so cardinal a point, to leave nothing to construction . . . .<sup>289</sup>

Hamilton then offered a hint into our fourth central question: What is the meaning of “proper”?<sup>290</sup> He wrote: “The propriety of a law, in a constitutional light, must always be determined by *the nature of the powers upon which it is founded*.”<sup>291</sup> Hamilton was referring specifically to the limited nature of federal powers, but the comment has more general application. If congressional powers were in the “nature” of agency powers—as Hamilton himself believed<sup>292</sup>—then “propriety” had to be defined by rules applicable to agency.

On January 25, 1788, Madison added another “Federalist” essay in which he affirmed that the Clause gave no additional authority to Congress, and further explained the consequences that might have ensued if it had been omitted:

Had the Constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government, by unavoidable implication. No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included. Had this last method, therefore, been pursued by the convention [i.e., leaving out the Clause] . . . the real inconveniency would be incurred of not

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<sup>289</sup> THE FEDERALIST NO. 33, *supra* note 2, at 158-59 (Alexander Hamilton).

<sup>290</sup> *Supra* Part II(D).

<sup>291</sup> THE FEDERALIST NO. 33, *supra* note 2, at 160 (Alexander Hamilton) (emphasis in original). Thus, not based primarily on questions of, say, convenience for society, but on the kind of powers (here, agency powers) granted.

<sup>292</sup> See generally THE FEDERALIST NO. 23, *supra* note 2 (Alexander Hamilton).

removing a pretext which may be seized on critical occasions for drawing into question the essential powers of the union.<sup>293</sup>

As Wilson had done, Madison then affirmed that Congressional usurpation could be curbed by judicial review:

If it be asked what is to be the consequence, in case the Congress shall misconstrue this part of the Constitution, and exercise powers not warranted by its true meaning . . . In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; and in the last resort a remedy must be obtained from the people who can, by the election of more faithful representatives, annul the acts of the usurpers.<sup>294</sup>

On January 31, 1788, Alexander Contee Hanson, a member of Congress from Maryland who wrote under the name "Aristides," published an important pamphlet that surveyed the Constitution from a federalist point of view. Hanson definitively agreed with Hamilton on our fifth central question:<sup>295</sup> "and" is conjunctive:

I take the construction of these words to be precisely the same, as if the clause had proceeded further and said, "No act of Congress shall be valid, unless it have relation to the foregoing powers, and be necessary and proper for carrying them into execution."<sup>296</sup>

Hanson then reinforced the argument of Wilson and Madison that federal laws would be subject to judicial review: "[E]very judge in the union, whether of federal or state appointment, (and some persons would say every jury) will have a right to reject any act, handed to him as law, which he may conceive repugnant to the constitution."<sup>297</sup> On the other hand, Hanson was one of the very few federalists who did not think the Clause was surplusage: "Without this general clause, it were easy to suppose cases, wherein a particular clause might be incompetent to its own purpose."<sup>298</sup> However, he offered no examples. Hanson concluded by offering, as "A.B." had previously, an

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<sup>293</sup> THE FEDERALIST NO. 44, *supra* note 2, at 234-35 (James Madison).

<sup>294</sup> THE FEDERALIST NO. 44, *supra* note 2, at 235 (James Madison).

<sup>295</sup> *Supra* Part II(E).

<sup>296</sup> Alexander Contee Hanson as "Aristides," Remarks on the Proposed Plan of a Federal Government (Jan. 31, 1788), in 15 DOCUMENTARY HISTORY, *supra* note 2, at 531.

<sup>297</sup> *Id.* at 531.

<sup>298</sup> *Id.* at 532.

enumeration of subjects that would remain in state control and beyond federal interference.<sup>299</sup>

On February 6, 1788, the Massachusetts convention became the sixth to ratify, doing so narrowly, and demanding amendments.<sup>300</sup> The first of these was, "That it be explicitly declared, that all powers not expressly delegated by the aforesaid Constitution are reserved to the several states, to be by them exercised."<sup>301</sup> Edmund Randolph, who as we have seen also sought amendments, was not happy with the Massachusetts language, characterizing it as "among the rocks on which the old confederation has split,"<sup>302</sup>—presumably because its reservation of all authority not "expressly" granted would eliminate the doctrine of incidental agency powers. In any event, Massachusetts' ratification came before that state's chief justice, Caleb Cushing, was able to deliver a speech asserting that the Necessary and Proper Clause was "no more than was necessarily implied in the powers themselves. For if [Congress] could not make laws that were *necessary* and *proper* to carry [t]hem into [execution], the powers themselves would be totally dead & *Useless*."<sup>303</sup> Although an undelivered speech could not have been persuasive, it offers further insight into the representations that all federalists (with the partial exception of Hanson) were advancing.

After ratification in the Bay State, federalists found progress harder. The New Hampshire convention adjourned without having ratified,<sup>304</sup> and Rhode Island voters rejected the Constitution in a referendum.<sup>305</sup> On March 12, with North Carolina about to elect its delegates,<sup>306</sup> one of that state's leading citizens, James Iredell (a fu-

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<sup>299</sup> *Id.* at 545 ("[T]he regulations of property, the regulations of the penal law, the protection of the weak, the promotion of useful arts . . .").

<sup>300</sup> The vote at the convention was 187-168. 13 DOCUMENTARY HISTORY, *supra* note 2, at xli.

Federalist delegate Dr. Charles Jarvis of Boston justified ratification with amendments by reference to the incidental agency powers doctrine. Speech by Dr. Jarvis at the Massachusetts Convention on the Adoption of the Federal Constitution (Feb. 2, 1788), in 2 ELLIOT'S DEBATES, *supra* note 2, at 151 ("It is a maxim, I believe, universally admitted, that, in every instance, the manner in which every power is to be exerted, must be in its nature discretionary with that body to which this power is delegated.").

<sup>301</sup> Speech by John Hancock at the Massachusetts Convention on the Adoption of the Federal Constitution (Feb. 2, 1788), in 2 ELLIOT'S DEBATES, *supra* note 2, at 177.

<sup>302</sup> REARDON, *supra* note 2, at 132.

<sup>303</sup> Undelivered speech by William Cushing (Feb. 4, 1788), in 6 DOCUMENTARY HISTORY, *supra* note 2, at 1436.

<sup>304</sup> 13 DOCUMENTARY HISTORY, *supra* note 2, at xli-ii.

<sup>305</sup> The vote was overwhelming. 13 DOCUMENTARY HISTORY, *supra* note 2, at xli (noting that the vote was 2,711 to 239).

<sup>306</sup> The election was held March 28 and 29. 13 DOCUMENTARY HISTORY, *supra* note 2, at xli.

ture Supreme Court Justice, then writing as “Marcus”) addressed the subject of the Necessary and Proper Clause:

These [enumerated] powers would be useless, except acts of Legislation could be exercised upon them . . . If Congress, under pretence of exercising the power delegated to them, should, in fact, by the exercise of any other power, usurp upon the rights of the different Legislatures, or of any private citizens, the people will be exactly in the same situation as if there had been an express provision against such power in particular, and yet they had presumed to exercise it. It would be an act of tyranny . . . .<sup>307</sup>

Iredell then confronted the anti-federalist argument that the new government might seize control of the criminal law. On the contrary, Iredell responded—other than counterfeiting, piracy, treason, and offenses on the seas and against the law of nations—

Congress can exercise no other power of this kind, except in the enacting of penalties to enforce their actions of Legislation in the cases where express authority is delegated to them, and if they could not enforce such acts by the enacting of penalties, those powers would be altogether useless . . . .<sup>308</sup>

Iredell’s argument thereby reinforced two points the federalists already had made repeatedly: (1) Congress would have no capacity to legislate for any purpose other than the enumerated ones, and (2) the Necessary and Proper Clause really adds nothing, because Congress’ enumerated powers already carry incidental powers with them. Otherwise, the enumerated powers would be nugatory. One of the two delegates named MacLaine (Archibald or William is not clear) echoed the same sentiments at the North Carolina ratifying convention:

This clause specifies that they shall make laws to carry into execution all the powers vested by this Constitution; consequently, they can make no laws to execute any other power. This clause gives no new power, but declares that those already given are to be executed by proper laws.<sup>309</sup>

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<sup>307</sup> Marcus IV, NORFOLK AND PORTSMOUTH J., Mar. 12, 1788, in 16 DOCUMENTARY HISTORY, *supra* note 2, at 379-80.

<sup>308</sup> *Id.* at 381.

<sup>309</sup> MacLaine, Remarks at the North Carolina Ratifying Convention (July 28, 1788), in 4 ELLIOT’S DEBATES, *supra* note 2, at 141.

Iredell then made explicit the connection between the Constitution's enumeration of authority and powers of attorney: "It is a declaration of particular powers by the people to their representatives, for particular purposes. It may be considered as a great power of attorney, under which no power can be exercised but what is expressly [*sic*] given."<sup>310</sup> Despite the efforts of Iredell and MacLaine, however, the North Carolina convention adjourned without having ratified.<sup>311</sup>

With opposition strong in North Carolina, New Hampshire and Rhode Island, with ratification in Maryland in April<sup>312</sup> and in South Carolina (with amendments) in May,<sup>313</sup> it appeared that the fate of the Constitution would be decided in New York and Virginia. The contest in both states was extremely close.<sup>314</sup> It was in Virginia that the climatic battle was fought.<sup>315</sup>

On February 28, 1788, the Petersburg, Virginia *Gazette* published an essay by "An Impartial Citizen," in which the author attacked George Mason's broad construction of the Necessary and Proper Clause with an explicit statement of the incidental powers doctrine:

Now, I insist that Mr. Mason's construction on this clause is absolutely puerile, and by no means warranted by the words, which are chosen with peculiar propriety. When a power is vested any where, from the nature of things it must be understood to be attended by such other incidental powers as are necessary to give it efficacy; for to say, that a power is given, without the power of enforcing it, is a solecism in language.<sup>316</sup>

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<sup>310</sup> James Iredell, Remarks at the North Carolina Ratifying Convention, (July 28, 1788), in 4 ELLIOT'S DEBATES, *supra* note 2, at 148. See also *id.* at 166 (repeating same argument). See also *Conciliator*, INDEPENDENT GAZETTEER, Jan. 15, 1788, in 2 DOCUMENTARY HISTORY, *supra* note 2, at microfilm supp. 1485-95 (analogizing the Constitution's grant of powers to grant of powers to a ship captain and discussing the inherent limits in such a grant and the uselessness of itemizing specific limitations).

<sup>311</sup> 13 DOCUMENTARY HISTORY, *supra* note 2, at xlii (reported by the editor).

<sup>312</sup> *Id.* at xli (ratification by 63-11 margin as reported by the editor).

<sup>313</sup> *Id.* at xlii (ratification by 149-73 as reported by the editor).

<sup>314</sup> Both states ultimately ratified, New York by a margin of 30-27 and Virginia by 89-79. Both states proposed amendments. *Id.* (reported by the editor).

<sup>315</sup> In New York, the convention defeated a motion by John Lansing, "That no power shall be exercised by Congress, but such as is expressly given by this Constitution; and all others, not expressly given, shall be reserved to the respective states, to be by them exercised." John Lansing, Motion at the New York Ratifying Convention (July 2, 1788), in 2 ELLIOT'S DEBATES, *supra* note 2, at 406.

<sup>316</sup> *An Impartial Citizen V*, PETERSBURG VA. GAZETTE, Feb. 28 1788, in 8 DOCUMENTARY HISTORY, *supra* note 2, at 431.

Hamilton had offered an important clue to the meaning of our fourth central question: the meaning of “proper.” Now the “Impartial Citizen” completed the explanation:

In this case, the laws which Congress can make . . . must not only be *necessary*, but *proper*—So that if those powers cannot be executed without the aid of a law, granting commercial monopolies, inflicting unusual punishments, creating new crimes, or commanding any unconstitutional act; yet, as such a law would be manifestly *not proper*, it would not be warranted by this clause, without absolutely departing from the usual acceptance of words.<sup>317</sup>

The “Impartial Citizen’s” list of improper laws all were governmental analogues of common breaches of fiduciary duty. A government granting a commercial monopoly bestowed a favor on one group to the exclusion of others. This was a breach of the duty of impartiality.<sup>318</sup> Inflicting unusual punishments—like violating rights generally—breached both the duty of impartiality and the duty of loyalty, for an agent must not oppress his principals.<sup>319</sup> Laws creating new crimes or commanding unconstitutional acts violated the agent’s obligation to remain within the scope of authority.<sup>320</sup>

On April 2, “A Native of Virginia” wrote to affirm that the Clause gave no powers beyond those enumerated, and to explain, as Ellsworth, Hamilton and Madison had previously, that the Necessary and Proper Clause “is necessary; as without it the different states might

<sup>317</sup> *Id.*

<sup>318</sup> Natelson, *Public Trust*, *supra* note 2, at 1157-58.

<sup>319</sup> *Cf.* James Madison, Memorial and Remonstrance against Religious Assessments in THE FOUNDERS’ CONSTITUTION 82, 82-84 (Philip B. Kurland & Ralph Lerner eds., 1987) (1785), available at [http://press-pubs.uchicago.edu/founders/documents/amendI\\_religions43.html](http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html) (last visited Aug. 29, 2004):

As the Bill violates equality by subjecting some to peculiar burdens, so it violates the same principle, by granting to others peculiar exemptions.

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Either we must say, that they may controul the freedom of the press, may abolish the Trial by Jury, may swallow up the Executive and Judiciary Powers of the State; nay that they may despoil us of our very right of suffrage, and erect themselves into an independent and hereditary Assembly or, we must say, that they have no authority to enact into law the Bill under consideration.

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We the Subscribers say, that the General Assembly of this Commonwealth have no such authority: And that no effort may be omitted on our part against so dangerous an usurpation, we oppose to it, this remonstrance; earnestly praying . . . that the Supreme Lawgiver of the Universe . . . turn their Councils from every act which would . . . violate the trust committed to them . . .

<sup>320</sup> See *infra* Part VIII(D) (explaining why this interpretation of “proper” is not a substantive limitation, so the Clause is still a rule of construction).



counteract all laws of Congress, and render the Federal Government nugatory.”<sup>321</sup> A week later, still another federalist writer, “Cassius,” emphasized that the Clause merely gave Congress capacity to effectuate its express powers.<sup>322</sup>

The Virginia ratifying convention met on June 2.<sup>323</sup> It soon erupted into oratorical fireworks. Patrick Henry’s assaults on the Constitution were heavily punctuated with barrages against the Necessary and Proper Clause. Again and again, Henry—who shared the federalists’ view that government officials should be the people’s agents<sup>324</sup>—slammed home the anti-federalist line: that, working in tandem with the Preamble and General Welfare Clause, the Necessary and Proper Clause would give Congress unfettered power to erect an absolute tyranny in America!

Henry was an orator equal to any four men. Fortunately for the Constitution, he faced—without eloquent assistance on his own side—not four, but *five* highly talented opponents. They were Edmund Pendleton, George Nicholas, James Madison, John Marshall<sup>325</sup>—and Governor Edmund Randolph.<sup>326</sup> For Randolph was arrayed once again with the friends of the Constitution. To be sure, he con-

<sup>321</sup> *A Native of Virginia*, Observations upon the propped plan of Federal Government with an attempt to answer some of the principal objections that have been made to it (*Virginia Gazette* 1788), in 9 DOCUMENTARY HISTORY, *supra* note 2, at 675.

<sup>322</sup> *Cassius II*, To Richard Henry Lee, Esq., VA. INDEP. CHRON., Apr. 9, 1788, in 9 DOCUMENTARY HISTORY, *supra* note 2, at 714 (stating in an article published on April 9, 1788, that “Congress can make no laws, except such, as are, essentially, necessary to carry into execution the particular powers, given to them by the constitution”).

<sup>323</sup> 13 DOCUMENTARY HISTORY, *supra* note 2, at xlii (reported by the editor).

<sup>324</sup> Patrick Henry, Remarks at the Virginia Ratifying Convention (May 14, 1788), in 4 ELLIOT’S DEBATES, *supra* note 2, at 324 (“Rulers are the servants and agents of the people: the people are their masters.”).

<sup>325</sup> Marshall did not address the Necessary and Proper Clause directly, but gave a lengthy speech in which he stressed the role of government officials as the people’s agents. John Marshall, Remarks at the Virginia Ratifying Convention (June 10, 1788), in 3 ELLIOT’S DEBATES, *supra* note 2, at 225 (“You cannot exercise the powers of government personally yourselves. You must trust to agents.”); *id.* at 227 (“We are answered, that the powers may be abused; that . . . Congress may . . . prostitute their powers to destroy our liberties. This goes to the destruction of all confidence in agents.”); *id.* at 233 (“Are they not both the servants of the people? Are not Congress and the state legislatures the agents of the people, and are they not to consult the good of the people?”).

For a contemporary reaction to Henry’s brilliant battle against very talented federalists, see Letter from William Nelson, Jr. to William Short, (July 12, 1788) in 10 DOCUMENTARY HISTORY, *supra* note 2, at 1701-02.

<sup>326</sup> Pendleton was of the former generation, REARDON, *supra* note 2, at 31, but the others were all tightly knit. George Nicholas was the brother of Randolph’s wife. REARDON, *supra* note 2, at 125. Madison and Randolph had a long-time political alliance. *Id.* at 43 and *passim*, and Madison was the godfather to Randolph’s third child. *Id.* at 75. When Randolph left law practice to become governor, he handed over his clients to Marshall. *Id.* at 88.

Nicholas and his brother, Wilson Cary Nicholas (also a delegate at the Virginia convention), had worked closely with Madison before, notably in obtaining passage of the Virginia Statute for Religious Freedom. Banning, *supra* note 2, at 118, 122.

tinued to express doubts and state his desire for amendments.<sup>327</sup> Nonetheless, he engagingly argued that, when all was said and done, the Constitution had to be ratified. On June 10, he opened his defense of the Necessary and Proper Clause with the standard federalist position:

This formidable clause does not in the least increase the powers of Congress. It is only inserted for greater caution, and to prevent the possibility of encroaching upon the powers of Congress. No sophistry will be permitted to be used to explain away any of those powers; nor can they possibly assume any other power, but what is contained in the Constitution, without absolute usurpation.<sup>328</sup>

Randolph's argument fit well with a comment on a related topic the previous day by pro-Constitution delegate Henry Lee of Westmoreland County: "if a man delegated certain powers to an agent, it would be an insult upon common sense to suppose that the agent could legally transact any business for his principal which was not contained in the commission whereby the powers were delegated . . . ."<sup>329</sup>

Later on June 10<sup>th</sup>, George Nicholas—lawyer, former state legislator, former colonel in the continental army,<sup>330</sup> and Randolph's brother in law<sup>331</sup>—rose to speak:

The gentleman [Henry] has adverted to what he calls the *sweeping clause*, &c., and represents it as replete with great dangers . . . . The committee will perceive that the Constitution had enumerated all the powers which the general gov-

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<sup>327</sup> Edmund Randolph, Remarks at the Virginia Ratifying Convention (June 4, 1788), in 3 ELLIOT'S DEBATES, *supra* note 2, at 25 ("As with me the only question has ever been between previous and subsequent amendments . . . .").

<sup>328</sup> Edmund Randolph, Remarks at the Virginia Ratifying Convention (June 10, 1788), in 3 ELLIOT'S DEBATES, *supra* note 2, at 206.

To be sure, Randolph had alluded earlier to the issue of delegated powers. Edmund Randolph, Remarks at the Virginia Ratifying Convention (June 16, 1788), in 3 ELLIOT'S DEBATES, *supra* note 2, at 70-71:

Experience and history, the least fallible judges, teach us that, in forming a government, the powers to be given must be commensurate to the object. A less degree will defeat the intention, and a greater will subject the people to the depravity of rulers, who, though they are but the agents of the people, pervert their powers to their emoluments and ambitious views.

<sup>329</sup> Henry Lee, Remarks at the Virginia Ratifying Convention (June 9, 1788), in 3 ELLIOT'S DEBATES, *supra* note 2, at 186. Lee was arguing that a bill of rights was unnecessary because the powers delegated to the federal government did not extend to suppressing citizen rights.

<sup>330</sup> Brief biographical facts may be found at <http://politicalgraveyard.com/bio/nexsen-nicholoff.html#RJ60OA5II> (last visited Aug. 29, 2004).

<sup>331</sup> REARDON, *supra* note 2, at 125.

ernment should have, but did not say how they were to be exercised. It therefore, in this clause, tells how they shall be exercised. Does this give any new power? I say not. Suppose it had been inserted, at the end of every power, that they should have power to make laws to carry that power into execution; would this have increased their powers? If, therefore, it could not have increased their powers, if placed at the end of each power, it cannot increase them at the end of all. This clause only enables them to carry into execution the powers given to them, but gives them no additional power.<sup>332</sup>

Then it was Madison's turn. In response to a renewed offensive from Henry, Madison, who had earlier in the convention made clear his own adherence to the agency theory of government,<sup>333</sup> now resorted to the doctrine of incidental agency powers:

[W]hat new terrors can arise from this particular clause? It is only a superfluity. If that latitude of construction which he [Henry] contends for were to take place with respect to the sweeping clause, there would be room for those horrors. But it gives no supplementary power. It only enables them to execute the delegated powers. If the delegation of their powers be safe, no possible inconvenience can arise from this clause. *It is at most but explanatory. For when any power is given, its delegation necessarily involves authority to make laws to execute it.*<sup>334</sup>

Reinforcing Madison was the Old Dominion's most respected lawyer, Chancellor Edmund Pendleton, another devotee of the agency theory of government.<sup>335</sup>

I understand that clause as not going a single step beyond the delegated powers. What can it act upon? Some power given

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<sup>332</sup> George Nicholas, Remarks at the Virginia Ratifying Convention (June 10, 1788), in 3 ELLIOT'S DEBATES, *supra* note 2, at 245-46 (emphasis in original).

<sup>333</sup> James Madison, Remarks at the Virginia Ratifying Convention (June 12, 1788), in 3 ELLIOT'S DEBATES, *supra* note 2, at 306 ("The members of the one government, as well as of the other, are the agents of, and subordinate to, the people.").

<sup>334</sup> James Madison, Remarks at the Virginia Ratifying Convention (June 14, 1788), in 3 ELLIOT'S DEBATES, *supra* note 2, at 438 (emphasis added).

<sup>335</sup> Edmund Pendleton, Remarks at the Virginia Ratifying Convention (June 12, 1788), in 3 ELLIOT'S DEBATES, *supra* note 2, at 298 ("[T]he people are consequently the fountain of all power. They must, however, delegate it to agents, because, from their number, dispersed situation, and many other circumstances, they cannot exercise it in person."); Edmund Pendleton, Remarks at the Virginia Ratifying Convention (June 20, 1788), in *id.* at 550 ("The honorable gentleman to-day said it was putting too much confidence in our agents and rulers.").

by this Constitution. If they should be about to pass a law in consequence of this clause, they must pursue some of the delegated powers, but can by no means depart from them, or arrogate any new powers; for the plain language of the clause is, to give them power to pass laws in order to give effect to the delegated powers.<sup>336</sup>

In the words of the reporter, "Mr. GEORGE NICHOLAS, in reply to the gentlemen opposed to the clause under debate, went over the same grounds, and developed the same principles, which Mr. Pendleton and Mr. Madison had done."<sup>337</sup> Nicholas then examined the remedies for Congressional usurpation: "[W]ho is to determine the extent of such powers? I say, the same power which, in all well-regulated communities, determines the extent of legislative powers. If they exceed these powers, the judiciary will declare it void, or else the people will have a right to declare it void."<sup>338</sup> Meanwhile, when anti-federalists argued that the new federal government might use the treaty power to make land cessions that damaged the southern states, Randolph responded with the standard Whig doctrine that such a breach of the trust duty of impartiality would be *ultra vires*.<sup>339</sup> "There is a prohibition naturally resulting from the nature of things, it being contradictory and repugnant to reason, and the law of nature and nations, to yield the most valuable right of a community, for the exclusive benefit of one particular part of it."<sup>340</sup>

The federalist case having been made, Governor Randolph could not resist exercising another of his characteristic turns. Although he previously had said that the "sweeping clause" added nothing to Congressional authority,<sup>341</sup> he now reverted to some of the doubts he had expressed in Philadelphia on September 10 of the previous year.

"Gov. RANDOLPH observed that he had some objections to the clause. He was persuaded that the construction put upon it by the

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<sup>336</sup> Edmund Pendleton, Remarks at the Virginia Ratifying Convention (June 14, 1788), in 3 ELLIOT'S DEBATES, *supra* note 2, at 441.

<sup>337</sup> *Id.* at 442.

<sup>338</sup> George Nicholas, Remarks at the Virginia Ratifying Convention (June 14, 1788), in 3 ELLIOT'S DEBATES, *supra* note 2, at 443.

<sup>339</sup> See *supra* note 220 and accompanying text.

<sup>340</sup> Edmund Randolph, Remarks at the Virginia Ratifying Convention (June 13, 1788), in 3 ELLIOT'S DEBATES, *supra* note 2, at 362. See also *id.* at 504-05 (Randolph); James Madison, Remarks at the Virginia Ratifying Convention (June 13, 1788), in *id.* 504-05; James Madison, Remarks at the Virginia Ratifying Convention (June 18, 1788), in 3 ELLIOT'S DEBATES, *supra* note 2, at 501 (Madison, pointing out that not even the King of England could dismember the empire by treaty).

<sup>341</sup> See *supra* note 327 and accompanying text.

gentlemen, on both sides, was erroneous; but he thought any construction better than going into anarchy.”<sup>342</sup>

On the following day, he explained his thinking at greater length:

Permit me to return to that clause which is called by gentlemen the *sweeping clause*. I observed, yesterday, that I conceived the construction which had been put on this clause by the advocates of the Constitution was too narrow, and that the construction put upon it by the other party was extravagant. The immediate explanation appears to me most rational. The former contend that it gives no supplementary power, but only enables them to make laws to execute the delegated powers—or, in other words, that it only involves the powers incidental to those expressly delegated. By *incidental powers* they mean those which are necessary for the principal thing. That the incident is inseparable from the principal, is a maxim in the construction of laws. A constitution differs from a law; for a law only embraces one thing, but a constitution embraces a number of things, and is to have a more liberal construction . . . . On this principle, what should be said of the clause under consideration? . . . If incidental powers be those only which are necessary for the principal thing, the clause would be superfluous.

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Let me say that, in my opinion, the adversaries of the Constitution wander equally from the true meaning.<sup>343</sup>

After digressing to other subjects, Randolph returned to the Clause later in his speech:

My objection is, that the clause is ambiguous, and that that ambiguity may injure the states. My fear is, that it will, by gradual accessions, gather to a dangerous length.<sup>344</sup>

In other words, he still supported giving Congress implied powers, but feared the Necessary and Proper Clause could be construed to grant more. Randolph continued:

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<sup>342</sup> 3 ELLIOT'S DEBATES, *supra* note 2, at 444 (as recorded by the reporter).

<sup>343</sup> Edmund Randolph, Remarks at the Virginia Ratifying Convention (June 15, 1788), in 3 ELLIOT'S DEBATES, *supra* note 2, at 463-64.

<sup>344</sup> *Id.* at 470.

But, sir, are we to reject it [the Constitution], because it is ambiguous in some particular instances? I cast my eyes to the actual situation of America. I see the dreadful tempest, to which the present calm is a prelude, if disunion takes place. I see the anarchy which must happen if no energetic government be established. In this situation, I would take the Constitution, were it more objectionable than it is . . . .

\* \* \* \*

Whether we shall propose previous or subsequent amendments [i.e., previous or subsequent to ratification], is now the only dispute . . . . I ask gentlemen whether, as eight states have adopted it, it be not safer to adopt it, and rely on the probability of obtaining amendments, than, by a rejection, to hazard a breach of the Union?<sup>345</sup>

In other words, Randolph wanted to ensure that the Necessary and Proper Clause did not increase Congressional jurisdiction—that it represented only its intended purpose—and thus he favored ratification only with amendments.

And that is what he got. The convention in Virginia approved the Constitution by a 53-47 percent margin<sup>346</sup> and only because the convention voted to demand extensive changes. The convention's very first amendment read as follows: "That each state in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States, or to the departments of the federal government."<sup>347</sup> This, of course, was very similar to the first amendment adopted by the Massachusetts convention,<sup>348</sup> with this important difference: the adverb "expressly" before the word "delegated" had been deleted. Under the Virginia formulation, the federal government would enjoy implied incidental agency powers—but no more.

## 2. *Federalist Enumerations and Agreement to Amendments*

During the ratification process, the line between laws "proper" or "improper" was sharpened by specific federalist representations as to what powers would be reserved exclusively to the states. In the first

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<sup>345</sup> *Id.* at 470-71.

<sup>346</sup> On June 25, 1788, Virginia became the tenth state to ratify. The margin was 89-79. 13 DOCUMENTARY HISTORY, *supra* note 2, at xlii (reported by editor).

<sup>347</sup> Amendments to the Constitution, Virginia Ratifying Convention, in 3 ELLIOT'S DEBATES, *supra* note 2, at 659.

<sup>348</sup> See *supra* note 300 and accompanying text.

six months of 1788, many promoters of the Constitution—especially prominent lawyers—issued enumerations of this kind. Among these authors of short lists were Hamilton, Madison, Wilson, Pendleton, Iredell, and, interestingly enough, John Marshall. In addition, several anonymous Federalist authors offered short enumerations.<sup>349</sup> More elaborate and complete lists came from the pens of other federalist writers, anonymous<sup>350</sup> and otherwise. We have seen that one pseudonymous federalist (“A.B.”) began the process, and that Alexander Contee Hanson (“Aristides”)<sup>351</sup> continued it. Still others were Nathaniel Peaslee Sargeant, a Justice (and shortly thereafter, Chief Justice) of the Massachusetts Supreme Judicial Court;<sup>352</sup> Alexander White, a distinguished Virginia lawyer;<sup>353</sup> and businessman Tench Coxe.<sup>354</sup> All of these enumerations were remarkably consistent, with much overlap but relatively little dispute among federalist writers about which powers were reserved to the states.

I previously have written about these enumerations of state powers.<sup>355</sup> In capsule form, the federalist representations were that, outside the capital district, national authority would not include training the militia or appointing militia officers, nor control over local government, real property, personal property outside of commerce, domestic or family affairs, crimes *malum in se* (except treason, piracy, and counterfeiting), state court systems, the law of torts or contracts (except in suits between citizens of different states), religion, education, services for the poor and unfortunate, agriculture, or other business enterprises.<sup>356</sup> This list reassured the wavering public that inci-

<sup>349</sup> For detailed citations and who said what, see Natelson, *Enumerated*, *supra* note 2, at 476-88.

<sup>350</sup> A.B., HAMPSHIRE GAZETTE, Jan. 2, 1788, *reprinted in*, 5 DOCUMENTARY HISTORY, *supra* note 2, at 599; Anonymous, MASS. GAZETTE, Jan. 8, 1788, *in* 5 DOCUMENTARY HISTORY, *supra* note 2, at 651-52. Both clearly were intended to be relied on. The former was in specific response to the claims of the anti-federalist essayist “Brutus” that the Constitution imposed insufficient limits on the federal government. The latter was reprinted in two other papers. In the MASSACHUSETTS CENTINEL, the piece was published under the headline, “READ THIS! READ THIS!” Anonymous, MASS. GAZETTE, Jan. 8, 1788, *in* 5 DOCUMENTARY HISTORY, *supra* note 2, at 652.

<sup>351</sup> Aristides, Remarks on the proposed plan of a Federal Government (1788), *in* 1 FOUNDERS’ CONSTITUTION 462 (Philip B. Kurland & Ralph eds. 1987); Letter from Contee Hanson to Tench Coxe (Mar. 27, 1788), *in* 5 DOCUMENTARY HISTORY, *supra* note 2, at 520-21 (referring to the “avidity, with which I am informed my humble essay has been bought up.”).

<sup>352</sup> Letter from Nathaniel Peaslee Sargeant to Joseph Badger (1788), *in* 8 DOCUMENTARY HISTORY, *supra* note 2, at 568.

<sup>353</sup> The relevant (first) portion of White’s essay (with explanatory annotations) is found at Alexander White, Essay, VA. GAZETTE, Feb. 22, 1788, *in* 8 DOCUMENTARY HISTORY, *supra* note 2, at 401-08.

<sup>354</sup> Tench Coxe, A Freeman III, PA. GAZETTE, Feb. 6, 1788, *in* 5 DOCUMENTARY HISTORY, *supra* note 2, at 49.

<sup>355</sup> Natelson, *Enumerated*, *supra* note 2.

<sup>356</sup> *Id.* at 481-88. In addition, see Roger Sherman to Unknown Recipient, Dec. 8, 1787, *in*

dental powers would not be construed too broadly, and that the Constitution sanctioned only laws that were truly “proper” to congressional agents’ sphere of authority.<sup>357</sup>

As we have seen, the federalists were not able to win their narrow ratification victories in Massachusetts or Virginia until they agreed to clarifying amendments. In all, seven states—a majority—proposed similar amendments when ratifying.<sup>358</sup> The outgrowth of these proposals was the Bill of Rights, especially the Ninth and Tenth Amendments,<sup>359</sup> which preserved the incidental agency doctrine, but assured that would not be applied with too much latitude. When the First Congress met in 1789 and James Madison introduced his proposed amendments, he particularly emphasized the need to limit the scope of implication under the Necessary and Proper Clause.<sup>360</sup>

## VII. CONFIRMATION OF THE AGENCY LAW MEANING OF THE CLAUSE: THE BANK DEBATES

The first great debate over the Necessary and Proper Clause after ratification of the Constitution occurred in 1791. The subject was the constitutionality of the federal government granting a corporate char-

Hutson, SUPPLEMENT, *supra* note 2, at 288 (stating that state courts will have exclusive jurisdiction over “all causes between citizens of the same State, except where they claim lands under grants of different states”).

<sup>357</sup> See the strictest use of “proper,” *supra* note 85 and accompanying text.

<sup>358</sup> Amendments were proposed by Massachusetts, South Carolina, New Hampshire, Virginia, New York, North Carolina, and Rhode Island. 13 DOCUMENTARY HISTORY, *supra* note 2, at xli - xlii.

An extant letter from Madison to Hamilton offers a glimpse into the bartering process. Letter from James Madison to Alexander Hamilton (Jun. 22, 1788), in 10 DOCUMENTARY HISTORY, *supra* note 2, at 1665 (discussing the plan of the federalists to concede recommendatory amendments so as to secure ratification in Virginia).

<sup>359</sup> U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); *id.* 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.”).

<sup>360</sup> ANNALS, *supra* note 2, at 455-56 (stating that Congress may, in absence of a bill of rights, abuse the Necessary and Proper Clause by adopting measures neither necessary nor proper).

James Monroe (the future President) had made a similar argument before ratification in a pamphlet entitled “Some Observations on the Constitution.” Monroe had written:

All powers not ceded [to the federal government] it is true belong to the people; but those given in a constitution are expressed in general terms . . . this involves in it the right of making laws for the purpose, for the means are included in the power; otherwise it is a nullity.

James Monroe, Some Observations on the Constitution (May 25, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 2, at 859.

Noting, therefore, that Congress might conclude that abolishing the right of trial by jury, freedom of conscience, and freedom of the press was within its implied powers, Monroe concluded that it was important to enumerate those rights. *Id.*



ter to a Bank of the United States. The bill was uncontroversial in the Senate; the spheres of debate were the House of Representatives and President Washington's cabinet.

Controverted post-ratification statements usually are poor evidence of pre-ratification understanding.<sup>361</sup> In this debate, however, there was—with the partial exception of Hamilton, who was an outlier on the political spectrum<sup>362</sup>—a striking amount of underlying agreement on the role, although not the application, of the Necessary and Proper Clause. Both proponents<sup>363</sup> of the Bank and opponents<sup>364</sup> treated the Clause as an expression of the incidental agency powers doctrine, and agreed that it gave Congress no additional powers. The opinion of Edmund Randolph, now attorney general, treated the matter this way:

[W]e come to the last inquiry, which has been already anticipated, whether [the bank bill] be sanctified by the power to make all laws, which shall be necessary and proper for carrying into execution the powers vested by the Constitution. To be necessary is to be incidental, or, in other words, may be denominated the natural means of executing a power.

The phrase, “and proper,” if it has any meaning, does not enlarge the powers of Congress, but rather restricts them. For no power is to be assumed under the general clause [i.e., the Necessary and Proper Clause], but such as is not only necessary but proper, or perhaps expedient also.

But as the friends to the bill ought not to claim any advantage from this clause [i.e., the Necessary and Proper Clause], so ought not the enemies to it, to quote the clause as having a restrictive effect. Both ought to consider it as among the sur-

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<sup>361</sup> *Supra* note 14 and accompanying text.

<sup>362</sup> See *supra* note 80 and accompanying text. See Alexander Hamilton, *Opinion of Alexander Hamilton on the Constitutionality of a National Bank*, in BANK HISTORY, *supra* note 2, at 96, 98 (outlining Hamilton's theory of “resulting powers” supposedly held by government,—those neither express nor implied—and his view that government powers [as opposed, presumably to individual rights and freedoms], ought to be construed liberally).

<sup>363</sup> 2 ANNALS, *supra* note 2, at 1959 (statement by Rep. Fisher Ames). See also *id.* at 1955 (statement by Rep. Fisher Ames) (analogizing government to a corporation and its incidents, the later apparently drawn from Blackstone). See *supra* note 193 and accompanying text; Alexander Hamilton, *Opinion on the Constitutionality of the National Bank*, in BANK HISTORY, *supra* note 2, at 99 (showing that even Hamilton agreed with this point).

<sup>364</sup> 2 ANNALS, *supra* note 2, at 1947 (statement by Rep. James Madison). See also *id.* at 1982 (statement by Rep. Michael Jennifer Stone) (stating that the consensus followed the view that never did any country more completely unite in any sentiment than America in this, “that Congress ought not to exercise, by implication, powers not granted by the Constitution”).

plusage which as often proceeds from inattention as caution.<sup>365</sup>

Thus, "necessary" meant "incidental." The word "and" was conjunctive, because "proper" was restrictive.<sup>366</sup> Randolph also seemed to be saying that for a law to be "proper" it had to be expedient for the principal—that is, it had to be a reasonable exercise of the agent's discretion. But the clause as a whole added nothing of substance. That rendered it a rule of construction.

The constitutional argument over the bank really circled not around the purpose of the Clause but its application. Both sides agreed that the bank bill had to be tied to one or more express powers,<sup>367</sup> but they disagreed as to the identity of such powers. Some opponents argued that an implied power had to be absolutely necessary to an express one.<sup>368</sup> At least one proponent, Rep. Fisher Ames of Massachusetts, claimed a national bank met that test.<sup>369</sup> Other proponents, however, demonstrated that an incidental power could also be reasonably necessary<sup>370</sup> or customary.<sup>371</sup> They then pointed out how a bank could be reasonably necessary<sup>372</sup>—and that it was customary, since many other governments used national banks.<sup>373</sup> The

<sup>365</sup> Edmund Randolph, *Opinion of Edmund Randolph*, in *BANK HISTORY*, *supra* note 2, at 89, in Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinions*, 44 DUKE L.J. 110, 127 (1994).

<sup>366</sup> I do not understand Randolph to be implying that "proper" has no meaning; the sense is the same as in, "If you are a man at all, you'll do it."

<sup>367</sup> 2 ANNALS, *supra* note 2, at 1992, 1994 (statement by Rep. William Branch Giles); Alexander Hamilton, *Opinion on the Constitutionality of the National Bank*, in *BANK HISTORY*, *supra* note 2, at 99, 103 ("[T]he doctrine [that Congress may charter a corporation] is stated with this express qualification, that the right to erect corporations does only extend to cases and objects within the sphere of the specified powers of the Government.") (emphasis in original).

<sup>368</sup> 2 ANNALS, *supra* note 2, at 1984 (statement by Rep. Michael Jennifer Stone); *id.* at 1993 (statement by William Branch Giles) ("I have been taught to conceive that the true exposition of a necessary mean to produce a given end was that mean without which the end could not be produced."); Thomas Jefferson, *Opinion of Thomas Jefferson, Secretary of State*, in *BANK HISTORY*, *supra* note 2, at 92-93.

<sup>369</sup> 2 ANNALS, *supra* note 2, at 1956-57 (statement by Rep. Fisher Ames).

<sup>370</sup> *Id.* at 1998-99 (statement by Rep. Elbridge Gerry).

<sup>371</sup> *Id.* at 1961 (statement by Rep. Theodore Sedgwick) ("It is universally agreed that wherever a power is delegated for express purposes, all the known and usual means for the attainment of the objects expressed are conceded also."). See also *id.* at 1962 ("known and usual means"); *id.* at 1974 (statement by Rep. Elias Boudinot) (referring to "the common and usual necessary means").

<sup>372</sup> *Id.* at 1958 (statement by Rep. Fisher Ames) (stating that the business of a national bank could be done "badly" without incorporation, but that incorporation was indispensable for doing it "well, safely, and extensively"); *id.* at 1975 (statement by Rep. Elias Boudinot) ("[h]e had not heard any argument by which it was proved [in absence of a bank] that either individuals, private banks, or foreigners could with safety and propriety be depended on as the efficient and necessary means for so important a purpose."); *id.* at 1998-2001 (statement by Rep. Elbridge Gerry).

<sup>373</sup> *Id.* at 1956, 1959 (statement by Rep. Fisher Ames); 2 ANNALS, *supra* note 2, at 2007

opponents then argued that the bank was neither necessary<sup>374</sup> nor, in the case of this particular bank, customary.<sup>375</sup> The sides also argued over the magnitude of the incorporation power, with opponents claiming that it was so momentous that it was really a principal rather than an incident.<sup>376</sup> Opponents pointed out that broad implication would contradict the federalists' pre-ratification representations on the scope of national authority.<sup>377</sup> Bank supporters asked opponents to be more precise as to where they would draw the limits of implication.<sup>378</sup> Finally, the opponents claimed (although not exactly in this language) that the bill would violate Congress' fiduciary duties by creating monopolies and otherwise benefiting some Americans at the expense of others.<sup>379</sup> The friends of the Bank did not posit any power of Congress to erect monopolies or adopt "partial" legislation. They argued only that the bill erected no monopoly, and would benefit all.<sup>380</sup>

Thus, the tenets of agency law framed the debate. Given the way this controversy has been painted—as a defining moment in American constitutionalism—it is significant how parties differing so much on application, could agree on principle.

## VIII. INTERPRETATIVE IMPLICATIONS

### A. *The Clause Should be Interpreted as an Expression of Agency Law*

We have seen that the Necessary and Proper Clause was an expression of the doctrine of implied incidental agency powers, exercise

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(statement by Rep. John Vining); Alexander Hamilton, *Opinion on the Constitutionality of the National Bank*, in BANK HISTORY, *supra* note 2, at 111-12.

<sup>374</sup> *Id.* at 2009 (statement by Rep. James Madison).

<sup>375</sup> *Id.* at 1969 (statement by Rep. James Jackson, distinguishing this proposal from foreign banks); *id.* at 1985 (statement by Rep. Michael Jennifer Stone).

<sup>376</sup> *Id.* at 1950 (statement by Rep. James Madison); *id.* at 1991 (statement by Rep. William Branch Giles).

<sup>377</sup> *Id.* at 1951 (statement by Rep. James Madison); *id.* at 1995 (statement by Rep. William Branch Giles).

<sup>378</sup> *Id.* at 1955 (statement by Rep. Fisher Ames).

<sup>379</sup> *Id.* at 1941, 1968 (statement by Rep. James Jackson); *id.* at 1950 (statement by Rep. James Madison); Thomas Jefferson, *Opinion of Thomas Jefferson, Secretary of State*, in BANK HISTORY, *supra* note 2, at 91.

*See also* 2 ANNALS, *supra* note 2, at 1973 (statement by Rep. Elias Boudinot) (observing the acknowledgment of Congress' "trust" responsibilities by leading proponents); *id.* at 2003 (statement by Rep. Elbridge Gerry); *id.* at 2012 (statement by Rep. James Madison).

<sup>380</sup> *Id.* at 1941 (statement by Rep. John Laurance [or "Lawrence"]) (claiming that benefits of the bank would be diffused); *id.* at 1941 (statement by Rep. Elbridge Gerry) (denying that the bank would be a monopoly); Alexander Hamilton, *Opinion on the Constitutionality of the National Bank*, in BANK HISTORY, *supra* note 2, at 99.

of which was to be subject to fiduciary duties and to be policed by the courts. Although substantively surplus, the provision, synergistically with the Supremacy Clause (and ultimately with the Ninth and Tenth Amendments), was a rule of construction clarifying the scope of federal jurisdiction. To pass muster under the Necessary and Proper Clause, any federal law had to (a) be a good faith effort to pursue at least one of the enumerated powers, rather than a pretext to exercise an ungranted power; (b) be necessary—that is, be indispensable, reasonably necessary, or customary; and (c) be “proper”—that is, compliant with Congress’ fiduciary obligations. Hence, Professor Randy E. Barnett had it right when he concluded, “The appropriate legal construct [for interpreting the Clause] is not the surrender of rights to a master, but the delegation of powers to an agent.”<sup>381</sup>

### B. “Necessity” As an Incident

An instinctive approach to analyzing the Necessary and Proper Clause is to look for general meanings of “necessary” as a condition precedent to exercise of a power. This approach takes the form in symbolic logic:

$$-N \supset -P$$

That is, “if a measure is not necessary to execute an express power, then the measure is not within the power.” However, the Necessary and Proper Clause is better thought of as the former expression’s *contrapositive*,<sup>382</sup> with the law’s “necessity” as a necessary consequence. As set forth in logical form:

$$P \supset N$$

That is, if the law is incidental to the express power, it is “necessary.” Coke and Blackstone had taught American lawyers that when a principal was granted, “[t]he incident shall pass by the grant of the principal.”<sup>383</sup> The term “necessary” served as a rule of construction to remind the reader that when the people granted Congress express pow-

<sup>381</sup> Barnett, *supra* note 2, at 217.

<sup>382</sup> See Stephen F. Barker, *THE ELEMENTS OF LOGIC* (1965) (explaining that to form a contrapositive, the subject and predicate reverse positions and each is negated. The result is an expression logically identical to the original. Thus, the contrapositive of, “If it is a house, it is a building” is “If it is not a building, it is not a house.” The same can be done with categorical sentences—e.g., “All houses are buildings” becomes “All non-buildings are non-houses.”).

<sup>383</sup> COKE, *supra* note 2, at folios 151a n.3, 152a, 349b; 2 BLACKSTONE, *supra* note 2, at 176 (stating the rule is a restatement of the maxim, “*accessorium non ducit, sed sequitur, suum principale*”—the accessory does not lead, but follows, its principal”).

ers, then implied powers, as understood in agency law, rode with them as a rent rides on a reversion.<sup>384</sup> Certainly eighteenth century agency jurisprudence was extensive enough to provide a set of general principles and many illustrative precedents.<sup>385</sup> It also was deferential enough so that, when applied to legislative enactments, it allowed Congress a wide area of discretion.

During the ratification process, John Marshall, a young lawyer with a growing private practice,<sup>386</sup> had been a resolute supporter of the “agency theory” of government.<sup>387</sup> So we can understand now why he was right when he ruled that the term “necessary” in this context could mean “convenient” or “useful.”<sup>388</sup>

### C. The Clause Embodies Limitations

Agency law also dictates that an agent’s discretion can be limited by the structure and wording of his authority.<sup>389</sup> The Clause’s mandate that laws must be adopted to execute enumerated powers and not for other purposes, coupled with the fiduciary duty of good faith, suggests that courts should strike down legislation enacted for purposes outside the enumerated powers. That was the position of Chief Justice Marshall in *McCulloch*.<sup>390</sup> To be sure, democratic governance requires that Congress usually receive the benefit of the doubt. But when Senators boast to their constituents about how they “voted for a bill to get more federal cash to our farmers,”<sup>391</sup> or “sponsored a bill to keep guns out of schools”<sup>392</sup>—then it’s a pretty safe bet that the bill in question wasn’t really about commerce, or about any other enumerated power.

In 1791, Madison pointed to another structural aspect of the Constitution that limits the scope of implication: Article I, Section 8

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<sup>384</sup> 2 BLACKSTONE, *supra* note 2, at 176; COKE, *supra* note 2, at folio 152a.

<sup>385</sup> *Supra* Part IV(B).

<sup>386</sup> He had succeeded to Governor Randolph’s clients. REARDON, *supra* note 2, at 88.

<sup>387</sup> John Marshall, Remarks at the Commonwealth of Virginia Ratifying Convention, in 3 ELLIOT’S DEBATES, *supra* note 2, at 225 (“You cannot exercise the powers of government personally yourselves. You must trust to agents.”); *id.* at 227 (“We are answered, that the powers may be abused; that . . . Congress may . . . prostitute their powers to destroy our liberties. This goes to the destruction of all confidence in agents.”); *id.* at 233 (“Are they not both the servants of the people? Are not Congress and the state legislatures the agents of the people, and are they not to consult the good of the people?”).

<sup>388</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 413 (1819).

<sup>389</sup> See *supra* Part IV(D). See also THE FEDERALIST No. 33, *supra* note 2, at 160 (Hamilton).

<sup>390</sup> *McCulloch*, 17 U.S. (4 Wheat) at 358-59.

<sup>391</sup> Cf. *Wickard v. Filburn*, 317 U.S. 111, 127-128 (1942) (sustaining federal agricultural program).

<sup>392</sup> Cf. *United States v. Lopez*, 514 U.S. 549, 551 (1995) (striking down Gun-Free Schools Zone Act).

enumerates powers that would be surplus if one interpreted the Necessary and Proper Clause too expansively. In arguing against the bill for chartering a national bank, Madison observed:

The latitude of interpretation required by the bill is condemned by the rule furnished by the constitution itself.

Congress shall have the power "to regulate the value of money"; yet it is expressly added not left to be implied, that counterfeiters may be punished.

They have the power "to declare war," to which armies are more incident, than incorporated Banks, to borrowing; yet is expressly added, the power "to raise and support armies"; and to this again, the express power "to make rules and regulations for the government of armies"; a like remark is applicable to the powers as to a navy.

The regulation and calling out of the militia are more appurtenant to war, than the proposed bank, to borrowing; yet the former is not left to construction. The very power to borrow money is a less remote implication from the power of war, than an incorporated monopoly bank, from the power of borrowing—yet the power to borrow is not left to implication.<sup>393</sup>

Madison left his case half-argued, for he did not add that, while Congress was empowered, "To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes,"<sup>394</sup> the drafters still found it necessary to add the discrete powers, "To establish . . . uniform Laws on the subject of Bankruptcies",<sup>395</sup> "To . . . fix the Standard of Weights and Measures";<sup>396</sup> "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";<sup>397</sup> and "To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."<sup>398</sup> Nor did Madison list in detail the representations that, during the ratification debates, his own side had made about the powers outside the federal sphere.<sup>399</sup>

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<sup>393</sup> 2 ANNALS, *supra* note 2, at 1949 (statement by Rep. James Madison).

<sup>394</sup> U.S. CONST. art. I, § 8, cl. 3

<sup>395</sup> *Id.* at cl. 4.

<sup>396</sup> *Id.* at cl. 5.

<sup>397</sup> *Id.* at cl. 8.

<sup>398</sup> *Id.* at cl. 10.

<sup>399</sup> See *supra* Part VI(B)(2) and accompanying text.

*D. The Implications of "and Proper."*

Under our reading of the Necessary and Proper Clause, one must reconcile the conclusion that it was substantive surplus with the conclusion that "and proper" embodies a fiduciary-style restriction on Congress. After all, if "and proper" substantively restricted Congress, then the provision was not wholly surplus.

One must, however, recall that the founders were steeped in the contemporary Whig teaching that, under natural law government, as an agent and trustee of the people, had no legitimate authority to betray its principals. Richard Price had written: "[Parliaments] possess no power beyond the limits of the trust for the execution of which they were formed. If they contradict this trust, they betray their constituents and dissolve themselves."<sup>400</sup> When this is understood, the founders' contention that the Clause added nothing of substance to the Constitution remains viable: Without the Clause, the Congress would still have "necessary" powers but could not legitimately violate fiduciary norms by adopting improper laws. Modern courts choosing to enforce the Necessary and Proper Clause to restrict government must decide whether to enforce the phrase "and proper" as an affirmative limitation in itself, or as the founders saw it: a mere reflection of underlying natural law.

Elsewhere, I have argued that much of the modern congressional special-interest horse-trading probably violates the purpose of the General Welfare Clause.<sup>401</sup> We have seen that it also may transgress the Necessary and Proper Clause. In view of the goals of the Constitution's drafters and promoters, this is not a surprising conclusion. As historian Lance Banning has remarked of the Father of the Constitution, "Madison did not define the public good as nothing more than the result of bargaining among competing interests."<sup>402</sup> Certainly judicial enforcement of fiduciary norms would require more stringent review of spending and economic regulations now routinely approved under the "rational basis test."<sup>403</sup>

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<sup>400</sup> Richard Price, *Observations on the Nature of Civil Liberty, the Principles of Government, and the Justice and Policy of the War with America Part I*, § 2 (1776), available at <http://www.constitution.org/price/price.txt>. For other examples of this view, see *supra* note 220.

<sup>401</sup> U.S. CONST. art. I, § 8, cl. 1. See also Natelson, *General Welfare*, *supra* note 2.

<sup>402</sup> Banning, *supra* note 2, at 129.

<sup>403</sup> The rational basis test sustains laws if they have some conceivable connection to a legitimate government purpose, even if there is no evidence that the legislature ever considered that purpose. See ERWIN CHEMERINKSY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 414-15 (1997).

## IX. CONCLUSION

Despite its presence among seventeen granted powers, the Necessary and Proper Clause did not give additional authority to Congress. The overwhelming weight of evidence from the ratification era shows that its purpose was to serve as a rule of construction. It was designed to make explicit two aspects of the Constitution—incidental powers and fiduciary limitations—that the drafters and ratifiers thought already inherent in the rest of the document.

The role of the Necessary and Proper Clause was to indicate to future public officials and citizens that:

- Unlike Congress under the Articles of Confederation, Congress under the Constitution would enjoy fairly broad incidental powers just as other agents enjoyed incidental powers under prevailing rules of common law and equity.
- These incidental powers were limited to those that were, *bona fide*, adopted to further the exercise of the express powers.
- The Clause required congressional laws to accord with fiduciary standards roughly similar to those governing agents in the private sector. In other words, Congress was to remain within its (somewhat restricted) realm of authority, and proceed in good faith, with reasonable care, and with impartiality and loyalty toward its constituents.
- Congressional compliance with the rules of the Clause was to be monitored by the President, the people, and the courts.

Thus, enforcing the original meaning of the Necessary and Proper Clause would require a higher standard of judicial review than courts currently apply to federal spending and economic legislation.