UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

NO. 98-17044

OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES,

Appellants/Defendants,

v.

UNITED STATES OF AMERICA,

Appellee/Plaintiff.

Appeal from Order Denying Motion to Dismiss
Case No. C 98-0088 CRB
dated September 3, 1998, by Judge Charles R. Breyer.

ADDENDUM TO APPELLANTS' OPENING BRIEF

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ADDENDUM
In Support of Appellants' Opening Brief

Tab	Description
1	Text and election results regarding passage of medical marijuana initiatives in Alaska (Ballot Measure 8), Oregon (Measure 57), and Washington (Initiative 692)
2	G. Lawson & P. Granger, *The "Proper" Scope of the Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267 (1993)
3	R. Barnett, *Necessary and Proper*, 44 U.C.L.A. L. Rev. 745 (1997)

ALASKA

Election Summary Report
State of Alaska 1998 General Election
UNOFFICIAL RESULTS

11/10/98
10:49:32

U.S. SENATOR			
Precincts Reporting		453/453	100.00%
Ballots Cast/Reg. Voters		204439/453332	45.10%
Total Votes		199917	
GOTTLIEB, JEFFREY	GRN	6201	3.10%
SONNEMAN, JOSEPH	DEM	39434	19.73%
KOHLHAAS, SCOTT	LIB	4486	2.24%
MURKOWSKI, FRANK	REP	149222	74.64%
Write-in Votes		574	0.29%

U.S. REPRESENTATIVE			
Precincts Reporting		453/453	100.00%
Ballots Cast/Reg. Voters		204439/453332	45.10%
Total Votes		201230	
YOUNG, DON	REP	125811	62.52%
DUNCAN, JIM	DEM	69958	34.77%
GRAMES, JOHN	GRN	5061	2.52%
Write-in Votes		400	0.20%

GOV/LT. GOV			
Precincts Reporting		453/453	100.00%
Ballots Cast/Reg. Voters		204439/453332	45.10%
Total Votes		198188	
LINDAUER/WARD	REP	34573	17.44%
METCALFE/BAXLEY	MOD	12128	6.12%
KNOWLES/ULMER	DEM	102029	51.48%
SULLIVAN	AI	3615	1.82%
JACOBSSON/MILLIGAN	GRN	5794	2.92%
Write-in Votes		40049	20.21%

SENATE DIST. B			
Precincts Reporting		19/19	100.00%
Ballots Cast/Reg. Voters		13429/24370	55.10%
Total Votes		13276	
ABEL, DON	REP	5919	44.58%
ELTON, KIM	DEM	7315	55.10%
Write-in Votes		42	0.32%

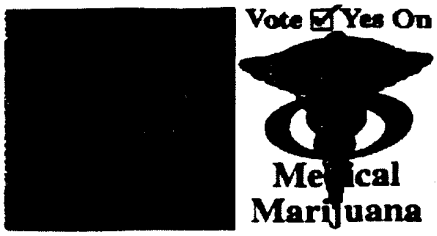
SENATE DIST. D			
Precincts Reporting		23/23	100.00%
Ballots Cast/Reg. Voters		11435/23738	48.17%
Total Votes		9229	
TORGERSON, JOHN	REP	8918	96.63%
Write-in Votes		311	3.37%

BALLOT MEASURE NO. 6		
Precincts Reporting	453/453	100.00%
Ballots Cast/Reg. Voters	204438/453332	45.10%
Total Votes	200977	
YES	137818	68.57%
NO	63159	31.43%

BALLOT MEASURE NO. 7		
Precincts Reporting	453/453	100.00%
Ballots Cast/Reg. Voters	204438/453332	45.10%
Total Votes	196837	
YES	97812	49.69%
NO	99025	50.31%

BALLOT MEASURE NO. 8		
Precincts Reporting	453/453	100.00%
Ballots Cast/Reg. Voters	204438/453332	45.10%
Total Votes	201882	
YES	117003	57.96%
NO	84879	42.04%

BALLOT MEASURE NO. 9		
Precincts Reporting	453/453	100.00%
Ballots Cast/Reg. Voters	204448/453332	45.10%
Total Votes	201037	
YES	73538	36.58%
NO	127499	63.42%



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Full Text

An Act Relating to the Medical Uses of Marijuana for Persons Suffering from Debilitating Medical Conditions

Be it Enacted by the People of the State of Alaska

Sec 1. AS 17 is amended by adding a new chapter which reads as follows:

AS 17.35.010. Registry of Patients.

(a) The Department shall create and maintain a confidential registry of patients who have applied for and are entitled to receive a registry identification card according to the criteria set forth in this chapter. Authorized employees of state or local law enforcement agencies shall be granted access to the information contained within the Department s confidential registry only for the purpose of verifying that an individual who has presented a registry identification card to a state or local law enforcement official is lawfully in possession of such card.

(b) No person shall be permitted to gain access to names of patients, physicians, primary care-givers or any information related to such persons maintained in connection with the Department s confidential registry, except for authorized employees of the Department in the course of their official duties and authorized employees of state or local law enforcement agencies who have stopped or arrested a person who claims to be engaged in the medical use of marijuana and in the possession of a registry identification card or its functional equivalent, pursuant to AS 17.35.010(e).

(c) In order to be placed on the state s confidential registry for the medical uses of marijuana, a patient shall provide to the Department:

(1) the original or a copy of written documentation stating that the patient has been diagnosed with a debilitating medical condition and the physician s conclusion that the patient might benefit from the medical use of marijuana;

(2) the name, address, date of birth, and social security number of the patient;

(3) the name, address, and telephone number of the patient s physician; and

(4) the name and address of the patient s primary care-giver, if one is designated at the time of application.

(d) The Department shall verify all information submitted under AS 17.35.010(c) within 30 days of receiving it. The Department shall notify the applicant that his or her application for a registry identification card has been denied if its review of the information which the patient has provided discloses that the information required pursuant to AS 17.35.010(c)has not been provided or has been falsified. Otherwise, not more than five days after verifying such information, the Department shall issue a serially numbered registry identification card to the patient stating:

(1) the patient s name, address, date of birth, and social security number;

(2) that the patient s name has been certified to the state health agency as a person who has a debilitating medical condition which the patient may address with the medical use of marijuana;

(3) the dates of issuance and expiration of the registry identification card; and

(4) the name and address of the patient s primary care- giver, if any is designated at the time of application.

(e) If the Department fails to issue a registry identification card within thirty-five days of receipt of an application, the patient s application for such card will be deemed to have been approved. Receipt of an application shall be deemed to have occurred upon delivery to the Department or deposit in the United States mails. Notwithstanding the foregoing, no application shall be deemed received prior to June 1, 1999. A patient who is questioned by any state or local law enforcement official about his or her medical use of marijuana shall provide a copy of the written documentation submitted to the Department and proof of the date of mailing or other transmission of the written documentation for delivery to the Department, which shall be accorded the same legal effect as a registry identification card, until the patient receives actual notice that the application has been denied. No person shall apply for a registry identification card more than once every six months.

(f) The denial of a registry identification card shall be considered a final agency action subject to judicial review. Only the patient whose application has been denied shall have standing to contest the final agency action.

(g) When there has been a change in the name, address, physician, or primary care-giver of a patient who has qualified for a registry identification card, that patient must notify the state health agency of any such change within ten days. To maintain an effective registry identification card, a patient must annually resubmit updated written documentation to the state health agency, as well as the name and address of the patient s primary care-giver, if any.

(h) A patient who no longer has a debilitating medical condition shall return his or her registry identification card to the Department within twenty-four hours of receiving such diagnosis by his or her physician.

(i) The Department may determine and levy reasonable fees to pay for any administrative costs associated with their roles in this program.

AS 17.35.020. Medical Use of Marijuana.

(a) A patient may not engage in the medical use of marijuana with more marijuana than is medically justified to address a debilitating medical condition. A patient s medical use of marijuana within the following limits is lawful:

(1) no more than one ounce of marijuana in usable form; and

(2) no more than six marijuana plants, with no more that three mature and flowering plants producing usable marijuana at any one time.

(b) For quantities of marijuana in excess of the amounts in AS 17.35.020(a), a patient or his or her primary care-giver must prove by a preponderance of the evidence that any greater amount was medically justified to address the patient s debilitating medical condition.

AS 17.35.030. Privileged medical use of marijuana.

(a) Except as otherwise provided in AS 17.35.040, no patient or primary care- giver may be found guilty of, or penalized in any manner for, a violation of any provision of law related to the medical use of marijuana, where it is proved by a preponderance of the evidence that:

(1) the patient was diagnosed by a physician as having a debilitating medical condition;

(2) the patient was advised by his or her physician, in the context of a bona fide physician-patient relationship, that the patient might benefit from the medical use of marijuana in connection with a debilitating medical condition; and

(3) the patient and his or her primary care-giver were collectively in possession of amounts of marijuana only as permitted under this section.

(b) Except as otherwise provided in AS 17.35.040, no patient or primary care-giver in lawful possession of a registry identification card shall be subject to arrest, prosecution, or penalty in any manner for medical use of marijuana or for applying to have his or her name placed on the confidential register maintained by the Department.

(c) No physician shall be subject to any penalty, including arrest, prosecution, disciplinary proceeding, or be denied any right or privilege, for:

(1) Advising a patient whom the physician has diagnosed as having a debilitating medical condition, about the risks and benefits of medical use of marijuana or that he or she might benefit from the medical use of marijuana, provided that such advice is based upon the physician s contemporaneous assessment of the patient s medical history and current medical condition and a bona fide physician-patient relationship; or

(2) Providing a patient with written documentation, based upon the physician s contemporaneous assessment of the patient s medical history and current medical condition and a bona fide physician-patient relationship, stating that the patient has a debilitating medical condition and might benefit from the medical use of marijuana.

(d) Notwithstanding the foregoing provisions, no person, including a patient or primary care-giver, shall be entitled to the protection of this section for his or her acquisition, possession, cultivation, use, sale, distribution, and/or transportation of marijuana for non-medical use.

(e) Any property interest that is possessed, owned, or used in connection with the medical use of marijuana, or acts incidental to such use, shall not be harmed, neglected, injured, or destroyed while in the possession of state or local law enforcement officials where such property has been seized in connection with the claimed medical use of marijuana. Any such property interest shall not be forfeited under any provision of state or local law providing for the forfeiture of property other than as a sentence imposed after conviction of a criminal

offense or entry of a plea of guilty to such offense. Marijuana and paraphernalia seized by state or local law enforcement officials from a patient or primary care-giver, in connection with the claimed medical use of marijuana shall be returned immediatly upon the determination that the patient or primary care-giver is entitled to the protection contained in this section as may be evidenced, for example, by a decision not to prosecute,the dismissal of charges, or acquittal.

AS 17.35.040. Restrictions on medical use of marijuana.

(a) No patient in lawful possession of a registry identification card shall:

(1) engage in the medical use of marijuana in a way that endangers the health or well-being of any person;

(2) engage in the medical use of marijuana in plain view of, or in a place open to, the general public; or

(3) sell or distribute marijuana to any person who is known to the patient not to be either in lawful possession of a registry identification card or eligible for such card.

(b) Any patient found by a preponderance of the evidence to have willfully violated the provisions of this chapter shall be precluded from obtaining or using a registry identification card for the medical use of marijuana for a period of one year.

(c) No governmental, private, or any other health insurance provider shall be required to be liable for any claim for reimbursement for the medical use of marijuana.

(d) Nothing in this section shall require any accommodation of any medical use of marijuana:

(1) in any place of employment;

(2) in any correctional facility;

(3) on or within 500 feet of school grounds;

(4) at or within 500 feet of a recreation or youth center; or

(5) on a school bus.

AS 17.35.050. Medical use of marijuana by a minor.

Notwithstanding AS 17.35.030(a), no patient who has not reached the age of majority under AS 25.20 or who has not had the disabilities of a minor removed under AS 09.55.590 shall engage in the medical use of marijuana unless:

(a) his or her physician has diagnosed the patient as having a debilitating medical condition;

(b) the physician has explained the possible risks and benefits of medical use of marijuana to the patient and one of the patient s parents or legal guardians residing in Alaska, if any;

(c) the physician has provided the patient with the written documentation specified in AS 17.35.010(c)(1);

(d) the patient s parent or legal guardian referred to in AS 17.35.050(b), consents to the

Department in writing to serve as the patient s primary care-giver and to permit the patient to engage in the medical use of marijuana;

(e) the patient completes and submits an application for a registry identification card and the written consent referred to in AS 17.35.050(d) to the Department and receives a registry identification card;

(f) the patient and the primary care-giver collectively possess amounts of marijuana no greater than those specified in AS 17.35.020(a)(1) and (2); and

(g) the primary care-giver controls the acquisition of such marijuana and the dosage and frequency of its use by the patient.

AS 17.35.060. Addition of debilitating medical conditions.

Not later than June 1, 1999, the Department shall promulgate regulations under the Administrative Procedure Act governing the manner in which it may consider adding debilitating medical conditions to the list provided in this section. After June 1, 1999, the Department shall also accept for consideration physician or patient initiated petitions to add debilitating medical conditions to the list provided in this section and, after hearing, shall approve or deny such petitions within one hundred eighty days of submission. The denial of such a petition shall be considered a final agency action subject to judicial review.

AS 17.35.070. Definitions. In this chapter, unless the context clearly requires otherwise:

(a) Correctional facility means a state prison institution operated and managed by employees of the Department of Corrections or provided to the Department of Corrections by agreement under AS 33.30.031 for the care, confinement or discipline of prisoners.

(b) Debilitating medical condition means:

(1) cancer, glaucoma, positive status for human immunodeficiency virus, or acquired immune deficiency syndrome, or treatment for any of these conditions;

(2) any chronic or debilitating disease or treatment for such diseases, which produces, for a specific patient, one or more of the following, and for which, in the professional opinion of the patient s physician, such condition or conditions reasonably may be alleviated by the medical use of marijuana: cachexia; severe pain; severe nausea; seizures, including those that are characteristic of epilepsy; or persistent muscle spasms, including those that are characteristic of multiple sclerosis; or

(3) any other medical condition, or treatment for such condition, approved by the Department, pursuant to its authority to promulgate regulations or its approval of any petition submitted by a patient or physician under AS 17.35.060.

(c) Department means the Department of Health and Social Services;

(d) Medical use means the acquisition, possession, cultivation, use, and/or transportation of marijuana and/or paraphernalia related to the administration of such marijuana to address the symptoms or effects of a debilitating medical condition only after a physician has authorized such medical use by a diagnosis of the patient s debilitating medical condition.

(e) Patient means a person who has a debilitating medical condition.

(f) Physician means a person licensed to practice medicine in this state or an officer in the regular medical service of the armed forces of the United States or the United States Public Health Service while in the discharge of their official duties, or while volunteering services without pay or other remuneration to a hospital, clinic, medical office, or other medical facility in this state;

(g) Primary care-giver means a person, other than the patient s physician, who is eighteen years of age or older and has significant responsibility for managing the well-being of a patient who has a debilitating medical condition.

(h) Prisoner means a person detained or confined in a correctional facility, whether by arrest, conviction, or court order, or a person held as a witness or otherwise, including municipal prisoners held under contract and juveniles held under the authority of AS 47.10.

(i) Registry Identification card means a document issued by the Department s which identifies a patient authorized to engage in the medical use of marijuana and the patient s primary care-giver, if any.

(j) Usable form and usable marijuana means the seeds, leaves, buds, and flowers of the plant (genus) Cannabis, but does not include the stalks or roots.

(k) Written documentation means a statement signed by a patient s physician or copies of the patient s pertinent medical records.

AS 17.35.080. Short title.

A.S. 17.35.010--17.35.070 may be cited as the Medical Uses of Marijuana for Persons Suffering From Debilitating Medical Conditions Act.

Sec 2. AS 11.71.190(b) is amended to read:

Sec. 11.71.190(b). Schedule VIA. Marijuana is a schedule VIA controlled substance except for marijuana possessed for medical purposes under AS 17.35.

OREGON

Election Results
November 3, 1998

Alaska

Measure 8: Medical Marijuana
YES: 58%
NO: 42%
(97% of precincts reporting)

Up to the minute results:
http://www.gov.state.ak.us/ltgov/elect98/index.html#gen
(Way at the bottom of the page)

Sponsors: Alaskans for Medical Rights
http://www.alaskalife.net/AKMR/

More information on Alaska's Medical Marijuana Initiative
http://www.levellers.org/akstat.htm

Arizona

Arizona – Prop. 300
YES: 43%
NO: 57%
(100% of precincts reporting - CBS News is reporting that Prop. 300 was officially defeated.)

A 'no' vote will allow doctors to continue to prescribe Schedule I drugs without any further authorization from Congress or the FDA.
Referendum relating to the medical use of Schedule 1 drugs which was put on the ballot to overturn the gutting by the legislature of Prop. 200 (the Drug Medicalization, Prevention and Control Act), which passed by 65% of the vote in 1996.

Up to the minute results:
http://event.cbs.com/state/state_az.html

More information on Prop. 300
http://www.levellers.org/azstat.htm

Nevada

Ballot Question #9 - Medical Marijuana
YES: 59%

NO: 41%
(99% of precincts reporting - CBS News is reporting that Ballot Question #9 has officially won.)

Up to the minute results:
http://event.cbs.com/state/state_nv.html

More information on Nevada's Medical Marijuana Initiative:
http://www.levellers.org/nvstat.htm

Oregon

Measure 57: Recriminalization
(A 'no' vote prevents recriminalization of marijuana in Oregon)
http://www.koin.com/news/campaign98/elec_results/measure57.html
YES: 33%
NO: 67%
(240/2,196 precincts reporting - KOIN News is reporting that Measure 57 has been officially defeated.)

Measure 67: Medical Marijuana
(A 'yes' vote allows patients to possess one to three ounces of marijuana for medicine and to grow three plants to obtain that medicine. Measure 67 prohibits distribution.)
http://www.koin.com/news/campaign98/elec_results/measure67.html
YES: 55%
NO: 45%
[1,853 of 2,194 precincts reporting (84%)]

Another Site for Oregon Results
http://www.kgw.com/election982.asp

Sponsors of Measure 67: Oregonians for Medical Rights
http://www.teleport.com/~omr/

Oregon Elections Division - Unofficial Election Results
http://www.sos.state.or.us/elections/nov398/nov398.htm

More information on Oregon's Medical Marijuana Initiative and Recriminalization Referendum
http://www.levellers.org/orstat.htm

Washington State

Initiative 692 - Medical Marijuana
YES: 59%
NO: 41%
(99% of precincts reporting - CBS News is reporting that I-692 has officially won.)

Up to the minute results:

The Oregon Medical Marijuana Act

SECTION 1. Sections 1 through 19 of this Act shall be known as the Oregon Medical Marijuana Act.

SECTION 2. The people of the state of Oregon hereby find that:

(1) Patients and doctors have found marijuana to be an effective treatment for suffering caused by debilitating medical conditions, and therefore, marijuana should be treated like other medicines;

(2) Oregonians suffering from debilitating medical conditions should be allowed to use small amounts of marijuana without fear of civil or criminal penalties when their doctors advise that such use may provide a medical benefit to them and when other reasonable restrictions are met regarding that use;

(3) Sections 1 to 19 of this Act are intended to allow Oregonians with debilitating medical conditions who may benefit from the medical use of marijuana to be able to discuss freely with their doctors the possible risks and benefits of medical marijuana use and to have the benefit of their doctor's professional advice; and

(4) Sections 1 to 19 of this Act are intended to make only those changes to existing Oregon laws that are necessary to protect patients and their doctors from criminal and civil penalties, and are not intended to change current civil and criminal laws governing the use of marijuana for nonmedical purposes.

SECTION 3. As used in sections 1 to 19 of this Act:

(1) "Attending physician" means a physician licensed under ORS chapter 677 who has primary responsibility for the care and treatment of a person diagnosed with a debilitating medical condition.

(2) "Debilitating medical condition" means:

(a) Cancer, glaucoma, positive status for human immunodeficiency virus or acquired immune deficiency syndrome, or treatment for these conditions;

(b) A medical condition or treatment for a medical condition that produces, for a specific patient, one or more of the following:

(i) Cachexia;

(ii) Severe pain;

(iii) Severe nausea;

(iv) Seizures, including but not limited to seizures caused by epilepsy; or

(v) Persistent muscle spasms, including but not limited to spasms caused by multiple sclerosis; or

(c) Any other medical condition or treatment for a medical condition adopted by the division by rule or approved by the division pursuant to a petition submitted pursuant to section 14 of this Act.

(3) "Delivery" has the meaning given that term in ORS 475.005.

(4) "Designated primary caregiver" means an individual eighteen years of age or older who has significant responsibility for managing the well-being of a person who has been diagnosed with a debilitating medical condition and who is designated as such on that person's application for a registry identification card or in other written notification to the division. "Designated primary caregiver" does not include the person's attending physician.

(5) "Division" means the Health Division of the Oregon Department of Human Resources.

(6) "Marijuana" has the meaning given that term in ORS 475.005.

(7) "Medical use of marijuana" means the production, possession, delivery, or administration of marijuana, or paraphernalia used to administer marijuana, as necessary for the exclusive benefit of a person to mitigate the symptoms or effects of his or her debilitating medical condition.

(8) "Production" has the same meaning given that term in ORS 475.005.

(9) "Registry identification card" means a document issued by the division that identifies a person authorized to engage in the medical use of marijuana and the person's designated primary caregiver, if any.

(10) "Usable marijuana" means the dried leaves and flowers of the plant Cannabis family Moraceae, and any mixture or preparation thereof, that are appropriate for medical use as allowed in sections 1 to 19 of this Act. "Usable marijuana" does not include the seeds, stalks and roots of the plant.

(11) "Written documentation" means a statement signed by the attending physician of a person diagnosed with a debilitating medical condition or copies of the person's relevant medical records.

SECTION 4. (1) Except as provided in sections 5 and 11 of this Act, a person engaged in or assisting in the medical use of marijuana is excepted from the criminal laws of the state for possession, delivery or production of marijuana, aiding and abetting another in the possession, delivery or production of marijuana or any other criminal offense in which possession, delivery or production of marijuana is an element if the following conditions have been satisfied:

(a) The person holds a registry identification card issued pursuant to this section, has applied for a registry identification card pursuant to subsection (9) of this section, or is the designated primary caregiver of a cardholder or applicant; and

(b) The person who has a debilitating medical condition and his or her primary caregiver are collectively in possession of, delivering or producing marijuana for medical use in the amounts allowed in section 7 of this Act.

(2) The division shall establish and maintain a program for the issuance of registry identification cards to persons who meet the requirements of this section. Except as provided in subsection (3) of this section, the division shall issue a registry identification card to any person who pays a fee in the amount established by the division and provides the following:

(a) Valid, written documentation from the person's attending physician stating that the person has been diagnosed with a debilitating medical condition and that the medical use of marijuana may mitigate the symptoms or effects of the person's debilitating medical condition;

(b) The name, address and date of birth of the person;

(c) The name, address and telephone number of the person's attending physician; and

(d) The name and address of the person's designated primary caregiver, if the person has designated a primary caregiver at the time of application.

(3) The division shall issue a registry identification card to a person who is under eighteen years of age if the person submits the materials required under subsection (2) of this section, and one of the person's parents or legal guardians signs a written statement that:

(a) The person's attending physician has explained to the person and to one of the person's parents or legal guardians the possible risks and benefits of the medical use of marijuana;

(b) The parent or legal guardian consents to the use of marijuana by the person for medical purposes;

(c) The parent or legal guardian agrees to serve as the person's designated primary caregiver; and

(d) The parent or legal guardian agrees to control the acquisition of marijuana and the dosage and frequency of use by the person.

(4) A person applying for a registry identification card pursuant to this section may submit the information required in this section to a county health department for transmittal to the division. A county health department that receives the information pursuant to this subsection shall transmit the information to the division within five days of receipt of the information. Information received by a county health department pursuant to this subsection shall be confidential and not subject to disclosure, except as required to transmit the information to the division.

(5) The division shall verify the information contained in an application submitted pursuant to this section and shall approve or deny an application within thirty days of receipt of the application.

(a) The division may deny an application only for the following reasons:

(i) The applicant did not provide the information required pursuant to this section to establish his or her debilitating medical condition and to document his or her consultation with an attending physician regarding the medical use of marijuana in connection with such condition, as provided in subsections (2) and (3) of this section; or

(ii) The division determines that the information provided was falsified.

(b) Denial of a registry identification card shall be considered a final division action, subject to judicial review. Only the person whose application has been denied, or, in the case of a person under the age of eighteen years of age whose application has been denied, the person's parent or legal guardian, shall have standing to contest the division's action.

(c) Any person whose application has been denied may not reapply for six months from the date of the denial, unless so authorized by the division or a court of competent jurisdiction.

(6) (a) If the division has verified the information submitted pursuant to subsections (2) and (3) of this section and none of the reasons for denial listed in subsection (5)(a) of this section is applicable, the division shall issue a serially numbered registry identification card within five days of verification of the information. The registry identification card shall state:

(i) The cardholder's name, address and date of birth;

(ii) The date of issuance and expiration date of the registry identification card;

(iii) The name and address of the person's designated primary caregiver, if any; and

(iv) Such other information as the division may specify by rule.

(b) When the person to whom the division has issued a registry identification card pursuant to this section has specified a designated primary caregiver, the division shall issue an identification card to the designated primary caregiver. The primary caregiver's registry identification card shall contain the information provided in subsection 4(6)(a)(i)-(iv).

(7) (a) A person who possesses a registry identification card shall:

(i) Notify the division of any change in the person's name, address, attending physician or designated primary caregiver; and

(ii) Annually submit to the division:

(A) updated written documentation of the person's debilitating medical condition; and

(B) the name of the person's designated primary caregiver if a primary caregiver has been designated for the upcoming year.

(b) If a person who possesses a registry identification card fails to comply with this subsection, the card shall be deemed expired. If a registry identification card expires, the identification card of any designated primary caregiver of the cardholder shall also expire.

(8) A person who possesses a registry identification card pursuant to this section and who has been diagnosed by the person's attending physician as no longer having a debilitating medical condition shall return the registry identification card to the division within seven calendar days of notification of the diagnosis. Any designated primary caregiver shall return his or her identification card within the same period of time.

(9) A person who has applied for a registry identification card pursuant to this section but whose application has not yet been approved or denied, and who is contacted by any law enforcement officer in connection with his or her administration, possession, delivery or production of marijuana for medical use may provide to the law enforcement officer a copy of the written documentation submitted to the division pursuant to subsections (2) or (3) of this section and proof of the date of mailing or other transmission of the documentation to the division. This documentation shall have the same legal effect as a registry identification card until such time as the person receives notification that the application has been approved or denied.

SECTION 5. (1) No person authorized to possess, deliver or produce marijuana for medical use pursuant to sections 1 to 19 of this Act shall be excepted from the criminal laws of this state or shall be deemed to have established an affirmative defense to criminal charges of which possession, delivery or production of marijuana is an element if the person, in connection with the facts giving rise to such charges:

(a) Drives under the influence of marijuana as provided in ORS 813.010;

(b) Engages in the medical use of marijuana in a public place as that term is defined in ORS 161.015, or in public view;

(c) Delivers marijuana to any individual who the person knows is not in possession of a registry identification card; or

(d) Delivers marijuana for consideration to any individual, even if the individual is in possession of a registry identification card.

(2) In addition to any other penalty allowed by law, a person who the division finds has willfully violated the provisions of sections 1 to 19 of this Act or rules adopted under sections 1 to 19 of this Act may be precluded from obtaining or using a registry identification card for the medical use of marijuana for a period of up to six months, at the discretion of the division.

SECTION 6. (1) Except as provided in sections 5 and 11 of this Act, it is an affirmative defense to a criminal charge of possession or production of marijuana, or any other criminal offense in which possession or production of marijuana is an element, that the person charged with the offense is a person who:

(a) Has been diagnosed with a debilitating medical condition and been advised by his or her attending physician the medical use of marijuana may mitigate the symptoms or effects of that debilitating medical condition;

(b) Is engaged in the medical use of marijuana; and

(c) Possesses or produces marijuana only in the amounts allowed in section 7 (1) of this Act, or in excess of those amounts if the person proves by a preponderance of the evidence that the greater amount is medically necessary to mitigate the symptoms or effects of the person's debilitating medical condition.

(2) It is not necessary for a person asserting an affirmative defense pursuant to this section to have received a registry identification card in order to assert the affirmative defense established in this section.

(3) No person who claims that marijuana provides medically necessary benefits and who is charged with a crime pertaining to such use of marijuana shall be precluded from presenting a defense of choice of evils, as set forth in ORS 161.200, or from presenting evidence supporting the necessity of marijuana for treatment of a specific disease or medical condition, provided that the amount of marijuana at issue is no greater than permitted under section 7 of this Act.

SECTION 7. (1) A person who possesses a registry identification card issued pursuant to section 4 of this Act may engage in, and a designated primary caregiver of such a person may assist in, the medical use of marijuana only as justified to mitigate the symptoms or effects of the person's debilitating medical condition. Except as allowed in subsection (2) of this section, a registry identification cardholder and that person's designated primary caregiver may not collectively possess, deliver or produce more than the following:

(a) If the person is present at a location at which marijuana is not produced, including any residence associated with that location, one ounce of usable marijuana; and

(b) If the person is present at a location at which marijuana is produced, including any residence associated with that location, three mature marijuana plants, four immature marijuana plants and one ounce of usable marijuana per each mature plant.

(2) If the individuals described in subsection (1) of this section possess, deliver or produce marijuana in excess of the amounts allowed in subsection (1) of this section, such individuals are not excepted

from the criminal laws of the state but may establish an affirmative defense to such charges, by a preponderance of the evidence, that the greater amount is medically necessary to mitigate the symptoms or effects of the person's debilitating medical condition.

(3) The Health Division shall define by rule when a marijuana plant is mature and when it is immature for purposes of this section.

SECTION 8. (1) Possession of a registry identification card or designated primary caregiver identification card pursuant to section 4 of this Act shall not alone constitute probable cause to search the person or property of the cardholder or otherwise subject the person or property of the cardholder to inspection by any governmental agency.

(2) Any property interest possessed, owned or used in connection with the medical use of marijuana or acts incidental to the medical use of marijuana that has been seized by state or local law enforcement officers shall not be harmed, neglected, injured or destroyed while in the possession of any law enforcement agency. No such property interest may be forfeited under any provision of law providing for the forfeiture of property other than as a sentence imposed after conviction of a criminal offense. Marijuana and paraphernalia used to administer marijuana that was seized by any law enforcement officer shall be returned immediately upon a determination by the district attorney in whose county the property was seized, or his or her designee, that the person from whom the marijuana or paraphernalia used to administer marijuana was seized is entitled to the protections contained in sections 1 to 19 of this Act. Such determination may be evidenced, for example, by a decision not to prosecute, the dismissal of charges, or acquittal.

SECTION 9. No attending physician may be subjected to civil penalty or discipline by the Board or Medical Examiners for:

(1) Advising a person whom the attending physician has diagnosed as having a debilitating medical condition, or a person who the attending physician knows has been so diagnosed by another physician licensed under ORS chapter 677, about the risks and benefits of medical use of marijuana or that the medical use of marijuana may mitigate the symptoms or effects of the person's debilitating medical condition, provided the advice is based on the attending physician's personal assessment of the person's medical history and current medical condition; or

(2) Providing the written documentation necessary for issuance of a registry identification card under section 4 of this Act, if the documentation is based on the attending physician's personal assessment of the applicant's medical history and current medical condition and the physician has discussed the potential medical risks and benefits of the medical use of marijuana with the applicant.

SECTION 10. No professional licensing board may impose a civil penalty or take other disciplinary action against a licensee based on the licensee's medical use of marijuana in accordance with the provisions of sections 1 to 19 of this Act or actions taken by the licensee that are necessary to carry out the licensee's role as a designated primary caregiver to a person who possesses a lawful registry identification card issued pursuant to section 4 of this Act.

SECTION 11. Nothing in sections 1 to 19 of this Act shall protect a person from a criminal cause of action based on possession, production, or delivery of marijuana that is not authorized by sections 1 to 19 of this Act.

SECTION 12. (1) The division shall create and maintain a list of the persons to whom the division has issued registry identification cards pursuant to section 4 of this Act and the names of any designated primary caregivers. Except as provided in subsection (2) of this section, the list shall be confidential and not subject to public disclosure.

(2) Names and other identifying information from the list established pursuant to subsection (1) of

this section may be released to:

(a) Authorized employees of the division as necessary to perform official duties of the division; and

(b) Authorized employees of state or local law enforcement agencies, only as necessary to verify that a person is a lawful possessor of a registry identification card or that a person is the designated primary caregiver of such a person.

SECTION 13. (1) If a person who possesses a registry identification card issued pursuant to section 4 of this Act chooses to have a designated primary caregiver, the person must designate the primary caregiver by including the primary caregiver's name and address:

(a) On the person's application for a registry identification card;

(b) In the annual updated information required under section 4 of this Act; or

(c) In a written, signed statement submitted to the division.

(2) A person described in this section may have only one designated primary caregiver at any given time.

SECTION 14. Any person may submit a petition to the division requesting that a particular disease or condition be included among the diseases and conditions that qualify as debilitating medical conditions under section 3 of this Act. The division shall adopt rules establishing the manner in which the division will evaluate petitions submitted under this section. Any rules adopted pursuant to this section shall require the division to approve or deny a petition within 180 days of receipt of the petition by the division. Denial of a petition shall be considered a final division action subject to judicial review.

SECTION 15. The division shall adopt all rules necessary for the implementation and administration of sections 1 to 19 of this Act.

SECTION 16. Nothing in sections 1 to 19 of this Act shall be construed to require:

(1) A government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of marijuana; or

(2) An employer to accommodate the medical use of marijuana in any workplace.

SECTION 17. The division may take any actions on or before the effective date of this Act that are necessary for the proper and timely implementation and administration of sections 1 to 19 of this Act.

SECTION 18. Any section of this Act being held invalid as to any person or circumstance shall not affect the application of any other section of this Act that can be given full effect without the invalid section or application.

SECTION 19. All provisions of this Act shall apply to acts or offenses committed on or after December 3, 1998, except that sections 4, 12 and 14 shall become effective on May 1, 1999.

[OMR Home Page]

WASHINGTON

Washington

The results are complete.

Final update: 12 Noon EST, November 5, 1998

U.S. SENATE

98% of Precincts Reporting [click for results by locale]

Candidate	Party	Vote	%	W
Patty MURRAY*	DEM	807505	58	☆
Linda SMITH	REP	576674	42	

#200: NO AFFIRM ACTN

98% of Precincts Reporting [click for results by locale]

Candidate	Party	Vote	%	W
YES	YES	810621	59	☆
NO	NO	571875	41	

#692: MED MARIJUANA

98% of Precincts Reporting [click for results by locale]

Candidate	Party	Vote	%	W
YES	YES	816194	59	☆
NO	NO	576520	41	

#694: NO PT ABORTION

98% of Precincts Reporting [click for results by locale]

Candidate	Party	Vote	%	W
YES	YES	595138	43	
NO	NO	776701	57	☆

HOUSE - 1

100% of Precincts Reporting [click for results by locale]

Candidate	Party	Vote	%	W
Jay INSLEE	DEM	80294	51	☆
Rick WHITE*	REP	68187	43	
Bruce CRASWELL	IND	9725	6	

HOUSE - 2

100% of Precincts Reporting [click for results by locale]

Candidate	Party	Vote	%	W
Grethe CAMMERMEYER	DEM	79700	45	
Jack METCALF*	REP	97368	55	☆

HOUSE - 3

100% of Precincts Reporting [click for results by locale]

Candidate	Party	Vote	%	W
Brian BAIRD	DEM	100868	55	☆
Don BENTON	REP	83043	45	

HOUSE - 4 **100% of Precincts Reporting** [click for results by locale]

Candidate	Party	Vote	%	W
Gordon PROSS	DEM	34851	25	
Doc HASTINGS*	REP	96075	69	☆
Peggy McKERLIE	RFM	9135	6	

HOUSE - 5 **99% of Precincts Reporting** [click for results by locale]

Candidate	Party	Vote	%	W
Brad LYONS	DEM	62336	38	
George NETHERCUTT*	REP	92764	57	☆
John BEAL	IND	8260	5	

HOUSE - 6 **98% of Precincts Reporting** [click for results by locale]

Candidate	Party	Vote	%	W
Norm DICKS*	DEM	106620	69	☆
Bob LAWRENCE	REP	49057	31	

HOUSE - 7 **95% of Precincts Reporting** [click for results by locale]

Candidate	Party	Vote	%	W
Jim McDERMOTT*	DEM	118511	89	☆
(No Candidate)	REP	0	0	
Stan LIPPMANN	RFM	11894	9	
Jeff POWERS	SW	3347	2	

HOUSE - 8 **97% of Precincts Reporting** [click for results by locale]

Candidate	Party	Vote	%	W
Heidi BEHRENS-BENEDICT	DEM	56925	42	
Jennifer DUNN*	REP	78909	58	☆

HOUSE - 9 **99% of Precincts Reporting** [click for results by locale]

Candidate	Party	Vote	%	W
Adam SMITH*	DEM	76274	65	☆
Ron TABER	REP	41422	35	

STATE OF WASHINGTON

Office of the Secretary of State

1998 Online Voters Guide

FOR THE GENERAL ELECTION - NOVEMBER 3, 1998

Complete Text of Initiative 692

TO THE PEOPLE

FORMATTING NOTE:

In initiatives, legislative bills and other proposed measures, language that is to be deleted from current statutes is represented by a "strikethrough" character and language that is to be added is underlined. Because these special characters cannot be formatted in all Internet browsers, a different set of symbols is used for presenting these proposals on-line. The symbols are as follows:

- Text that is surrounded by (({- text here -})) is text that will be *deleted from* the existing statute if the proposed measure is approved.
- Text that is surrounded by {+ text here +} is text that will be *added to* the existing statute if the proposed measure is approved.
- {+ NEW SECTION+} (found at the beginning of a section or paragraph) indicates that *all* of the text in that section will become law if the proposed measure is approved.

INITIATIVE 692

AN ACT Relating to the medical use of marijuana; adding a new chapter to Title 69 RCW; and prescribing penalties.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

NEW SECTION: Sec. 1. TITLE.
This chapter may be known and cited as the Washington state medical use of marijuana act.

NEW SECTION. Sec. 2. PURPOSE AND INTENT.
The People of Washington state find that some patients with terminal or debilitating illnesses, under their physician's care, may benefit from the medical use of marijuana. Some of the illnesses for which marijuana appears to be beneficial include chemotherapy-related nausea and vomiting in cancer patients; AIDS wasting syndrome; severe muscle spasms associated with multiple sclerosis and other spasticity disorders; epilepsy; acute or chronic glaucoma; and some forms of intractable pain.

The People find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physicians' professional medical judgment and discretion.

Therefore, The people of the state of Washington intend that:

Qualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana;

Persons who act as primary caregivers to such patients shall also not be found guilty of a crime under state law for assisting with the medical use of marijuana; and

Physicians also be excepted from liability and prosecution for the authorization of marijuana use to qualifying patients for whom, in the physician's professional judgment, medical marijuana may prove beneficial.

NEW SECTION. Sec. 3. NON-MEDICAL PURPOSES PROHIBITED.
Nothing in this chapter shall be construed to supersede Washington state law prohibiting the acquisition, possession, manufacture, sale, or use of marijuana for non-medical purposes.

NEW SECTION. Sec. 4. PROTECTING PHYSICIANS AUTHORIZING THE USE OF MEDICAL MARIJUANA.
A physician licensed under chapter 18.71 RCW or chapter 18.57 RCW shall be excepted from the state's criminal laws and shall not be penalized in any manner, or denied any right or privilege, for:

1. Advising a qualifying patient about the risks and benefits of medical use of marijuana or that the qualifying patient may benefit from the medical use of marijuana where such use is within a professional standard of care or in the individual physician's medical judgment; or
2. Providing a qualifying patient with valid documentation, based upon the physician's assessment of the qualifying patient's medical history and current medical condition, that the potential benefits of the medical use of marijuana would likely outweigh the health risks for the particular qualifying patient.

NEW SECTION. Sec. 5. PROTECTING QUALIFYING PATIENTS AND PRIMARY CAREGIVERS.

1. If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated primary caregiver who assists a qualifying patient in the medical use of marijuana, will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter. Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions.
2. The qualifying patient, if eighteen years of age or older, shall:
   (a) Meet all criteria for status as a qualifying patient;
   (b) Possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty day supply; and
   (c) Present his or her valid documentation to any law enforcement official who questions the patient regarding his or her medical use of marijuana.
3. The qualifying patient, if under eighteen years of age, shall comply with subsection (2) (a) and (c) of this section. However, any possession under subsection (2) (b) of this act, as well as any production, acquisition, and decision as to dosage and frequency of use, shall be the responsibility of the parent or legal guardian of the qualifying patient.
4. The designated primary caregiver shall:
   (a) Meet all criteria for status as a primary caregiver to a qualifying patient;
   (b) Possess, in combination with and as an agent for the qualifying patient, no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty day supply;
   (c) Present a copy of the qualifying patient's valid documentation

required by this chapter, as well as evidence of designation to act as primary caregiver by the patient, to any law enforcement official requesting such information;

(d) Be prohibited from consuming marijuana obtained for the personal, medical use of the patient for whom the individual is acting as primary caregiver; and

(e) Be the primary caregiver to only one patient at any one time.

NEW SECTION. Sec. 6. DEFINITIONS.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

1. "Medical use of marijuana" means the production, possession, or administration of marijuana, as defined in RCW 69.50.101(q), for the exclusive benefit of a qualifying patient in the treatment of his or her terminal or debilitating illness.
2. "Primary caregiver" means a person who:
   (a) Is eighteen years of age or older;
   (b) Is responsible for the housing, health, or care of the patient;
   (c) Has been designated in writing by a patient to perform the duties of primary caregiver under this chapter.
3. "Qualifying Patient" means a person who:
   (a) Is a patient of a physician licensed under chapter 18.71 or 18.57 RCW;
   (b) Has been diagnosed by that physician as having a terminal or debilitating medical condition;
   (c) Is a resident of the state of Washington at the time of such diagnosis;
   (d) Has been advised by that physician about the risks and benefits of the medical use of marijuana; and
   (e) Has been advised by that physician that they may benefit from the medical use of marijuana.
4. "Terminal or Debilitating Medical Condition" means:
   (a) Cancer, human immunodeficiency virus (HIV), multiple sclerosis, epilepsy or other seizure disorder, or spasticity disorders; or
   (b) Intractable pain, limited for the purpose of this chapter to mean pain unrelieved by standard medical treatments and medications; or
   (c) Glaucoma, either acute or chronic, limited for the purpose of this chapter to mean increased intraocular pressure unrelieved by standard treatments and medications; or
   (d) Any other medical condition duly approved by the Washington state medical quality assurance board as directed in this chapter.
5. "Valid Documentation" means:
   (a) A statement signed by a qualifying patient's physician, or a copy of the qualifying patient's pertinent medical records, which states that, in the physician's professional opinion, the potential benefits of the medical use of marijuana would likely outweigh the health risks for a particular qualifying patient; and
   (b) Proof of Identity such as a Washington state driver's license or identicard, as defined in RCW 46.20.035.

NEW SECTION. Sec. 7. ADDITIONAL PROTECTIONS.

1. The lawful possession or manufacture of medical marijuana as authorized by this chapter shall not result in the forfeiture or seizure of any property.
2. No person shall be prosecuted for constructive possession, conspiracy, or any other criminal offense solely for being in the presence or vicinity of medical marijuana or it's use as authorized by this chapter.
3. The state shall not be held liable for any deleterious outcomes

from the medical use of marijuana by any qualifying patient.

NEW SECTION. Sec. 8. RESTRICTIONS, AND LIMITATIONS REGARDING THE MEDICAL USE OF MARIJUANA.

1. It shall be a misdemeanor to use or display medical marijuana in a manner or place which is open to the view of the general public.
2. Nothing in this chapter requires any health insurance provider to be liable for any claim for reimbursement for the medical use of marijuana.
3. Nothing in this chapter requires any physician to authorize the use of medical marijuana for a patient.
4. Nothing in this chapter requires any accommodation of any medical use of marijuana in any place of employment, in any school bus or on any school grounds, or in any youth center.
5. It is a class C felony to fraudulently produce any record purporting to be, or tamper with the content of any record for the purpose of having it accepted as, valid documentation under section 6 (5)(a) of this act.
6. No person shall be entitled to claim the affirmative defense provided in Section 5 of this act for engaging in the medical use of marijuana in a way that endangers the health or well-being of any person through the use of a motorized vehicle on a street, road, or highway.

NEW SECTION. Sec. 9. ADDITION OF MEDICAL CONDITIONS.
The Washington state medical quality assurance board, or other appropriate agency as designated by the governor, shall accept for consideration petitions submitted by physicians or patients to add terminal or debilitating conditions to those included in this chapter. In considering such petitions, the Washington state medical quality assurance board shall include public notice of, and an opportunity to comment in a public hearing upon, such petitions. The Washington state medical quality assurance board shall, after hearing, approve or deny such petitions within one hundred eighty days of submission. The approval or denial of such a petition shall be considered a final agency action, subject to judicial review.

NEW SECTION. Sec. 10. SEVERABILITY.
If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 11. CAPTIONS NOT LAW.
Captions used in this chapter are not any part of the law.

NEW SECTION. Sec. 12.
Sections 1 through 11 of this act constitute a new chapter in Title 69 RCW.

--- END ---

Ballot Measures Index

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THE "PROPER" SCOPE OF FEDERAL POWER: A JURISDICTIONAL INTERPRETATION OF THE SWEEPING CLAUSE

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We are grateful to Akhil Reed Amar, Steven G. Calabresi, David E. Engdahl, and Martin H. Redish for their valuable comments and to the Stanford Clinton, Sr. Faculty Fund for support.

SUMMARY:

... Congress shall have Power . . . t o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Consti- tution in the Government of the United States, or in any Depart- ment or Officer thereof. ... It is also objected by Mr. Mason, that under their own construc- tion of the general clause, at the end of the enumerated powers, the Congress may grant monopolies in trade, constitute new crimes, inflict unusual punishments, and in short, do whatever they please . . . . 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 . . . . In this case, the laws which Congress can make, for carrying into execu- tion the conceded powers, must not only be necessary, but prop- er--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 unconsti- tutional act; yet, as such a law would be manifestly not proper, it would not be warranted by this clause, without absolutely depart- ing from the usual acceptation of words. ... The Sweeping Clause is the textual vehicle by which those principles find expression in the Constitution: a "proper" law for carrying into execution the powers of any depart- ment of the national government must confine that department to its peculiar jurisdiction. ...

TEXT:

Congress shall have Power . . . t o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Consti- tution in the Government of the United States, or in any Depart- ment or Officer thereof. n1

n1 U.S. Const. art. I, section 8, cl. 18 (emphasis added).

Introduction

The year is 1790--shortly after ratification of the Federal Constitution. Imagine that the newly formed U.S. Congress, pursu- ant to its constitutionally enumerated power to "establish Post Offices and post Roads," n2 authorizes construction of a post road between Baltimore and Philadelphia. n3 Suppose further that the [*268] most convenient route runs straight through, for example, Mrs. Barrington's cow pasture. Mrs. Barrington values her cows' sereni- ty and strongly urges the government to build its road around her pasture. Congress nonetheless enacts a statute instructing the Presi- dent and his subordinates to build the road across Mrs. Barrington's land. The enabling statute does not authorize com- pensation for Mrs. Barrington for the loss of her property, nor does she receive compensation through a private bill or any other legislatively authorized source. n4 Is the statute constitutional?

n2 Id. cl. 7.

n3 We are assuming, as would virtually everyone today, that the power to "estab- lish . . . post Roads" authorizes the construction of new roads as well as the designation of existing roads as routes for the carriage of mail. The Founders did not universally accept this view. See Letter from Thomas Jefferson to James Madison (Mar. 6, 1796), in 3 The Founders' Constitution 28 (Philip B. Kurland & Ralph Lerner eds., 1987) (suggesting that the postal power encompasses only the power to "select from those roads already made, those on which there shall be a post"). Indeed, government offi- cials were still vigorously debating this question into the nineteenth century. Compare James Monroe, Views of the President of the United States on the Subject of Internal Improvements (1822), in 2 A Compilation of the Messages and Papers of the Presidents, 1787-1897, at 142, 156-59 (James D. Richardson ed., 1896) (doubting Congress's power to construct post roads); 30 Annals of Cong. 897 (1817) (reporting that Representative Barbour "had always considered that nothing else was intended by the postal power , than an authority to designate and fix the mail routes"); and 31 An- nals of Cong. 1141 (1818) (statement of Representative Smyth denying that Congress has power to construct post roads) with id. at 1130 (statement of Representative Smith that "the power to establish post roads is not merely that of pointing them out, but of opening and making them efficient"). At least one U.S. Supreme Court Justice doubted Congress's power to build roads as late as 1845. See *Searight v. Stokes, 44 U.S. (3 How.) 151, 181 (1845)* (Daniel, J., dissenting) ("I believe that the authority vested in Congress by the Constitution to establish post-roads, confers no right to open new roads."). None- theless, in 1833, Joseph Story confidently (if erroneously) declared that " n obody doubts, that the words establish post-roads,' may . . . be construed so, as to include the power to lay out and construct roads," Joseph Story, Commentaries on the Constitution of the United States section 1144 (1833), and the Kentucky Court of Appeals strongly en- dorsed Story's construction of the postal power in dictum five years later. See *Dickey v. Maysville, Washington, Paris & Lexington Turnpike Rd. Co., 37 Ky. (7 Dana) 113, 125-28, 134-35 (1838)*; cf. David P. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789-1888, at 275 n.298 (1985) (claiming that the majority in Searight v. Stokes approved in dictum a congressional power to construct post roads). The

text of the Constitution supports advocates of congressional power to construct new roads. The constitutional provisions granting Congress power to "establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies," U.S. Const. art. I, section 8, cl. 4 (emphasis added), and referring to "such inferior Courts as the Congress may from time to time ordain and establish," Id. art. III, section 1 (emphasis added), surely contemplate that Congress will create such rules, laws, and courts, respectively; there is no reason to suppose that the word "establish" has a different meaning in the Postal Clause. For an extensive discussion of the debates over the power to construct post roads, see Lindsay Rogers, The Postal Power of Congress: A Study in Constitutional Expansion, in 34 Johns Hopkins University Studies in Historical and Political Science 61 (1916).

n4 Mrs. Barrington could be compensated for her land only if Congress appropriated funds for that purpose; the President or the courts could not unilaterally decide to com- pensate her. See U.S. Const. art. I, section 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

Today, it is tempting to answer "no" on the simple ground that the Fifth Amendment flatly prohibits the national government from taking "private property . . . for public use, without just [*269] compensation." n5 The Fifth Amendment, however, was not ratified, and thus had no legal effect, until December 15, 1791. The ques- tion for Mrs. Barrington under these circumstances in 1790 is whether, before ratification of the Bill of Rights, Congress could constitutionally take property without providing just compensation. Similar questions would arise if Congress in 1790 authorized the issuance of general warrants to search Mrs. Barrington's farm, imposed a prior restraint on her criticism of the government's actions, or violated other widely acknowledged individual rights or principles of governmental structure that the constitutional text does not expressly protect.

n5 Id. amend. V.

Modern constitutional scholars would likely address Mrs. Barrington's problem in one of two ways. Some scholars, including some textualists, might conclude that because the unamended Constitution contained no express limitation on Congress with respect to the taking of property, no such limitation existed in 1790. In contrast, other scholars might insist that such a limitation was part of the natural law background against which the Con- stitution was enacted and that an uncompensated taking of Mrs. Barrington's land therefore would have violated the "unwritten constitution." n6 Mrs. Barrington would seem to be faced with a choice between fidelity to constitutional text and a contented herd.

n6 See Thomas C. Grey, The Original Understanding and the Unwritten Constitution, in Toward a More Perfect Union: Six Essays on the Constitution 145 (Neil L. York ed., 1988); Suzanna Sherry, The Founders' Unwritten Constitution, *54 U. Chi. L. Rev. 1127 (1987)*. But cf. Helen K. Michael, The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?, 69 N.C. L. Rev. 421 (1991) (questioning whether the relevant histori- cal sources sustain Grey's and Sherry's conclusions about the role of unwritten law in ju- dicial decisions). Conceivably, such natural law scholars also could maintain that protec- tion against uncompensated takings was not sufficiently fundamental in 1789 to be

part of the unwritten constitution. See William M. Treanor, Note, The Origins and Original Sig- nificance of the Just Compensation Clause of the Fifth Amendment, *94 Yale L.J. 694 (1985)* (arguing that the inclusion of just compensation requirements in the Bill of Rights and contemporaneous state constitutions was a product of then-recent liberal ideology). This escape hatch can be closed by adding to our example, as discussed above, the issu- ance of a general warrant to search Mrs. Barrington's farm or the imposition of a prior restraint on her speech.

There is, however, another possibility that resolves Mrs. Barrington's dilemma. Neither of the views described above identifies the constitutional source, if any, of Congress's power to condemn land and thus never asks whether that source contains [*270] internal, textual limits on the condemnation power. Perhaps the unamended constitutional text does indeed contain a just compen- sation requirement, but in a subtler form than textualists have thus far recognized.

The power of eminent domain is not among Congress's explic- itly enumerated powers. Nor did the Fifth Amendment's Takings Clause confer this power in 1791; the clause does not confer any governmental power, but rather limits an assumed, preexisting power of eminent domain. n7 If the eminent domain power exists at all in the national government, n8 it stems--both in 1790 and to- day--from the constitutional grant of power to Congress " t o 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." n9

n7 The U.S. Supreme Court has recognized that the eminent domain power does not derive from the Fifth Amendment. See *United States v. Jones, 109 U.S. 513, 518 (1883)* ("The provision . . . for just compensation for the property taken, is merely a limitation upon the use of the eminent domain power. It is no part of the power it- self . . . .").

n8 As with the power to construct post roads, see U.S. Const. art. I, section 8, cl. 7, not all persons in 1790 would have conceded that Congress could exercise a power of con- demnation. See Monroe, supra note 3, at 156 (declaring that "very few would concur in the opinion that such a power exists"); 31 Annals of Cong. 1209 (1818) (statement by Representative Austin questioning whether the national government can "against the will of the individual, or by his consent, carve out any mode under the Constitution, by jury or otherwise, so as to ascertain the value of the soil, and acquire title? He did not think they could . . . ."). The Supreme Court did not recognize such a power until 1876. See *Kohl v. United States, 91 U.S. 367, 371-74 (1876)* (dictum).

n9 U.S. Const. art. I, section 8, cl. 18; see Currie, supra note 3, at 435 n.43 (identifying the Sweeping Clause as the source of the eminent domain power); David E. Engdahl, State and Federal Power over Federal Property, *18 Ariz. L. Rev. 283, 338 n.238 (1976)* (same); see also *United States v. Gettysburg Elec. Ry., 160 U.S. 668, 679 (1896)* (stating that Congress can authorize condemnation of property "whenever it is necessary or ap- propriate to use the land in the execution of any of the powers granted to it by the Constitution"). Some nineteenth-century decisions declared that the power of eminent domain was inherent in all governments and did not have to be traced to any specific constitutional source. See, e.g., *Jones, 109 U.S. at 518; Boom Co. v. Patterson,*

98 U.S. 403, 406 (1878). However, these decisions are plainly inconsistent with the principle of defined and limited federal powers that underlies the Constitution.

Although the Framers, adopting the terminology of the anti- federalists, called this provision the "Sweeping Clause," n10 it is not, [*271] nor did the Framers think it to be, a grant of general legislative power. The clause's language limits its authorizing scope to laws that are "necessary and proper" and that "carry into Execution" powers vested in the national government. The hypothetical statute seizing a right of way through Mrs. Barrington's farm without compensation does indeed "carry into Execution" a constitu- tionally vested power--the postal power--but the question remains whether it is a "necessary and proper" means to execute that power.

n10 See, e.g., The Federalist No. 33, at 203 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (referring to "the sweeping clause, as it has been affectedly called"). We use the founding era's label rather than the modern designation of the provision as the "Necessary and Proper Clause." Cf. William W. Van Alstyne, The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause, 40 Law & Contemp. Probs., Spring 1976, at 102 (using both labels in roughly equal measures).

The Supremacy Clause, U.S. Const. art. VI, cl. 2, was also occasionally described by anti-federalists as the "sweeping clause," see Centinel II, Philadelphia Freeman's J., Oct. 24, 1787, reprinted in 13 The Documentary History of the Ratification of the Constitution 457, 460 (John P. Kaminski & Gaspare J. Saladino eds., 1981) here- inafter 13 Documentary History ; Extract of a Letter from Queen Anne's County, Philadelphia Freeman's J., Nov. 21, 1787, reprinted in 14 Documentary History of the Ratification of the Constitution 163, 163 (John P. Kaminski & Gaspare J. Saladino eds., 1983) hereinafter 14 Documentary History , but this usage never be- came standard.

Today, that question may seem trivial. Ever since Chief Jus- tice John Marshall's famous opinion in McCulloch v. Maryland, n11 which construed the Sweeping Clause to require only a minimal "fit" between legislatively chosen means and a valid governmental end, n12 the clause has not been widely viewed as a significant sub- stantive limitation on congressional authority. n13 Chief Justice Marshall's discussion, however, focused almost exclusively on the word "necessary," whereas the clause requires executory laws n14 to be both necessary and proper. We submit that the word "proper" serves a critical, although previously largely unacknowledged, con- stitutional purpose by requiring executory laws to be peculiarly within Congress's domain or jurisdiction--that is, by requiring that such laws not usurp or expand the constitutional powers of any federal institutions or infringe on the retained rights of the states or of individuals. n15 The Sweeping Clause, so construed, serves as [*272] a textual guardian of principles of separation of powers, principles of federalism, and unenumerated individual rights. n16

n11 *17 U.S. (4 Wheat.) 316 (1819)*.

n12 See infra notes 77-89 and accompanying text.

n13 See Stephen L. Carter, The Political Aspects of Judicial Power: Some

Notes on the Presidential Immunity Decision, *131 U. Pa. L. Rev. 1341, 1378 (1983)* ("Since the time of McCulloch v. Maryland, it has been clear that the Sweeping Clause presents no formidable barriers to legislative activity.") (footnote omitted).

n14 We use "executory laws" to mean laws enacted pursuant to the Sweeping Clause.

n15 Several scholars have hinted at such an interpretation of the word "proper," although none has developed the point. See Currie, supra note 3, at 326-27 (noting prior attempts to construe the word "proper" as having substantive meaning); David E. Engdahl, Sense and Nonsense about State Immunity, 2 Const. Commentary 93, 100, 111, 115 (1985) (insisting that "proper" executory laws must conform to constitutional princi- ples of federalism); Richard A. Epstein, The Proper Scope of the Commerce Power, *73 Va. L. Rev. 1387, 1398 (1987)* (stating that it would not be "proper" for Congress to regulate all local activity as a means for implementing its commerce power); Grey, supra note 6, at 163-64 (suggesting that "laws passed by Congress must be both instrumentally useful in pursuing one of Congress's delegated powers (necessary) and consistent with traditionally recognized principles of individual right (proper)").

n16 As our hypothetical example involving Mrs. Barrington illustrates, prior to 1791, all individual rights held by persons against the federal government, beyond the short list in Article I, Section 9, were unenumerated.

In Part I, we present an overview of the principal textual and structural features of the Sweeping Clause. In Part II, we explore the Sweeping Clause's meaning in four steps. First, we demon- strate that the word "necessary" in the Sweeping Clause refers to a telic n17 relationship, or fit, between executory laws and valid government ends. We take no firm position on how close the relationship between those means and ends must be, although we acknowledge the force of Chief Justice Marshall's argument in McCulloch that "necessary" in this context does not mean "indis- pensable." Second, we show that legal actors during the founding era understood the words "necessary" and "proper" to have dis- tinct meanings in many contexts, which counsels strongly against treating the words as synonymous in the Sweeping Clause. Third, we show that one of the many ordinary meanings of the word "proper" during the founding era was "peculiar to" or "belonging to." In the context of the Sweeping Clause, this meaning of "prop- er" would require executory laws to be laws that are peculiarly within the jurisdiction or competence of Congress--that is, to be laws that do not tread on the retained rights of individuals or states, or the prerogatives of federal executive or judicial depart- ments. n18 Finally, we marshall evidence for the proposition that the word "proper" in the Sweeping Clause not only can but does bear [*273] this jurisdictional meaning of "peculiar to" or "belonging to." The evidence includes statements by eighteenth- and nineteenth-century legal actors evincing this understanding of the Sweeping Clause, comparisons with the language and structure of other provisions in the Constitution and with related provisions in contemporaneous state constitutions, and inferences from the Framers' design for a limited national government. This evidence demonstrates that a jurisdictional construction of the Sweeping Clause is the best un- derstanding of the clause in the overall context of the Constitu- tion.

n17 We borrow the term "telic" from David Engdahl to describe the means-ends relationship required by the Sweeping Clause. See David E. Engdahl, Constitutional Federalism in a Nutshell 20 (2d ed. 1987).

n18 In accordance with the dominant usage of the founding era, we describe the national legislature, executive, and judiciary as "departments" rather than "branches." See Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, *105 Harv. L. Rev. 1153, 1156 n.6 (1992)*.

Part III describes some of the important implications of our construction of the Sweeping Clause for constitutional history and constitutional law. First, this jurisdictional interpretation of the Sweeping Clause harmonizes the seemingly conflicting modern views on the meaning of the Ninth Amendment. Some scholars maintain that the Ninth Amendment was designed solely to pre- vent an inference that Congress possessed all legislative powers that the first eight amendments did not specifically deny it. n19 Oth- er scholars insist that the Ninth Amendment also protects unenumerated individual rights that are enforceable against the national government even when the government is exercising pow- ers that the Constitution clearly grants to it. n20 Our construction of the Sweeping Clause demonstrates that both sides are partially correct. The Ninth Amendment potentially does refer to unenumerated substantive rights, but the Sweeping Clause's re- quirement that laws be "proper" means that Congress never had the delegated power to violate those rights in the first instance. Those unenumerated rights, as well as the rights enumerated in the first eight amendments, therefore were legally protectible even before the Bill of Rights was ratified. Second, our construction of the Sweeping Clause illuminates the Constitution's methods for safeguarding federalism. The principal safeguard, of course, is the scheme of enumerated national powers, under which the federal government is granted only limited subject matter jurisdiction. Our analysis demonstrates that the Sweeping Clause is an important part of this scheme: a "proper" executory law must be peculiarly and distinctively within the province of the national government and therefore must respect the national government's jurisdictional [*274] boundaries. In this sense, the Sweeping Clause was the precursor of the Tenth Amendment's declaration that " t he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." n21 Third, our interpretation of the Sweeping Clause provides a textual foundation for principles of separation of pow- ers that have long been understood to animate and supplement the specific constitutional provisions allocating authority among federal institutions. All laws "carrying into Execution" the powers of any national department or officer must keep all departments and officers within their "proper" jurisdiction.

n19 See infra notes 242-44 and accompanying text.

n20 See infra notes 245-49 and accompanying text.

n21 U.S. Const. amend. X. The Sweeping Clause, of course, does delegate power to the United States, but the requirement that executory laws be "proper" prevents the national government from using the Sweeping Clause to regulate indirectly subjects over which it does not have direct jurisdiction. See infra notes 257-60 and accompanying text.

Part IV comments on the reliability of some of the documen- tary sources that we employ. Part V briefly summarizes our con- clusions.

The Sweeping Clause, when properly understood as a jurisdic- tional limitation on the scope of federal power, is a vital part of the constitutional design. That understanding has largely been lost in modern times. We hope to reclaim it here.

I. The Sweeping Clause in Constitutional Context

The Sweeping Clause provides that "Congress shall have Pow- er . . . t o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers enumerated in Arti- cle I , and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Offi- cer thereof." n22 Three textual and structural features of this clause provide important background for understanding its meaning.

n22 U.S. Const. art. I, section 8, cl. 18.

A. The Sweeping Clause Is Not a Self-Contained Power

First, and most obviously, the Sweeping Clause is not a self- contained grant of power. It authorizes Congress only to pass laws that "carry into Execution" powers the Constitution elsewhere vests in one or more institutions of the federal government. n23 An [*275] exercise of the Sweeping Clause power must always be tied to the exercise of some other identifiable constitutional power of the national government. n24

n23 By its terms, the Sweeping Clause gives Congress power to pass laws both "verti- cally" to implement its own enumerated powers and "horizontally" to implement the con- stitutionally vested powers of federal executive and judicial officers. For an illuminating analysis of the horizontal aspects of the Sweeping Clause, see Van Alstyne, supra note 10.

n24 The Framers understood this feature of the Sweeping Clause well. See, e.g., 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 468 (Jonathan Elliot ed., 2d ed. 1836) hereinafter Elliot's Debates (statement of James Wilson at the Pennsylvania convention that the words necessary and proper "are limited and defined by the following, for carrying into execution the forego- ing powers' "); 3 id. at 441 (statement of Edmund Pendleton at the Virginia convention that "the plain language of the sweeping clause is, to give them power to pass laws in order to give effect to the delegated powers"); id. at 455 (reporting a statement of James Madison at the Virginia convention that " w ith respect to the supposed operation of what was denominated the Sweeping Clause, . . . it only extended to the enumerated powers. Should Congress attempt to extend it to any power not enumerated, it would not be warranted by the clause."); 4 id. at 141 (statement of Archibald Maclaine at the North Carolina convention that the Sweeping 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"); 1 Annals of Cong. 277 (Joseph Gales ed., 1789) (statement of Elbridge Gerry that the Sweeping Clause "gives no legislative authority to Congress to carry into effect any power not expressly vested by the constitu- tion").

Nonetheless, members of the Federalist Party often ignored this stricture on the Sweeping Clause during the 1798 debates on the Alien and Sedition Acts. See James M. Smith, Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties 135 (1956). This episode prompted Representative John Clopton to propose a constitutional amendment that would have explicitly required the Sweeping Clause to

be construed so as to comprehend only such laws as shall have a natural connexion with and immediate relation to the powers enumerated in the said section, or to such other powers as are expressly vested by this Constitution in the Government of the United States, or in any department or officer thereof.

16 Annals of Cong. 148 (1806).

B. "Necessary" and "Proper" Are Distinct Requirements

Second, and more significantly for our purposes, the Sweeping Clause specifies that any laws enacted under its authority must be both necessary and proper--in the conjunctive. n25 It is linguistically possible, of course, that this conjunction merely adds emphasis and that the words "necessary" and "proper" are essentially synony- mous. Indeed, at the time of the Framing, the clause sometimes was misquoted (usually by opponents of the proposed Constitution) to omit altogether the requirement that laws be "proper," n26 [*276] and members of the Federalist Party pointedly avoided mention of the word "proper" when discussing the Sweeping Clause during debates on the Alien and Sedition Acts. n27 Nonetheless, as a tex- tual matter, the Sweeping Clause seems to set forth distinct re- quirements of necessity and propriety; anyone who claims that the word "proper" is redundant bears a heavy burden. n28

n25 See *McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 367 (1819)* (argument of Mr. Jones, counsel for the state of Maryland) ("It is not necessary or proper,' but nec- essary and proper.' The means used must have both these qualities.").

n26 See 2 Elliot's Debates, supra note 24, at 334 (statement of John Smith at the New York convention); 3 id. at 56, 436 (statement of Patrick Henry at the Virginia con- vention); id. at 217 (statement of James Monroe at the Virginia convention); 3 Annals of Cong. 304 (1791-93) (unattributed comments); cf. 1 id. at 280 (Joseph Gales ed., 1789) (statement of Representative Lawrence that Congress has power "to make all laws necessary or proper to carry the declarations of the constitution into effect") (emphasis added).

n27 Smith, supra note 24, at 73 n.23 (" O nly one of the Federalists made any ref- erence to the word proper' from the necessary and proper clause. They seemed to as- sume that anything was proper which they deemed necessary.").

n28 As we later demonstrate, that burden cannot be met. See infra Section II(B).

C. Congress Does Not Have Unfettered Discretion to Determine What Is

"Necessary" and "Proper"

Third, and most significantly, the clause does not explicitly designate Congress as the sole judge of the necessity and propriety of executory laws. The Sweeping Clause gives Congress power " t o make all Laws which shall be necessary and proper" for carrying federal powers into execution. This mandatory language clearly implies that such laws must in fact be necessary and proper and not merely thought by Congress to be necessary and proper. The clause sets forth an objective standard by which the necessity and propriety of laws can and must be determined, and it gives no indication that Congress is the only entity authorized to make that determination. In modern jargon, the Sweeping Clause does not exhibit "a textually demonstrable constitutional commitment of the issue to . . . the legislative department." n29

n29 *Baker v. Carr, 369 U.S. 186, 217 (1962).*

There is evidence that this feature of the Sweeping Clause is not accidental. Other constitutional provisions that employ the adjectives "necessary" or "proper," or the related adjectives "expe- dient" or "needful," sometimes do and sometimes do not confer final authority on the relevant political actors to judge the necessi- ty, propriety, expediency, or needfulness of the conduct prescribed. The absence of overt discretion-granting language in the Sweeping Clause is therefore significant. n30 [*277]

n30 By referring to the Sweeping Clause as nondiscretionary, we obviously do not mean that the choice of executory laws is a ministerial task. Congress clearly can choose from among a wide range of necessary and proper laws in implementing any of the national government's enumerated powers. We mean only that congressional judgments of necessity and propriety are fully subject to both judicial and executive review for consti- tutionality.

There are five power-granting provisions in the Constitution that include the phrases "shall think," "they think," "shall judge," or "shall deem" before the relevant grants of power and thus ex- pressly bestow discretion on the pertinent actors to determine the necessity, propriety, or expediency of prescribed action. n31 Three of these provisions use the word "proper." For example, Article II, Section 3 states that if Congress cannot agree on a time of ad- journment, " the President may adjourn Congress to such Time as he shall think proper." n32 This provision grants sole discretion to the President to determine when it is "proper" for Congress to re- convene, subject only to constraints found elsewhere in the Consti- tution. n33 Even if one assumes that certain times of reconvening could objectively be proper or improper, propriety is not the mea- sure of constitutionality: if the President thinks a time is "proper," but some objective standard would render it improper, the clause nonetheless validates the President's action, merely by virtue of the President's belief. n34 [*278]

n31 If there is any appropriate role for a political question doctrine, it may be in connection with these provisions that overtly make the President, the Congress, or the states, respectively, the judges of their own actions. But cf. Martin H. Redish, The Federal Courts in the Political Order 111-36 (1991) (doubting the legitimacy of the political question doctrine but not directly addressing the discretionary clauses dis- cussed herein).

n32 U.S. Const. art. II, section 3 (emphasis added).

n33 For example, the Constitution mandates that "Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day." Id. art. I, section 4, cl. 2, amended by id. amend. XX, section 2 (fixing date as "noon on the 3d day of January"). Thus, the President cannot adjourn Congress indefinitely.

n34 One could say that presidential decisions under this clause present political questions because the time of reconvening is textually committed to the President's dis- cretion. This conclusion, however, may be too hasty. One might argue instead that the President's action is unconstitutional if the President does not truly think his action is proper. Such a claim seems justiciable in principle, although the problems of proof may be insurmountable. It is highly improbable that the President would ever declare that he thought his action was improper when he took it, and the fact that the President selected a certain time would be prima facie proof that he thought it was proper. Nonetheless, one conceivably could infer from objective circumstances (such as the extraordinary in- convenience of a chosen time) that the President could not really have thought that his action was proper.

Similarly, the Constitution granted the then-existing states the power, until 1808, to import "such Persons as any of them shall think proper to admit," n35 and the Appointments Clause of Article II allows Congress to "vest the Appointment of such inferior Offi- cers, as they think proper, in the President . . . , the Courts of Law, or in the Heads of Departments." n36 Just as the Article II, Section 3 "shall think proper" phrase gives decisional responsibility to the President, these provisions grant untrammelled discretion to the states and to Congress, respectively. n37 In addition, Article II, Section 3 states that the President "shall . . . recommend to Congress's Consideration such Measures as he shall judge neces- sary and expedient." n38 Finally, Article V authorizes Congress to propose constitutional amendments "whenever two thirds of both Houses shall deem it necessary." n39 These provisions expressly make a political actor's judgment, rather than objective necessity, propriety, or expediency, the test of constitutionality. [*279]

n35 U.S. Const. art. I, section 9, cl. 1 (emphasis added).

n36 Id. art. II, section 2, cl. 2 (emphasis added). If Congress does not exercise this power, the default mode of appointment for inferior officers--as is always the only constitutional mode of appointment for principal officers--is nomination by the President and confirma- tion by the Senate. See id. We contend only that Congress has untrammelled discretion to choose whether and when to avoid this more formal mode of appointment for inferior officers by vesting their appointment, without Senate confirmation, in the President, the courts, or department heads. We take no position on whether Congress also has untram- melled discretion to permit any of the designated recipients of the appointment power to appoint any inferior officer outside their own respective departments. See *Morrison v. Olson, 487 U.S. 654, 675-76 (1988)* (permitting Congress to vest the appointment of a special prosecutor in the courts of law but suggesting that interdepartmental appointments might be improper "if there were some incongruity' between the functions normally performed by the courts and the performance of their duty to appoint") (citing *Ex parte Siebold, 100 U.S. 371, 398 (1880)*).

n37 One could argue that it is a justiciable question under these clauses whether the states or Congress, respectively, truly think that their actions are proper. The identities of the actors involved in these provisions, however, make it even more unlikely than in the case of the President under the *Recommendation Clause, see supra* note 34, that one could ever prove the absence of the relevant states of mind, and such proof may even be impossible. Unlike the President--an individual whose thoughts and intentions may arguably be determinable to some extent--the states and Congress are entities comprised of many individuals whose joint decision to act does not leave room for much debate about intent in a literal sense.

n38 U.S. Const. art. II, section 3 (emphasis added). This may, at last, be an instance of a decision that is unreviewable in principle. The fact that the President puts forward a recommendation is definitive proof that he judges the recommendation to be necessary and expedient for some purpose.

n39 Id. art. V (emphasis added).

In contrast, other constitutional provisions that use adjectives similar to those found in the Sweeping Clause do not expressly confer discretion on the actor in whom power is vested. For exam- ple, states are forbidden from laying imposts or duties without the consent of Congress, "except what may be absolutely necessary for executing their inspection Laws." n40 Under this clause, the states are not the ultimate arbiters of absolute necessity: their impost laws must in fact be absolutely necessary in order to be valid without congressional consent. Nor is Congress the ultimate arbi- ter: if the states' laws are, indeed, absolutely necessary for inspec- tion purposes, the Constitution validates them regardless of wheth- er Congress thinks them absolutely necessary.

n40 Id. art. I, section 10, cl. 2 (emphasis added).

An objective, if undemanding, standard also constrains Congress's enumerated powers to erect buildings on federal en- claves and to govern territories. Under the relevant clauses, Con- gress has the power, respectively, " t o exercise exclusive Legisla- tion in all Cases whatsoever" over federal enclaves purchased from states "for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings" n41 and to "make all needful Rules and Regulations respecting the Territory or other Property belong- ing to the United States." n42 "Needful" is an objective requirement in each clause, although the standard of needfulness is consider- ably less stringent than the standard of absolute necessity that governs the Imposts Clause. Congress has general, rather than limited, legislative power over enclaves and territories n43 and ac- cordingly must have considerable latitude in its decisions concern- ing such domains. Thus, Congress surely has broad power to de- cide which buildings and territorial rules and regulations are need- ful--not because these clauses expressly confer unreviewable dis- cretion on Congress but because "needful" in the context of these grants of general legislative power is not an especially confining term. n44 [*280]

n41 Id. art. I, section 8, cl. 17 (emphasis added). The clause also empowers Congress to legislate for the District of Columbia.

n42 Id. art. IV, section 3, cl. 2 (emphasis added).

n43 See infra notes 183-86 and accompanying text.

n44 Two other constitutional provisions use the adjective "necessary" and treat it as a nondiscretionary condition that must be satisfied, but neither usage of the term qualifies a grant of power to any legal actor. See U.S. Const. art. I, section 7, cl. 3 (setting forth the presidential presentment requirement for " e very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary"); id. art. II, section 1, cl. 3 (specifying that when presidential elections are thrown into the House of Representatives, "a Majority of all the States shall be necessary to a Choice of a President "). We therefore do not discuss these provisions further in this Article.

As with these latter provisions, the Sweeping Clause does not explicitly confer discretion on Congress to determine which laws are necessary and proper. The clause contains no language stating that Congress may enact laws that it "shall believe" or "shall think" necessary and proper. On the contrary, Congress is given power " t o 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." n45

n45 Id. art. I, section 8, cl. 18 (emphasis added).

Furthermore, the mandatory language of the Sweeping Clause contrasts starkly with an analogous legislative power grant in the Georgia State Constitution of 1789, which declared that " t he general assembly shall have power to make all laws and ordinanc- es which they shall deem necessary and proper for the good of the State, which shall not be repugnant to this constitution." n46 This constitution was contemporaneous with and, in fact, modelled after the U.S. Constitution. n47 The principal difference, of course, is that the government of Georgia is a general government, possessing all legislative powers not specifically restricted by its constitution, whereas the national government is limited to its constitutionally enumerated powers. One would not expect the legislative power- granting provisions of a general government to contain internal limits but would expect limitations to stem from a bill of rights or other prohibitory clauses. By the same token, one would expect the legislative power-granting provisions of a limited government to place constraints on the exercise of power; to do otherwise might defeat the very purpose of constituting a limited govern- ment. n48 Georgia's decision to add the discretionary phrase "they [*281] shall deem" before "necessary and proper" reflects this qualitative difference between general and limited governments and further reinforces a nondiscretionary, limiting construction of the Sweeping Clause.

n46 Ga. Const. of 1789, art. I, section 16 (emphasis added). See infra subsection II(D)(3).

n47 See 2 Sources and Documents of United States Constitutions 455 (Wil- liam F. Swindler ed., 1973) hereinafter Sources .

n48 Madison recognized this principle in his Report on the Virginia Resolutions op- posing the Alien and Sedition Acts:

Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is, whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be, whether it is properly an incident to an express power, and necessary to its execution. If it be, it may be exercised by Congress. If it be not, Congress cannot exercise it.

. . . .

It must be recollected by many, and could be shown to the satisfaction of all, that the construction here put on the terms "necessary and proper" is precisely the construction which prevailed during the discussions and ratifications of the Constitution. It may be added, and cannot too often be repeated, that it is a construction absolutely necessary to maintain their consistency with the pecu- liar character of the government, as possessed of particular and definite powers only, not of the general and indefinite powers vested in ordinary govern- ments . . . . And it must be wholly immaterial whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution limited powers.

4 Elliot's Debates, supra note 24, at 567-68.

There was widespread recognition during and shortly after the ratification debates on the Constitution that the Sweeping Clause placed cognizable limits on Congress's discretion to determine the necessity and propriety of executory laws. For example, in The Federalist, James Madison clearly suggested that both the President and the judiciary would have the power to review legislative determinations of necessity and propriety:

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, I answer the same as if they should misconstrue or enlarge any other power vested in them . . . . In the first instance, the success of the usur- pation 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. n49

n49 The Federalist No. 44, at 285-86 (James Madison) (Clinton Rossiter ed., 1961).

Likewise, during the debates at the Virginia ratifying convention, George Nicholas emphasized the availability of judicial review to confine the exercise of Congress's powers under the Sweeping Clause: " W ho is to determine the extent of such powers? I say, the same power which, in all well-regulated communities, deter- mines the extent of legislative powers. If they exceed these pow- ers, the judiciary will declare it void, or else the people will have

[*282] a right to declare it void." n50 Nicholas's colleague at the Virginia convention, Governor Edmund Randolph, agreed that the "much dreaded" Sweeping Clause was not a limitless grant of power to Congress and argued that any use of that clause by Congress to expand its constitutionally granted powers would constitute an "absolute usurpation." n51

n50 3 Elliot's Debates, supra note 24, at 443.

n51 Id. at 206.

Members of the House of Representatives on both sides of the 1791 debate over the first Bank of the United States also accepted a limited, and limiting, construction of the Sweeping Clause. Representative Stone, an opponent of the Bank, declared that the Sweeping Clause was "meant to reduce legislation to some rule. In fine, it confined the Legislature to those means that were necessary and proper." n52 Representative Smith, a Bank pro- ponent whom Stone earlier had
accused of adopting an excessively latitudinarian view of the Sweeping Clause, n53 corrected that mis- conception of his views and agreed with Stone that Congress was not the final judge of its powers under the Sweeping Clause. Smith maintained that Congress in the first instance had to judge the necessity and propriety of any proposed executory law but that "it was still within the province of the Judiciary to annul the law, if it should be by them deemed not to result by fair construction from the powers vested by the Constitution." n54

n52 2 Annals of Cong. 1986 (1791).

n53 See id. at 1983 (" A gentleman from South Carolina (Mr. Smith) had remarked that all our laws proceeded upon the principle of expediency--that we were the judges of that expediency--as soon as we gave it as our opinion that a thing was expedient, it became constitutional.").

n54 Id. at 1988.

Others from the founding era, however, contended that Con- gress had sole and unfettered discretion to judge the necessity and propriety of laws enacted pursuant to the Sweeping Clause. James Monroe's comments at the Virginia convention exemplified this view:

There is a general power given to the national government to make all laws that will enable them to carry their powers into effect. There are no limits pointed out. They are not restrained or controlled from making any law, however oppressive in its [*283] operation, which they may think necessary to carry their powers into effect. n55

n55 3 Elliot's Debates, supra note 24, at 218 (emphasis added).

John Williams of New York and John Tyler and Patrick Henry of Virginia shared Monroe's concerns, n56 as did many other anti-fed- eralists. n57 Perhaps the clearest such construction of the Sweeping Clause was set forth in a pamphlet authored by "An Old Whig," who read the clause as a grant of power

n56 2 id. at 330 (statement of John Williams that the Sweeping Clause authorizes Congress to "pass any law which they may think proper"); 3 id. at 455 (statement of John Tyler that if Congress wanted to establish a monarchy, the Sweeping Clause would enable it "to call in foreign assistance, and raise troops, and do whatever they think proper to carry this proposition into effect"); id. at 436 (rhetorical question of Patrick Henry: "If members of Congress think any law necessary for their personal safety, after perpetrating the most tyrannical and oppressive deeds, cannot they make it by this Sweeping Clause?").

n57 See Cumberland County Petition to the Pennsylvania Convention, Dec. 5, 1787, re- printed in 2 Documentary History of the Ratification of the Constitution 309, 310 (Merrill Jensen ed., 1976) hereinafter 2 Documentary History (predicting that members of Congress "are to be the judges of what laws shall be necessary and prop- er"); Centinel V, Philadelphia Independent Gazetteer, Dec. 4, 1787, reprinted in 14 Documentary History, supra note 10, at 343, 345 ("Whatever law congress may deem necessary and proper for carrying into execution any of the powers vested in them, may be enacted . . . ."); Brutus V, N.Y. J., Dec. 13, 1787, reprinted in id., at 422, 423 (" i t is obvious, that the legislature alone must judge what laws are proper and necessary"); Centinel VIII, Philadelphia Independent Gazetteer, Jan. 2, 1788, reprinted in 15 Documentary History of the Ratification of the Constitution 231, 232 (John P. Kaminski & Gaspare J. Saladino eds., 1984) hereinafter 15 Documentary History (arguing that the members of Congress "are to be the sole judges of the propriety of such laws").

to make all such laws which the Congress shall think necessary and proper,--for who shall judge for the legislature what is nec- essary and proper?--Who shall set themselves above the sover- eign?--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 controul them, unless by force n58

n58 An Old Whig, No. 2 (1787), reprinted in 3 The Founders' Constitution, supra note 3, at 239. James Iredell came very close to endorsing this position in his charge to the grand jury in the prosecution of Jonathan Fries. See Case of *Fries, 9 F. Cas. 826, 838 (C.C.D. Pa. 1799) (No. 5126)* (stating that judgments of necessity and propriety under the Sweeping Clause "are considerations of policy, not questions of law, and upon which the legislature is bound to decide according to its real opinion of the necessity and pro- priety of any act particularly in contemplation").

This controversy continued into the second decade of the nineteenth century, although the advocates of limited congressional [*284] discretion firmly gained the upper hand. During the 1811 debate on the renewal of the charter of the first Bank of the United States, numerous representatives assumed that Congress's judg- ments of necessity and propriety could be objectively correct or incorrect; n59 only Representative Sheffey argued, to the contrary, that Congress was the sole judge of the scope of the powers grant- ed by the Sweeping Clause. n60 Moreover, a counsel arguing to the U.S. Supreme Court in 1815 shared this understanding that the Sweeping Clause establishes objective requirements of necessity and propriety. n61

n59 See, e.g., 22 Annals of Cong. 295-96 (1811) (statement of Senator Taylor); id. at 634-35 (statement of Representative Porter); id. at 695-96 (statement of Representative Barry); id. at 797-98 (statement of Representative Stanley).

n60 See id. at 735 ("To whom is confided the right to judge what shall be necessary and proper?' I presume it will be admitted that this right is exclusively inherent in Con- gress.").

n61 This counsel maintained:

I t is declared that Congress shall have power "to make all laws," not that they, in their good pleasure, with a discretion that acknowledges neither guide nor restraint, not to make any, and every sort of law they may chuse, in furtherance of any special power, but only those "which shall be necessary and proper . . . ."

United States v. Bryan & Woodcock, 13 U.S. (9 Cranch) 374, 376 (1815).

Although the proponents of unlimited congressional discretion to construe the Sweeping Clause generally did not offer arguments in support of this construction, there are several reasons why they might have described Congress's powers so broadly. First, at least prior to the decision in Marbury v. Madison n62 in 1803, concerns about the scope of congressional discretion under the Sweeping Clause may have reflected generalized doubts about the availabili- ty of judicial (or presidential) n63 review of legislation; if Congress is the final authority on all questions regarding its constitutional powers, it is of course the final judge of its powers under the Sweeping Clause. Second, some of the claims made during the ratification debates may have been political poses; the argument that the proposed Constitution would in practice create an unlimited national government was one of the anti-federalists' strongest [*285] weapons. n64 Third, such people may simply have made honest mis- takes when interpreting the clause.

n62 *5 U.S. (1 Cranch) 137 (1803).*

n63 For an overview of the 200-year-long debate over the President's power to re- view legislation for constitutionality, see Who Speaks for the Constitution?: The Debate Over Interpretive Authority (The Federalist Society, Occasional Paper No. 3, 1992).

n64 See John P. Kaminski, The Constitution Without a Bill of Rights, in The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberalism 16, 29 (Patrick T. Conley & John P. Kaminski eds., 1992) (" Anti- federalists pointed to the general welfare clause and the necessary and proper clause to show that Congress possessed unlimited authority under the Constitution.").

Whatever considerations may have spawned the claim that the Sweeping Clause

gives Congress unlimited and unreviewable pow- er, that claim was assuredly mistaken. The language and structure of the Sweeping Clause, especially in view of the Constitution's selective use of express discretion-granting language in other claus- es, n65 establish that the Sweeping Clause places some limit on Congress's authority to enact executory laws. The question is not whether the Sweeping Clause contains internal limits on Congress's executory power but to what extent those limits reach--a question that can only be answered by close scrutiny of the clause's lan- guage and role in the constitutional design. n66

n65 See supra notes 31-39 and accompanying text.

n66 The Sweeping Clause's drafting history is of no help because "the accounts of the 1787 Constitutional Convention are silent on the meaning of the necessary and prop- er power." Bernard H. Siegan, The Supreme Court's Constitution: An Inquiry Into Judicial Review and Its Impact on Society 1 (1987). See David E. Engdahl, What's in a Name? The Constitutionality of Multiple "Supreme" Courts, *66 Ind. L.J. 457, 484 n.134 (1991)* (summarizing the clause's sparse drafting history).

II. The Meaning of the Sweeping Clause

Historically, discussion of the Sweeping Clause has been domi- nated by discussion of the meaning of the word "necessary," no doubt because of Chief Justice Marshall's focus on that word in McCulloch v. Maryland. n67 The word "proper" has generally been treated as a constitutional nullity or, at best, as a redundancy. n68 There are, however, strong textual and structural arguments that suggest that "proper," as used in the Sweeping Clause, is a term distinct from, and supplementary to, "necessary" and that it func- tions as an integral part of the constitutional design for a limited national government. We develop these arguments in four discrete steps: first, we establish that the word "necessary" refers to a telic [*286] relationship between governmental means and ends; second, we show that the word "proper," as used in the Sweeping Clause, has a meaning distinct from "necessary;" third, we show that a jurisdic- tional meaning of "proper" was in ordinary usage during the fram- ing era; and fourth, we argue that this jurisdictional meaning is the best interpretation of the word "proper" in the context of the Sweeping Clause.

n67 *17 U.S. (4 Wheat.) 316 (1819)*.

n68 See Carter, supra note 13, at 1378 ("The word proper' has been read to mean appropriate,' which adds little to necessary,' except for a strong implication that legisla- tion is appropriate only when it does not conflict with another constitutional provision.").

A. The Meaning of "Necessary"

The 1755 and 1785 editions of Samuel Johnson's Dictionary of the English Language both define "necessary" as: "1. Needful; in- dispensably requisite. 2. Not free; fatal; impelled by fate. 3. Conclu- sive; decisive by inevitable consequence." n69 In McCulloch v. Maryland, n70 the most famous, although not the first, U.S. Su- preme Court case to construe the Sweeping Clause, n71 counsel for the state of Maryland invoked the definition of "necessary" as "indispensably requisite" n72 in arguing that the Sweeping Clause strongly restricts Congress's discretion to choose the means by which it executes the

national government's enumerated powers. n73 Counsels for McCulloch, on the other hand, argued that "neces- sary" merely means "suitable," "most useful," n74 "fairly adapted," n75 or "ha ving a natural and obvious connection" n76 to the relevant executory laws' ends.

n69 2 Samuel Johnson, Dictionary of the English Language (1785) hereinaf- ter Johnson (1785) (emphasis added); 2 Samuel Johnson, Dictionary of the Eng- lish Language (1755) hereinafter Johnson (1755) (emphasis added). These editions of Johnson's Dictionary are not paginated.

n70 *17 U.S. (4 Wheat.) 316 (1819)*.

n71 In *United States v. Fisher, 6 U.S. (2 Cranch) 358 (1805)*, the Court, per Chief Justice Marshall, upheld the constitutionality of a statute under the Sweeping Clause that gave debts due to the United States priority in the settlement of insolvent estates. See *id. at 396-97*.

n72 *McCulloch, 17 U.S. (4 Wheat.) at 367* (argument of Mr. Jones) ("The word nec- essary,' is said to be a synonyme of needful.' But both these words are defined indis- pensably requisite;' and most certainly this is the sense in which the word necessary' is used in the constitution.").

n73 *Id. at 366-67*.

n74 *Id. at 324-25* (argument of Mr. Webster for the plaintiff in error).

n75 *Id. at 356-57* (argument of Attorney General for the plaintiff in error).

n76 *Id. at 386-88* (argument of Mr. Pinckney for the plaintiff in error).

Chief Justice Marshall, writing for a unanimous Court, agreed with McCulloch's position. He stated that "necessary" in this con- text does not connote "absolute physical necessity," but rather [*287] means "convenient, or useful, or essential to another." n77 As sup- port for this construction, Chief Justice Marshall compared the Sweeping Clause to Article I, Section 10, Clause 2, n78 which pro- vides that " n o 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." n79 He concluded that the presence of the word "absolute- ly" in this clause, and its absence in the Sweeping Clause, indi- cated that the term "necessary," standing alone, has a less restric- tive meaning than that urged by counsel for Maryland. n80 He also argued that the "strict and rigorous sense of necessary' " would render the use of the word "proper" in the Sweeping Clause ex- traneous. n81 Finally, he pointed to the Sweeping Clause's place- ment among the grants of power to Congress in Article I, Section 8, rather than among the limitations on congressional power enu- merated in Article I, Section 9. n82 This placement was relevant, he argued, because in the absence of the Sweeping Clause, the natu- ral inference concerning Congress's executory powers would be that "any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the gov- ernment, would be in themselves constitutional." n83 As the Sweeping Clause "purport s to enlarge, not to diminish the pow- ers vested in the government," n84 Chief Justice Marshall concluded that Congress must have at least as much discretion in its choice of means as would exist in the clause's absence. n85

n77 *Id. at 413.*

n78 *Id. at 414.*

n79 U.S. Const. art. I, section 10, cl. 2 (emphasis added).

n80 *McCulloch, 17 U.S. (4 Wheat.) at 414-15.*

n81 See id. at 418-19.

n82 Id. at 419-20.

n83 Id. at 419. This claim is dubious. In the absence of the Sweeping Clause, execu- tory laws that satisfied Chief Justice Marshall's criteria but that violated accepted princi- ples of individual rights or governmental structure would surely be unconstitutional. Con- gress cannot plausibly claim an implied power to infringe on the prerogatives of the peo- ple, the states, or other federal departments.

n84 Id. at 420.

n85 Id.

As Chief Justice Marshall construed it, the word "necessary" describes the extent to which legislatively chosen means are "adapted to the end" and "tend directly to the execution of the constitutional powers of the government." n86 Necessity, on this un- [*288] derstanding, refers to the telic relationship, or fit, between legisla- tive means and ends--that is, the extent to which the means effi- caciously promote the ends.

n86 Id. at 419; see also id. at 423 (stating that a law is necessary if it is "really cal- culated to effect any of the objects entrusted to the government").

To the best of our knowledge, no one, including the oppo- nents of the Bank in McCulloch, has ever doubted that the word "necessary" refers to some kind of fit between means and ends. The only dispute over the term has concerned how tight the means-ends fit must be to comply with the requirements of the Sweeping Clause. Although we take no firm position on this dis- pute, we acknowledge the force of Chief Justice Marshall's claim that something less than strict indispensability is sufficient. He was correct in saying that the use of the phrase "absolutely necessary" in Article I, Section 10, Clause 2 strongly suggests that "neces- sary," by itself, does not connote indispensability. In addition, the Recommendation Clause of Article II, Section 3 provides powerful support for Chief Justice Marshall's position, although he did not make use of it. The clause instructs the President to recommend to Congress "such Measures as he shall judge necessary and expe- dient." n87 If "necessary" means "indispensable," it is hard to un- derstand why it would be conjoined with a term like "expedient," which suggests only a minimal requirement of usefulness. n88

n87 U.S. Const. art. II, section 3.

n88 The meaning of the word "necessary" is not inevitably the same in every

clause of the Constitution. The Second Amendment, for example, which states that " a well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed," Id. amend. II (emphasis added), may well use the word "necessary" in a more restrictive sense than do the constitutional pro- visions described above. See Akhil Reed Amar, The Bill of Rights as a Constitution, *100 Yale L.J. 1131, 1172 (1991)*. One needs, however, very strong reasons to attribute differ- ent meanings to instances of the same word in the same document.

The fitness requirement imposed by the word "necessary," however, only exhausts the meaning of the Sweeping Clause if the word "proper" also describes merely a telic relationship between means and ends. Chief Justice Marshall's opinion in McCulloch did not directly address the meaning of the word "proper," perhaps because the Bank's opponents questioned only the Bank's necessi- ty and not its propriety. n89 Thus, although McCulloch is often [*289] treated as a definitive discussion of the Sweeping Clause, it is at best only a starting point. A complete discussion also must consid- er the meaning of the word "proper" and, in particular, the possi- bility that the word has a distinct and powerful meaning that goes well beyond a requirement of a telic relationship between means and ends.

n89 See *McCulloch, 17 U.S. (4 Wheat.) at 331-33* (argument of Mr. Hopkinson); *id. at 367-68* (argument of Mr. Jones). This tactic was not surprising. The Bank's challengers had to deal with the facts that Congress had once before approved the Bank after a heated constitutional debate and that the Bank had existed from 1791 to 1811. They no doubt feared that this precedent would weigh heavily in favor of the Bank's constitution- ality--and, indeed, Chief Justice Marshall's first argument in support of the Bank invoked this precedent. See *id. at 401-02*. The best argument for the Bank's challengers was thus to claim that although the first Bank might have been "necessary" for the collection of revenue in 1791, the different financial circumstances in 1816 rendered the second Bank "unnecessary" for these purposes. See *id. at 331* (argument of Mr. Hopkinson) ("The argument might have been perfectly good, to show the necessity of a bank for the opera- tions of the revenue, in 1791, and entirely fail now, when so many facilities for money transactions abound, which were wanting then."). On the other hand, if the Bank was not "proper" in 1816, it could not have been "proper" in 1791.

B. "Necessary" As Distinct From "Proper"

Daniel Webster, arguing on behalf of McCulloch and the Bank, suggested that " t hese words, necessary and proper,' in such an instrument, are probably to be considered as syn- onimous." n90 Webster's conflation of "necessary" and "proper," however, plainly did not conform to ordinary usage in the eigh- teenth and nineteenth centuries, either in general legal discourse or in specific discussions of the Sweeping Clause.

n90 *Id. at 324*.

During and shortly after the founding era, the words "neces- sary" and "proper" were commonly used as distinct terms with different meanings, often with "proper" being the more restrictive term. For example, James Wilson argued at the Pennsylvania rati- fying convention that a bill of rights would be "not only unneces- sary, but improper," n91 while Samuel Spencer at the North Caroli-

na ratifying convention insisted that " i t might not be so necessary to have a bill of rights . . . ; but at any event, it would be proper to have one." n92 Wilson and Spencer both clearly treated "neces- sary" and "proper" as distinct terms--as did many other persons during and shortly after the ratification debates. n93 [*290]

n91 2 Elliot's Debates, supra note 24, at 453.

n92 4 id. at 138.

n93 See, e.g., id. at 149 (statement of James Iredell at the North Carolina convention that " i f we had formed a general legislature, with undefined powers, a bill of rights would not only have been proper, but necessary"); 1 Annals of Cong. 500 (Joseph Gales ed., 1789) (statement of James Madison during the debate on the presidential removal power that some persons considered it "improper, or at least unnecessary, to come to any decision on this subject"); id. at 442 (statement of Representative Jackson that if the addition of a bill of rights "is not dangerous or improper, it is at least unnec- essary").

Likewise, a distinction between "necessary" and "proper" pervaded discussions of the Sweeping Clause in the founding era. For example, Edmund Randolph's opinion on the constitutionality of the first Bank of the United States stated that "no power is to be assumed under the general sweeping clause,
but such as is not only necessary, but proper, or perhaps expedient also." n94 Repre- sentative Barry was even clearer on this point in opposing the second Bank, insisting that " t he word proper' is, in my mind, an important and operative word in this sweeping clause of the Constitution. The incidental power to be exercised must not only be necessary, but proper." n95

n94 Opinion of Edmund Randolph (Feb. 12, 1791), reprinted in Legislative and Documentary History of the Bank of the United States 86, 89 (M. St. Clair Clarke & D.A. Hall eds., 1832) hereinafter History of the Bank .

n95 22 Annals of Cong. 696 (1811); see also 28 id. 986 (1814) (statement of Rep- resentative Clopton that the word "necessary" in the Sweeping Clause is "qualified and restricted in its meaning by the addition of the term proper'"). Other participants in the debates over the Bank distinguished "necessary" from "proper," although using "necessary" as the more restrictive term. See Opinion of Alexander Hamilton, on the Constitutionality of the National Bank (Feb. 23, 1791), reprinted in *History of the Bank, supra* note 94, at 95, 106 ("To designate or appoint the money or thing in which taxes are to be paid, is not only a proper, but a necessary exercise of the power of col- lecting them."); Spencer Roane, Roane's "Hampden" Essays, in John Marshall's De- fense of McCulloch v. Maryland 131 (Gerald Gunther ed., 1969) hereinafter Marshall's Defense (writing that a valid law under the Sweeping Clause "must be one which is not only proper, that is peculiar to that end, but also necessary"). As these quotations demonstrate, the words "necessary" and "proper" both can bear different meanings in different contexts. What is significant for our purposes, however, is that the terms were regarded as distinct in so many of these contexts during the founding era.

These comments are consistent with the venerable legal max- im of document construction that presumes that every word of a statute or constitution is used

for a particular purpose. n96 Chief Justice Marshall's emphasis in McCulloch on the difference be- tween the phrase "absolutely necessary" in the Imposts Clause and the word "necessary" in the Sweeping Clause n97 illustrates the [*291] maxim's power for the founding generations. There is thus good reason to think that the word "proper" adds meaning to the Sweeping Clause rather than merely emphasis to the word "neces- sary."

n96 See, e.g., 2A Norman J. Singer, Statutes and Statutory Construction section 46.06 (5th ed. 1992) (describing and citing numerous authorities for the rule in the context of statutory interpretation); John Harrison, Reconstructing the Privileges or Immu- nities Clause, *101 Yale L.J. 1385, 1434 (1992)* (objecting to the standard interpretation of the Fourteenth Amendment's Equal Protection Clause as a general equality provision on the ground that "the word protection is not doing much work in the standard reading of the text").

n97 See supra notes 78-80 and accompanying text.

C. The Meaning of "Proper"

The word "proper" has several meanings that have been part of common English usage since at least the mid-eighteenth centu- ry. Samuel Johnson's dictionary, in both its 1755 and 1785 editions, offered nine different definitions of the word "proper." The first and fifth of these definitions are especially pertinent to our discus- sion: "1. Peculiar; not belonging to more; not common" and "5. Fit; accommodated; adapted; suitable; qualified." n98 The fifth defi- nition closely parallels the now-accepted construction of "neces- sary" in the Sweeping Clause, which seems to have been accepted by default as the construction of "proper" ever since the Court's decision in McCulloch. n99 The first definition, however, was widely in use around the time of the Framing in contexts involving the allocation of governmental powers. This usage suggests that a "proper" law is one that is within the peculiar jurisdiction or re- sponsibility of the relevant governmental actor.

n98 2 Johnson (1785), supra note 69; 2 Johnson (1755), supra note 69. The other definitions seem less applicable in the context of the Sweeping Clause: "2. Noting an individual. 3. One's own. It is joined with any of the possessives: as, my proper, their proper. 4. Natural; original . . . . 6. Exact; accurate; just. 7. Not figurative. 8. It seems in Shakespeare to signify, mere; pure. 9. Elegant; pretty." 2 Johnson (1785), supra note 69; 2 Johnson (1755), supra note 69. The third definition may be an aspect of the first; both emphasize that X is "proper" in relation to Y if X distinctively or peculiarly be- longs to Y.

n99 We know of no court decision that expressly turns on the meaning of the word "proper" in the Sweeping Clause. A recent lower court decision, however, suggests in passing that a law is not "proper" if it violates express constitutional prohibitions. See *Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n., 673 F.2d 425, 455 (D.C. Cir. 1982)*, aff'd sub nom. *Process Gas Consumers Group v. Consumer Energy Council of Am., 463 U.S. 1216 (1983)*.

The word "proper" (or a variation thereon) n100 was used in this jurisdictional sense in four state constitutions that were avail- able as models in the decade preceding the drafting of the Federal Constitution. The first

substantive provision of the Virginia Consti- tution of 1776 declared that " t he legislative, executive, and judi- [*292] ciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other." n101 The Georgia Constitution of 1777 contained an identical separation of powers provision, n102 as did the Vermont Constitution of 1786. n103 In addition, the Connecticut Constitutional Ordinance of 1776 stated

n100 Words like "improper," "properly," and "propriety" are often used in contexts that shed obvious light on the meaning of the root word "proper."

n101 Va. Const. of 1776, paragraph 3 (emphasis added).

n102 Ga. Const. of 1777, art. I. In fact, the Virginia Constitution of 1776 actually referred to the legislative, executive, and judiciary "department," in the singular. We suspect that this was a clerical error in the transcription of the original constitution. The 1830 constitution contains the same provision, which, as in the Georgia document, uses the word "departments" (with no comma following). Va. Const. of 1830, art. II.

n103 Vt. Const. of 1786, ch. II, section VI.

that all the free Inhabitants of this or any other of the United States of America, and Foreigners in Amity with this State, shall enjoy the same justice and Law within this State, which is gen- eral for the State, in all Cases proper for the Cognizance of the Civil Authority and Court of Judicature within the same, and that without Partiality or Delay. n104

n104 Conn. Const. Ordinance of 1776, paragraph 3, reprinted in 2 Sources, supra note 47, at 143 (second emphasis added).

The Vermont Constitution of 1786 similarly declared that " c ourts of justice shall be maintained in every county in this State, and also in new counties when formed; which courts shall be open for the trial of all causes proper for their cognizance." n105 Each of these provisions used the word "proper" to mark out the jurisdic- tion of one or more legal actors. The Virginia, Georgia, and Ver- mont constitutions employed the term explicitly to differentiate the peculiar functions of the respective governmental departments. n106 The Connecticut and Vermont constitutions used the word "prop- er" to refer to the sphere of activity of relevant judicial authori- ties--that is, to refer to their jurisdiction.

n105 Vt. Const. of 1786, ch. II, section IV (emphasis added).

n106 See also Ky. Const. of 1792, art. I, paragraph 2 ("No person, or collection of persons, being of one of these departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly permitted.") (emphasis added).

This was not, of course, the only way in which the word "proper" was used in the state constitutions of that era. For exam- ple, it was sometimes used more generally to mean "suitable" or "appropriate." n107 Our point here is only that the jurisdictional [*293] meaning of "proper" was one common way in which

the word was understood in the era just preceding the drafting of the Federal Constitution.

n107 See, e.g., Del. Declaration of Rights and Fundamental Rules of 1776, art. 18, reprinted in 1 Bernard Schwartz, The Bill of Rights: A Documentary History 278 (1971) (" A well regulated militia is the proper, natural and safe defense of a free government."); Del. Const. of 1776, art. 12 (prescribing a mode of appoint- ment for justices of the peace "if the legislature shall think proper to increase the num- ber"); Md. Declaration of Rights, art. XXV (" A well regulated militia is the proper and natural defence of a free government."); N.Y. Const. of 1777, art. III (per- mitting the council of revision to veto bills that "appear improper to the said council").

This jurisdictional usage of "proper" (or related offshoots of the word) was also prevalent in ordinary legal discourse during and following the drafting of the Federal Constitution. As do the separation of powers provisions of the Virginia, Georgia, and Ver- mont constitutions, some of these uses described the jurisdictional boundaries of the three departments of the national government. For instance, the Constitutional Convention of 1787 attempted to define the powers of the presidency by providing that the execu- tive be entrusted

"with power to carry into effect. the national laws. to appoint to offices in cases not otherwise provided for, and to execute such other powers not Legislative nor Judiciary in their nature.' as may from time to time be delegated by the national Legislature". The words not legislative nor judiciary in their nature' were added to the proposed amendment in consequence of a sugges- tion by Genl Pinkney that improper powers might otherwise be delegated n108

n108 1 The Records of the Federal Convention of 1787, at 67 (Max Farrand ed., 1937) (emphasis added) (punctuation and alterations in original) (footnote omitted).

Madison's notes on the Constitutional Convention further report that Mr. Read argued that " t he Legislature was an improper body for appointments." n109 Similarly, at the Pennsylvania ratifying convention, James Wilson responded to an anti-federalist conten- tion that, in Wilson's words, "improper powers are . . . blended in the Senate." n110 In each of these instances, the word "improper" is clearly used to describe a departure from sound jurisdictional principles of separation of powers. n111 [*294]

n109 1 1787: Drafting the U.S. Constitution 899 (Wilbourn E. Benton ed., 1986) hereinafter Drafting .

n110 2 Elliot's Debates, supra note 24, at 505.

n111 See also 3 Annals of Cong. 704 (1792) (statement of Representative Baldwin that "it is as improper for the Legislative to attend to the execution of a law, as it is for the Executive to meddle in the business of legislation") (emphasis added); id. at 718 (statement of Representative Ames that "the Legislative and Executive branches of Gov- ernment are to be kept distinct, and

this . . . instruction to the Secretary of the Trea- sury to report a plan for redemption of the public debt will produce an improper blend- ing of them") (emphasis added); id. at 1320 (letter to Congress from Justice Iredell and Judge Sitgreaves questioning whether certain administrative or quasi-administrative func- tions vested in the federal courts were "properly of a Judicial nature") (emphasis added).

This meaning of "proper" also was often employed during the 1791 congressional debates on the post office bill. The original bill specifically designated the routes by which mail was to be car- ried. n112 Representative Sedgwick moved to amend the bill to au- thorize the carriage of mail "by such route as the President of the United States shall, from time to time, cause to be established." n113 Several representatives objected to this amendment on the ground that it would unconstitutionally delegate legislative power to the President. Two of them expressly framed this argument in terms of the "propriety" of the proposed action. Representative Livermore "did not think they could with propriety delegate that power, which they were themselves appointed to exercise." n114 Represen- tative Page even more forcefully declared:

n112 The final legislation did so as well. Act of Feb. 20, 1792, ch. 7, section 1, 1 Stat. 232.

n113 3 Annals of Cong. 229 (1791) (quoting Representative Sedgwick).

n114 Id. (emphasis added); see also id. at 422 (report of comments by Representative Smith that because the President has no constitutional command over the militia until they are called into actual service, "he cannot, with any propriety, be invested with th e power to arrange the state militias into units ") (emphasis added).

If the motion before the committee succeeds, I shall make one which will save a deal of time and money, by making a short session of it; for if this House can, with propriety, leave the busi- ness of the post office to the President, it may leave to him any other business of legislation; and I may move to adjourn and leave all the objects of legislation to his sole consideration and direction. n115

n115 Id. at 233 (emphasis added).

Furthermore, Representative Sedgwick, responding to another delegation's challenge to a different portion of his amendment, n116 noted that Congress had previously authorized the appointment of [*295] revenue officers but had "very properly left with the Execu- tive" n117 the determination of the number of such officers.

n116 The Annals do not give the text of this portion of Representative Sedgwick's amendment, but one can infer from the debate that it authorized the appointment of deputy postmasters without specifying the number and precise duties of such officers. A provision to this effect ultimately became section 3 of the enacted statute: " T here shall be one Postmaster General, who shall have authority to appoint an assistant, and deputy postmasters, at all places where such shall be found necessary." Act of Feb. 20, 1792, ch. 7, section 3, 1 Stat.

232, 234.

n117 3 Annals of Cong. 239 (1791) (emphasis added).

Other statements from the post office debate involving use of the word "peculiar" indirectly reinforce this jurisdictional con- struction of "proper." Representative Vining concluded, on the basis of President Washington's invitation to Congress to take up the subject of the post office, that the President "had no other conception of the matter than that it was the peculiar privilege of the Legislature." n118 Representative Sedgwick, commenting gener- ally on the difficulty of drawing "a boundary line between the business of Legislative and Executive," suggested "that as a gener- al rule, the establishment of principles was the peculiar province of the former, and the execution of them, that of the latter." n119 Both of these representatives, therefore, used the word "peculiar" in the same way that other participants (including Sedgwick) in the same debate used the word "proper," namely, to describe the appropriate jurisdiction of the legislative and executive depart- ments.

n118 Id. at 235 (emphasis added).

n119 Id. at 239-40 (emphasis added).

Representative Findley echoed this usage of "peculiar" and directly equated it with "proper" the next year in a debate over a proposed resolution " t hat the Secretary of the Treasury be di- rected to report to this House his opinion of the best mode for raising the additional supplies requisite for the ensuing year." n120 He argued that the demand for a secretarial report was an uncon- stitutional delegation of legislative power n121 because " t he House of Representatives are peculiarly intrusted with the authority of digesting fiscal arrangements and principles . . . . I consider this . . . method of originating money bills highly improper in it- self . . . ." n122

n120 Id. at 437 (1792).

n121 In fact, such a report would merely be advisory, and its filing with the House could in no way constitute an exercise of legislative authority. See id. at 716-18 (state- ment of Representative Ames regarding a different, but similar, report by the Secretary of the Treasury).

n122 Id. at 447 (emphasis added).

These usages of "peculiar" are significant because they under- score the dictionary definition of "proper" that is most relevant to [*296] our thesis: "Peculiar; not belonging to more; not common." n123 Such usages strongly suggest that "proper" and "peculiar" were at the time of the Framing regarded as synonymous in certain legal contexts involving the distribution of governmental powers.

n123 2 Johnson (1785), supra note 69 (emphasis added).

Justice Paterson's 1798 opinion in Calder v. Bull n124 reflected the same jurisdictional understanding of "proper." Calder involved a Connecticut statute that set aside a testamentary decree and ordered a new hearing. The Court

unanimously upheld the act's constitutionality. "True it is," Justice Paterson wrote, "that the awarding of new trials falls properly within the province of the judiciary; but if the Legislature of Connecticut have been in the uninterrupted exercise of this authority, . . . we must . . . respect their decisions as flowing from a competent jurisdiction, or consti- tutional organ." n125 Under this interpretation, a "proper" alloca- tion of governmental powers is one that conforms to generally accepted jurisdictional lines. n126

n124 *3 U.S. (3 Dall.) 386 (1798)*.

n125 *Id. at 395* (opinion of Paterson, J.) (first emphasis added).

n126 "Proper" still held this meaning for the Court 30 years later. See *United States v. Tingey, 30 U.S. (5 Pet.) 115, 128 (1831)* (" T he United States being a body politic, may, within the sphere of the constitutional powers confided to it, and through the in- strumentality of the proper department to which those powers are confided, enter into contracts . . . .") (emphasis added).

Other speakers used "proper" to denote the appropriate divi- sion of authority between state governments and the new national government. During the Constitutional Convention, Madison of- fered a list of powers that he described as "proper to be added to those of the General Legislature." n127 Shortly thereafter, in New York's ratification debates, Alexander Hamilton described "com- merce, manufactures, population, production, and common resourc- es of a state" as "the proper objects of federal legislation." n128 Later in the same convention, in discussing how the Framers chose to allocate powers to the federal government, Hamilton also de- clared:

n127 1 Drafting, supra note 109, at 904 (emphasis added).

n128 2 Elliot's Debates, supra note 24, at 265-66 (emphasis added).

The question, then, of the division of powers between the gener- al and state governments, is a question of convenience: it be- comes a prudential inquiry, what powers are proper to be re- served to the latter; and this immediately involves another inqui- [*297] ry into the proper objects of the two governments. This is the criterion by which we shall determine the just distribution of powers. n129

n129 Id. at 350 (emphasis omitted and added).

Even more pointedly, Roger Sherman urged that " i f the federal government keeps within its proper jurisdiction, it will be the inter- est of the state legislatures to support it, and they will be a power- ful and effectual check to its interfering with their ju- risdictions." n130

n130 Roger Sherman, A Citizen of New Haven, Conn. Courant, Jan. 7, 1788, reprint- ed in 3 Documentary History of the Ratification of the Constitution 525 (Merrill Jensen ed., 1978) hereinafter 3 Documentary History (emphasis added).

Thus, the word "proper" was often used during the founding era to describe

the powers of a governmental entity as peculiarly within the province or jurisdiction of that entity.

D. The Jurisdictional Meaning of the Sweeping Clause

The Sweeping Clause requires valid executory laws to be "proper." If the word "proper" in that clause has a jurisdictional meaning, then the authority conferred by executory laws must distinctively and peculiarly belong to the national government as a whole and to the particular national institution whose powers are carried into execution. In view of the limited character of the national government under the Constitution, Congress's choice of means to execute federal powers would be constrained in at least three ways: first, an executory law would have to conform to the "proper" allocation of authority within the federal government; second, such a law would have to be within the "proper" scope of the federal government's limited jurisdiction with respect to the retained prerogatives of the states; and third, the law would have to be within the "proper" scope of the federal government's limit- ed jurisdiction with respect to the people's retained rights. In other words, under a jurisdictional construction of the Sweeping Clause, executory laws must be consistent with principles of separation of powers, principles of federalism, and individual rights. n131 [*298]

n131 This distinction among separation of powers, federalism, and individual rights, al- though often analytically useful, should not be overemphasized. Separation of powers and federalism are vehicles for securing individual rights, and many of what we today regard as individual rights have foundations in, and important implications for, considerations of constitutional structure. See generally Amar, supra note 88 (describing the continuity be- tween the original Constitution and the Bill of Rights). Moreover, persons in the found- ing era who discussed jurisdictional limits on the national government did not always sharply distinguish among these categories. Accordingly, we do not mean to suggest that all issues regarding the jurisdiction of the national government can be assigned uniquely to one of these analytical categories. Moreover, although we later discuss some constitu- tional implications of our construction of the Sweeping Clause, see infra Part III, we do not discuss in detail how to determine the precise content of the national government's jurisdiction--for example, whether it is defined solely by reference to express constitution- al provisions or in part by background principles that underlie the Constitution. We mean only to establish that whatever those jurisdictional limits may be, the Sweeping Clause is a textual vehicle for their enforcement.

Such a jurisdictional construction of the Sweeping Clause is supported by evidence from four distinct sources: statements by eighteenth- and nineteenth-century legal actors; the language and structure of other provisions of the Federal Constitution; the lan- guage and structure of the power-granting provisions of contempo- raneous state constitutions; and inferences from the Framers' de- sign of the national government. Each source independently contributes to an understanding of the jurisdictional nature of the Sweeping Clause.

1. The Founders' Understanding of the Sweeping Clause. Many legal actors, spanning the half-century from the Founding to the 1830s, interpreted the Sweeping Clause in pre- cisely the jurisdictional fashion that we suggest. At a minimum, their statements--which we present in chronological sequence to

emphasize the consistency of this interpretation over time--show that such a construction of the Sweeping Clause was a linguistical- ly acceptable, and accepted, interpretation of the clause during the founding era. At a maximum, the statements directly demonstrate that our proposed construction of the Sweeping Clause is the best representation of the clause's original public meaning.

In a response to George Mason's well-publicized objections to the proposed Constitution during the Virginia ratification debate, "An Impartial Citizen" clearly set forth the idea that a "proper" law under the Sweeping Clause must respect limitations that are not expressly enumerated in the constitutional text:

It is also objected by Mr. Mason, that under their own construc- tion of the general clause, at the end of the enumerated powers, the Congress may grant monopolies in trade, constitute new crimes, inflict unusual punishments, and in short, do whatever they please . . . . I insist that Mr. Mason's construction on this clause is absolutely puerile, and by no means warranted by the [*299] words, which are chosen with peculiar propriety . . . . In this case, the laws which Congress can make, for carrying into execu- tion the conceded powers, must not only be necessary, but prop- er--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 unconsti- tutional act; yet, as such a law would be manifestly not proper, it would not be warranted by this clause, without absolutely depart- ing from the usual acceptation of words. n132

n132 An Impartial Citizen V, Petersburg Va. Gazette, Feb. 28, 1788, reprinted in 8 Documentary History of the Ratification of the Constitution 428, 431 (John P. Kaminski & Gaspare J. Saladino eds., 1988) (emphasis added).

This passage distinguishes between the words "necessary" and "proper" in the Sweeping Clause and construes the latter as a powerful limitation on Congress's executory authority. Moreover, it observes that this construction of the word "proper" reflects "the usual acceptation of words" n133 as understood by the public.

n133 Id.

In The Federalist, Alexander Hamilton similarly argued that the word "proper" in the Sweeping Clause embodies principles of federalism. In answer to his own question--"Who is to judge of the necessity and propriety of the laws to be passed for executing the powers of the Union?"--he responded:

The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is found- ed. Suppose, by some forced constructions of its authority (which, indeed, cannot easily be imagined), the federal legislature should attempt to vary the law of descent in any State, would it not be evident that in making such an attempt it had exceeded its ju- risdiction and infringed upon that of the State? Suppose, again, that upon the pretense of an interference with its revenues, it should undertake to abrogate a land tax imposed by the authori- ty of a State; would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to this

species of tax, which its Constitution plainly supposes to exist in the State governments? n134

n134 The Federalist No. 33, at 203-04 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

A jurisdictional view of the Sweeping Clause was also en- dorsed by Representative Ames during the debates on the first Bank of the United States. Speaking after the ratification of the [*300] Federal Constitution but nearly a year before the ratification of the Bill of Rights, Ames declared that

Congress may do what is necessary to the end for which the Constitution was adopted, provided it is not repugnant to the natural rights of man, or to those which they have expressly reserved to themselves, or to the powers which are assigned to the States. This rule of interpretation seems to be a safe, and not a very uncertain one, independently of the Constitution itself. By that instrument certain powers are specially delegated, together with all powers necessary or proper to carry them into execution. That construction may be maintained to be a safe one which promotes the good of the society, and the ends for which the Government was adopted, without impairing the rights of any man, or the powers of any State. n135

n135 2 Annals of Cong. 1956 (1791).

This passage is a virtual declaration that a "necessary" law that impairs "the rights of any man, or the powers of any State" n136 is beyond Congress's power under the Sweeping Clause because it is not "proper."

n136 Id.

Representative Niles similarly commented in the debate over the postal bill in 1791:

But, sir, the question is simply, whether Congress have a right to authorize the carrier of the mail to carry passengers on hire, through those States where an exclusive right of carrying pas- sengers for hire has been granted by the State Government, and still exists. You are empowered by the Constitution to establish post offices and post roads, and to do whatever may be necessary and proper to carry that power into effect. Now, sir, is it neces- sary, in order to the transportation of your mail, that you should erect stage-coaches for the purpose of transporting passengers? What has your mail to do with passengers transported for hire? Why, sir, nothing more than this--by granting to the carrier of your mail a right to carry passengers for hire, the carriage of the mail may be a little less expensive. Does this consideration ren- der it necessary and proper for you to violate the laws of the States? If not, you will, by so doing, violate their rights, and overleap the bounds of your own. This matter may occasion a legal adjudication, in order to which the Judiciary must deter- mine, whether you have a constitutional right to establish this regulation, and this will depend on the question whether it be [*301] necessary and proper. A curious discretionary law question! Such a one as I

presume never entered the thought of the States when they adopted the Constitution. But, sir, if the trifling pecuniary saving proposed by this regulation, entitles it to the character of a necessary one, or, in the sense of the Constitution, a proper one, and so a constitutional one, what may not Congress do un- der the idea of propriety? It may be proper, for the sake of a more advantageous contract for carrying the mail, to authorize the carrier to erect ferry-boats, for the transportation both of the mail and of passengers--or to grant the right of driving herds of cattle over toll bridges and turnpike roads, toll free, in violation both of legal and prescriptive rights--to erect post houses under peculiar regulations, and with exclusive right. What, sir, may not be construed as proper to be done by Congress? Under this idea, the whole powers vested in Congress by the Constitution will be found in the magic word proper; and the States might have spared, as nugatory, all their deliberations on the Constitution, and have constituted a Congress, with general authority to legis- late on every subject, and in any manner it might think proper. What rights, then, remain to the States? None, sir, but the empty denomination of Republican Governments. n137

n137 3 id. at 309-10 (1792); see also id. at 304-05 (similar comments by an unidenti- fied representative). But see id. at 305 (comments by another unidentified representative contesting the comments of the former).

St. George Tucker expressed a similar view of the Sweeping Clause, although somewhat obliquely, in 1803 in his appendix to Blackstone's Commentaries. n138 According to Tucker, under the Sweeping Clause, Congress may exercise a power not expressly enumerated in the Constitution if "it is properly an incident to an express power, and necessary to it's sic execution." n139 Tucker insisted that this provision would "operate as a powerful and im- mediate check upon the proceedings of the federal legislature" n140 by providing standards that both legislators and judges could use [*302] to assess the constitutionality of executory laws. His discussion of the role of judicial review is particularly important. Tucker began by restating, almost verbatim, Madison's argument that a limited, and limiting, construction of the Sweeping Clause is necessary for judicial review. n141 He then gave a specific example:

n138 1 St. George Tucker, Appendix to 1 William Blackstone, Commentaries (St. George Tucker ed., Philadelphia, Birch & Small 1803).

n139 Id. at 288 (emphasis added).

n140 Id. Tucker went on to state that

this construction of the words "necessary and proper," is not only consonant with that which prevailed during the discussions and ratifications of the constitu- tion, but is absolutely necessary to maintain their consistency with the peculiar character of the government, as possessed of particular and defined powers, only; not of the general and indefinite powers vested in ordinary governments.

Id.

n141 He said:

If it be understood that the powers implied in the specified powers, have an immediate and appropriate relation to them, as means, necessary and proper for carrying them into execution, questions on the constitutionality of laws passed for this purpose, will be of a nature sufficiently precise and determinate, for judicial cognizance and control. If on the one hand congress are not limited in the choice of the means, by any such appropriate relation of them to the specified powers, but may use all such as they may deem capable of answering the end, without regard to the necessity, or propriety of them, all questions relating to means of this sort must be questions of mere policy, and expediency, and from which the judicial interposition and control are completely excluded.

Id. at 288-89; cf. 4 Elliot's Debates, supra note 24, at 568 (setting forth Madison's al- most identical original argument).

If, for example, congress were to pass a law prohibiting any person from bearing arms, as a means of preventing insurrec- tions, the judicial courts, under the construction of the words necessary and proper, here contended for, would be able to pro- nounce decidedly upon the constitutionality of these means. But if congress may use any means, which they choose to adopt, the provision in the constitution which secures to the people the right of bearing arms, is a mere nullity; and any man imprisoned for bearing arms under such an act, might be without relief; because in that case, no court could have any power to pro- nounce on the necessity or propriety of the means adopted by congress to carry any specified power into complete effect. n142

n142 Tucker, supra note 138, at 289.

Tucker illustrated his interpretation of the Sweeping Clause by positing an executory law that would potentially violate the Second Amendment, n143 but, significantly, he framed the constitutional case against the law in terms of the Sweeping Clause rather than in terms of the Amendment. In Tucker's view, an executory law that infringed on the right to keep and bear arms would not be "necessary and proper" within the meaning of the Sweeping Clause. Perhaps he meant only that such a law would not be es- sential to the end of suppressing insurrections and thus would not satisfy a strict definition of necessity similar to that later advanced by opponents of the Bank of the United States in McCulloch v. [*303] Maryland. n144 It is at least as plausible, however, to read the pas- sage as saying that laws that violate individual rights are not "proper," regardless of whether they are "necessary."

n143 U.S. Const. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall

not be infringed.").

n144 See supra notes 72-73 and accompanying text.

An explicit interpretation of "proper" as a vehicle for securing rights was put forward in 1815 in an argument to the U.S. Su- preme Court in United States v. Bryan & Woodcock. n145 A 1797 statute provided that debts owed to the United States by bankrupt debtors should be given priority over the claims of all other credi- tors. n146 A revenue officer died one month before enactment of this statute, in debt to the United States. The debtor's garnishees challenged the United States' attempt to invoke its statutory pri- ority retroactively. The Supreme Court held that the statute, by its terms, did not apply to the case. n147 Accordingly, the Court did not reach the constitutional argument of counsel for the debtor's garnishees that even if the statute applied to the debtor, such retroactive operation of a civil law n148 would be unconstitutional. Counsel's unaddressed argument was expressly couched in terms of the Sweeping Clause. He correctly traced the source of Congress's power to enact the challenged law to the Sweeping Clause. n149 Af- ter noting that laws under the clause must be both necessary and proper, he argued:

n145 *13 U.S. (9 Cranch) 374, 377 (1815).*

n146 The statute stated in part

t hat where any revenue officer, or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied . . . .

Act of Mar. 3, 1797, ch. 20, section 5, 1 Stat. 515.

n147 The statute applied to any persons "hereinafter becoming indebted" to the *Unit- ed States. Bryan & Woodcock, 13 U.S. (9 Cranch) at 387.* Although the debtor died before the statute was enacted, the accounting that revealed his debt to the United States was completed after the statute took effect. The Court concluded that the debt was fixed at the time of death, not the time of settling accounts. Id.

n148 The Court had already ruled that the Constitution's ban on ex post facto laws, U.S. Const. art. I, section 9, cl. 3, applies only to retrospective criminal laws. See *Calder v. Bull, 3 U.S. (3 Dall.) 386, 390-92 (1798)* (opinion of Chase, J.), see also *id. at 395* (opin- ion of Paterson, J.); *id. at 398* (opinion of Iredell, J.). See generally Currie, supra note 3, at 43-45 (discussing the arguments for and against such a limited conception of ex post facto laws).

n149 *Bryan & Woodcock, 13 U.S. (9 Cranch) at 375.*

To pass a retrospective law . . . would not be "proper," because it would be to travel a path of error, which the people have [*304] positively forbidden their own state governments to use. It would not be "proper," because it would overturn instead of "establish- ing justice:" it would be to frustrate in place of promoting one of the first great objects of the people in forming this govern- ment. n150

n150 *Id. at 377;* see also *id. at 376* (noting that the "talismanic" words "necessary and proper" placed important limitations on Congress prior to the ratification of the Bill of Rights).

Although conceding that some retrospective civil laws might be constitutional, n151 counsel urged that the law in question was im- proper because

n151 *Id. at 378.*

i t cannot be "necessary and proper," nor will it "establish jus- tice," to transfer to others the consequences of their own improv- idence. Such, the Defendants in this case, contend would virtually be the effect of retrospective liens and priorities, in favor of the government, and at the expense of the citizen . . . . To set up such liens and priorities would not be "proper," because it would impair the obligation of contracts between citizen and citizen, by rendering unavailing the means of insuring their execution. It would not be "proper," because it would be lessening the security for private "property," if not taking away by undue "process" of law . . . . An act, then, producing any of these effects could not have been "necessary and proper;" and is not warranted by the constitution n152

n152 *Id. at 378-79.*

A similar jurisdictional construction of the Sweeping Clause found support four years later in an unlikely source: Chief Justice Marshall's opinion in McCulloch v. Maryland. n153 Chief Justice Marshall formulated his test for the constitutionality of executory laws in now-famous language: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are ap- propriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." n154 Elsewhere, he emphasized that Congress [*305] could not, "under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the govern- ment." n155

n153 *17 U.S. (4 Wheat.) 316 (1819).*

n154 Id. at 421. Professor Currie aptly describes this formulation as "remarkably care- ful and hard to improve upon in the light of a century and a half of experience." Currie, supra note 3, at 162. Chief Justice Marshall may have borrowed the formulation from Senator Taylor, a defender of the Bank of the United States, who expressly tied this language to the word "proper" in the

Sweeping Clause during the 1811 debates on renewal of the Bank's charter:

> The signification of the word proper I take to contain the description of the measure or law to which it is applied, in the following respects: whether the law is in conformity to the letter, the spirit, and the meaning of the Constitu- tion; whether it will produce the good end desired in the most ready, easy, and convenient mode, that we are acquainted with.

22 Annals of Cong. 296 (1811) (statement of Senator Taylor).

n155 *McCulloch, 17 U.S. (4 Wheat.) at 423.*

One might argue, however, that these passages from McCulloch are merely a declaration that executory laws must be suitable "for carrying into Execution" n156 enumerated powers. n157 Under this interpretation, Chief Justice Marshall's assertion that Congress cannot pass laws that do not "consist with the letter and spirit of the constitution" n158 or "for the accomplishment of ob- jects not entrusted to the government" n159 does not address the substance of the executory laws themselves but only insists that these laws directly relate to the execution of an enumerated pow- er. n160

n156 U.S. Const. art. I, section 8, cl. 18.

n157 See generally supra notes 23-24 and accompanying text.

n158 *McCulloch, 17 U.S. (4 Wheat.) at 421.*

n159 *Id. at 423.*

n160 Chief Justice Marshall acknowledged, of course, that executory laws cannot vio- late express constitutional provisions. See id. (stating that Congress cannot "adopt mea- sures which are prohibited by the constitution").

This interpretation of Chief Justice Marshall's opinion in McCulloch is implausible, however, in light of his subsequent, pseudonymous defense of that opinion against editorial attacks published in Virginia newspapers. An 1819 essay by "Am- phictyon" n161 harshly criticized Chief Justice Marshall's broad con- struction of Congress's powers under the Sweeping Clause. n162 [*306] Specifically, Amphictyon suggested that Chief Justice Marshall's interpretation of the Sweeping Clause would sustain a federal statute prohibiting state governments from levying property taxes, on the ground that this prohibition would be conducive to the collection of federal taxes. n163 Chief Justice Marshall heatedly in- sisted:

n161 Gerald Gunther surmises that Amphictyon was probably Judge William Brockenbrough. See Marshall's Defense, supra note 95, at 1.

n162 A Virginian's "Amphictyon" Essays, reprinted in id. at 52. Amphictyon's criticisms dealt exclusively with Chief Justice Marshall's construction of the word "necessary." Amphictyon interpreted the word "proper" to require a telic

relationship between means and ends much like that required by Chief Justice Marshall's interpretation of the word "necessary." Amphictyon wrote:

> Suppose the word necessary had been omitted. Then Congress might have made all laws which might be proper, that is suitable, or fit, for carrying into execu- tion the other powers; in that case they would have had a wider field of discre- tion: they would then have only been obliged to enquire what were the suitable means to attain the desired end.

Id. at 66. Amphictyon thus recognized that one term in the Sweeping Clause imposes telic limitations on Congress and another imposes jurisdictional limitations. He simply mismatched the clause's terms and limitations.

n163 In Amphictyon's example,

> Congress passes a law to raise the sum of ten millions of dollars by a tax on land . . . . It would be extremely convenient and a very appropriate measure, and very conducive to their purpose of collecting this tax speedily and promptly, if the state governments could be prohibited during the same year from laying and collecting a land tax.

Id. at 66-67.

Now I deny that a law prohibiting the state legislatures from imposing a land tax would be an "appropriate" means, or any means whatever, to be employed in collecting the tax of the United States. It is not an instrument to be so employed. It is not a means "plainly adapted," or "conducive to" the end. The passage of such an act would be an attempt on the part of Con- gress, "under the pretext of executing its powers, to pass laws for the accomplishment of objects not intrusted to the govern- ment." n164

n164 Marshall's "A Friend to the Union" Essays, reprinted in id. at 78, 100 (quoting *McCulloch, 17 U.S. (4 Wheat.) at 423*).

If Chief Justice Marshall meant that such a law could not be an efficacious, and hence a "necessary," means of fostering federal tax collection, he was so clearly wrong that the claim would be disin- genuous. Nor could he plausibly claim that such a law was not linked to the execution of an enumerated power; the federal gov- ernment is expressly given the power to levy taxes. n165 If he were serious that such a law was not, and could not be, a constitutional exercise of the Sweeping clause power, he must have based that conclusion on something in the clause other than the word "neces- sary"--he must have meant that the law would not be "proper" because it would infringe on the protected rights of the states.

n165 U.S. Const. art. I, section 8, cl. 1.

Finally, President Andrew Jackson explicitly adopted such a jurisdictional construction of the word "proper" in his message to Congress explaining his veto of the Bank of the United States' [*307] reauthorization bill in 1832. n166 The bill would have authorized aliens to hold stock in the Bank and thus indirectly to have inter- ests in the Bank's real property. Most of the states at that time had "laws disqualifying aliens from acquiring or holding lands within their limits," n167 which Jackson claimed would be frustrated by the bank bill. He concluded that " t his privilege granted to aliens is not necessary' to enable the bank to perform its public duties, nor in any sense proper,' because it is vitally subversive of the rights of the States." n168 The word "proper," according to Jackson, serves as an important safeguard of principles of federalism.

n166 Andrew Jackson, Veto Message, reprinted in 3 The Founders' Constitution, supra note 3, at 263.

n167 Id. at 264.

n168 Id. at 265.

Jackson also treated the requirement that executory laws be "proper" as a source of other jurisdictional limitations on Con- gress. The proposed bank bill, like its predecessor, promised that no other national bank would be established during the Bank of the United States' period of incorporation. Jackson doubted that Congress had power under the Sweeping Clause to bind its legisla- tive successors in this way:

It can not be "necessary" or "proper" for Congress to barter away or divest themselves of any of the powers vested in them by the Constitution to be exercised for the public good. It is not "necessary" to the efficiency of the bank, nor it is "proper" in relation to themselves and their successors. They may properly use the discretion vested in them, but they may not limit the discretion of their successors. This restriction on themselves and grant of a monopoly to the bank is therefore unconstitution- al. n169

n169 Id. at 264.

He also doubted Congress's power to make the United States a stockholder in the Bank, which he thought would unduly extend the government's constitutional power to acquire land:

The Government of the United States have sic no constitutional power to purchase lands within the States except pursuant to article I, section 8, clause 17 "for the erection of forts, maga- zines, arsenals, dockyards, and other needful buildings," and even for those objects only "by the consent of the legislature of the [*308] State in which the same shall be." By making themselves stock- holders in the bank and granting to the corporation the power to purchase lands for other purposes they assume a power not granted in the Constitution and grant to others what they do not themselves possess. It is not

necessary to the receiving, safe-keep- ing, or transmission of the funds of the Government that the bank should possess this power, and it is not proper that Con- gress should thus enlarge the powers delegated to them in the Constitution. n170

n170 Id. at 265. We take no position on whether President Jackson correctly under- stood the scope of the government's power to acquire land.

Nor, said Jackson, could Congress use the Bank and its ability to circulate notes as a means of exercising its power " t o coin Mon- ey, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures." n171 This is a power to be ex- ercised by Congress: "It is neither necessary nor proper to transfer its legislative power to such a bank, and therefore unconstitu- tional." n172 Jackson thus saw the word "proper" as a wide-ranging prohibition on undue extensions of congressional power and on delegations of legislative authority. The Sweeping Clause, in his view, kept Congress within its constitutional jurisdiction. n173

n171 U.S. Const. art. I, section 8, cl. 5.

n172 3 The Founders' Constitution, supra note 3, at 265.

n173 The Kentucky Court of Appeals made the same point six years later in *Dickey v. Maysville, Washington, Paris & Lexington Turnpike Rd. Co., 37 Ky. (7 Dana) 113 (1838)*, stating in dictum that an executory law that will effectuate a constitutional end is permissible, "unless it be prohibited by the constitution, or be subversive of some funda- mental principle, and, therefore, would not be proper' as well as necessary." *Id. at 132*.

2. Comparison with Other Constitutional Provisions. An examination of the Sweeping Clause in relation to other constitu- tional clauses even more powerfully supports the proposition that the word "proper" is a substantive limitation on congressional power rather than merely a superfluous counterpart to the word "necessary."

For example, the Recommendation Clause of Article II, Sec- tion 3 commands the President to recommend to Congress "such Measures as he shall judge necessary and expedient." n174 The use of the word "expedient" as a counterpart to "necessary" is striking in comparison to the pairing of "necessary" and "proper" in the [*309] Sweeping Clause. As noted earlier, n175 Samuel Johnson's dictio- nary gave two definitions of "proper" that could naturally fit the term in the context of the Sweeping Clause: "1. Peculiar; not be- longing to more; not common . . . ; 5. Fit; accommodated; adapt- ed; suitable; qualified." n176 Johnson's dictionary further defines "expedient" as "proper; fit; convenient, suitable." n177 The latter three terms in this definition plainly overlap with, and are equiva- lent to, the terms in the fifth definition of "proper." All these terms convey the idea of a telic relationship: means are expedient if they will promote their appointed ends. n178

n174 U.S. Const. art. II, section 3 (emphasis added).

n175 See supra note 98 and accompanying text.

n176 2 Johnson (1785), supra note 69.

n177 1 Johnson (1785), supra note 69.

n178 This, of course, is precisely the meaning of the word "necessary" in the *Sweeping Clause*. *See supra* notes 86-88 and accompanying text.

It is significant that the Constitution uses "necessary and ex- pedient" in one provision and "necessary and proper" in another. If the Framers' design was to have a term accompanying "neces- sary" in the Sweeping Clause that meant only "fit" or "suitable," they could have effectuated that design precisely and unambigu- ously by using "expedient" instead of "proper," as they did in Article II, Section 3. However, they did not.

In addition, although each use of "proper" in the Constitution other than in the Sweeping Clause carries this meaning of "fit" or "suitable," the different context in which the word "proper" ap- pears in the Sweeping Clause warrants attributing to it a different meaning from the other usages. Specifically, before 1808, Congress could not bar the importation "of such Persons as any of the States now existing shall think proper to admit;" n179 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;" n180 and in case of disagreement between the House and Senate on a time of adjournment, the President "may adjourn them to such Time as he shall think prop- er." n181 In each of these provisions, however, the word "proper" stands alone, whereas in the Sweeping Clause, as in the structurally similar Recommendation Clause, it is conjoined with another adjective. Furthermore, these other provisions all overtly [*310] confer discretionary power on a political actor to do what he or it "think s " proper. n182 In that context, it is natural to use "proper" to mean, in essence, "expedient." In contrast, the Sweeping Clause does not expressly give Congress untrammelled discretion, but rather defines and limits Congress's authority. It is therefore more natural to think that the Sweeping Clause uses "proper" in its jurisdictional sense.

n179 U.S. Const. art. I, section 9, cl. 1.

n180 Id. art. II, section 2, cl. 2.

n181 Id. art. II, section 3.

n182 See supra notes 31-39 and accompanying text.

Another instructive intraconstitutional comparison is between the Sweeping Clause and the Territories Clause, which gives Con- gress "Power to dispose of and make all needful Rules and Regu- lations respecting the Territory or other Property belonging to the United States." n183 "Needful," according to Samuel Johnson, was a synonym of "necessary." n184 It is therefore interesting that the Territories Clause requires that rules and regulations merely be "needful," rather than both "needful and proper." This wording was probably not accidental. Congress has general, rather than limited, legislative powers over the territories. n185 That is, when legislating for the territories, Congress is not confined to the sub- ject areas enumerated elsewhere in the Constitution. By contrast, when Congress passes "necessary and proper" laws pursuant to the

Sweeping Clause, its actions must "carry into Execution" n186 one or more of the national government's enumerated powers. It is noteworthy that Congress's general power over territories and property is described as the power to "make all needful Rules and Regulations," n187 whereas in its role as part of a government of limited powers, Congress is granted only the power to make laws [*311] that are both "necessary and proper." n188 The absence of the word "proper" from the Territories Clause highlights the word's role in the Sweeping Clause as a textual limitation on Congress's legisla- tive powers. n189 [*312]

n183 U.S. Const. art. IV, section 3, cl. 2 (emphasis added). The District Clause, id. art. I, section 8, cl. 17, is also substantively similar to the Sweeping Clause and Territories Clause. The District Clause, however, simply authorizes Congress " t o exercise exclusive Legislation in all Cases whatsoever," id., over the seat of government and does not use any other ad- jectives to qualify that power, see id.

n184 2 Johnson (1785), supra note 69.

n185 See *National Bank v. County of Yankton, 101 U.S 129, 133 (1880)* (Congress has "full and complete legislative authority over the people of the Territories and all the de- partments of the territorial governments."); Gary Lawson, Territorial Governments and the Limits of Formalism, *78 Cal. L. Rev. 853, 864 (1990)*. At least, Congress has such gen- eral power over territory that is not within the boundaries of a state. Whether Congress has equal power over federal land that is within a state's boundaries and was not pur- chased with the consent of the state's legislature is a complex question we do not ad- dress here. For an intriguing perspective on this problem, see Engdahl, supra note 9.

n186 U.S. Const. art. 1, section 8, cl. 18.

n187 Id. art. IV, section 3, cl. 2 (emphasis added).

n188 Id. art. I, section 8, cl. 18 (emphasis added).

n189 The enforcement provisions of the Thirteenth, Fourteenth, and Fifteenth Amend- ments ("the Reconstruction Amendments") are also similar enough to the Sweeping Clause to warrant a brief comparison. Section 2 in both the Thirteenth and Fifteenth Amendments provides that "Congress shall have power to enforce this article by appro- priate legislation." Id. amend. XIII, section 2; id. amend. XV, section 2. Section 5 of the Fourteenth Amendment gives to Congress "power to enforce, by appropriate legislation, the provi- sions of this article." Id. amend. XIV, section 5.

The rationale behind these provisions is obvious. The Sweeping Clause only em- powers Congress to enact laws that "carry into Execution" powers vested in the nation- al government. Inasmuch as the substantive provisions of the Reconstruction Amendments do not vest powers in the national government, but rather prohibit the exercise of state power, an explicit enforcement power was needed to enable Congress to legislate in the subject areas the Amendments covered. (The states, of course, have always had the au- thority to legislate on subjects covered by the Reconstruction Amendments. See Akhil Reed Amar, The Case of the Missing Amendments: R.A.V. v. City of St. Paul, *106 Harv. L. Rev. 124, 155 (1992)*).

It is less obvious, however, why the drafters of the Reconstruction Amendments did not simply follow the language of the Sweeping Clause. The text of the Thirteenth Amendment, including the language in Section 2 concerning "appropriate legislation," originated in 1864 with the Senate Committee on the Judiciary. See Cong. Globe, 38th Cong., 1st Sess. 1313 (1864). Senator Charles Sumner proposed several amendments to the text that would have imported the Sweeping Clause's "necessary and proper" lan- guage into the Thirteenth Amendment, see id. at 1482-83, 1487-88, but these proposals did not excite much interest. By contrast, John Bingham's original draft of the Four- teenth Amendment directly tracked the language of the Sweeping Clause, see Cong. Globe, 39th Cong., 1st Sess. 1034 (1866), but the Joint Committee on Reconstruction's subsequent draft, which ultimately became the Fourteenth Amendment, instead substituted the phrase "appropriate legislation;" see id. at 2286 (statement of Representative Stevens). The available records do not reveal why, in 1864, these congressional committees, and in particular the Senate Committee on the Judiciary, chose the "appropriate legislation" language rather than the established "necessary and proper" language that Senator Sumner and Representative Bingham favored. There is evidence, however, that the term "appropriate" was taken from Chief Justice Marshall's opinion in McCulloch, in which he used the term "appropriate" to help define the scope of the *Sweeping Clause*. *McCulloch v. Maryland 17 U.S. (4 Wheat.) 316, 421 (1819)*. In the 1866 debates on the Civil Rights Act, Representative Wilson copiously cited McCulloch as an authoritative exposition of the meaning of Section 2 of the Thirteenth Amendment. See Cong. Globe, 39th Cong., 1st Sess. 1118 (1866). In subsequent debates on civil rights legislation, Senator Thurman flatly said of Section 5 of the Fourteenth Amendment,

> What is meant by this term "appropriate legislation?" We know where the term comes from. We know it comes from an opinion of Chief Justice Marshall, and was applied by him simply to the old provision of the Constitution that Con- gress has power to make all laws necessary and proper for carrying into effect the foregoing powers.

Cong. Globe, 41st Cong., 2d Sess. 602 (1870); see also id. at 3663 (statement of Senator Thurman similarly tracing the origin of Section 2 of the Fifteenth Amendment). Repre- sentatives Shellabarger and Willard also identified Section 5 of the Fourteenth Amend- ment with the Sweeping Clause, see Cong. Globe, 42d Cong., 1st Sess. app. 71 (1871) (statement of Representative Shellabarger); id. app. 189 (statement of Representative Willard), as did the Supreme Court in 1883 in *The Civil Rights Cases, 109 U.S. 3, 13-14, 20 (1883)*. Moreover, "appropriate" is indeed a good substitute for the phrase "necessary and proper;" the word can plausibly function as a synonym both for "proper" in its juris- dictional sense and for "necessary" in its sense of fitness for a particular end. See Engdahl, supra note 15, at 115.

This history, of course, does not explain why the drafters of the Reconstruction Amendments used Chief Justice Marshall's gloss on the Sweeping Clause, rather than the clause's language itself. There is no indication, however, that the change in language was prompted by any widespread sense that

the Sweeping Clause's terms were either too strict or too loose to serve the purposes of Reconstruction. Accordingly, the Reconstruc- tion Amendments shed little, if any, light on the meaning of the Sweeping Clause.

3. Contemporaneous State Constitutions. This substantive difference between the Territories Clause and the Sweeping Clause is illuminated further by examination of the legislative power- granting provisions of the constitutions and charters of the original states at the time of the Framing. The Sweeping Clause has no clear antecedents in these documents; the phrase "necessary and proper" does not appear in an American governmental charter until the Constitution. That absence is not surprising. The state governments were all general governments whose powers did not depend on specific enumerations in a constitution. It would there- fore be odd for a state constitution even to declare that its legisla- ture could pass all necessary laws, much less all necessary and [*313] proper laws. n190 Such a provision could be seen, however, as nec- essary for a government of limited and enumerated powers.

n190 The only pre-1789 constitutions to contain such declarations were the Massachu- setts Constitution of 1780 and the Georgia Constitution of 1777. The former provided that

> full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions . . . , so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this common- wealth . . . .

Mass. Const. of 1780, ch. I, section I, art. IV (using "general court" to describe the legislative body). Although this document seems to require all laws to be objectively wholesome and reasonable, the subsequent statement that the legislature is to "judge" whether laws pro- mote the state's "good and welfare" grants the legislature discretion to determine what is "wholesome and reasonable," subject only to specific prohibitions in the state constitution. The 1777 Georgia constitution gave its legislature "power to make such laws and regula- tions as may be conducive to the good order and well-being of the State; provided such laws and regulations be not repugnant to the true intent and meaning of any rule or regulation contained in this constitution." Ga. Const. of 1777, art. VII, cl. 1. Again, al- though this provision, read alone, would appear to declare that laws must actually (or at least potentially) be conducive to the state's good order and well-being, the succeeding clause provides that " t he house of assembly shall also have power to repeal all laws and ordinances they find injurious to the people." Id. art. VII, cl. 2. The overall context thus suggests that, as with the Massachusetts constitution, there is no effective internal limitation on the general legislative power. Several state constitutions contained provisions permitting the legislature to control its own internal procedures, to expel members, and to exercise "all other powers necessary for the legislature of a free and independent State." Del. Const. of 1776, art. V; see also Conn. Const. of 1818, art. III, section 8; Pa. Const. of 1776, section 9; Pa. Const. of 1790, art. I, section 13. However,

these provisions dealt only with matters of internal governance, such as judging elections, issuing subpoenas, and keeping journals.

The Georgia Constitution of 1789, which was explicitly mod- elled after the then-recently ratified Federal Constitution, n191 con- tains a provision that declares that " t he general assembly shall have power to make all laws and ordinances which they shall deem necessary and proper for the good of the State, which shall not be repugnant to this constitution." n192 Significantly, the Geor- gia constitution places the phrase "which they shall deem" in front of the phrase "necessary and proper." Thus, the Georgia constitu- tion expressly grants the legislature discretion to determine the necessity and propriety of the laws it makes--just as the Federal Constitution sometimes grants discretion to Congress, the Presi- dent, or the states. n193 The addition of the discretionary language [*314] makes perfect sense if the phrase "necessary and proper" is un- derstood as a significant limitation on legislative power. In the absence of the express grant of discretion, a requirement that state laws actually be "necessary and proper" might undermine the oth- erwise general authority of the state legislature, inasmuch as that requirement is distinctively suited to a government of limited, rather than general, powers.

n191 See 2 Sources, supra note 47, at 455.

n192 Ga. Const. of 1789, art. I, section 16.

n193 See supra notes 31-39 and accompanying text.

The provision in the 1789 Georgia constitution that legislation not be "repugnant to this constitution" n194 reinforces this inter- pretation. In the absence of this clause, a constitutional grant to the legislature of power "to make all laws and ordinances which they shall deem necessary and proper for the good of the State" n195 would arguably make the legislature the final judge of the constitutionality of its measures. If the phrase "necessary and proper" includes a requirement that laws conform to (implicit and explicit) constitutional norms, such a bare grant of discretionary power would then validate all laws that the legislature believed to be constitutional. The measure of the law's constitutionality would be the legislature's belief, rather than the law's objective proper- ties. Accordingly, an express stipulation that legislation must not violate the constitution might have been seen as required. n196 [*315]

n194 Ga. Const. of 1789, art. 1, section 16.

n195 Id. (emphasis added).

n196 The 1789 Georgia constitution was the only post-revolutionary era document that granted legislative powers in this form. Most constitutions, both before and after ratifica- tion of the Federal Constitution, either contained express general vesting clauses, see Conn. Const. of 1818, art. III, section 1 ("The legislative power of this State shall be vested in two distinct houses or branches . . . ."); Del. Const. of 1792, art. II, section 1 ("The legis- lative power of this State shall be vested in a general assembly . . . ."); N.H. Const. of 1784, pt. II, paragraph 2 ("The supreme legislative power within this state shall be vested in the senate and house of representatives . . . ."); N.J. Const. of 1776, arts. I, V, VI (vesting governmental power in a governor,

legislative council, and general assembly and granting the council and assembly power to pass bills into law); N.Y. Const. of 1777, art. II (" T he supreme legislative power within this State shall be vested in . . . the assem- bly . . . and the senate of the State of New York . . . ."); N.C. Const. of 1776, art. I (" T he legislative authority shall be vested in two distinct branches . . . ."); Pa. Const. of 1776, sections 2, 9 ("The supreme legislative power shall be vested in a house of represen- tatives," which shall have power to "prepare bills and enact them into laws."); S.C. Const. of 1776, art. VII (" T he legislative authority shall be vested in the president and commander-in-chief, the general assembly and legislative council . . . ."); S.C. Const. of 1778, art. II (" T he legislative authority shall be vested in a general assem- bly . . . ."), or simply created legislative bodies that possessed general legislative powers by implication. See Del. Const. of 1776, art. II ("The Legislature shall be formed of two distinct branches . . . ."), Ga. Const. of 1777, art. II ("The legislature of this State shall be composed of the representatives of the people, as is hereinafter pointed out . . . ."); Md. Const. of 1776, art. I (" T he Legislature shall consist of two distinct branches . . . ."); Mass. Const. of 1780, ch. I, art. I ("The department of legislation shall be formed by two branches . . . ."); N.H. Const. of 1776, paragraph 4 (" T his Congress shall assume the name, power and authority of a house of Representatives or Assembly for the Colony of New-Hampshire . . . ."); Va. Const. of 1776, paragraph 2 ("The legislative shall be formed of two distinct branches, who, together, shall be a complete Legisla- ture.").

The only other forms of power-granting provisions in that era were found in Connecticut's and Rhode Island's colonial charters. Until 1818, Connecticut was governed by its colonial charter of 1662, see Conn. Const. Ordinance of 1776 paragraph I (" T he an- cient Form of Civil Government, contained in the Charter from Charles the Second, King of England, and adopted by the People of this State, shall be and remain the Civil Constitution of this State."), which authorized the legislative authority "to Make, Ordain, and Establish all manner of wholesome and reasonable Laws, Statutes, Ordinances, Direc- tions, and Instructions, not Contrary to the Laws of this Realm of England." Conn. Charter of 1662. Until 1841, Rhode Island was governed under its colonial charter of 1663, which empowered the legislative authority

> to make, ordeyne, constitute or repeal, such lawes, statutes, orders and ordi- nances, fformes and ceremonies of government and magistracye as to them shall seeme meete for the good nad sic wellfare of the sayd Company, and ffor the government and ordering of the landes and hereditaments, hereinafter men- tioned to be graunted, and of the people that doe, or att any tyme hereafter shall, inhabitt or bee within the same; soe as such lawes, ordinances and constitutiones, soe made, bee not contrary and repugnant unto, butt, as neare as may bee, agreeable to the lawes of this our realme of England, considering the nature and constitutione of the place and people there . . . .

R.I. Charter of 1663. We do not discuss the early Connecticut and Rhode Island docu- ments because we are reluctant to draw conclusions for the interpretation of late eighteenth-century American constitutions from mid-seventeenth-century corporate charters based on English law.

4. The Framers' Design. Some of the most intriguing evi- dence concerning the meaning of the Sweeping Clause is indirect. A jurisdictional interpretation of the Sweeping Clause harmonizes with the Framers' conception of limited government, accounts for the otherwise puzzling explanation offered by advocates of the Constitution for the absence of a bill of rights, and provides a role for the Bill of Rights, including the Ninth and Tenth Amendments, that is consistent with almost everything we know about the Constitution's design. In sum, our construction of the Sweeping Clause makes sense of--and is necessary to make sense of--the positions advanced by the Constitution's defenders during the crucial period of ratification.

Although some anti-federalists argued that the new national government was an uncontrollable leviathan with unlimited pow- ers, n197 the federalists uniformly maintained that the national gov- [*316] ernment could legitimately exercise only those powers granted to it, expressly or by fair implication, by the Constitution. n198 They especially emphasized the limited character of the national govern- ment in responding to criticisms of the Constitution for not includ- ing a comprehensive bill of rights. n199 They persistently argued that a bill of rights was unnecessary, and even dangerous, because the national government was not granted any powers that required limitation by a bill of rights. n200 Today, the best-known expression of this view is Hamilton's argument in The Federalist, n201 but the [*317] ratification debates were filled with claims that the Constitution's design for a limited government adequately secured the rights of the states and the people. n202 The statement of Alexander Contee Hanson, writing as "Aristides," was particularly pointed, emphasiz- ing the difference between a constitution with an unlimited sweep- ing clause that conferred general legislative power on the central government and the actual, limited document that the convention produced:

n197 See, e.g., 2 Elliot's Debates, supra note 24, at 398-99 (statement of Thomas Tredwell that all rights not specifically reserved by the people are transferred to the national government); A Republican I: To James Wilson, Esquire, N.Y. J., Oct. 25, 1787, reprinted in 13 Documentary History, supra note 10, at 477, 478-79 (inferring from the prohibitions in Article I, Section 9 that Congress possesses general powers); Letter from Richard Henry Lee to Samuel Adams (Oct. 27, 1787), in id. at 484, 484-85 (same); Cincinnatus I: To James Wilson, Esquire, N.Y. J., Nov. 1, 1787, reprinted in id. at 529, 531 (arguing that because the Constitution, unlike the Articles of Confederation, contains no express declaration that all powers not expressly given to the national government are reserved, " t he presumption therefore is, that the framers of the proposed constitution, did not mean to subject it to the same exception"); see also 2 Elliot's Debates, supra note 24, at 448 (statement of James Wilson responding to a claim that the Sweeping Clause "gives to Congress a power of legislating generally"); 3 id. at 464 (statement of Edmund Randolph attributing to Patrick Henry the view that "complete and unlimited legislation is vested in the Congress of the United States").

n198 See, e.g., 2 Elliot's Debates, supra note 24, at 362 (statement of Alexander Hamilton that "the laws of Congress are restricted to a certain sphere, and when they depart from this sphere, they are no longer supreme or binding"); 3 id. at 110 (statement of Francis Corbin that " l iberty is secured, sir, by the limitation of the national government's powers, which are clearly

and unequivocally defined"); id. at 186 (state- ment of Henry Lee that the Constitution "goes on the principle that all power is in the people, and that rulers have no powers but what are enumerated in that paper"); id. at 246 (statement of George Nicholas that " i t is a principle universally agreed upon, that all powers not given are retained").

n199 The unamended Constitution does contain a bill of rights of sorts: the prohibi- tions in Article I, Section 9 place affirmative limitations on congressional power in the fashion of a bill of rights. See The Federalist No. 84, at 510-12 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The anti-federalists' complaint was that these prohibitions did not extend far enough because they did not protect such cherished rights as the rights to freedom of speech, freedom of conscience, and a civil jury. See, e.g., 3 Elliot's De- bates, supra note 24, at 461 (statement of Patrick Henry that " t he restraints in this congressional bill of rights are so feeble and few, that it would have been infinitely bet- ter to have said nothing about it").

n200 See Thomas B. McAffee, The Original Meaning of the Ninth Amendment, *90 Colum. L. Rev. 1215, 1229-34 (1990)*. Of course, the Constitution's defenders then had to explain why the prohibitions in Article I, Section 9 were not unnecessary or danger- ous. See *id. at 1234-35*. Edmund Randolph accepted the challenge, arguing at the Virgin- ia ratifying convention that every prohibition in the unamended Constitution "is an ex- ception, not from general powers, but from the particular powers therein vested." 3 Elliot's Debates, supra note 24, at 464; see also id. at 464-66.

n201 Hamilton argued:

> I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Consti- tution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a color- able pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?

The Federalist No. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

n202 See, e.g., Oliver Ellsworth, The Letters of a Landholder, 1787-1788, in 1 Schwartz, supra note 107, at 460, 461 (declaring that bills of rights against the national government "are insignificant since . . . all the power government now has is a grant from the people. The constitution they establish with powers limited and defined, be- comes now to the legislator and magistrate, what originally a bill of rights was to the people."); 2 Elliot's Debates, supra note 24, at 436 (statement of James Wilson that "in a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgment, high- ly imprudent"); id. at 540 (statement of Thomas M'Kean that a bill of rights is unneces- sary, "for the powers of Congress, . . . being therein enumerated and positively

granted, can be no other than what this positive grant conveys"); 4 id. at 140 (statement of Archibald Maclaine that " i t would be very extraordinary to have a bill of rights, be- cause the powers of Congress are expressly defined; and the very definition of them is as valid and efficacious a check as a bill of rights could be, without the dangerous implica- tion of a bill of rights"); id. at 148 (statement of James Iredell: "Of what use, therefore, can a bill of rights be in this Constitution, where the people expressly declare how much power they do give, and consequently retain all they do not?"); id. at 259 (statement of Charles Pinkney that a bill of rights against the national government is unnecessary be- cause "no powers could be executed, or assumed, but such as were expressly delegated").

Should the compact authorize the sovereign, or head to do all things it may think necessary and proper, then there is no limitation to its authority; and the liberty of each citizen in the union has no other security, than the sound policy, good faith, virtue, and perhaps proper interests, of the head.

When the compact confers the aforesaid general power, making nevertheless some special reservations and exceptions, then is the citizen protected further, so far as these reservations and exceptions shall extend.

But, when the compact ascertains and defines the power delegated to the federal head, then cannot this government, with- [*318] out manifest usurpation, exert any power not expressly, or by necessary implication, conferred by the compact.

This doctrine is so obvious and plain, that I am amazed any good man should deplore the omission of a bill of rights. n203

n203 Alexander C. Hanson, Remarks on the Proposed Plan of a Federal Government, in Pamphlets on the Constitution of the United States 217, 241-42 (Paul L. Ford ed., 1888) hereinafter Pamphlets (first emphasis added).

The federalists' argument that a bill of rights was unnecessary makes sense, of course, only if the national government's enumer- ated powers do not authorize that government to violate the people's or the states' rights and liberties. Accordingly, the federal- ists vigorously insisted that cherished rights were in no danger from the national government. A parade of them maintained, for example, that textual protection for speech and the press was unnecessary because, as Hugh Williamson put it, "examine the Plan of the Constitution , and you will find that the liberty of the press and the laws of Mahomet are equally affected by it." n204 During the ratification debates, such major figures as James Wil- son, n205 Edmund Randolph, n206 Charles Cotesworth Pinckney, n207 James Iredell, n208 Roger Sherman, n209 and Oliver Ellsworth n210 [*319] made similar representations with respect to national power over speech and the press. Indeed, in his Report on the Virginia Resolu- tions n211 opposing the Alien and Sedition Acts, James Madison recalled this federalist consensus and indicated that it specifically extended to the Sweeping Clause, which in no way authorized Congress to violate rights such as the freedom of the press:

n204 Hugh Williamson, Remarks on the New Plan of Government (1788), reprinted in 1 Schwartz, supra note 107, at 550, 551.

n205 For example, Wilson stated:

It is very true, sir, that this Constitution says nothing with regard to that sub- ject of the press , nor was it necessary; because it will be found that there is given to the general government no power whatsoever concerning it; and no law, in pursuance of the Constitution, can possibly be enacted to destroy that liberty.

2 Elliot's Debates, supra note 24, at 449. In another forum, Wilson said:

For instance, the liberty of the press, which has been a copious source of decla- mation and opposition, what control can proceed from the foederal government to shackle or destroy that sacred palladium of national freedom? If indeed, a power similar to that which has been granted for the regulation of commerce, had been granted to regulate literary publications, it would have been as nec- essary to stipulate that the liberty of the press should be preserved inviolate, as that the impost should be general in its operation.

James Wilson, Speech at a Public Meeting in Philadelphia, (Oct. 6, 1787), reprinted in 13 Documentary History, supra note 10, at 337, 340.

n206 See 3 Elliot's Debates, supra note 24, at 203 ("Go through these powers, examine every one, and tell me if the most exalted genius can prove that the liberty of the press is in danger."); see also id. at 469 ("But I ask, . . . Where is the page where the freedom of the press is restrained? If there had been any regulation about it, leav- ing it insecure, then there might have been reason for clamors. But this is not the case.").

n207 See 4 id. at 315 ("The general government has no powers but what are expressly granted to it; it therefore has no power to take away the liberty of the press.").

n208 James Iredell, Observations on George Mason's Objections to the Federal Con- stitution (1788), in Pamphlets, supra note 203, at 333, 361 ("If the Congress should exercise any other power over the press than the power to secure "for limited Times to Authors . . . the exclusive Right to their respective Writings," U.S. Const. art. I, section 8, cl. 8 . . . they will do it without any warrant from this constitution . . . .").

n209 See A Citizen of New Haven, Conn. Courant, Jan. 7, 1788, reprinted in 3 Doc- umentary History, supra note 130, at 524, 525 ("The liberty of the press can be in no danger, because that is not put under the direction of the new government.").

n210 According to Ellsworth:

There is no declaration of any kind to preserve the liberty of the press, &c. Nor is liberty of conscience, or of matrimony, or of burial of the dead; it is enough that congress have no power to prohibit either, and can have no temptation. This objection is answered in that the states have all the power originally, and congress have only what the states grant them.

See Landholder VI, Conn. Courant, Dec. 10, 1787, reprinted in 14 Documentary History, supra note 10, at 398, 401.

n211 4 Elliot's Debates, supra note 24, at 546.

When the Constitution was under the discussions which preceded its ratification, it is well known that great apprehensions were expressed by many, lest the omission of some positive exception, from the powers delegated, of certain rights, and of the freedom of the press particularly, might expose them to danger of being drawn, by construction, within some of the powers vested in Congress; more especially of the power to make all laws necessary and proper for carrying their other powers into execution. In reply to this objection, it was invariably urged to be a fundamental and characteristic principle of the Constitution, that all powers not given by it were reserved; that no powers were given beyond those enumerated in the Constitution, and such as were fairly incident to them; that the power over the rights in question, and particularly over the press, was neither among the enumerated powers, nor incident to any of them: and consequently that an exercise of any such power would be manifest usurpation. It is painful to remark how much the arguments now employed in behalf of the Sedition Act, are at variance with the reasoning which then justified the Constitution, and invited its ratifica- tion. n212

n212 Id. at 571-72 (emphasis added).

[*320]

In addition, numerous federalists agreed with Madison's fur- ther claim that " t here is not a shadow of right in the general government to intermeddle with religion." n213 Wilson, n214 Ran- dolph, n215 and Iredell, n216 among others, n217 all affirmed that the Constitution granted the national government no power over reli- gion. Furthermore, Randolph (later joined by Madison) insisted that a textual prohibition on general warrants was unnecessary because the national government had no power to issue such war- rants. n218 Hamilton maintained that Congress, under the original Constitution, could not abolish jury trials in civil cases, n219 and [*321] "An Impartial Citizen" denied that the Constitution gave Congress power, inter alia, to provide for unusual punishments. n220 This general sentiment about the scope of national power under the un- amended Constitution was aptly summarized by Theophilus Parson at the Massachusetts convention, who insisted that "no power was given to Congress to infringe on any one of the natural rights of the people by this Constitution; and, should they attempt it with- out constitutional authority, the act would be
a nullity, and could not be enforced." n221

n213 Id. at 330.

n214 Wilson maintained:

W e are told that there is no security for the rights of conscience. I ask the honorable gentleman, what part of this system puts it in the power of Congress to attack those rights? When there is no power to attack, it is idle to prepare the means of defence.

2 id. at 455.

n215 See 3 id. at 469 ("No part of the Constitution, even if strictly construed, will justify a conclusion that the general government can take away or impair the freedom of religion."); see also id. at 204 (" N o power is given expressly to Congress over reli- gion.").

n216 Iredell declared:

They certainly have no authority to interfere in the establishment of any reli- gion whatsoever; and I am astonished that any gentleman should conceive they have. Is there any power given to Congress in matters of religion? . . . If any future Congress should pass an act concerning the religion of the country, it would be an act which they are not authorized to pass, by the Constitu- tion . . . .

4 id. at 194.

n217 See id. at 208 (statement of Richard D. Spaight) ("As to the subject of reli- gion, . . . n o power is given to the general government to interfere with it at all. Any act of Congress on this subject would be a usurpation."); A Freeman II, Penn. Gazette, Jan. 30, 1788, reprinted in 15 Documentary History, supra note 57, at 508, 508 ("Ev- ery regulation relating to religion, or the property of religious bodies, must be made by the state governments, since no powers affecting those points are contained in the consti- tution."); see also 1 Annals of Cong. 730 (Joseph Gales ed., 1789) ("Mr. Sherman thought the amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the Constitution to make religious establishments; he would, therefore, move to have it struck out.").

n218 Randolph observed:

The honorable gentleman says there is no restraint on the power of issuing general warrants. If I be tedious in asking where is that power, you will

ascribe it to him who has put me to the necessity of asking. They have no such power given them: if they have, where is it?

3 Elliot's Debates, supra note 24, at 60.

n219 See The Federalist No. 29, at 183-84 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It would be absurd . . . to believe that a right to enact laws necessary and proper for the imposition and collection of taxes would involve that of . . . abolishing the trial by jury in cases relating to it.") (emphasis added).

n220 See supra text accompanying note 132.

n221 2 Elliot's Debates, supra note 24, at 162.

The anti-federalists were not persuaded. Several of them ar- gued that even if the federal government could be limited to its enumerated powers, n222 the Sweeping Clause itself granted Con- gress ample power to violate the people's liberty. Patrick Henry feared that encroachments on the rights of the press and of jury trial "will be justified by the last part of Article I, Section 8 , which gives them full power to make all laws which shall be nec- essary and proper to carry their power into execution.'" n223 A peti- tion to the Pennsylvania ratifying convention similarly worried that the Sweeping Clause

n222 Many anti-federalists did not accept the principle of enumerated powers, arguing that, in the American tradition, constitutions presumptively grant to governments all pow- ers not expressly prohibited. For example, Thomas Tredwell stated at the New York convention that

t he first and grand leading, or rather misleading, principle in this debate, and on which the advocates for this system of unrestricted powers must chiefly depend for its support, is that, in forming a constitution, whatever powers are not expressly granted or given the government, are reserved to the people, or that rulers cannot exercise any powers but those expressly given to them by the Constitution . . . . W e may reason with sufficient certainty on the subject, from the sense of all the public bodies in the United States, who had occasion to form new constitutions. They have uniformly acted upon a direct and con- trary principle, not only in forming the state constitutions and the old Confeder- ation, but also in forming this very Constitution . . . .

Id. at 398.

n223 3 id. at 149.

submits every right of the people of these states, both civil and sacred to the disposal of Congress, who may exercise their power to the expulsion of the jury--trial in civil causes--to the total suppression of the liberty of the press; and to the setting up and establishing of a cruel tyranny, if they

should
be so disposed, over all the dearest and most sacred rights of the citizens. n224

n224 Cumberland County Petition to the Pennsylvania Convention, Dec. 5, 1787, re- printed in 2 Documentary History, supra note 57, at 309, 310.

[*322]

Brutus, a pseudonymous anti-federalist, thought it "a question well worthy consideration" n225 whether Congress could use the Sweeping Clause to justify imposition of a military draft. n226 Con- sequently, in the First Congress, Madison observed that calls for a bill of rights had been prompted largely by such fears about the scope of the Sweeping Clause. n227

n225 Brutus VIII, N.Y. J., Jan. 10, 1788, reprinted in 15 Documentary History, supra note 57, at 335, 336.

n226 See id.

n227 The Annals report that

Mr. Madison said, he apprehended the meaning of the words to be, that Con- gress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their con- science. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the Constitution, which gave pow- er to Congress to make all laws necessary and proper to carry into execution the Constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a nation- al religion . . . .

1 Annals of Cong. 730 (1789) (Joseph Gales, ed., 1789).

In light of these arguments, the federalists' unswerving insis- tence that the federal government did not have the power to vio- late the rights of the states and the people must be taken to mean, as Madison's Report on the Virginia Resolutions main- tained, n228 that the Sweeping Clause, at least as understood by those defenders of the Constitution, did not grant the government any power to affect those rights. The federalists could have meant that the word "proper" by itself performs a strong limiting func- tion. Alternatively, in the era before Chief Justice Marshall in McCulloch v. Maryland construed the word "necessary" to confer very broad powers on the national government, they could have meant that the words "necessary and proper" jointly constrain the national government's ability to violate protected rights. Madison, for example, doubted that laws authorizing the issuance of general warrants could be either necessary or proper, although he believed that a bill of rights might serve as a useful guard against miscon- struction of the Sweeping Clause:

n228 See supra text accompanying note 212.

It has been said, that in the Federal Government bills of rights are unnecessary, because the powers are enumerated . . . . I admit that these arguments are not entirely without foundation; but they are not conclusive to the extent which has been sup- [*323] posed. It is true, the powers of the General Government are cir- cumscribed, they are directed to particular objects; but even if Government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent . . . ; because in the Constitution of the United States, there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the Government of the United States, or in any department or officer thereof sic ; this enables them to fulfil every purpose for which the Government was es- tablished. Now, may not laws be considered necessary and proper by Congress, (for it is for them to judge of the necessity and propriety to accomplish those special purposes which they may have in contemplation), which laws in themselves are neither necessary nor proper . . . ? I will state an instance, which I think in point, and proves that this might be the case. The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for this purpose . . . ? n229

n229 1 Annals of Cong. 438 (1789) (Joseph Gales ed., 1789) (emphasis added). If "necessary" has the meaning ascribed to it in McCulloch v. Maryland, see supra notes 77-86 and accompanying text, Madison's conclusion that general warrants cannot be nec- essary is wrong. One can readily imagine circumstances in which general warrants would be highly efficacious means for effectuating the national government's various revenue- raising powers or the power to prohibit (after 1808) the importation of slaves and thus would be "necessary" as that word is used in the Sweeping Clause as construed in McCulloch. Similarly, it is easy to imagine circumstances in which restrictions on the press might be efficacious means for carrying into execution the national government's military powers. In those circumstances, the word "proper" must carry the burden of limiting the government's jurisdiction--as it clearly can.

In either case, the federalists must have believed that the Sweep- ing Clause does jurisdictional work. Therefore, according to the federalists, an executory law abridging the freedom of speech, authorizing issuance of a general warrant, imposing a cruel or unusual punishment, or (so Mrs. Barrington would argue) authoriz- ing a taking of private property without just compensation would fall outside the enumerated powers of Congress and, although rarely explicitly stated in terms of this language, would be improp- er. n230 [*324]

n230 But cf. Andrzej Rapaczynski, The Ninth Amendment and the Unwritten Consti- tution: The Problems of Constitutional Interpretation, *64 Chi.-Kent L. Rev. 177, 186-88 (1988)* (suggesting that the Framers' view that the national government has no power to violate rights is plausible only if they viewed constitutional guarantees as political, rather than legal, but not considering the possibility that the Sweeping Clause affords a tradi- tional legal vehicle for protecting rights).

A jurisdictional construction of the Sweeping Clause amply protects the people's rights and liberties because virtually all feder- al laws are executory laws enacted pursuant to, and thus subject to the limitations of, the Sweeping Clause. The enumerations of pow- er in the other seventeen clauses of Article I, Section 8 and else- where in the Constitution essentially provide the subject matter for the exercise of Congress's executory authority. n231 Suppose, for example, that Congress wants to forbid the interstate transporta- tion of publications critical of Congress. A bare prohibition stating that "it shall be unlawful to ship, in interstate commerce, printed material that criticizes Congress" seems to qualify as a direct regu- lation of commerce requiring no constitutional authorization be- yond the Commerce Clause. n232 Nevertheless, as soon as Congress tries to make the prohibition effective by prescribing penalties for violation of the prohibition or by authorizing executive en- forcement of the law, it must employ the Sweeping Clause to "carry into Execution" that exercise of the commerce power, and any such implementing law must therefore be "necessary and proper." A law prescribing penalties for interstate transportation of political speech critical of Congress would plainly not be "proper" under a jurisdictional interpretation of that term. Nor would it be "proper" to enact laws authorizing the issuance of general war- rants to enforce the prohibition; laws restricting the rights of de- fendants under the statute to indictment by grand jury, to counsel, or to trial by jury; or laws prescribing cruel and unusual punish- ments for violation of the prohibition. None of these laws would be within Congress's enumerated authority under the Sweeping Clause. n233 [*325]

n231 See Engdahl, supra note 17, at 10-11.

n232 U.S. Const. art. I, section 8, cl. 3 ("Congress shall have Power . . . To regulate Com- merce . . . among the several States . . . .").

n233 This conclusion assumes, of course, that Congress is legislating for citizens in the states, rather than for citizens in the territories or the District of Columbia. The Territo- ries Clause authorizes Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," id. art. IV, section 3, cl. 2, and the District Clause empowers Congress " t o exercise exclusive Legislation in all Cases whatsoever over the District of Columbia ," id. art. I, section 8, cl. 17. These clauses are self-contained grants of general legislative power. Accordingly, Congress does not need the Sweeping Clause to legislate with respect to the territories or the District of Columbia, and the jurisdictional restrictions on Congress contained in the Sweeping Clause therefore do not apply to such legislation. Congressional legislation for the territo- ries and the District of Columbia must conform to certain constitutional limitations of form and substance, such as the presentment requirement, id. art. I, section 7, cl. 2-3, or the general prohibition on ex post facto laws, id. art. I, section 9, cl. 3, but if the only textual ve- hicle for a limitation on such form or substance is the Sweeping Clause, that limitation might not have effect in the territories.

In a previous article, Professor Lawson argued that congressional legislation for the territories is subject to general separation of powers constraints such as the nondelegation doctrine. See Lawson, supra note 185, at 900-02. If the Sweeping Clause is the only vehi- cle by which the nondelegation doctrine is given legal effect, this conclusion requires reconsideration.

History thus may have dealt too harshly with the Framers' decision to exclude a comprehensive bill of rights from the Consti- tution. The omission of a bill of rights is typically portrayed as a major blunder, n234 attributable either to the Framers' carelessness or to their lack of concern for the protection of rights. n235 Ac- cording to the conventional story, once the anti-federalists exposed the Framers' error, the Framers made matters worse by contriving weak arguments to justify their mistake. n236 Perhaps the Framers were indeed fools and knaves who concocted a desperate defense of a flawed document. n237 If our interpretation of the Sweeping Clause is correct, however, the Framers' argument for the original Constitution was more powerful than some may have sup- posed. n238 The Framers were correct when they maintained that a bill of rights was unnecessary to protect the people's rights, as those rights were safeguarded by the requirement that executory laws be "proper." n239 The scheme of enumerated powers protected the people's rights by not granting Congress the power to violate [*326] them. Thus, under a jurisdictional interpretation of the Sweeping Clause, and only under such an interpretation of the Sweeping Clause, the federalists' view that the Bill of Rights was unneces- sary and superfluous makes perfect sense.

n234 See Leonard W. Levy, The Original Constitution as a Bill of Rights, 9 Const. Commentary 163, 170 (1992) (stating that with the addition of the Bill of Rights in 1791, " t he Framers had rectified their great blunder of omission").

n235 See Kaminski, supra note 64, at 22.

n236 One commentator argues:

That supporters of the Constitution could ask, "What have we to do with a bill of rights" suggests that they had made a colossal error of judgment. They had omitted a bill of rights and then compounded their error by refusing to admit it. Their single-minded purpose of creating an effective government had exhausted their energies and good sense, and when they found themselves on the defensive, under an accusation that their handiwork threatened the liberties of the people, their frayed nerves led them into indefensible positions.

Levy, supra note 234, at 167.

n237 The Framers' political judgment was clearly questionable; the omission of a bill of rights almost doomed the Constitution. See Kaminski, supra note 64, at 28-39 (describ- ing the Constitution's ratification history).

n238 See 3 Bernard Schwartz, The Roots of the Bill of Rights 528 (1980) (arguing that federalist writings on the Bill of Rights "illustrate the approach of Feder- alist writers to the weakest aspect of their case").

n239 This conclusion is true at least with respect to the states. A bill of rights might have been necessary to safeguard individual rights in the territories. See supra note 233.

III. The "Proper" Jurisdiction of Congress

Our analysis of the Sweeping Clause has several important implications for constitutional history and constitutional law. A ju- risdictional understanding of the Sweeping Clause illuminates the meanings of the Ninth and Tenth Amendments and clarifies the Constitution's methods for safeguarding federalism and the sepa- ration of powers.

A. The Sweeping Clause and the Meaning of the Ninth Amend- ment

A jurisdictional construction of the Sweeping Clause provides important insight into the meaning of the Ninth Amendment, which has been a persistent subject of modern academic controver- sy. n240 The Ninth Amendment states that " t he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." n241 The tradition- al--and, until recently, near-universal--view of the Ninth Amend- ment was that it only prohibited an inference, drawn from the listing of specific rights in the first eight amendments, that the national government had been granted powers not enumerated in the Constitution. Thomas McAfee has recently restated and de- fended this position, noting that "on this reading the other rights retained by the people are defined residually from the powers granted to the national government." n242 In other words, accord- ing to this "residual rights" n243 thesis, the rights of the people and the powers of the national government are flip sides of the same [*327] coin: if the national government exceeds its delegated powers by regulating subjects beyond its original enumerated jurisdiction, it thereby violates the rights of the people, but if it genuinely exer- cises a delegated power, even if by exercising that power it affects certain interests of the people, it by definition does not infringe on the people's retained rights. n244

n240 See McAffee, supra note 200, at 1215-23 (describing the contours of the modern debate). For excellent representative samples of current scholarship on the Ninth Amend- ment, see 2 The Rights Retained by the People: The History and Meaning of the Ninth Amendment (Randy E. Barnett ed., 1993); 1 The Rights Retained by the People: The History and Meaning of the Ninth Amendment (Randy E. Barnett ed., 1989) hereinafter Rights Retained .

n241 U.S. Const. amend. IX.

n242 McAffee, supra note 200, at 1221.

n243 Id.

n244 The best way to understand this interpretation of the Ninth Amendment is to study an example of its violation. A five-Justice majority in the *Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871)*, did precisely what the traditional interpretation of the Ninth Amendment instructs decisionmakers not to do. Justice Strong's opinion for the Court affirmed Congress's power to issue paper money that is not immediately redeemable in precious metals, despite the opinion's recognition that such a power could not be derived from any of the enumerated powers. The Court's reasoning must be read to be disbe- lieved:

And, that important powers were understood by the people who adopted the Constitution to have been created by it, powers not enumerated, and not included incidentally in any one of those enumerated, is shown by the amendments. The first ten of these were suggested in the conventions of the States, and proposed at the first session of the first Congress, before any complaint was made of a disposition to assume doubtful powers. The preamble to the resolution submitting them for adoption recited that the "conventions of a number of the States had, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added." This was the origin of the amendments, and they are significant. They tend plainly to show that, in the judgment of those who adopted the Constitution, there were powers created by it, neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted. Most of these amendments are denials of power which had not been expressly granted, and which cannot be said to have been necessary and proper for carrying into exe- cution any other powers. Such, for example, is the prohibition of any laws re- specting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.

Id. at 534-35. A clearer violation of the traditionally understood Ninth Amendment is hard to imagine. See Currie, supra note 3, at 328 nn.312-14.

On other hand, a score of modern scholars, exemplified by Randy Barnett, n245 maintain that the Ninth Amendment refers to rights that "are to be defined independently of, and may serve to limit the scope of, powers granted to the national government by the Constitution." n246 Instead of "looking exclusively to the dele- [*328] gation of powers to define as well as to protect the rights of the people," n247 these nontraditional, or "affirmative rights," n248 schol- ars "look to the rights retained by the people in . . . their ef- fort s to interpret and define the delegated-powers provi- sions." n249 Under this view, a determination that Congress has genuinely exercised a delegated power does not end the inquiry. The affirmative rights scholars argue that just as Congress can exercise, for example, its Commerce Clause power in a manner that violates the First Amendment or other provisions of the Bill of Rights, so it can exercise any of its enumerated powers in a manner that implicates other rights "retained by the people" but not specified in the first eight amendments.

n245 See Randy E. Barnett, Introduction: James Madison's Ninth Amendment, in 1 *Rights Retained, supra* note 240, at 1; Randy E. Barnett, Foreword: Unenumerated Constitutional Rights and the Rule of Law, *14 Harv. J.L. & Pub. Pol'y 615 (1991)* hereinafter Barnett, Unenumerated Rights ; Randy E. Barnett, Foreword: The Ninth Amendment and Constitutional Legitimacy, *64 Chi.-Kent L. Rev. 37 (1988)*. Professor Barnett's conclusions are not necessarily endorsed by all, or even most, Ninth Amendment scholars who reject the traditional view, but for our purposes the differences among the non-traditional scholars are irrelevant.

n246 McAffee, supra note 200, at 1222.

n247 *Barnett, Unenumerated Rights, supra* note 245, at 639.

n248 See McAffee, supra note 200, at 1222.

n249 *Barnett, Unenumerated Rights, supra* note 245, at 639 (footnote omitted).

Our analysis of the Sweeping Clause demonstrates that both sides to this controversy are partially correct. The Ninth Amend- ment prohibits an inference that the enumeration of rights in the first eight amendments is the only basis on which an executory law can be found "improper" under the Sweeping Clause for violating individual rights. The principal function of the Ninth Amendment is thus to prevent misconstruction of the Sweeping Clause. n250

n250 It also serves the traditionally recognized function of preventing an inference of unenumerated federal powers from the enumeration of rights. See supra notes 242-44 and accompanying text.

The key to understanding this interpretation of the Ninth Amendment is to recognize that the Sweeping Clause is an enu- merated power, no different in principle from Congress's other enumerated powers, and that limitations on Congress's authority under the Sweeping Clause are therefore denials of delegated pow- er rather than affirmative constraints on an otherwise delegated power. If a law that violates the rights of citizens or the states is not "proper" within a jurisdictional meaning of the Sweeping Clause, it exceeds the delegated power of Congress to enact exec- utory laws. The residual rights thesis is therefore correct: one can completely identify the rights retained by the people and the states by determining the scope of the national government's delegated powers. Nevertheless, Professor Barnett and other affirmative rights scholars are also correct inasmuch as the scope of Congress's delegated authority under the Sweeping Clause is con- strained by the requirement that executory laws must be "prop- [*329] er"--that is, must conform to traditional principles of individual rights, whatever they may be. n251 The Ninth Amendment ensures that any executory laws that would have been improper before ratification of the Bill of Rights remain improper after ratification. It serves as a warning against concluding that the enumeration of rights in the first eight amendments is necessarily an exhaustive list of the ways in which executory laws can be improper. n252

n251 See infra notes 254-56 and accompanying text.

n252 Professor Barnett, drawing heavily on Madison's speech against the first Bank of the United States, argues that the Ninth Amendment establishes an interpretative pre- sumption in favor of strict construction of all enumerated powers, including the Sweeping Clause. See *Barnett, Unenumerated Rights, supra* note 245, at 635-39. We do not disagree with this conclusion, which is supported by the Ninth Amendment, the Tenth Amend- ment, and indeed the entire structure and context of the Constitution. We suggest, how- ever, that the Ninth Amendment uniquely generates a more specific interpretative rule: laws that were "improper" in 1789 because they violated individual rights remain improp- er after 1791, even if the rights in question are not among the rights specified in the first eight amendments.

This understanding of the Ninth Amendment fits perfectly with the Framers' understanding of the Constitution. The Framers, as we have seen, denied one of

the central premises of the affir- mative rights reading of the Ninth Amendment: that Congress could, before ratification of the Bill of Rights, exercise its enu- merated powers in a manner that would violate the rights protect- ed by the first eight amendments. n253 The Framers steadfastly in- sisted that Congress simply had no delegated power to violate such rights. Although the Framers did not always expressly indicate the textual basis for their claim, a jurisdictional reading of the Sweep- ing Clause provides the obvious vehicle--indeed, the only plausible vehicle--for their position. Once it is understood that the Sweep- ing Clause protects individual rights, the Ninth Amendment, like the first eight amendments, is shown to be essentially a declaration of principles already implicit in the design of the national govern- ment, n254 as the Framers insisted was true of the Bill of Rights. The Ninth Amendment does not add new constraints to Congress's [*330] power, but it preserves those constraints that the Sweeping Clause had already built into the Constitution. n255

n253 See supra notes 198-221 and accompanying text.

n254 It is possible that one or more of the rights enumerated in the Bill of Rights are not rights whose violation would have been "improper" before 1791. It is also possible that the contours of those rights were altered somewhat by their reduction to writing in the Bill of Rights. It is unlikely, for example, that the twenty dollar amount-in-contro- versy requirement of the Seventh Amendment corresponded precisely to a preexisting background principle that would have operated before 1791 through the Sweeping Clause. See U.S. Const. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .").

n255 The Bill of Rights may also extend those rights to the territories. See supra note 233.

The task of identifying those unenumerated rights, if any, that the Sweeping Clause and the Ninth Amendment jointly protect is beyond the scope of our inquiry. Proponents of different interpre- tative theories will obviously have different methods for defining such rights. For example, originalists will seek to identify those rights the violation of which the general public in 1789 would have thought "improper." Under originalist premises, this list can in- clude rights the eighteenth-century public did not actually acknowl- edge but would have acknowledged if all relevant arguments and information had been brought to its attention--just as electronic surveillance can be a "search" within the original meaning of the Fourth Amendment n256 if the eighteenth-century public, knowing what we know today about technology, would have fitted such sur- veillance within its concept of a search.

n256 U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be vio- lated . . . .").

B. The Sweeping Clause and Constitutional Federalism

The relationship between the Sweeping Clause and the Tenth Amendment is similar to the relationship between the Sweeping Clause and the Ninth Amendment: the Tenth Amendment makes explicit what is already contained in the Sweeping Clause. The Tenth Amendment declares that " t he powers not delegated to the

United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the peo- ple." n257 This provision expressly confines the national government to its delegated sphere of jurisdiction. As we have demonstrated, however, that is one of the functions that the Sweeping Clause serves. An executory law that regulates subjects outside Congress's enumerated powers is not "proper" and therefore not constitutional. The Tenth Amendment, as with the rest of the Bill of Rights, is thus declaratory of principles already contained in the unamended Constitution via the Sweeping Clause. [*331]

n257 Id. amend. X.

It is difficult to prescribe a precise method for identifying the appropriate federalism constraints imposed on Congress by the Sweeping Clause. n258 The core principle, however, is that a "prop- er" executory law must respect the system of enumerated federal powers: executory laws may not regulate or prohibit activities that fall outside the subject areas specifically enumerated in the Consti- tution. Two considerations support this strict construction of the Sweeping Clause. First, the word "proper" limits the powers con- ferred on Congress. It would be very strange if a "proper" exec- utory law--a law that is distinctively and peculiarly within the jurisdiction of the national government--could regulate subjects outside the careful, precise enumeration of regulable subjects found elsewhere in the Constitution. Second, the Sweeping Clause only authorizes laws "for carrying into Execution" powers vested by the Constitution in the national government. n259 To carry a law or power into execution in its most basic sense means to provide enforcement machinery, prescribe penalties, authorize the hiring of employees, appropriate funds, and so forth to effectuate that law or power. It does not mean to regulate unenumerated subject areas to make the exercise of enumerated powers more effi- cient. n260

n258 This difficulty is not unique to our analysis. See *New York v. United States, 112 S. Ct. 2408, 2417 (1992)* (" T he task of ascertaining the constitutional line between feder- al and state power has given rise to many of the Court's most difficult and celebrated cases.").

n259 See U.S. Const. art. I, section 8, cl. 18. For a discussion of this aspect of the Sweep- ing Clause, see supra notes 23-24 and accompanying text.

n260 See Epstein, supra note 15, at 1397-98.

Of course, it will not always be clear whether an executory law "properly" provides for the execution of enumerated powers or "improperly" regulates a subject beyond Congress's jurisdiction. For example, the law at issue in McCulloch v. Maryland, which in- corporated a national bank as a means to effectuate the enumer- ated power to borrow money, n261 presents a hard case. The power of incorporation seems more like a subject to be separately enumerated than a vehicle for carrying into execution another enu- merated power, as are the powers to prescribe penalties, appropri- ate funds, or hire federal employees, although we admit that the distinction is difficult to verbalize. If, however, hard cases under [*332] the Sweeping Clause abound, so do easy ones: a law regulating the production of wheat for home consumption is plainly not "proper for carrying into Execution" the federal commerce power. n262

n261 U.S. Const. art. I, section 8, cl. 2 ("The Congress shall have Power . . . To borrow Money on the credit of the United States . . . .").

n262 See *Wickard v. Filburn, 317 U.S. 111 (1942)*. We thus disagree to some extent with Professor Engdahl, who maintains that the Sweeping Clause enables Congress to regulate subjects outside the enumerated powers as long as the executory law bears a telic relationship to an enumerated power. See Engdahl, supra note 17, at 18-19. Pro- fessor Engdahl's thoughtful analysis gives a very generous construction to the phrase "for carrying into Execution" and a very limited scope to the word "proper." Indeed, under Professor Engdahl's construction of the Sweeping Clause, the only function of the word "proper" is to require an especially strong telic relationship between executory laws and legislative ends when, for example, traditional principles of federalism are at issue. The jurisdictional meaning of the word "proper" that we set forth requires more.

An even thornier problem is whether executory laws that regulate subjects within Congress's enumerated powers but that significantly impair the autonomy of state governments can be "improper" because such laws contravene constitutionally "proper" principles of federalism. For example, assuming that Congress has the power, under the Commerce Clause, to set minimum wages and maximum hours for private employment, n263 does it necessari- ly follow that Congress can extend those regulations to employees of state governments? The question has a checkered history in the U.S. Supreme Court, n264 and we do not purport to answer it here. Nevertheless, we do insist that the answer lies in the Sweeping Clause. n265 If the Constitution was enacted against a background understanding of sound principles of federalism, under a jurisdic- tional interpretation of the Sweeping Clause, "proper" executory laws must conform to those principles. Accordingly, even if the majority in Garcia v. San Antonio Metropolitan Transit Authori- ty n266 was correct that the Supreme Court has "no license to em- ploy freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause," n267 the Court might have a license--and a duty--to employ such concep- [*333] tions of sovereignty when measuring congressional authority under the Sweeping Clause.

n263 See *United States v. Darby, 312 U.S. 100 (1941)* (holding that Congress has such power).

n264 See *Maryland v. Wirtz, 392 U.S. 183 (1968)* (holding the Fair Labor Standards Act (FLSA) applicable to employees of public schools and hospitals), overruled by Na- tional *League of Cities v. Usery, 426 U.S. 833 (1976)* (holding the FLSA inapplicable to state employees engaged in traditional governmental functions), overruled by *Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)* (holding the FLSA applicable to municipal mass-transit employees).

n265 See Engdahl, supra note 15, at 93.

n266 *469 U.S. 528 (1985)*.

n267 *Id. at 550.*

C. The Sweeping Clause and the Proper Separation of Powers

Our interpretation of the Sweeping Clause also contributes to an

understanding of the constitutional scheme of separation of powers. Numerous provisions in the Constitution allocate authority to various institutions of the national government, but there is no general "separation of powers clause" similar to those that ap- peared in many state constitutions of the founding era. n268 None- theless, it has long been recognized that general principles of sepa- ration of powers infuse the Constitution and give content to its specific provisions. n269 The Sweeping Clause is the textual vehicle by which those principles find expression in the Constitution: a "proper" law for carrying into execution the powers of any depart- ment of the national government must confine that department to its peculiar jurisdiction.

n268 For example, the Massachusetts Constitution of 1780 provided:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Mass. Const. of 1780, art. XXX; see also supra notes 101-02 and accompanying text (discussing the separation of powers clauses of the Virginia and Georgia state constitu- tions).

n269 See *Morrison v. Olson, 487 U.S. 654, 704 (1988)* (Scalia, J., dissenting) ("Our opinions are full of the recognition that it is the principle of separation of powers . . . which gives comprehensible content to the Appointments Clause, and determines the appropriate scope of the removal power.").

It is beyond the scope of this Article to spell out the content of a "proper" separation of powers doctrine; we recognize that different constitutional theorists will have different conclusions on this issue. An originalist, for example, would ask whether a fully informed public in 1789 would have regarded a particular distribu- tion of governmental power as an "improper" departure from sound separation of powers principles. Whatever the content of that doctrine may be, however, it is textually incorporated into the Constitution through the Sweeping Clause. The Sweeping Clause [*334] therefore does not give Congress untrammelled authority to struc- ture the national government. Congress must create and empower some of the institutions of national governance (if these institu- tions are to exist), such as executive agencies and inferior courts, but in so doing it must respect both the specific allocations of power prescribed by the Constitution, such as the Appointments Clause, n270 and any unenumerated but "proper" principles of gov- ernmental structure, such as the principle against delegation of legislative power.

n270 U.S. Const. art. II, section 2, cl. 2.

IV. The Accuracy of the Historical Record

Our analysis often discusses evidence of linguistic usage of the word

"proper" drawn from documentary sources of the founding generation. Any scholar of early constitutional history must take account of the serious flaws in that era's documentary record. In particular, we quote extensively from Jonathan Elliot's compilation of the debates at the state ratifying conventions and from the early volumes of the Annals of Congress. According to James H. Hutson, who scrutinized the documentary record of the Constitu- tion, both sources are of questionable accuracy. Mr. Hutson re- ports that the published accounts of the ratification debates were often incomplete and inaccurate and, in some cases, may have been doctored for partisan purposes. n271 He is even more critical of the early editions of the Annals, which purport to record the debates in the House of Representatives. (Reports of Senate de- bates were not made available until 1794.) These early Annals were based on the notes of Thomas Lloyd, whose reportorial skills in 1789 were "dulled by excessive drinking," n272 and whose manu- script was "periodically interrupted by doodling, sketches of mem- bers, horses, and landscapes, and by poetry." n273 These problems are of special concern to an enterprise like ours that focuses heavi- ly on specific word usages and draws inferences from surrounding verbal contexts.

n271 See James H. Hutson, The Creation of the Constitution: The Integrity of the Doc- umentary Record, *65 Tex. L. Rev. 1, 12-24 (1986)*.

n272 *Id. at 36*.

n273 Id.

Nonetheless, for three principal reasons, we do not think that these difficulties with the documentary record significantly affect [*335] our project. First, we place our heaviest reliance on textual and structural features of the Federal Constitution and contemporane- ous state constitutions, rather than on direct statements from indi- vidual actors. Second, the patterns of usage to which we refer are remarkably consistent across all documents that we have surveyed, including many whose accuracy is not subject to challenge, such as constitutions, letters, and court records. We thus feel relatively confident in relying on otherwise questionable sources, inasmuch as more reliable documents reinforce our conclusions. Third, even if some of the passages we cite are imaginative reconstructions, they at least give some evidence of contemporaneous linguistic us- age.

In sum, we use these documents much as did Madison (at least if the reporter can be believed) in opposing a latitudinarian construction of the Sweeping Clause during the 1791 debate on the Bank of the United States:

The explanations in the State Conventions all turned on the same fundamental principle, and on the principle that the terms necessary and proper gave no additional powers to those enumer- ated. Here he read sundry passages from the Debates of the Pennsylvania, Virginia, and North Carolina Conventions, showing the ground on which the Constitution had been vindicated by its principal advocates, against a dangerous latitude of its powers, charged on it by its opponents. He did not undertake to vouch for the accuracy or authenticity of the publications which he quoted. He thought it probable that the sentiments delivered might, in many instances, have been mistaken, or imperfectly noted; but the complexion of the whole, with what he himself and many others must recollect, fully justified the use he had made of them. n274

n274 2 Annals of Cong. 1951 (1791) (alteration in original).

V. Conclusion

Our jurisdictional construction of the Sweeping Clause ac- counts for the available evidence better than does any alternative construction: a jurisdictional usage of "proper" was common in legal discourse during the founding era; this understanding of the Sweeping Clause fits well with other provisions of the Federal Constitution and contemporaneous state constitutions; and many [*336] persons during the founding era (broadly understood to extend into the first portion of the nineteenth century) expressly held such a view of the Sweeping Clause. Moreover, the Constitution's proponents repeatedly insisted that they were creating a govern- ment with very specific qualities--most notably, limited powers that did not include the power to violate individual rights or struc- tural principles of separation of powers or federalism--which would only exist if the federal government's executory authority were strictly constrained. Our jurisdictional interpretation of the Sweeping Clause realizes the Founders' vision of a limited national government without departing from the constitutional text--the Framers clearly thought that the Constitution of 1789 placed such jurisdictional limits on the scope of national power, and the Framers were right.

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ARTICLE: Necessary and Proper

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SUMMARY:
... It should go without saying, but often does not, that the framers of the U.S. Constitution believed in "the pre-existent rights of nature," by which they meant those rights that are "essential to secure the liberty of the people" from abuses by either minority or majority "factions" operating through representative government. ... Why is it that only the "specific prohibitions of the Constitution" may shift the presumption of constitutionality, when the Ninth Amendment declares: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"? Disparaging the unenumerable liberties protected by the rights retained by the people by construing a Marshallian conception of necessity whenever government infringes upon them is exactly what Footnote 4 attempts to accomplish. ... Adopting a Madisonian conception of necessity, however, raises the following potential difficulty: If a restriction of liberty is shown to be truly necessary, in the Madisonian sense, to put into execution an enumerated power, in what way can it be considered an "improper" infringement on these background rights? Have not the people surrendered to the national government the powers that were enumerated in Article I and any right inconsistent with the exercise of such powers? ...

TEXT:
[*745]

Introduction

It should go without saying, but often does not, that the framers of the U.S.

Constitution believed in "the pre-existent rights of nature," n1 by which they meant those rights that are "essential to secure the liberty of [*746] the people" n2 from abuses by either minority or majority "factions" n3 operating through representative government. What divided the founding generation was not whether such rights existed, but how these rights are best protected.

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n1. 1 Annals of Cong. 454 (Joseph Gales ed., 1789) (statement of Rep. James Madison).

n2. Id. In the passage from which these phrases are taken, Madison is arguing that the right of trial by jury enumerated in the proposed amendments, though a "positive right," is as essential to secure the liberty of the people as any natural right. See also Roger Sherman, Draft of the Bill of Rights, reprinted in Text of Proposal for a Separate Bill of Rights, N.Y. Times, July 29, 1987, at C21, reprinted in 1 The Rights Retained by the People: The History and Meaning of the Ninth Amendment app. A at 351 (Randy E. Barnett ed., 1989) [hereinafter The Rights Retained by the People] ("The people have certain natural rights which are retained by them when they enter into Society ....").

n3. See The Federalist No. 10, at 57 (James Madison) (Jacob E. Cooke ed., 1961) ("By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." (emphasis added)).

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Some, perhaps most Federalists, thought that the structures embodied in the Constitution would adequately protect rights. These structures included the separation of powers, limited and enumerated powers, and the fact that direct democracy played a role, but only a limited one, in each branch of government. Opponents of the Constitution - dubbed "Antifederalists" by its supporters - argued that more explicit protection of these rights in the form of a bill of rights was needed. Taken together, the constitutional strategy of limited powers (structurally reinforced by separation of powers and federalism) and protected rights was supposed to enable an energetic national government to accomplish certain ends, while ensuring that the liberty of the people would be protected.

The rise in this century of a powerful administrative state at the national level has put a strain on this theory of constitutionalism and the role of the judiciary. Though not every act of the federal administrative state constrains the exercise of liberty, the breadth of its ambitions increases the likelihood of clashes between the will of the government and the liberties of the citizenry. When the powers of the federal administrative state are used to restrict citizens' exercise of their liberty, there are really only three responses the judiciary may make.

First, the judiciary could completely acquiesce to the assumption of power by the other two branches of the national government. This option, though appealing to "judicial conservatives" who advocate "judicial restraint," would amount to a unilateral surrender by the judiciary - supposedly a coequal branch of the federal government - of its powers of judicial review. With this

surrender, enumerated powers and enumerated [*747] (or unenumerated) rights would no longer provide any constraints on the size and scope of the administrative state. This response would represent a profound change in our theory of constitutionalism from one in which powers are retained by the people unless granted to government to one in which all powers are held by two branches of the national government and it is solely for these branches to decide when and how they should exercise them, subject only to the constraints of democratic electoral processes.

Second, whether the national government is operating within or beyond its enumerated powers, the judiciary could scrutinize legislative restrictions on liberty to ensure that they do not violate the rights retained by the people. This option is the one that the judiciary has all-too-tepidly been pursuing these past sixty years. Elsewhere I have argued that, given its refusal to limit the federal government to its enumerated powers, the judiciary has been overly timid in protecting both enumerated and unenumerated individual rights from infringement by the administrative state. n4

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n4. See Randy E. Barnett, Getting Normative: The Role of Natural Rights in Constitutional Adjudication, 12 Const. Commentary 93 (1995) [hereinafter Barnett, Getting Normative]; Randy E. Barnett, Reconceiving the Ninth Amendment, *74 Cornell L. Rev. 1 (1988)* [hereinafter Barnett, Reconceiving].

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Third, courts could try to confine the national government to operating within its enumerated powers and thus reduce its opportunity to restrict the liberties of the people. Until the 1995 Supreme Court decision of United States v. Lopez, n5 this option was considered antiquated and beyond the bounds of respectable academic discussion. In Lopez, the Court struck down a federal statute mandating gun-free school zones around local public schools on the ground that such legislation did not lie within the enumerated powers of Congress, in particular, its commerce power. Significantly, by enforcing this limitation on the scope of federal power in this way, the Court never had to address the question of whether this statute violated the Second Amendment. In this case, stopping the Congress from exceeding its enumerated powers also deprived it of the chance to infringe upon the retained enumerated right to keep and bear arms. n6

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n5. *115 S. Ct. 1624 (1995)*.

n6. This is not to say that the statute in Lopez did infringe the right to keep and bear arms. I am of the opinion (reflected in an amicus brief to which I was a signatory) that, as applied to minors carrying guns in or near public schools, it did not violate the Second Amendment. See *Amicus Brief on Behalf of Academics for the Second Amendment, United States v. Lopez, 115 S. Ct. 1624 (1995)* (No. 93-1260). As applied to adults transporting guns on public streets, perhaps in their vehicles, within 1000 feet of a public school, however, I have serious qualms about its constitutionality under the Second Amendment.

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In this Article, I shall maintain that, if the courts are to hold Congress to the exercise of its enumerated powers, then they must come to grips with [*748] the congressional 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." n7 While the Necessary and Proper Clause has long been used to greatly expand congressional power, I argue that, to the contrary, it provides a two-part standard against which all national legislation should be judged: Such laws shall be "necessary and proper." According to this standard, laws that are either unnecessary or improper are beyond the powers of Congress to enact.

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n7. U.S. Const. art. I, 8, cl. 18 (emphasis added).

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In Part I, I consider the meaning of this requirement. First, I identify what I shall call the Madisonian and Marshallian conceptions of necessity. Next, I discuss the meaning of "proper," the other half of the standard that all laws enacted by Congress must meet and discuss how propriety is distinct from necessity. Finally, in Part II, I consider a doctrinal means of implementing the Necessary and Proper Clause. I conclude that a rigorous application of the necessary and proper standard would serve to protect both the enumerated and, especially, the unenumerated rights retained by the people.

I.

The Meanings of "Necessary" and "Proper"

It is beyond serious question that, by the time of ratification, the framers contemplated judicial review that would nullify unconstitutional legislation n8 - including whatever amendments might be ratified in the future. n9 While a vigorous scholarly debate continues as to whether judicial [*749] review was intended also to protect other unenumerated rights "retained by the people," n10 in any event, neither enumerated nor unenumerated rights received much, if any, consideration from the courts during the first several decades of the United States. Indeed, the first time a federal statute was held to be an unconstitutional violation of the natural right of freedom of speech enumerated in the First Amendment n11 was in the 1965 case of Lamont v. Postmaster General. n12

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n8. See, e.g., The Federalist No. 78, at 526 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("Whenever a particular statute contravenes the constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former.... The courts of justice are to be considered as the

bulwarks of a limited constitution, against legislative encroachments ...."). Hamilton also answered the charge that this would be to advocate judicial supremacy:

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

Id. at 525.

n9. See 1 Annals of Cong. 457 (Joseph Gales ed., 1789) (statement of Rep. James Madison).

If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

Id.

n10. For those who say nay, see, for example, Raoul Berger, Natural Law and Judicial Review: Reflections of an Earthbound Lawyer, *61 U. Cin. L. Rev. 5 (1992)*; Raoul Berger, The Ninth Amendment, as Perceived by Randy Barnett, *88 Nw. U. L. Rev. 1508 (1994)*; Philip A. Hamburger, Natural Rights, Natural Law, and American Constitutions, *102 Yale L.J. 907 (1993)*; Thomas B. McAffee, The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People, *16 S. Ill. U. L.J. 267 (1992)*; Thomas B. McAffee, The Original Meaning of the Ninth Amendment, *90 Colum. L. Rev. 1215 (1990)* [hereinafter McAffee, Original Meaning]; Thomas B. McAffee, Prolegomena to a Meaningful Debate of the "Unwritten Constitution" Thesis, *61 U. Cin. L. Rev. 107 (1992)* [hereinafter McAffee, Prolegomena]; Helen K. Michael, The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?, *69 N.C. L. Rev. 421 (1991)*.

For those who say aye, see, for example, Calvin R. Massey, Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights (1995); Randy E. Barnett, Introduction: Implementing the Ninth Amendment, in 2 The Rights Retained by the People: The History and Meaning of the Ninth Amendment 1 (Randy E. Barnett ed., 1993); Steven J. Heyman, Natural Rights, Positivism and the Ninth Amendment: A Response to McAffee, *16 S. Ill. U. L.J. 327 (1992)*; Calvin R. Massey, The Natural Law Component of the Ninth Amendment, *61 U. Cin. L. Rev. 49 (1992)*; David N. Mayer, The Natural Rights Basis of the Ninth Amendment: A Reply

to Professor McAffee, *16 S. Ill. U. L.J. 313 (1992)*; Bruce N. Morton, John Locke, Robert Bork, Natural Rights and the Interpretation of the Constitution, *22 Seton Hall L. Rev. 709 (1992)*; Suzanna Sherry, The Founders' Unwritten Constitution, *54 U. Chi. L. Rev. 1127 (1987)*; Suzanna Sherry, Natural Law in the States, *61 U. Cin. L. Rev. 171 (1992)*; John Choon Yoo, Our Declaratory Ninth Amendment, *42 Emory L.J. 967 (1993)*.

n11. That the freedom of speech was considered a natural right is evidenced by James Madison's notes for the congressional speech in which he introduced and explained his proposed amendments to the Constitution. These notes are reprinted in The Rights Retained by the People: The History and Meaning of the Ninth Amendment. James Madison, Madison's Notes for Amendments Speech, 1789, reprinted in 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1042 (1971), reprinted in The Rights Retained by the People, supra note 2, at 64-65 [hereinafter Madison's Notes]. In the section discussing "Contents of Bill of Rhts," the following appears: "3. natural rights retained as speach [sic]." Id. at 64.

n12. *381 U.S. 301 (1965)*; see Laurence H. Tribe, American Constitutional Law 5-11, at 327 n.18 (2d ed. 1988) ("The federal statute struck down in Lamont [was] the first federal law the Supreme Court ever held to be violative of the first amendment ....").

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The courts' early willingness to defer to legislative judgment was the central focus of James Thayer's classic 1893 Harvard Law Review article, [*750] The Origin and Scope of the American Doctrine of Constitutional Law. n13 There he reproduced a goodly number of examples of judicial unwillingness to second-guess legislative judgment, beginning with the 1811 opinion of Chief Justice Tilghman, of Pennsylvania:

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n13. James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 *Harv. L. Rev. 129 (1893)*. Recently, on the one-hundredth anniversary of its publication, an entire symposium was devoted to the legacy of this one article. See One Hundred Years of Judicial Review: The Thayer Centennial Symposium, *88 Nw. U. L. Rev. 1 (1993)*.

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"For weighty reasons, it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this court, and every other court of reputation in the United States, that an Act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt." n14

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n14. Thayer, supra note 13, at 140 (quoting *Commonwealth v. Smith, 4 Binn. 117 (1811)*).

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What are these "weighty reasons" to which Justice Tilghman alluded? It is not enough to assert separation-of-powers concerns, because the courts are themselves a separate and coequal branch of government whose judgment concerning constitutionality presumably merits a weight at least equal to that of the other branches. Giving courts a voice genuinely equal to that of legislatures means giving no presumption to legislative judgment. Still, judicial deference might have rested upon a factual assumption that the representatives of the people were conscientious enough to consider the constitutional implications of their legislative acts. To question the judgment of the legislature was to question the good faith of a coequal branch, an accusation that should not lightly be made.

Then there was the reason offered by Thayer himself:

This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional. This is the principle which the rule that I have been illustrating affirms and supports. n15

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n15. *Id. at 144*.

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According to Thayer, constitutional judgments were sufficiently uncertain that a judgment by a legislature that it was acting within its proper powers should be respected unless it is clearly wrong.

Thayer's argument for judicial deference to legislatures, on the grounds that exigency requires and the Constitution permits a range of legislative choices, arises most tellingly when interpreting the Necessary and Proper Clause. With every legislative enactment, this Clause raises the question of how much deference courts owe to a legislative judgment that an act is both "necessary" and "proper." In the next Part, I shall suggest that whether an assessment of a statute's necessity is too uncertain to be decided by courts depends, in important part, on how this constitutionally supplied standard is conceived.

A.

The Meaning of "Necessary"

The term "necessary" in the Necessary and Proper Clause immediately raises two questions: (1) how necessary is "necessary," and (2) who decides what is and is not necessary? I shall contend that the answer to the second of these questions depends, at least in part, on how one answers the first.

1.

Madisonian v. Marshallian Conceptions of "Necessary"

a.

Madison's Interpretation of Necessary

When the Constitution says that a law passed by Congress "shall be necessary," n16 what does this require? It might mean really necessary in the sense that the end cannot be performed in some manner that does not infringe the retained liberties of the people, as Madison argued in his speech to the first House of Representatives opposing the creation of a national bank:

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n16. U.S. Const. art. I, 8, cl. 18 (emphasis added).

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But the proposed Bank could not even be called necessary to the Government; at most it could be but convenient. Its uses to the Government could be supplied by keeping the taxes a little in advance; by loans from individuals; by the other Banks, over which the Government would have equal command; nay greater, as it might [*752] grant or refuse to these the privilege (a free and irrevocable gift to the proposed Bank) of using their notes in the Federal revenue. n17

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n17. 2 Annals of Cong. 1901 (1791).

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Although he was speaking here in his capacity as a legislator, Madison was not, at this point in his speech, arguing the "policy" issues raised by a

national bank, but rather its constitutionality. He had previously addressed the policy issues when, at the start of his speech, he "began with a general review of the advantages and disadvantages of banks." n18 However, "in making these remarks on the merits of the bill, he had reserved to himself the right to deny the authority of Congress to pass it." n19

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n18. Id. at 1894.

n19. Id. at 1896.

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Madison was primarily concerned with meaning of the Necessary and Proper Clause:

Whatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress.

Its meaning must, according to the natural and obvious force of the terms and the context, be limited to means necessary to the end, and incident to the nature of the specified powers.

....

The essential characteristic of the Government, as composed of limited and enumerated powers, would be destroyed, if, instead of direct and incidental means, any means could be used, which, in the language of the preamble to the bill, "might be conceived to be conducive to the successful conducting of the finances, or might be conceived to tend to give facility to the obtaining of loans." n20

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n20. Id. at 1898. Notice that Madison is not appealing here to original intent.

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Madison thought that trying to justify the constitutionality of a national bank as necessary for carrying into execution an enumerated power - in this case the borrowing power - required too great a stretch:

Mark the reasoning on which the validity of the bill depends! To borrow money is made the end, and the accumulation of capitals implied as the means. The accumulation of capitals is then the end, and a Bank implied as the means. The Bank is then the end, and a charter of incorporation, a monopoly, capital

punishments, &c., implied as the means.

If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of [*753] legislation, every object within the whole compass of political economy. n21

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n21. Id.at 1899.

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In defense of this interpretation of the Necessary and Proper Clause, Madison gave several examples of enumerated powers that were not left to implication, though if a latitudinarian interpretation of the Necessary and Proper Clause were correct, they surely could have been:

Congress have 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 the power "to raise and support armies" is expressly added; 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 the navy.

The regulation and calling out of the militia are more appertinent 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 monpoly [sic] Bank from the power of borrowing; yet, the power to borrow is not left to implication. n22

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n22. Id.

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Madison did not mean to exaggerate the significance of these sorts of drafting decisions: "It is not pretended that every insertion or omission in the Constitution is the effect of systematic attention. This is not the character of any human work, particularly the work of a body of men." n23 Yet he thought that these examples "with others that might be added, sufficiently inculcate, nevertheless, a rule of interpretation very different from that on which the bill rests. They condemn the exercise of any power, particularly a great and important power, which is not evidently and necessarily involved in an express power." n24

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n23. Id.

n24. Id.

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Perhaps most importantly to those, like me, who wish to draw a connection between the Necessary and Proper Clause and the protection of the rights and powers retained by the people, Madison also cited in support of [*754] this "rule of interpretation" the Ninth n25 and Tenth n26 Amendments. Of course, in February of 1791, these amendments had yet to be ratified, and on that date were the eleventh and twelfth on the list of amendments then pending before states. Perhaps because he referred to them by these numbers, Madison's only known use of the Ninth Amendment in a constitutional argument had, until recently, largely been ignored. n27

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n25. See 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.").

n26. See U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

n27. Prior to my discussions of this speech (and reactions thereto), the only reference to it that I had found in the entire corpus of Ninth Amendment scholarship was Eugene M. Van Loan, III, Natural Rights and the Ninth Amendment, *48 B.U. L. Rev. 1, 15 (1968)* ("As evidence that the federal government was restricted to delegated powers and that even the necessary and proper clause was not unlimited, [Madison] pointed to, among other things, the ninth amendment.").

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The latitude of interpretation required by the bill is condemned by the rule furnished by the Constitution itself.

....

The explanatory amendments proposed by Congress themselves, at least, would be good authority with them; all these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for.... He read several of the articles proposed, remarking particularly on the 11th [the Ninth Amendment] and 12th [the Tenth Amendment]; the former, as guarding against a latitude of interpretation; the latter, as excluding every source of power not within the Constitution itself. n28

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n28. 2 Annals of Cong. 1899-1901 (1791) (emphasis added).

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Thus, for Madison, whether or not a proposed action of government that restricted the liberty of the people was necessary, and therefore within the powers of Congress to enact, required some assessment of whether the means chosen were essential to the pursuit of an enumerated end. Without this assessment, the scheme of limited enumerated powers would unravel.

True, Madison was speaking here as a legislator, not a judge. But he was speaking about the constitutionality, not the wisdom, of a national bank, and other statements by him make it clear that he desired this issue to be justiciable. A few days after his bank speech, Madison replied to those who asserted that necessary meant merely expedient as follows: "We [*755] are told, for our comfort, that the Judges will rectify our mistakes. How are the Judges to determine in the case; are they to be guided in their decisions by the rules of expediency?" n29 This statement should not be interpreted as a rejection of judicial review, but as a rejection of a standard of constitutionality that would preclude judicial review. As will be seen below, n30 Madison later made clear that he objected to equating "necessary" with mere expedience or convenience because such a standard would place the issue of necessity outside the competence of courts.

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n29. Id. at 1958.

n30. See infratext accompanying notes 56-57 (discussing Madison's statements as president).

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It is true as well that Madison did not address in this speech whether any benefit of the doubt should be attached to legislative judgment, but, as shall be seen below, Madison himself later argued that whether judicial deference is due legislative judgment depends, at least in part, on one's view of necessity. Moreover, in his speech replying to those who took issue with his initial remarks, Madison denied that the House should "respect" the judgment of the Senate concerning constitutionality, or that the President should "sanction their joint proceedings." n31 Madison "then enlarged on the exact balance or equipoise contemplated by the Constitution, to be observed and maintained between the several branches of Government; and showed, that except this idea was preserved, the advantages of different independent branches would be lost, and their separate deliberations and determinations be entirely useless." n32

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n31. 2 Annals of Cong. 1956 (1791).

n32. Id.

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Although I call this conception of necessity Madisonian, I do not contend that it was original to him, nor that he stood alone in asserting it. Secretary of State Thomas Jefferson, for example, drew the same distinction between necessity and convenience:

The constitution allows only the means which are "necessary," not those which are merely convenient for effecting the enumerated powers. If such a latitude of construction be allowed to this phrase, as to give any non enumerated power, it will go to every one; for there is no one, which ingenuity may not torture into a convenience, in some way or other, to some one of so long a list of enumerated powers: it would swallow up all the delegated powers .... Therefore it was that the constitution restrained them to the necessary means; [*756] that is to say, to those means, without which the grant of power would be nugatory. n33

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n33. Thomas Jefferson, Opinion of Thomas Jefferson, Secretary of State, on the Same Subject, in Legislative and Documentary History of the Bank of the United States: Including the Original Bank of North America 91, 93 (M. St. Clair Clarke & D.A. Hall eds., Washington, Gales & Seaton 1832); see also id. ("Perhaps, indeed, bank bills may be a more convenient vehicle than treasury orders; but a little difference in the degree of convenience cannot constitute the necessity, which the constitution makes the ground for assuming any non enumerated power.").

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In Congress, Madison was joined by Representative Stone, who argued that the Necessary and Proper Clause "was intended to defeat those loose and proud principles of legislation which had been contended for. It was meant to reduce legislation to some rule." n34 Representative Jackson observed:

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n34. 2 Annals of Cong. 1933 (1791).

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If the sweeping clause, as it is called, extends to vesting Congress with such powers, and necessary and proper means are an indispensable implication in the sense advanced by the advocates of the bill, we shall soon be in possession of all possible powers, and the charter under which we sit will be nothing but a name. n35

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n35. Id. at 1916-17 (emphasis added).

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And Representative Giles defined necessary as "that mean without which the end could not be produced." n36 He rejected the suggestion that ""necessary,' as applicable to a mean to produce an end, should be construed so as to produce the greatest quantum of public utility." n37 That definition,

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n36. Id. at 1941.

n37. Id. (emphasis added).

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if pursued, will be found to teem with dangerous effects, and would justify the assumption of any given authority whatever. Terms are to be so construed as to produce the greatest degree of public utility. Congress are to be the judges of this degree of utility. This utility, when decided on, will be the ground of Constitutionality. Hence any measure may be proved Constitutional which Congress may judge to be useful. These deductions would suborn the Constitution itself, and blot out the great distinguishing characteristic of the free Constitutions of America, as compared with the despotic Governments of Europe, which consist in having the boundaries of governmental authority clearly marked out and ascertained. n38

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n38. Id. (emphasis added).

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[*757]

b.

Marshall's Interpretation of Necessary

In contrast to Madison's treatment, we might view "necessary" to mean merely convenient or useful, as John Marshall argued in his opinion in McCulloch v. Maryland, n39 upholding the constitutionality of the national bank. n40 Maryland had asserted the Madisonian conception of necessity in challenging the constitutionality of the bank:

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n39. *17 U.S. (4 Wheat.) 316 (1819).*

n40. Though many argued that the bank was constitutional, and though Madison et al. lost their battle against the first national bank, we cannot entirely be sure whether this was because Congress rejected his conception of necessity or because a majority of Congress thought the bank met the more stringent standard. It was not until McCulloch in 1819 that the Supreme Court passed on the meaning of the Necessary and Proper Clause in connection with the second national bank, adopting what I am calling the Marshallian conception.

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But the laws which they are authorized to make, are to be such as are necessary and proper for this purpose. No terms could be found in the language more absolutely excluding a general and unlimited discretion than these. It is not "necessary or proper," but "necessary and proper." The means used must have both these qualities. It must be, not merely convenient - fit - adapted - proper, to the accomplishment of the end in view; it must likewise be necessary for the accomplishment of that end. Many means may be proper which are not necessary; because the end may be attained without them. The word "necessary," is said to be a synonyme of "needful." But both these words are defined "indispensably requisite;" and most certainly this is the sense in which the word "necessary" is used in the constitution. To give it a more lax sense, would be to alter the whole character of the government as a sovereignty of limited powers. This is not a purpose for which violence should be done to the obvious and natural sense of any terms, used in an instrument drawn up with great simplicity, and with extraordinary precision. n41

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n41. *McCulloch, 17 U.S. at 366-67.*

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Marshall rejected the Madisonian conception of necessity in favor of the position that both Madison and Maryland posed as its opposite - "necessary" means convenient:

If reference be had to its use, in the common affairs of the world, or in approved authors, we find that [the word "necessary"] frequently imports no more than that one thing is convenient, or useful, or [*758] essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. n42

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n42. *Id. at 413-14.*

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Although Marshall's textual and functional defense of this interpretation of "necessary" is both well known and more readily available than Madison's bank speech, I shall briefly summarize it here.

Textually, Marshall contrasted the use of the term "necessary" in this clause with the term "absolutely necessary" used in Article I, Section 10, n43 arguing that it is "impossible to compare these sentences ... without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary,' by prefixing the word "absolutely.'" n44 Thus it is a mistake, as a textual matter, to equate the term necessary with the term absolutely necessary, as the State of Maryland purportedly did. n45

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n43. See U.S. Const. art. I, 10 ("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 its inspection Laws ....").

n44. *McCulloch, 17 U.S. at 414-15.*

n45. In its brief, the State of Maryland did not use this phrase, though it did use the phrase "indispensably requisite." See supra text accompanying note 41.

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Functionally, he argued:

It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end.... To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail [*759] itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. n46

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n46. *McCulloch, 17 U.S. at 415-16.*

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Marshall dismissed, almost casually, concerns about how such an open-ended grant of discretionary power squared with the theory of limited and enumerated powers.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist. n47

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n47. *Id. at 405.*

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And, just as Madison gave examples of enumerated powers that were not left to implication, Marshall offered three examples of unenumerated powers that had already been implied, even though they were arguably not "indispensably necessary" to the accomplishment of some enumerated purpose: the implied powers to carry mail between post offices and along post roads, n48 to punish any violations of its laws, n49 and to require congressional oaths of office. n50

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n48. Id. at 417 ("It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post office and post road.").

n49. Id. ("The several powers of Congress may exist, in a very imperfect state to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given.").

n50. Id. at 416 ("The power to exact this security for the faithful performance of duty, is not given, nor is it indispensably necessary.").

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There are any number of quite plausible responses to these examples that someone employing a Madisonian conception of necessity could make. [*760] The power to carry mail can surely be considered, in Madison's words, both requisite to and "incident to the nature" n51 of the postal power. Similarly, the power to punish is clearly incident, if not identical, to the nature of the law-making power. For many, a legislative enactment with no sanctions for disobedience can hardly be called a law. In contrast, the power to require

congressional oaths of office may well be inessential to the performance of government; n52 let candidates for office challenge their opponents to take such an oath or suffer the electoral consequences. If the inability to require congressional oaths be the price for holding Congress to its enumerated powers, a Madisonian might contend, Justice Marshall's opinion notwithstanding, it is a price well worth paying. n53

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n51. 2 Annals of Cong. 1898 (1791).

n52. A mandatory congressional oath might be considered a qualification for holding office in addition to those mandated by Article I, Sections 2 and 3, and thus beyond the powers of Congress to impose. See *Powell v. McCormack, 395 U.S. 486 (1969)* (limiting Congress to judging only the qualifications for membership enumerated in Article I, Section 2). On the other hand, an oath requirement might be considered a procedural rule within the powers of each house to determine for itself rather than a law. On either theory, an oath requirement is either permissible or impermissible independent of the Necessary and Proper Clause.

n53. Assuming Marshall was correct in claiming that a Madisonian conception of necessity would mean that a mandatory congressional oath to preserve, protect, and defend the Constitution lies outside the powers of Congress, a Madisonian might respond that a Congress that imposed such a requirement would be violating the terms of such an oath.

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We may summarize Marshall's argument in McCulloch as follows: Because it is absolutely necessary that "necessary" not mean absolutely necessary, and because the word "necessary" does not necessarily mean absolutely necessary, of necessity it does not. Marshall's functional argument depends upon the fear that the national government will fail without the sort of discretionary powers that his interpretation allows. As important, it assumes that this open-ended grant of discretionary powers will not eventually undermine the enumerated powers scheme as Madison feared.

Although as president Madison had actually signed into law the bill establishing the national bank that Marshall upheld as constitutional, n54 Madison took immediate exception to Marshall's opinion in McCulloch, [*761] renewing the argument he had made as a congressman nearly thirty years before:

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n54. Madison later justified his decision by citing the precedent established by the long-standing acquiescence to the claimed power as well as by the expediency of the bank: "A veto from the Executive, under these circumstances, with an admission of the expediency and almost necessity of the measure, would have been a defiance of all the obligations derived from a course of precedents amounting to the requisite evidence of the national judgment and intention." Letter from James Madison to Mr. Ingersoll (June 25, 1831), in 4 Letters and Other Writings of James Madison 183, 186 (Philadelphia, J.B. Lippincott & Co. 1867) (emphasis added) [hereinafter Letters].

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Of most importance is the high sanction given to a latitude in expounding the Constitution, which seems to break down the landmarks intended by a specification of the powers of Congress, and to substitute, for a definite connection between means and ends, a legislative discretion as to the former, to which no practical limit can be assigned. In the great system of political economy, having for its general object the national welfare, everything is related immediately or remotely to every other thing; and, consequently, a power over any one thing, if not limited by some obvious and precise affinity, may amount to a power over every other thing. Ends and means may shift their character at the will and according to the ingenuity of the legislative body....

Is there a legislative power, in fact, not expressly prohibited by the Constitution, which might not, according to the doctrine of the court, be exercised as a means of carrying into effect some specified power? n55

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n55. Letter from James Madison to Judge Roane (Sept. 2, 1819), in 3 Letters, supra note 54, at 143, 143-44 (emphasis added).

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Notice that Madison both acknowledges the supposedly modern insight that the national economy is interconnected and rejects this as a basis for a latitudinarian interpretation of "necessary."

Perhaps most importantly for those who would deny that such issues ought to be justiciable, in the same letter, President Madison makes crystal clear his objection to removing the constitutional determination of necessity from the province of the courts: "Does not the court also relinquish, by their doctrine, all control on the legislative exercise of unconstitutional powers?" n56 Madison objected to interpreting necessary as merely expedient or convenient, in part, because doing so would place the matter "beyond the reach of judicial cognizance.... By what handle could the court take hold of the case?" n57

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n56. Id. at 144.

n57. Id.

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This view of the judiciary was not limited to Madison; nor was it a view that developed only later when Madison was president. Back during the 1791 bank debate in Congress an interesting exchange occurred between Representatives Stone and Smith. Stone accused Smith of hold- [*762] ing the view that "all

our laws proceeded upon the principle of expediency - that we were the judges of that expediency - as soon as we gave it as our opinion that a thing was expedient, it became constitutional." n58 To this, Representative Smith replied:

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n58. 2 Annals of Cong. 1932 (1791).

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He had never been so absurd as to contend, as the gentleman had stated, that whatever the Legislature thought expedient, was therefore Constitutional. He had only argued that, in cases where the question was, whether a law was necessary and proper to carry a given power into effect, the members of the Legislature had no other guide but their own judgment, from which alone they were to determine whether the measure proposed was necessary and proper .... That, nevertheless, it was still within the province of the Judiciary to annul the law, if it should be by them deemed not to result by fair construction from the powers vested by the Constitution. n59

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n59. Id. at 1936-37. Smith also asserted that members should determine "that the measure was not prohibited by any part of the Constitution, was not a violation of the rights of any State or individual, and was peculiarly necessary and proper to carry into operation certain essential powers of Government." Id. at 1936 (emphasis added). This statement is interesting for three reasons. First, it refers to individual not collective rights. Second, it was made before the ratification of the Bill of Rights and therefore presumably refers to unenumerated individual rights that constrain the powers of Congress. Finally, by distinguishing between prohibitions in the Constitution and violations of unenumerated individual rights, Smith assumed that unenumerated rights were not, as some have alleged, simply defined "residually" by those powers. See, e.g., McAffee, Original Meaning, supra note 10, at 1221. Having said this, I should concede that, by distinguishing between a violation of individual rights and a measure's propriety, this statement appears somewhat inconsistent with the theory endorsed below that a law is "improper" if it violates the background rights retained by the people.

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In sum, Representative Smith rejected the "absurd" accusation that Congress was the sole judge of a measure's necessity and propriety.

Of course, it was the opinion of Marshall, the Supreme Court Chief Justice, not Madison, that prevailed on this question of how to interpret "necessary." Notwithstanding that Marshall's opinion in McCulloch was lambasted at the time as a usurpation, n60 it became, as Stephen Gardbaum has observed,

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n60. See Francis N. Stites, John Marshall: Defender of the Constitution 132-34 (Oscar Handlin ed., 1981) (describing contemporary criticisms of Marshall's opinion in McCulloch); 8 G. Edward White, The History of the Supreme Court of the United States 552-62 (1988) (same).

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one of the handful of foundational decisions of the Supreme Court that are automatically cited as original sources for the propositions of constitutional law that they contain. But McCulloch has the further (and even rarer) distinction of being treated as providing a full and [*763] complete interpretation of a particular clause of the Constitution. Analysis of the Necessary and Proper Clause has historically begun and ended with McCulloch n61

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n61. Stephen Gardbaum, Rethinking Constitutional Federalism, *74 Tex. L. Rev. 795, 814 (1996)*.

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Marshall's latitudinarian conception of necessity survives to this day, largely unchallenged. Yet, while Marshall's fear of impotent government remains a matter of speculation (because he got his way), history seems to have borne out Madison's expressed concern for the integrity of the enumerated powers scheme. With rare exception, such as Lopez, n62 the enumeration of powers has largely been vitiated as a limitation on the scope of the national government, due in no small measure to the influence of Justice Marshall's opinion in McCulloch.

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n62. *United States v. Lopez, 115 S. Ct. 1624 (1995)*.

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c.

Who Decides What Is Necessary?

The term "necessary" also raises a second question: Who is to decide the issue of a measure's necessity? Although it is clear that Marshall's decision in Marbury v. Madison n63 was correct in its holding that legislative decisions are not immune from judicial assessment of constitutionality and nullification, n64 the crucial question is how much deference do the courts owe to legislatures. While the degree of deference depends on the perceived competency and good faith of the legislative process to reach knowledgeable, as opposed to merely

rent-seeking, decisions, it also depends on how you resolve the first question concerning the requirement of necessity.

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n63. *5 U.S. (1 Cranch) 137 (1803).*

n64. See, e.g., authorities cited supra notes 8-9.

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For if you take the Madisonian view that "necessary" means really necessary, then courts are quite capable of assessing the government's claim that Congress had no way to accomplish this legitimate end other than by restricting the liberties of the people. If, on the other hand, you take the Marshallian view of necessary as merely convenient, then making a choice among competing means of accomplishing a legitimate end appears to be a matter of discretion properly left to legislative processes. As Madison himself wrote:

The expediency and constitutionality of means for carrying into effect a specified power are controvertible terms; and Congress are admitted to be judges of the expediency. The court certainly cannot be so; a question, the moment it assumes the character of mere [*764] expediency or policy, being evidently beyond the reach of judicial cognizance. n65

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n65. Letter from James Madison to Judge Roane, supra note 55, at 144.

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In sum, a Madisonian or strict conception of necessity is a matter of constitutional principle and within the purview of judicial review, whereas a Marshallian or loose conception of necessity is a matter of legislative policy and outside the purview of courts. n66 Thus, the proper role of the courts in protecting the rights retained by the people from unnecessary infringement by government depends both on an assessment of legislative competence to assess the constitutionality of its enactments - in particular their necessity (and propriety) - and on which view of necessity one adopts.

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n66. Cf. Ronald Dworkin, Taking Rights Seriously 22, 90-94 (1977) (distinguishing between principles and policies).

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Whatever the views of the ratifying generation, by the time of the 1819 Marshall Court, the loose conception of necessity prevailed. From then until today, we can understand the two major swings of attitude concerning judicial

deference - the Lochner and post-New Deal eras - as reflecting an alternation between a more Madisonian and more Marshallian view of necessity.

(1)

The Rise and Fall of Means-End Scrutiny of Necessity

Notwithstanding the triumph of the Marshallian conception of necessity, the assumptions on which early judicial deference to legislatures rested began to be undermined at exactly the time it reached its ascendance. The antebellum concern over slavery eroded the widespread belief that legislatures, particularly state legislatures, were so likely to honor the rights of their citizens that they merited a presumption in their favor. After the Civil War, the enactment of the Fourteenth Amendment was specifically intended to subject state legislation to federal scrutiny to determine whether it violated the privileges or immunities of citizenship or whether it deprived any person of life, liberty, or property without due process of law. n67

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n67. See generally Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986) (discussing the origins of the Fourteenth Amendment).

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Although the five-to-four decision in the Slaughter House Cases n68 precluded the use of the Privileges or Immunities Clause for this purpose, it failed to suppress the growing skepticism of legislatures as deserving of a [*765] presumption of acting in good faith. At first, the skepticism surrounded the treatment of racial minorities. That is, until Slaughterhouse cut off one avenue of scrutiny via the Privileges or Immunities Clause, lower courts were less willing to presume that statutes adversely affecting blacks were constitutional simply because they were properly enacted.

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n68. *83 U.S. (16 Wall.) 36 (1873).*

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Later in the century, sympathy grew among intellectuals and the public for socialism and wealth redistribution grew. As a result, some among the judiciary became increasingly skeptical that state legislation infringing upon the liberties of the people was really being enacted as a necessary means to protect health, safety, and morals. On the national level, they suspected, instead, that arguments of necessity were merely pretexts for transforming the original constitutional scheme of limited and enumerated constitutional powers into one that would make possible the growth of what we now know as the administrative state.

This skepticism of legislative motive culminated in Lochner v. New York. n69 In Lochner and other such cases, the Court began to require proof that federal and state legislatures infringing the retained liberties of the people were actually pursuing a legitimate purpose rather than merely purporting to do so. Like Madison, they began requiring of legislation a showing of actual means-end fit, rather than merely deferring to legislative judgment. When judicial deference is based on trust and trust is eroded, increased scrutiny follows. n70

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n69. *198 U.S. 45 (1905).*

n70. After evaluating each of the rationales proffered on behalf of a statute limiting the hours a baker could work, the Court in Lochner concluded:

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law....

It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employe, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employes (all being men, sui juris), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employes.

Id. at 64.

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As anyone who has taken constitutional law knows, this era of means-end scrutiny came to a close as the perceived legitimacy of legislative activism continued to grow and, with it, the administrative state. What is not [*766] well known today is that the vehicle by which the Lochner-era precedent was overturned was the renewal of the presumption of constitutionality - an innovation urged by James Thayer in his 1893 Harvard Law Review article n71 - and eventually accepted by the Supreme Court due in part to the efforts of Justice Louis Brandeis. n72 Brandeis' opinion in O'Gorman & Young, Inc. v. Hartford Fire Insurance Co. n73 used the presumption of constitutionality to put the burden of proof on those challenging a statute:

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n71. Thayer, supra note 13, at 144 ("There is often a range of choice and judgment [and] in such cases the constitution does not impose upon the

legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.").

n72. In the Lochnercase itself, Justice Harlan had, in dissent, asserted the presumption of constitutionality:

The rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power.... If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional. McCulloch v. Maryland ....

Lochner, 198 U.S. at 68 (Harlan, J., dissenting).

n73. *282 U.S. 251 (1931)*.

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The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. n74

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n74. *Id. at 257-58* (footnote omitted).

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One contemporary of Brandeis, Walton Hamilton, writing glowingly in the Columbia Law Review, noted that the rejection of means-end scrutiny was accomplished merely by adopting a presumption in favor of the legislature:

The demand is to find an escape from the recent holdings predicated upon "freedom of contract" as "the rule," from which a departure is to be allowed only in exceptional cases. The occasion calls not for the deft use of tactics,

but for a larger strategy. The device of presumptions is almost as old as law; Brandeis revives the presumption that acts of a state legislature are valid and applies it to statutes [*767] regulating business activity. The factual brief has many times been employed to make a case for social legislation; Brandeis demands of the opponents of legislative acts a recitation of fact showing that the evil did not exist or that the remedy was inappropriate. He appeals from precedents to more venerable precedents; reverses the rules of presumption and proof in cases involving the control of industry; and sets up a realistic test of constitutionality. It is all done with such legal verisimilitude that a discussion of particular cases is unnecessary; it all seems obvious - once Brandeis has shown how the trick is done. It is attended with so little of a fanfare of judicial trumpets that it might have passed almost unnoticed, save for the dissenters, who usurp the office of the chorus in a Greek tragedy and comment upon the action. Yet an argument which degrades "freedom of contract" to a constitutional doctrine of the second magnitude is compressed into a single compelling paragraph. n75

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n75. Walton H. Hamilton, The Jurist's Art, *31 Colum. L. Rev. 1073, 1074-75 (1931)* (emphasis added) (footnotes omitted).

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In the passage italicized, it is not clear whether Hamilton was noting or simply missing the irony of the person lauded for bringing "realism" to judicial proceedings via the "Brandeis Brief," n76 adopting a presumption that would fictitiously impute a rational basis to any legislative decision. And who "realistically" is in the best position to present to a court empirical information for or against the necessity of a statute: agencies of government or an affected individual or company; those who have already succeeded in lobbying Congress to enact legislation or those who lost?

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n76. This term refers to the technique, pioneered by Brandeis as counsel in *Muller v. Oregon, 208 U.S. 412 (1908)*, of responding to the Lochner-era requirement to show means-ends fit by presenting the courts with a variety of empirical evidence purporting to show the necessity of economic legislation. The portion of Brandeis' famous brief in Muller devoted to this task ran some 95 pages. See John W. Johnson, Brandeis Brief, in The Oxford Companion to the Supreme Court of the United States 85 (Kermit L. Hall et al. eds., 1992) [hereinafter Oxford Companion]. In light of Hamilton's gushing praise for Brandeis' use of presumptions and the widespread acceptance of the presumption of constitutionality ever since, it is tempting to view the continuing veneration of Brandeis' "realist" tactics as a lawyer as merely agreement with the outcome it was being used to promote, rather than as a sincere endorsement of this method of evaluating the necessity of legislation.

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As Hamilton notes, the protests of the dissenters in O'Gorman make it clear

that the presumption of constitutionality was being used by Brandeis to avoid the means-end scrutiny of the necessity of interfering with a citizen's liberty (albeit at the state level) that had previously been required by the Court. After rejecting the suggestion that "the burden of establishing any underlying disputable fact rests upon the appellant before it can suc- [*768] cessfully challenge the validity of the questioned enactment," n77 the dissent argued: "In order to justify the denial of the right to make private contracts, some special circumstances sufficient to indicate the necessity therefor must be shown by the party relying upon the denial." n78

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n77. *O'Gorman, 282 U.S. at 265* (Van Devanter, J., dissenting).

n78. *Id. at 269* (emphasis added).

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We are accustomed to thinking of the issues raised by the Lochner era to involve the Due Process Clause of the Fourteenth Amendment with regard to means-end scrutiny of state legislation, and the Commerce Clause with regard to the Congress' power to regulate commercial activity. However, Stephen Gardbaum has recently argued that, with respect to federal powers,

the New Deal Court's own constitutional justification for its radical expansion of the scope of federal power over commerce was that the congressional
measures in question were valid exercises of the power granted by the Necessary and Proper Clause and were not direct exercises of the power to regulate commerce among the several states. That is, the Court did not simply and directly enlarge the scope of the Commerce Clause itself, as is often believed. Rather, it upheld various federal enactments as necessary and proper means to achieve the legitimate objective of regulating interstate commerce. n79

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n79. Gardbaum, supra note 61, at 807-08.

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In this manner, the Court used the long-accepted Marshallian conception of necessity to expand its power to regulate commerce among the states.

Gardbaum offers several examples to support this claim. One is Justice Stone's opinion in the 1941 case of United States v. Darby, n80 in which McCulloch v. Maryland is cited by Stone in support of the following position:

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n80. *312 U.S. 100 (1941).*

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The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce ... as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See McCulloch v. Maryland n81

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n81. *Id. at 118-19* (citations omitted).

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Later in this opinion, Stone makes clear that he favors deference to Congress' assessment of a measure's necessity: [*769]

Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means
chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government. n82

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n82. *Id. at 121* (citations omitted).

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Gardbaum also notes that among "the relatively few observers to acknowledge the basis on which the New Deal Court expanded federal power" was Justice O'Connor in her dissent in Garcia v. San Antonio Metropolitan Transit Authority: n83

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n83. *469 U.S. 528 (1985)*.

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The Court based the expansion [of the commerce power] on the authority of Congress, through the Necessary and Proper Clause, "to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." It is through this reasoning that an intrastate activity "affecting" interstate commerce can be reached through the commerce power.... And the reasoning of these cases underlies every recent decision concerning the reach of Congress to activities affecting interstate commerce. n84

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n84. *Id. at 584-85* (O'Connor, J., dissenting) (citations omitted).

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The only thing Gardbaum fails explicitly to note is that using the Necessary and Proper Clause, as interpreted by Marshall's opinion in McCulloch, to expand federal power was also facilitated doctrinally by adopting a presumption of constitutionality in favor of congressional judgment.

(2)

The Limited Revival of Means-Ends Scrutiny via Footnote 4

When the Court in 1937 finally abandoned entirely the means-end scrutiny of regulation in the economic sphere by employing Brandeis' technique of shifting the presumption of constitutionality to one favoring all such legislation, n85 it immediately became necessary to establish some limits on this burden-shifting technique lest it swallow the entire constitu- [*770] tional practice of judicial review. This feat was accomplished one year later in the 1938 case of United States v. Carolene Products Co., n86 which concerned legislative restrictions on the sale of a milk substitute that competed with the products of dairy farmers. n87 In the text of Justice Stone's opinion that immediately preceded the now-famous "Footnote 4," n88 the Court clearly asserted the presumption of constitutionality. "The existence of facts supporting the legislative judgment is to be presumed," it said,

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n85. See *West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)*.

n86. *304 U.S. 144 (1938)*.

n87. See Geoffrey P. Miller, The True Story of Carolene Products, *1987 Sup. Ct. Rev. 397*.

n88. The fame of this footnote is illustrated by the fact it merits its own entry in The Oxford Companion to the Supreme Court of the United States. See

Dean Alfange, Jr., Footnote Four, in Oxford Companion, supra note 76, at 306-07.

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for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators. n89

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n89. *Carolene Prods., 304 U.S. at 152.*

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With this in mind, we are now in a better position to appreciate fully the theory of Footnote 4, which began as follows:

There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. n90

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n90. *Id. at 152 n.4.*

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Thus, in Footnote 4 we have enunciated the modern theory of constitutional rights: Adopt a Marshallian conception of necessity and presume all acts of legislatures to be valid, except when an enumerated right listed in the Bill of Rights is infringed (or when legislation affects the political process or discrete and insular minorities n91), in which event the Court will [*771] employ a Madisonian conception of necessity and require of Congress a showing of means-ends fit. And subsequent cases have made the presumption in favor of legislation nearly irrebuttable, except when a fundamental enumerated right is at issue, in which event few statutes will withstand the "strict scrutiny" of both means and ends that will then be applied.

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n91. The rest of Footnote 4 adds:

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, ... or national, ... or racial minorities ... ; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 152-53 n.4 (citations omitted).

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Indeed, the main reason why Griswold v. Connecticut n92 and Roe v. Wade n93 were so controversial among constitutional scholars when they were decided was because the right to privacy was the first right since Carolene Products to be protected as fundamental that was not "within a specific prohibition of the Constitution." Thus, the right to privacy was controversial from the very first, not because it ran afoul of the original intent of either the initial Constitution or the Fourteenth Amendment, and not so much because it was used to protect contraceptives or abortion, but because it violated the post-New Deal jurisprudence of Carolene Products governing the presumption of constitutionality. Ironically, no group has been more faithful to this twentieth-century innovation than the modern judicial conservative proponents of original intent. n94

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n92. *381 U.S. 479 (1965)*.

n93. *410 U.S. 113 (1973)*.

n94. See, e.g., Robert H. Bork, The Tempting of America: The Political Seduction of the Law 60 (1990).

One hardly knows what to make of the tentativeness with which Stone suggests that the Court might be less deferential to the legislature if the legislation appears to be specifically prohibited by the Constitution. Of course, review should be more stringent if the Constitution reads on a subject than if it does not. That distinction should spell the difference between review and no review.

Id.

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Of course, the Carolene Products theory of constitutional rights neglects both the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth. Why is it that only the "specific prohibitions of the Constitution" may shift the presumption of constitutionality, when the Ninth Amendment declares: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"? n95 Disparaging the unenumerable liberties protected by the rights retained by the people by construing a Marshallian conception of necessity whenever government infringes upon them is exactly what Footnote 4 attempts to accomplish.

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n95. U.S. Const. amend. IX.

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[*772]

B.

The Meaning of "Proper"

To this point, I have only addressed one portion of the Necessary and Proper Clause, the requirement of necessity. What about the need to show that a measure is also proper? In what respect could a measure that was shown to be truly necessary to the effectuation of an enumerated purpose ever be improper? Would a meaningful means-end scrutiny of the necessity of a restriction on the liberties of the people make an assessment of its propriety superfluous?

1.

Distinguishing Proper from Necessary

In Chief Justice Marshall's opinion in McCulloch, he purports to treat the issue of propriety as distinct from that of necessity: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." n96 Gardbaum agrees with Justice O'Connor's opinion that this passage reflects a distinction between a determination of an act's necessity (which, according to Marshall, is a matter of legislative discretion) and its propriety (which presumably Marshall thought may be reviewable by a court): "It is not enough that the "end be legitimate'; the means to that end chosen by Congress must not contravene the spirit of the Constitution." n97 Indeed, writing pseudonymously in a newspaper as "A Friend of the Constitution," Marshall defended his opinion in McCulloch by emphasizing this point:

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n96. *McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)* (emphasis added).

n97. *Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 585 (1985)* (O'Connor, J., dissenting); see Gardbaum, supra note 61, at 816 ("as Justice O'Connor correctly points out in her Garcia dissent").

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In no single instance does the court admit the unlimited power of congress to adopt any means whatever, and thus to pass the limits prescribed by the Constitution. Not only is the discretion claimed for the legislature in the selection of its means, always limited in terms, to such as are appropriate, but the court expressly says, "should congress under the pretext of executing its powers, pass laws for the accomplishment of objects, not entrusted to the government, [*773] it would become the painful duty of this tribunal ... to say that such an act was not the law of the land." n98

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n98. John Marshall, A Friend of the Constitution, Alexandria Gazette, July 5, 1819, reprinted in John Marshall's Defense of McCulloch v. Maryland 184, 186-87 (Gerald Gunther ed., 1969). Madison doubted the effectiveness of this stated constraint: "But suppose Congress should, as would doubtless happen, pass unconstitutional laws, not to accomplish objects not specified in the Constitution, but the same laws as means expedient, convenient, or conducive to the accomplishment of objects intrusted to the government; by what handle could the court take hold of the case?" Letter from James Madison to Judge Roane, supra note 55, at 144.

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This principle leads to the question: What could make a law that is necessary in the Madisonian sense nonetheless improper? After an extensive examination of sources from the founding era, Gary Lawson and Patricia Granger proposed the following answer:

In view of the limited character of the national government under the Constitution, Congress's choice of means to execute federal powers would be constrained in at least three ways: first, an executory law would have to conform to the "proper" allocation of authority within the federal government; second, such a law would have to be within the "proper" scope of the federal government's limited jurisdiction with respect to the retained prerogatives of the states; and third, the law would have to be within the "proper" scope of the federal government's limited jurisdiction with respect to the people's retained rights. In other words, ... executory laws must be consistent with principles of separation of powers, principles of federalism, and individual rights. n99

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n99. Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, *43 Duke L.J. 267, 297 (1993)*.

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When Stephen Gardbaum considers the propriety of legislation, he focuses his attention on whether such laws are consistent with principles of federalism. n100 My concern here is instead with the last of these three ways by which, according to Lawson and Granger, laws could be improper: Laws are improper if they violate the background rights retained by the people. If we adopt a Marshallian conception of necessity, it is easy to see how the exercise of such a discretionary power might violate the background rights retained by the people - though this reintroduces under the rubric of propriety many of the difficulties Marshall argued attach to a strict [*774] construction of necessity. n101 Adopting a Madisonian conception of necessity, however, raises the following potential difficulty: If a restriction of liberty is shown to be truly necessary, in the Madisonian sense, to put into execution an enumerated power, in what way can it be considered an "improper" infringement on these background rights? Have not the people surrendered to the national government the powers that were enumerated in Article I and any right inconsistent with the exercise of such powers? n102

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n100. See Gardbaum, supra note 61.

n101. Using either an "originalist" or "constructive" method, we would have to devise a theory of unenumerated rights of sufficient specificity to identify improper exercises of government power, in the way that the First Amendment identifies as improper infringements on the freedom of speech. See Barnett, Reconceiving, supra note 4, at 30-38 (describing the originalist, constructive, and presumptive methods of interpreting unenumerated rights and how they are not mutually exclusive).

n102. The answer to this rhetorical question is not as obvious as it may at first seem. For the appropriate legal construct is not the surrender of rights to a master, but the delegation of powers to an agent. See, e.g., Marshall, supra note 98, at 211 ("It is the plain dictate of common sense, and the whole political system is founded on the idea, that the departments of government are the agents of the nation, and will perform, within their respective spheres, the duties assigned to them."). When a principal engages an agent, the agent can be empowered to act on behalf of and subject to the control of the principal, while the principal retains all his rights. So, for example, a principal can empower the agent to sell the principal's car, while retaining the right to sell it himself. And the fact that the principal retains the right to sell his car is one reason that the agent can be sued for failing to act on the principal's behalf or refusing to conform her actions to the principal's exercise of control. In normal agency relationships, the fact that an agent is empowered to

act on the principal's behalf does not make the agent the sole judge of whether or not she is acting within the scope of her agency, as the Marshallian discretionary conception of necessity seems to do. Moreover, the fact that some rights are inalienable suggests that those who purport to exercise them on behalf of another need justify their assumption of such power. See Randy E. Barnett, Contract Remedies and Inalienable Rights, 4 Soc. Phil. & Pol'y, Autumn 1986, at 179 [hereinafter Barnett, Contract Remedies] (defining inalienable rights and providing four reasons why some rights are inalienable); Randy E. Barnett, Squaring Undisclosed Agency Law with Contract Theory, *75 Cal. L. Rev. 1969, 1981 (1987)* [hereinafter Barnett, Squaring] ("A principal who authorizes his agent to so act "on his behalf' consensually empowers the agent to exercise certain rights that the principal alone would normally exercise.").

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To answer this question we must look to the enumerated power that is most often linked to the Necessary and Proper Clause and used to justify the administrative state. This is the power found in the Commerce Clause, which reads: "Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes...." n103 Special attention needs to be given the words "to regulate." Congress was not given the power to prohibit commerce but to regulate it. Unfortunately the power to regulate liberty has for so long been used as a euphemism for the power to prohibit its exercise that we have lost the original sense of the term.

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n103. U.S. Const. art. I, 8, cl. 3.

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[*775]

To regulate means literally "to make regular." For example, we would regulate the making of a will by requiring that there be two witnesses. One is too few and three are more than enough. Such a "regulation" of wills tells people how they may effectuate their purposes in such a way as to conform to the
expectations of other people. It would defeat the intentions of testators and be very bad for heirs to discover after it is too late that a will lacked enough witnesses to make it enforceable. But to regulate or make regular will making in this way is not to prohibit the making of wills or to refuse to honor the intentions they manifest. A power to regulate wills does not imply, for example, a power to tax or confiscate all bequests above a certain amount.

In general usage, eighteenth- and nineteenth-century Americans often used "regulate" not in the sense of legal prohibition but rather in the now less prominent uses given by Webster's:

2. to adjust to some standard or requirement, as amount, degree, etc.: to regulate the temperature. 3. to adjust so as to assure accuracy of operation: to regulate a watch. 4. to put in good order: to regulate the digestion. n104

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n104. Webster's Encyclopedic Unabridged Dictionary of the English Language 1209 (1989).

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Consistent with this, President James Polk used "well-regulated" to mean operating in good order, correctly or properly, referring to "well-regulated self-government among men." n105

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n105. James Polk, Inaugural Address (1845), in The Presidents Speak: The Inaugural Addresses of American Presidents 90 (Davis Newton Lott ed., 1961).

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For this reason, it was not a contradiction for the Second Amendment to defend "the right of the people to keep and bear arms" as instrumental to securing the existence of "a well-regulated militia." "In eighteenth century military usage, "well regulated' meant "properly disciplined,' not "government controlled.'" n106 The eighteenth-century usage of "regulate," in the context of the Second Amendment, had the more specialized meaning of practiced in the use of arms, properly trained and/or disciplined. Thus we find Alexander Hamilton, in The Federalist, No. 29, referring to "a well-regulated militia" as one that has been sufficiently drilled. n107 [*776] Empowering the national government to see that the militia was "well-regulated" conferred upon it neither the power to prohibit the states from forming militias, nor the power to prohibit the private possession of firearms. n108

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n106. Nelson Lund, The Second Amendment, Political Liberty, and the Right to Self-Preservation, *39 Ala. L. Rev. 103, 107 n.8 (1987)*.

n107. Hamilton assumes this meaning throughout Federalist No. 29, but it is made most explicit when he is discussing his reasons why Congress will not undertake to discipline "all the militia of the United States," pursuant to its powers under Article I, Section 8 ("to provide for organizing, arming, and disciplining the militia, and for governing such parts of them as may be employed in the service of the United States"):

To oblige the great body of the yeomanry, and of the other classes of the citizens, to be under arms for the purpose of going through military exercises and evolutions, as often as might be necessary, to acquire the degree of perfection which would entitle them to the character of a well regulated militia, would be a real grievance to the people, and a serious public inconvenience and loss.

The Federalist No. 29, at 184 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added).

n108. Citations to the extensive recent scholarship on the Second Amendment can be found in Randy E. Barnett & Don Kates, Under Fire: The New Consensus on the Second Amendment, 45 Emory L.J. (forthcoming).

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Similarly, in the context of the commerce power, the power to regulate commerce among the states is the power to make such commerce regular; it is not the power to prohibit commerce any more than the power to make regular the flow of water entails the power to shut off the flow. According to this distinction between regulation and prohibition, it is not a violation of the rights retained by the people for government to provide for genuinely necessary regulations of the exercise of liberty. n109 But the power to regulate does not include the power to prohibit the rightful exercise of liberty. n110

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n109. Of course a regulation will of necessity "prohibit" all actions that do not conform to its requirements and this will unavoidably lead to hard cases where it is difficult to discern whether the real purpose of a law is to regulate as opposed to being a pretext for a prohibition. But easy cases of unconstitutional prohibitions of liberty will exist as well and to address them it is well worth making the effort to distinguish regulation from prohibition.

n110. By a "rightful" exercise of liberty I mean an action that does not violate the rights of others. See infra p. 787. So, for example, the (enumerated) natural right of freedom of speech does not prevent the legal prohibition of fraud. As natural rights theorist John Locke argued,

But though this be a State of Liberty, yet it is not a State of Licence.... The State of Nature has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.

John Locke, Two Treatises of Government 288-89 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). Though more needs to be said about this than can be said here, comparatively few of all governmental interferences with liberty can reasonably be justified as the prohibition of rights-violating or "wrongful" behavior, and few such justifications on their behalf are even offered.

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Thus, for a law to be both "necessary and proper" to effectuate the commerce power, it must be a regulation that is truly necessary, but it must also be proper insofar as it is a regulation of commerce and not a prohibition. A genuine regulation that is unnecessary violates this Clause, and a law that

purports to regulate, but is really intended as a prohibition also violates the Clause. Whereas the Ninth Amendment argues against a [*777] latitudinarian interpretation of a measure's necessity, both the Ninth and Tenth Amendments argue against a latitudinarian interpretation of whether a measure falls within the enumeration of powers and is proper. In this manner, even had no bill of rights ever been enacted, the Necessary and Proper Clause would give the judiciary the power to protect the rights retained by the people.

2.

Problems with Professor McAffee's Interpretation of

Necessary and Proper

Professor Thomas McAffee has taken issue with Lawson and Granger's interpretation of the Necessary and Proper Clause:

Lawson and Granger suggest that the word "proper" plays a critical role as the textual source of important, external limitations on congressional authority. Indeed, their interpretation appears to warrant limiting Congress' powers in ways that would seem strained based upon the wording of the grants of power themselves, especially because it would provide a basis for imposing unwritten limitations on Congress in behalf of unenumerated individual rights. n111

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n111. Thomas B. McAffee, Federalism and the Protection of Rights: The Modern Ninth Amendment's Spreading Confusion, *1996 B.Y.U. L. Rev. 351, 369* (emphasis added).

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In defense of his originalist interpretation, n112 McAffee examines various statements about the Necessary and Proper Clause made during and after the constitutional convention. He pays special attention to the reference to the Clause made by Madison in his speech to the House on June 8, 1979, explaining and defending his proposal for a bill of rights. n113

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n112. McAffee favors the "traditional understanding" that the Necessary and Proper Clause "performs the mundane task of affirming the fundamental idea that Congress has the authority to exercise reasonable discretion in choosing the means by which to implement the goals set forth in the legislative powers granted by Article I, Section 8." *Id. at 365.* To be "improper," according to McAffee, a law deemed necessary by Congress would have to violate "limitations [stated or implied] elsewhere in the Constitution." *Id. at 370.*

n113. Because I am not making an originalist argument in this Article, I will not examine the other evidence of framers' intent discussed by McAffee. My thesis is that we ought to choose the Madisonian conception of necessity over the Marshallian conception, and that we ought to adopt a conception of propriety that restricts the government's power to violate the background rights retained by the people, because doing so helps assure that the laws enacted by Congress are not unjust and therefore that they bind the citizenry in conscience. See Barnett, Getting Normative, supra note 4 (explaining how the problem of legitimacy should influence constitutional interpretations). Of course, if Madison did indeed hold to the view I attribute to him, then it is unlikely that his interpretation would violate the original understanding of the Necessary and Proper Clause, though this original understanding might be underdeterminate enough to encompass more than one interpretation. By "underdeterminate" I mean that the original understanding might exclude a great many, but still not all, interpretations. See Lawrence B. Solum, On the Indeterminacy Crisis: Critiquing Critical Dogma, *54 U. Chi. L. Rev. 462, 473 (1987)* ("The law is underdeterminatewith respect to a given case if and only if the set of results in the case that can be squared with the legal materials is a nonidentical subset of the set of all imaginable results."); cf. Frederick Schauer, Easy Cases, *58 S. Cal. L. Rev. 399 (1985)* (describing how the constitutional text provides a "frame" that excludes many, but not all, possible interpretations).

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[*778]

In his bill of rights speech, Madison argues that the proposed amendments were needed notwithstanding the claim widely made by Federalists (including himself) when advocating the ratification of the Constitution, that a bill of rights is unnecessary "because the powers are enumerated, and it follows, that all that are not granted by the constitution are retained; that the constitution is a bill of powers, the great residuum being the rights of the people." n114 His response to this argument focused attention on the Necessary and Proper Clause:

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n114. 1 Annals of Cong. 455 (Joseph Gales ed., 1789).

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I admit that these arguments are not entirely without foundation; but they are not conclusive to the extent which has been supposed. It is true, the powers of the General Government are circumscribed, they are directed to particular objects; but even if Government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent, ... because in the constitution of the United States, there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the Government of the United States .... Now, may not laws be considered necessary and proper by Congress, for it is for them to judge of the necessity and propriety to

accomplish those special purposes which they may have in contemplation, which laws in themselves are neither necessary nor proper n115

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n115. *Id. at 455-56.*

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By appearing to allow Congress the discretion "to judge the necessity and propriety" of its laws, Madison's reference to the Necessary and Proper Clause in his bill of rights speech appears to undercut the view of the Clause I am suggesting here, though McAffee makes no mention of it. (Ishall return to this statement in a moment.)

Instead, McAffee places particular stress on the example Madison uses to illustrate an improper, though arguably necessary, means to effectuating [*779] an enumerated power: the use of general warrants to collect revenue. Madison stated:

The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for this purpose ... ? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government. n116

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n116. *Id. at 456.* Somewhat oddly, McAffee reads this passage as referring to "a criminal statute that might be enforced with a general search warrant if there were no constitutional guarantee against unreasonable searches and seizures." McAffee, supra note 111, at 371. This seems inaccurate on two counts: Madison was referring to a revenue, not a criminal statute; and the use of general warrants is barred by the requirement of particularity, not the prohibition on unreasonable searches. I am not sure, however, that anything of substance turns on this apparent misunderstanding.

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A general warrant, used widely by the British and reviled by Americans, was one that authorized its bearer to search at his discretion anywhere and anytime he chose. n117 Here is how McAffee interprets this example:

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n117. See Jacob Landynski, Fourth Amendment, in Oxford Companion, supra note 76, at 311 ("The Writ of Assistance, a general search warrant authorized by

Parliament, granted [British customs officials] virtually unlimited discretion to search and was valid for the lifetime of the sovereign.").

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Madison expressed his belief that without a Fourth Amendment the power to authorize general search warrants would have been available to Congress under the Necessary and Proper Clause.... However, if the key to a limited delegation of powers was to be the requirement that laws be "proper" as well as "necessary," Madison's example would have had no force. Indeed, Madison would have been arguing at most for the value of adding clarity to prior-existing limitations, rather than for the necessity of adding a bill of rights to the Constitution to secure basic liberties. n118

McAffee's use of this example is misleading. For he well knows that Madison thought that his proposed "Bill of Rhts" n119 included different types of rights. In particular, Madison distinguished between "natural [*780] rights retained as speach [sic]" n120 and "positive rights resultg. as trial by jury." n121 "Trial by jury," he said in his speech, "cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community." n122 As Madison made clear in his proposed amendment that was the precursor of the Ninth Amendment, "The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall ... be ... construed ... either as actual limitations of such powers, or as inserted merely for greater caution." n123 A positive right included in the Bill of Rights would be an "actual" or additional "limitation" on government powers that would not exist in the absence of enumeration, whereas a natural right, such as a the right of freedom of speech, would have been added "mainly for greater caution." Thus the Fourth Amendment requires that all warrants "particularly describe the place to be searched, and the persons or things to be seized." n124 This mandate created a "positive" constitutional right to be free from general warrants, which operates as an "actual limitation" on the powers of government.

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n118. McAffee, supra note 111, at 371-72.

n119. Madison's Notes, supra note 11, at 64.

n120. Id.

n121. Id.

n122. 1 Annals of Cong. 454 (Joseph Gales ed., 1789).

n123. Id. at 452. I have edited the provision to highlight those portions that are relevant to the point at issue here. The entire proposal read as follows: "The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution."

n124. U.S. Const. amend. IV.

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For this reason, to use McAffee's words, Madison was arguing bothfor "adding clarity to prior-existing limitations" n125 - that is, "for greater caution" - and for "the necessity of adding a bill of rights to the Constitution to secure basic liberties" n126 - that is, "as actual limitations of such powers." A prohibition on the use of general warrants is an example of the latter, not the former. Thus, Madison could have believed that general warrants would have to be expressly prohibited to be improper, and still believe that interference with the natural right of freedom of speech would have been improper even without the greater caution provided by what became the First Amendment. n127

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n125. McAffee, supra note 111, at 372.

n126. Id.

n127. That the Federalists argued repeatedly that a bill of rights was unnecessary because Congress was given no power to infringe upon, for example, the freedom of the press is well recognized by all constitutional scholars. Perhaps the best known statement is by Alexander Hamilton: "Why declare that things shall not be done, which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" The Federalist No. 84, at 579 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see also McAffee, supra note 111, at 371 (discussing Federalist arguments against the need to add a freedom of press provision to the Constitution). In this sense, adding the protection of the press in what became the First Amendment was merely "for greater caution" as opposed to an "actual limitation." But to say this is to say that the freedom of the press (and other unenumerated rights) was equally protected whether it has been enumerated or not.

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[*781]

In his bank speech, Madison himself drew attention to the connection between strictly construing governmental powers and protecting unenumerated rights:

The defense against the charge founded on the want of a bill of rights pre-supposed, he said, that the powers not given were retained; and that those given were not to be extended by remote implications. On any other supposition, the power of Congress to abridge the freedom of the press, or the rights of conscience, &c., could not have been disproved. n128

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n128. 2 Annals of Cong. 1901 (1791).

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Thus for Madison, Congress would have no power to infringe upon the rights of freedom of the press or of conscience whether or not these rights had been enumerated. That the right of freedom of press had been enumerated should not be used to deny or disparage the right of freedom of conscience. And one way to protect both rights was to adopt a restrictive interpretation of necessity.

What of Madison's statement in his bill of rights speech that "it is for them [Congress] to judge of the necessity and propriety to accomplish those special purposes which they may have in contemplation"? n129 Given the imprecise nature of congressional reporting in those days, it is probably unwise to put too much weight on the exact phraseology of a portion of one sentence. n130 While Madison might have been assuming an open-ended legislative discretion of the kind he rejected twenty months later in his bank speeches n131 and correspondence, n132 his example of general warrants suggests that he might have been referring instead to the legislative discretion to pursue enumerated ends by using means that do not of themselves violate the rights retained by the people. n133

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n129. 1 Annals of Cong. 455 (Joseph Gales ed., 1789).

n130. Madison's notes do not help. They read: "sweeping clause-Genl. Warrants &c." Madison's Notes, supra note 11, at 64.

n131. See supratext accompanying notes 7-9.

n132. Seesupra text accompanying notes 55-57.

n133. Similarly, the "presumption of liberty" I propose below would apply only when Congress adopts means that infringe the retained liberty of the people. It preserves legislative discretion in its choice of means that do not restrict liberty.

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[*782]

In any case, in his bill of rights speech, Madison was focusing on the need to guard against the danger of "abuse to a certain extent" by Congress using its "discretionary powers" to enact laws that were "neither necessary nor proper." The degree of discretion properly accorded to Congress was not his concern here. If this passing reference were all we knew of his thinking on the subject, we might well believe that Madison assumed that the Necessary and Proper Clause reposed an unlimited discretion in the Congress. Fortunately, in his bank speech to the first Congress, he directly considered at great length the meaning of the Necessary and Proper Clause and advocated the restrictive conception of necessity that I am calling "Madisonian." Moreover, as president some thirty years later, he reaffirmed his adherence to this conception. n134

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n134. See supratext accompanying notes 55-56.

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While McAffee relies on several of Madison's pre- and postratification statements concerning the Necessary and Proper Clause, n135 he completely omits any reference to the bank speech in which Madison argues against a latitudinarian interpretation of the Necessary and Proper Clause, in part, because it violates the rule of construction furnished by the Ninth Amendment. This omission is especially curious because McAffee is well aware of the speech, having written of it elsewhere. n136 Moreover, he previously wrote that "Madison was contending that the power to incorporate a bank was not sufficiently connected to the enumerated powers relied upon by its proponents to be deemed a "necessary' means to accomplishing legitimate governmental ends." n137 True, in his bank speech, Madison emphasized [*783] the limiting nature of the requirement of necessity, in contrast to Lawson and Granger, who McAffee criticizes for stressing the limiting nature of the requirement of propriety. n138 But while replying to Lawson and Granger, McAffee also advocates the Marshallian conception of necessity, n139 so one would think he would consider the speech (and correspondence) in which Madison takes issue with this conception.

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n135. McAffee concludes: "It is Madison's analysis, however, that comports with the weight of the historical evidence, including evidence of a pattern of design running from the Articles of Confederation to Article I of the Constitution and evidence of the framers' understanding of the enumerated powers scheme in the design of the Constitution." McAffee, supra note 111, at 373.

n136. See McAffee, Prolegomena, supra note 10, at 159-60 (discussing bank speech). McAffee failed to take any notice of Madison's bank speech until I first raised it in 1991. See Randy E. Barnett, Foreword: Unenumerated Constitutional Rights and the Rule of Law, *14 Harv. J.L. & Pub. Pol'y 615, 635-40 (1991)*. Compare McAffee, Original Meaning, supra note 10 (making no reference to the speech in 1990), with McAffee, Prolegomena, supra note 10, at 159 (discussing my interpretation of Madison's speech in 1992). McAffee's most recent summary of the entire debate over the Ninth Amendment also omits any mention of this speech. See Thomas B. McAffee, A Critical Guide to the Ninth Amendment, 69 Temp. L. Rev. 61 (1996) [hereinafter McAffee, Critical Guide]. And McAffee has failed thus far to mention the reference to judicial review in Madison's second bank speech or his later correspondence, see discussion supra notes 55-57, in which, as president, Madison both reaffirms the view I attributed to his bank speeches and objects to Marshall's interpretation of necessity in McCulloch on the ground that it would prevent judicial review.

n137. McAffee, Prolegomena, supra note 10, at 159 n.175. When McAffee wrote these words, he was not concerned with defeating any interpretation of the Necessary and Proper Clause that would restrict federal power. Rather he was attempting to deflect attention from the implication of Madison's use of the Ninth Amendment in his bank speech for McAffee's theory of the Ninth Amendment. McAffee had previously maintained that

the ninth amendment reads entirely as a "hold harmless" provision: it thus says nothing about how to construe the powers of Congress or how broadly to read the doctrine of implied powers; it indicates only that no inference about those powers should be drawn from the mere fact that rights are enumerated in the Bill of Rights.

McAffee, Original Meaning, supra note 10, at 1300 n.325 (emphasis added). Clearly, when he wrote these words, McAffee was unaware of the bank speech in which Madison used the Ninth Amendment precisely "to construe the powers of Congress" and thought it directly relevant to "how broadly to read the doctrine of implied powers." As I pointed out:

Yet when Madison used the Ninth Amendment in his speech concerning the national bank, he was in no manner responding to an argument for expanded federal powers based on the incomplete enumeration of rights, but rather was arguing entirely outside the only context in which, according to McAffee, the Ninth Amendment was meant to be relevant.

Barnett, supranote 136, at 639. To date, McAffee has yet to concede that his theory of the Ninth Amendment's original meaning is directly contradicted by Madison's only known use of the Amendment in a constitutional argument. In his most recent statement of his position, McAffee has reasserted his original claim. See McAffee, Critical Guide, supra note 136, at 66 ("The purpose of the Ninth Amendment is to preclude an inference against the rights-protective scheme of limited powers from the enumeration of specific rights ...."); id. at 83 (The Ninth Amendment means that "the enumeration of limits on government does not imply extended powers."). Nowhere in his article does McAffee even mention Madison's usage, much less that it conflicts with McAffee's theory.

n138. Lawson and Granger, though noncommittal, appear to lean towards a more Marshallian conception of necessity. See, e.g., Lawson & Granger, supranote 99, at 288.

To the best of our knowledge, no one ... has ever doubted that the word "necessary" refers to some kind of fit between means and ends. The only dispute over the term has concerned how tight the means-ends fit must be to comply with the requirements of the [Necessary and Proper] Clause. Although we take no firm position on this dispute, we acknowledge the force of Chief Justice Marshall's claim that something less than strict indispensability is sufficient.

Id.

n139. See McAffee, supra note 111, at 368 (citing with approval Marshall's rejection of "Maryland's argument that the term "necessary' required a law to be essential or indispensable").

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McAffee's argument is also curious because he has repeatedly rejected what he calls the "affirmative rights" conception of the Ninth Amendment in favor of one that views the Ninth and Tenth Amendments as efforts to protect "residual rights" n140 by reinforcing the enumerated powers scheme. [*784] Although in his earlier writings he insisted that this view still leaves the Ninth Amendment with a genuine role to play in constitutional law, n141 he seems here to be denying it any role whatsoever. Not only should the unenumerated rights not be directly or "affirmatively" protected; neither should the enumerated powers be cabined in such a way as to protect unenumerated rights. In this, he parts company from historian Philip Hamburger who, while agreeing with McAffee (and disagreeing with me) that the framers did not contemplate direct judicial protection of those "trivial rights" that were left unenumerated, still thinks that such rights were intended to be protected by rigorously preserving the limited and enumerated powers of Congress. "By specifying powers, [the Constitution] reserved to the people the undifferentiated mass of liberty they did not grant to the federal government - a general reservation of rights confirmed and preserved through the Ninth Amendment." n142

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n140. McAffee's distinction between affirmative and residual rights, a dichotomy unknown to the founding generation, greatly confuses the issues raised by unenumerated rights. For McAffee, an "affirmative right" is a right that is defined in and directly protected by the Constitution, while a "residual right" is a right defined and protected by the enumeration of powers. See McAffee, Original Meaning, supra note 10, at 1221-22. By this distinction, the trial by jury is an "affirmative" or protected right that qualifies federal power (though it was not a "residual" right), while the freedom of the press is both an affirmative and a residual right. It is an affirmative right because it is protected in the First Amendment, but it was also a residual right that Congress was given no power to infringe. But what of the other "residual rights" that remain unenumerated? Are they unenforceable simply because they were residual, as McAffee assumes? Ultimately, his distinction conceals the possibility that, if the enumerated powers scheme is one day breached by a latitudinarian interpretation of federal powers, all the "residual rights" originally defined by the enumeration of powers could also have been "affirmative rights" enforceable against the general government. In sum, calling a right "residual" does not automatically mean that it cannot be "affirmatively" protected whether or not it was enumerated. It would have been far easier to respond to McAffee's arguments and interpret the evidence he presents, had he stuck with the conventional distinctions between enumerated and unenumerated rights on the one hand, and enforceable and unenforceable rights on the other rather than collapsing these two distinctions into a single distinction between affirmative-enforceable and residual-unenforceable rights that often assumes what it purports to be demonstrating.

n141. See, e.g., McAffee, Original Meaning, supranote 10, at 1306-07.

If the government contended in a particular case that it held a general power to

regulate the press as an appropriate inference from the first amendment restriction on that power, or argued that it possessed a general police power by virtue of the existence of the bill of rights, the ninth amendment would provide a direct refutation.

Id. at 1306 (emphasis added).

However, as noted supra note 137, Madison was responding to neither of these arguments when he used the Ninth Amendment in his bank speech. Madison's usage belies McAffee's theory.

n142. Philip A. Hamburger, Trivial Rights, *70 Notre Dame L. Rev. 1, 31 (1994)* (emphasis added).

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Although McAffee has stated that "the Ninth Amendment's purpose was to preserve whatever amount of security for rights was supplied by the federal system of enumerated powers," n143 he fails to explain how this purpose can be served if the unenumerated rights retained by the people simply [*785] recede as enumerated powers are given increasingly latitudinarian interpretation. Given his concession that "in the long run the limited powers scheme has failed to restrict federal power significantly," n144 surely Madison's use of the Ninth Amendment to interpret the Necessary and Proper Clause is truer to this purpose than is McAffee's sterile conception. When McAffee asserts that "the Ninth Amendment does not warrant a search beyond the text for additional limitations on ... powers [granted by Article I]," n145 he somehow misses its implication for the crucial issue of how those powers, particularly the powers delegated by the Necessary and Proper Clause and the Commerce Clause, should be interpreted.

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n143. McAffee, Critical Guide, supra note 136, at 80.

n144. Id. at 86.

n145. Id. at 89.

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Although McAffee realizes that "in this regard, the Antifederalist proponents of a bill of rights proved to be more prophetic than their Federalist opponents," n146 he refuses to admit that James Madison's Ninth Amendment prophetically extended the protection afforded by the Bill of Rights to all the rights retained by the people, should the parchment barrier provided by enumerated powers be breached. Madison managed to provide both the weapon against expansive government power that the Antifederalists sought, and a means of avoiding the dangerously limited construction of a bill of rights that Federalists feared.

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n146. Id. at 86.

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Madison and McAffee simply disagree about both the need for judges to review the necessity of legislation and the conception of necessity they should employ. Of course, unlike McAffee, neither in his bank speech nor in his presidential correspondence did Madison rely exclusively on the original intent of the framers. Apart from asingle sentence in which he references the convention's rejection of a power of incorporation, n147 the only "apparent intention" upon which he relied was the intention to form a government of limited and enumerated powers. n148 Instead, Madison [*786] relied primarily on the implications for limited government of choosing one interpretation of the Necessary and Proper Clause over another. n149 "An interpretation that destroys the very characteristic of the Government," he argued, "cannot be just. Where a meaning is clear, the consequences, whatever they may be, are to be admitted - where doubtful, it is fairly triable by its consequences." n150 As Madison realized and explained at length, an effective reservation of rights would not be possible unless the courts have authority to assess the necessity and propriety of legislation purporting to facilitate an enumerated end or power. Madison's view was correct in 1791, in 1819, and is still correct today.

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n147. 2 Annals of Cong. 1896 (1791) ("His impression [that Congress lacked the authority to pass the bill] might, perhaps, be the stronger, because he well-recollected that a power to grant charters of incorporation had been proposed in the General Convention and rejected."). Of course, this sentence in the official reports might have summarized a longer oral statement.

n148. See id. at 1901. Even Madison's limited appeal to evidence of original understanding evinced a sharp reaction from the bill's proponents. Representative Vining, for example, argued that, "granting that the opinion of the gentleman from Virginia had been the full sense of the members of the Convention, their opinion at that day, ... is not a sufficient authority by which for Congress, at the present time to construe the Constitution." Id. at 2007. Similar was the argument of Representative Gerry: "Are we to depend on the memory of the gentleman for a history of their debates, and from thence to collect their sense? This would be improper, because the memories of different gentleman would probably vary, as they had already done, with respect to those facts; and if not, the opinions of individual members who debated are not to be considered as the opinions of the Convention." Id. at 2004 (emphasis added). When Gerry referred to "members" it is not clear whether he meant members of the convention or members of Congress.

n149. The conclusion of Madison's bank speech illustrates his interpretive methodology:

It appeared on the whole, he concluded, that the power exercised by the bill was condemned by the silence of the Constitution; was condemned by the rule of interpretation arising out of the Constitution; was condemned by its tendency to destroy the main characteristic of the Constitution; was condemned by the expositions of the friends of the Constitution, whilst depending before the

public; was condemned by the apparent intention of the parties which ratified the Constitution; was condemned by the explanatory amendments proposed by Congress themselves to the Constitution; and he hoped it would receive its final condemnation by the vote of this House.

Id. at 1902.

n150. Id.at 1896.

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II.

Effectuating the Necessary and Proper Clause

We are now in a position to see how the Necessary and Proper Clause may be made effectual in a manner that does not require us to enumerate all the enumerable liberties retained by the people. The only doctrine preventing meaningful scrutiny of the necessity and propriety of legislation infringing upon personal or economic liberties (whether or not these liberties are enumerated in the Constitution) is the setting of the background interpretive presumption.

There are at least four distinguishable approaches towards legislation that one may take. First is the laissez-faire approach of complete judicial deference: Adopt a general presumption of constitutionality towards all legislation affecting the liberties of the people. Second is the original Carolene Products approach: Adopt a presumption of constitutionality to legislation that does not infringe upon only those liberties that are specified in the Bill of Rights. Third is the current approach: Adopt the Carolene Products approach, but add protection for the right of privacy and perhaps other selected unenumerated rights deemed to be fundamental. We may [*787] call this third approach "Carolene Products-plus." Fourth is my proposal: Adopt a general presumption of liberty which places the burden on the government to establish the necessity and propriety of any infringement on individual or associational freedom.

To adopt the laissez-faire approach would be to make Congress the sole judge of its own powers in every dispute between it and a citizen concerning the necessity and propriety of a legislative interference with the citizen's rightful exercise of liberty. Essentially, it would eliminate judicial review of legislation infringing on constitutional liberties, including those enumerated in the Bill of Rights. Consequently, few advocate this position and it has never been accepted as the correct approach to judicial review.

Adopting the original Carolene Products approach is also deeply problematic. First, it flies in the face of the many unenumerated rights that have received protection from the Supreme Court for well over a hundred years - such as the right to travel (which had been enumerated in the Articles of Confederation) and the right to provide one's children with religious education or education in one's native language. n151 This approach directly conflicts as well with the unenumerated right to privacy that has been explicitly protected for over thirty

years. n152 Finally, the Carolene Products approach is undercut by the text of the Ninth and Fourteenth Amendments.

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n151. See Walter F. Murphy et al., American Constitutional Interpretation 1083-84 (1986) (listing unenumerated rights that have been recognized by the Supreme Court).

n152. See, e.g., *Griswold v. Connecticut, 381 U.S. 479 (1965)*.

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The present Carolene Products-plus approach is also objectionable. Because of it, judges now find themselves in the uneasy position of having to pick and choose among the unenumerated liberties of the people to find those that justify switching the presumption and those that do not. This approach places courts in the uncomfortable position of making essentially moral assessments of different exercises of liberty. A liberty to take birth control pills is protected, but a liberty to take marijuana is not. The business of performing abortions is protected, but the business of providing transportation is not. What "protected" means in this context is that a particular exercise of liberty is sufficient to rebut the presumption of constitutionality and that the government then must establish that such legislation is both necessary and proper.

With the 1992 decision in Planned Parenthood v. Casey, n153 there is virtually no chance that this Supreme Court will retreat all the way back to a purified Carolene Products approach in the near future. (Nor should it.) [*788] In Casey, the Court strongly asserted: "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before." n154 In support of this assertion the Court cited several cases including the two surviving Lochner-era cases of Pierce v. Society of Sisters n155 and Meyer v. Nebraska, n156 each of which scrutinized legislation infringing upon unenumerated rights. The Court in Casey explicitly relied upon the Ninth Amendment to justify the protection of unenumerated liberties under the Fourteenth Amendment. As Justices O'Connor, Kennedy, and Souter wrote:

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n153. *505 U.S. 833 (1992)*.

n154. *Id. at 847*.

n155. *268 U.S. 510 (1925)*.

n156. *262 U.S. 390 (1923)*.

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Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the

substantive sphere of liberty which the Fourteenth Amendment protects. See U. S. Const., Amend. 9. n157

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n157. *Casey, 505 U.S. at 848.*

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The principled alternative to a consistent presumption of constitutionality or an ad hoc Carolene Products-plus approach is to shift the presumption of constitutionality when legislation effects any exercise of liberty. Such a presumption of liberty would place the burden on the government to show why its interference with liberty is both necessary and proper rather than, as now, imposing a burden on the citizen to show why the exercise of a particular liberty is a fundamental right. Nowhere does the Constitution speak of fundamental (as distinct from nonfundamental) rights, n158 but it does speak of all laws being necessary and proper.

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n158. Except to note that the enumeration of certain rights "shall not be construed to deny or disparage others retained by the people." See U.S. Const. amend. IX.

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As I have explained at greater length elsewhere, n159 whenever government interferes with a rightful exercise of a citizen's liberty, it should have to bear the burden of showing (a) that its objectives are proper and (b) that it cannot accomplish these objectives by means that do not restrict the liberties of the people and, for this reason, its actions are also necessary. If a particular interference with liberty is truly necessary and proper, then this is not too much to ask of government officials. A "rightful exercise of liberty" is one that does not violate the rights of any other citizen. It roughly corresponds to what courts refer to as a "liberty interest," except that, at present, liberty interests are not protected unless they are also [*789] deemed to be fundamental rights. No court today would find an action that violated the rights of others to be a "liberty interest."

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n159. See Barnett, Getting Normative, supra note 4, at 113-21.

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Would this not mean, however, that unelected federal judges with lifetime tenure would be asked to speculate about "the rights of man"? What qualifies them to determine what learned philosophers disagree about? Where in their legal education or experience did they gain expertise in distinguishing rightful from wrongful conduct? A moment's reflection should dissipate such concerns. I would not expect federal judges assessing the necessity and propriety of legislation

to distinguish ab initio between those actions that are rightful exercises of liberty and those that are not. Rather, in our legal order, distinguishing rightful from wrongful conduct is generally made every working day at the state level - or in federal courts operating in diversity cases in which they try to follow state law. Indeed, at least a quarter of a law student's legal education is devoted to this subject in courses such as contracts, torts, property, agency and partnership, secured transactions, commercial paper, portions of criminal law, etc. Ever since the forms of action were abolished, the concepts provided in these subject areas have been used to assess the merits of claims that one person has violated the rights of another.

I am not suggesting that I agree with all the current rules and principles that currently define a person's rights - that is why I teach and write about contract law n160 - or even the exact process by which such decisions are currently made. Rather, I am only providing an answer to the question of how, as a practical matter, decisions about rightful and wrongful conduct are to be made. My answer: Such decisions should be made, for better or worse, the way these distinctions are made at present. There is today a healthy division of labor between state court processes and federal diversity cases assessing the rights of the people against each other, and federal constitutional adjudication that protects the rights of the people from infringement by government. It is only when federal judges are asked to distinguish protected fundamental rights from unprotected "liberty interests," as they must do under the current Carolene Products-plus approach, that they arguably exceed the boundaries of their competence.

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n160. See, e.g., Randy E. Barnett, Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract, *78 Va. L. Rev. 1175 (1992)*; Randy E. Barnett, A Consent Theory of Contract, *86 Colum. L. Rev. 269 (1986)*; Barnett, Contract Remedies, supra note 102; Randy E. Barnett, Some Problems with Contract as Promise, *77 Cornell L. Rev. 1022 (1992)*; Randy E. Barnett, The Sound of Silence: Default Rules and Contractual Consent, *78 Va. L. Rev. 821 (1992)*; Barnett, Squaring, supra note 102; Randy E. Barnett & Mary E. Becker, Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations, *15 Hofstra L. Rev. 443 (1987)*.

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[*790]

When assessing the practicality of this proposal, one must keep in mind two facts. First, very little legislation at the federal or state level even purports to be defining and prohibiting wrongful behavior - that is, behavior by one person that violates the rights of another. Rather, legislation is typically claiming to "regulate" the exercise of rightful conduct or to prohibit rightful conduct altogether so as to achieve some "compelling state interest" or social policy. To use the distinction made popular by Ronald Dworkin, n161 legislation rarely concerns matters of principle, and usually concerns matters of policy. Moreover, it simply is not the case that every claim of government power can plausibly be recast in terms of vindicating some individual's rights.

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n161. See Dworkin, supra note 66, at 22, 90-94.

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Second, not all legislation restricts the liberties of the people. The many laws that regulate the internal operation of government agencies or the dispensation of government funds, for example, would be unaffected by a presumption of liberty. When the post office sets its hours of operation or the price of its postage stamps, it is not restricting the rightful liberties of the citizenry any more than a private organization that does the same. If heightened scrutiny of the necessity and propriety of such laws is warranted, n162 as it may very well be, it would have to be justified on grounds other than that the laws in question potentially infringe upon the rights retained by the people. n163

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n162. I do not address in this Article the issue of when, if ever, conditioning the receipt of government benefits or employment on the waiver of one's background rights should be protected by a presumption of liberty. See generally Richard A. Epstein, Bargaining with the State (1993) (discussing the appropriate limits on the power of government to bargain with its citizens). Whether or not such so-called "unconstitutional conditions" violate the rights retained by the people, however, they may be insidious or "improper" enough in their own right to justify shifting the presumption of constitutionality, thereby placing the burden on the government to show that such conditions are both necessary and proper. So too with laws that unnecessarily or improperly infringe upon principles of federalism or separation of powers, though it is not clear that states or branches of the federal government require the same degree of protection as do individuals. Perhaps it is enough to recognize that such laws may be stricken as unnecessary or improper without shifting the presumption of constitutionality. I take no position on these matters here.

n163. For example, heightened scrutiny of the necessity of laws that tell state governments how they are to behave might be justified as infringing the powers reserved to the states or to the people mentioned by the Tenth Amendment. Heightened scrutiny of laws might also be warranted when laws appear to violate the Equal Protection Clauses of the Fifth and Fourteenth Amendments.

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On the other hand, when Congress asserts that to effectuate its power "to establish Post Offices," n164 it is necessary and proper to grant a legal monopoly to its post office, those companies that wish to carry first-class [*791] mail are entitled to demand that Congress or the Executive demonstrate the necessity and propriety of such a restriction on liberty. As Madison argued with respect to the national bank: "It involves a monopoly, which affects the equal rights of every citizen." n165 Similarly when Congress asserts that to effectuate its power "to raise and support Armies," n166 it is necessary and proper to draft young men or women to serve in the military, those who are subject to this form of involuntary servitude are entitled to demand that Congress or the Executive demonstrate to the satisfaction of an independent tribunal of justice that armies cannot be raised by using volunteers.

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n164. U.S. Const. art. I, 8, cl. 7.

n165. 2 Annals of Cong. 1900 (1791); see also Lysander Spooner, The Unconstitutionality of Laws of Congress, Prohibiting Private Mails (New York, Tribune Printing Establishment 1844), reprinted in 1 The Collected Works of Lysander Spooner (Charles Shively ed., 1971).

n166. U.S. Const. art. I, 8, cl. 12.

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Perhaps there are times when post offices cannot be provided without granting a monopoly, or when an all-volunteer army is insufficient for the defense of the United States. When Congress seeks to put postal competitors out of business or to draft young men or women, however, a presumption of liberty would put the onus on Congress to demonstrate that now is one of those times. In my view, when pressed with cases of genuine necessity, courts would not hesitate to uphold legislation as necessary. Indeed, even were a presumption of liberty to be adopted, I think government-employed judges are far more likely to uphold unnecessary restrictions on liberty than to strike down a law that is truly necessary.

Using a general presumption of liberty to effectuate the Necessary and Proper Clause can be justified, not only on the grounds that it gets the courts out of the business of picking and choosing among the liberties of the people, and not only on the grounds that it is more harmonious with the text (and original meaning) of the Ninth and Fourteenth Amendments. It can also be justified as a more realistic presumption in light of what we know of legislative behavior. After all, the original justification of the presumption of constitutionality rested, in part, on a belief that legislatures will consider carefully, accurately, and in good faith the constitutional protections of liberty before infringing it. This belief assumes that legislatures really do assess the necessity and propriety of legislation before enacting it. In recent decades, however, we have remembered the problem of faction that at least some of the framers never forgot. n167 We now understand much better (or are more willing to admit) than our post-New Deal [*792] predecessors on the left and on the right that both minorities and majorities can successfully assert their interests in the legislative process to gain enactments that serve their own interests rather than being necessary and proper.

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n167. See, e.g., supra note 3.

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In short, our understanding of the facts on which the presumption of constitutionality rests have changed. And, with this change in its factual underpinnings, the presumption - which appears nowhere in the constitutional text - must fall. Statutes that emerge from the legislative process are not entitled to the deference they now receive unless there is some reason to think that they are a product of necessity, rather than mere interest. And a statutory

prohibition of liberty will not be presumed to be an appropriate regulation. Statutes do not create a duty of obedience in the citizenry simply because they are enacted. Without some meaningful assurance of necessity and propriety, statutes are to be obeyed merely because the consequences of disobedience are onerous. This is an insidious view of statutes that undermines respect for all law.

The only way that statutes may create a prima facie duty of obedience in the citizenry is if some agency not as affected by interest (or affected by different interests) will scrutinize them to ensure that they are both necessary and proper. However imperfect they may be, only courts are presently available to perform this function. Without judicial review, statutes are mere exercises of will, and are not entitled to the same presumption of respect that attaches to statutes surviving meaningful scrutiny. n168

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n168. See Barnett, Getting Normative, supra note 4 (arguing that for laws to bind in conscience, they must not violate the background natural rights retained by the people).

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This is not to say that scrutiny must be strict. A standard of review that no statute can pass is as hypocritical as a standard of review that every statute can pass. Rather, some form of intermediate means-ends fit indicating necessity, and an assessment of a measure's propriety to see if the intention is really to regulate rather than prohibit an exercise of liberty, would be an important step towards both restoring legitimacy to legislation and protecting the liberties of the people.

I have previously recommended the presumption of liberty as a means of implementing the Ninth Amendment's protection of unenumerated rights retained by the people. n169 This symmetry is no coincidence. For the Necessary and Proper Clause can and should be viewed as creating a textual limit on congressional power that served to protect these unenumerated rights from infringement. Recall that when this Clause was [*793] enacted the Bill of Rights had yet to be proposed or ratified. n170 For two years all of the natural rights retained by the people were unenumerated rights. The only legal standard protecting them from infringement was that "all Laws ... for carrying into Execution the ... Powers" of the national government "shall be necessary and proper." n171

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n169. See id. at 113-21; Barnett, supra note 10, at 10-19.

n170. See Lawson & Granger, supra note 99, at 267-70 (discussing whether the Constitution prohibited takings without just compensation prior to the ratification of the Fifth Amendment and suggesting that, because of the Necessary and Proper Clause, it did).

n171. U.S. Const. art. I, 8, cl. 18.

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Further, as Madison argued, the Ninth Amendment can be viewed as precluding a latitudinarian interpretation of the Necessary and Proper Clause. n172 Gary Lawson and Patricia Granger have concluded: "The Ninth Amendment potentially does refer to unenumerated substantive rights, but the [Necessary and Proper] Clause's requirement that laws be "proper' means that Congress never had the delegated power to violate those rights in the first instance." n173 Therefore, it should come as no surprise that both the Ninth Amendment and the Necessary and Proper Clause can be effectuated at the same time and in the same manner. n174

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n172. See supra note 28.

n173. Lawson & Granger, supra note 99, at 273.

n174. As suggested by the writings of Lawson and Granger and of Gardbaum, however, the Necessary and Proper Clause may go beyond protecting the rights retained by the people to protect against other improper or unnecessary laws.

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Conclusion

When establishing government, the people retained the natural rights that protect their liberties. This much is established textually by the Ninth Amendment. When enacted statutes receive the benefit of an extratextual presumption of constitutionality, however, the people have no reason to be confident that their rights have been respected, and therefore the legitimacy of legislation - that is, its ability to bind the citizenry in conscience - is severely undermined. A presumption of liberty, on the other hand, protects these rights from the administrative state by giving effect to the Necessary and Proper Clause in a manner that is consistent with the powers that are granted to the national government. With this presumption in effect, as citizens, we can have increased confidence that because a particular enactment has been shown to be both necessary and proper, it does not constitute an unjust infringement on our liberties, and we owe it at least a prima facie duty of obedience.

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