1

Raiders of the Lost Clause

Excavating the Buried Foundations of the Necessary and Proper Clause

The U.S. Constitution creates a national government of limited and enumerated powers. More precisely, it creates a set of *institutions* of national governance of limited and enumerated powers. The Constitution never grants power to the "national government" or the "federal government" as an undifferentiated entity, but instead grants various aspects of governmental power to discrete actors. The president is vested with the "executive Power," the federal courts are vested with the "judicial Power," and Congress is vested with a range of specified "legislative Powers," primarily though not exclusively identified in Article I, section 8 of the document,[1] including the power to lay and collect taxes, borrow money, regulate various types of commerce, and provide for a military. The first seventeen clauses in Article I, section 8 identify (depending upon how one counts) roughly two dozen such legislative powers.

The eighteenth and last clause in Article I, section 8 grants Congress 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, or in any Department or Officer thereof."[2] Antifederalist critics of the Constitution pejoratively dubbed this provision "the Sweeping Clause," arguing that it granted dangerously broad and ill-defined powers to the new national

[1] Some non–Article I powers of Congress are the power to allow inferior federal officers to be appointed by the president, the federal courts, or federal department heads without Senate confirmation, U.S. Const. art. II, § 2, cl. 2; the power to prescribe the manner in which state acts and judicial proceedings will be given full faith and credit by sister states, *id*. art. IV, § 1; the power to admit new states, *id*. art. IV, § 3, cl. 1; the power to make "Rules and Regulations respecting the Territory or other Property belonging to the United States," *id*. art. IV, § 3, cl. 2; and the power to propose constitutional amendments, *id*. art. V.

[2] *Id*. art. I, § 8, cl. 18.

government.[3] The defenders of the Constitution vigorously contested this construction of the clause, but generally accepted the Antifederalist label for "the sweeping clause, as it has been affectedly called."[4] In modern times, however, the clause is more typically known as the "Necessary and Proper Clause," and we employ the modern label throughout this book.[5]

The origins of the Necessary and Proper Clause have proven to be something of a mystery to constitutional scholars. Those who look to the clause's drafting history for clues about its origins have generally been disappointed, complaining that "the accounts of the 1787 Constitutional Convention are silent on the meaning of the necessary and proper power."[6] One of the leading modern scholars on the clause reports that "[t]he Necessary and Proper Clause was added to the Constitution by the Committee of Detail without any previous discussion by the Constitutional Convention. Nor was it the subject of any debate from its initial proposal to the Convention's final adoption of the Constitution."[7] As for the Committee of Detail, the scholarly verdict is that it "gave no hint why it chose the language it did. …"[8] A broader look at the state ratifying conventions and early constitutional history seemingly provides no further guidance about the drafters' choice of language: Those sources contain considerable argument about the extent of

[3] *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 and John P. Kaminski eds., 1992) (noting that Antifederalists "pointed to the general welfare clause and the necessary and proper clause to show that Congress possessed unlimited authority under the Constitution"). For example, a petition to the Pennsylvania ratifying convention warned that the clause "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." *Cumberland County Petition to the Pennsylvania Convention*, Dec. 5, 1787, *reprinted in* 2 Documentary History of the Ratification of the Constitution 309, 310 (Merrill Jensen ed., 1976).

[4] The Federalist No. 33, at 203 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[5] The "sweeping clause" label, however, remained standard into the twentieth century. *See* 1 Francis Newton Thorpe, The Constitutional History of the United States 525 (1901).

[6] Bernard H. Siegan, The Supreme Court's Constitution: An Inquiry into Judicial Review and Its Impact on Society 1 (1987).

[7] Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183, 185 (2003).

[8] Mark A. Graber, *Unnecessary and Unintelligible*, 12 Const. Commentary 167, 168 (1995).

the powers granted to Congress by the Necessary and Proper Clause, but the arguments were pitched at a very high level of generality, and it looks at first glance as though nothing in those materials explains the peculiar wording of the clause. Indeed, Philip Kurland and Ralph Lerner's *The Founders' Constitution*, an encyclopedic compilation of source material on the Constitution, contains some excerpts from these debates but nothing that appears to shed light on the clause's origins.[9] In particular, Kurland and Lerner's often-indispensable work contains no entries on the Necessary and Proper Clause's background that predate the ratification debates. If there are nuggets to be mined in the standard sources of constitutional history, they seem thus far to have escaped notice.

All of this has led one scholar to proclaim the Necessary and Proper Clause "a masterpiece of enigmatic formulation."[10] Mark Graber, one of the country's most eminent legal historians, aptly summed up the conventional wisdom on the Necessary and Proper Clause's provenance when he insisted that "no one, including the constitutional framers, knows the point of the phrase 'necessary and proper.'"[11]

It would be truly extraordinary if the Necessary and Proper Clause emerged from a late-eighteenth-century Committee of Detail with no intellectual antecedents. As the vigorous founding-era debates over the scope of the clause illustrate, the Necessary and Proper Clause is central to the constitutional scheme of enumerated powers. It is indisputably the source of congressional power to enact most criminal statutes and other enforcement mechanisms[12] and to create and structure federal offices beyond the very few directly created by the Constitution.[13] Historically, it was the alleged source of federal power to create instrumentalities such as the Bank of the United States,[14] and the New Deal Court relied upon the Necessary and Proper Clause – rather than, as

[9] *See* 3 Philip B. Kurland & Ralph Lerner, The Founders' Constitution 238–277 (1987).

[10] Joseph M. Lynch, Negotiating the Constitution: The Earliest Debates Over Original Intent 4 (1999).

[11] Graber, supra note 8, at 168.

[12] The Constitution specifically authorizes Congress to punish counterfeiting, U.S. Const. art. I, § 8, cl. 6, piracy and offenses against the law of nations, *id.* art. I, § 8, cl. 10, and treason, *id.* art. III, § 2, but those are the only express authorizations for the enactment of criminal laws.

[13] Indeed, a Convention proposal to add the words "and establish all Offices" to the clause was rejected 9–2 on the stated ground that the clause already conferred such power. *See* James Madison, Notes of Debates in the Federal Convention of 1787, at 489 (1893).

[14] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

is often wrongly supposed, the Commerce Clause – to permit federal regulation of seemingly intrastate matters, such as the growing of wheat for home consumption.[15] More controversially, some scholars (including two of the present authors) have identified the Necessary and Proper Clause as the true source of the federal spending power,[16] and others (including one of the present authors) see it as the font of congressional power to create exceptions to the Supreme Court's appellate jurisdiction.[17] In modern Supreme Court jurisprudence, the Necessary and Proper Clause has been a central player in debates concerning federalism, including disputes over the ability of Congress to regulate seemingly noneconomic intrastate activities,[18] to control the actions of state legislatures and executives,[19] to abrogate state sovereign immunity,[20] and to construct a federal system of civil commitment for persons deemed sexually dangerous.[21] And because the Necessary and Proper Clause is the source of virtually all of the congressional power to structure the federal government, the clause is at the heart of almost any interdepartmental dispute about the separation of powers. There is a good argument that it is the most important clause in the Constitution. If the origins of such a vital provision are truly unknowable, then it is understandable why the Necessary and Proper Clause would prominently appear in a volume on "Constitutional Stupidities."[22]

The aim of this book is to challenge the conventional wisdom concerning the origins of the Necessary and Proper Clause – and indeed to do so three times over. Far from emerging immaculately from the Constitutional Convention, the Necessary and Proper Clause has a rich history, with numerous antecedents that would have been readily

[15] *See* Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 Tex. L. Rev. 795, 807–08 (1996).

[16] *See* Gary Lawson and Guy Seidman, The Constitution of Empire: Territorial Expansion and American Legal History 25–31 (2004).

[17] *See* Steven G. Calabresi and Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 Colum. L. Rev. 1002, 1039–42 (2007); David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 B.Y.U. L. Rev. 75, 119–26.

[18] Gonzalez v. Raich, 545 U.S. 1 (2005).

[19] Printz v. United States, 521 U.S. 898, 923–24 (1997).

[20] Alden v. Maine, 527 U.S. 706, 732–33 (1999).

[21] Comstock v. United States, 551 F.3d 274 (4th Cir. 2008), *cert. granted*, 129 S. Ct. 2828 (2008); United States v. Tom, 565 F.3d 497 (8th Cir. 2009).

[22] Mark Graber, *Unnecessary and Unintelligible*, *in* William N. Eskridge, Jr., and Sanford Levinson, Constitutional Stupidities, Constitutional Tragedies 43 (1998).

knowable (and were almost certainly known) by informed eighteenth-century drafters and ratifiers. These antecedents have thus far escaped notice because they are not found – or at least are not found without considerable interpretative background knowledge – in the sources to which constitutional scholars typically look for guidance: the Convention notes, the ratification debates, and early American constitutional history. Instead, the origins of the Necessary and Proper Clause are found in principles of agency law, administrative law, and corporate law that infused founding-era constitutionalism but are not generally consulted by constitutional scholars and courts. We thus say of those who despair about finding the origins of this clause precisely what Indiana Jones and Sallah said of the efforts of Belloc and the Nazis to excavate the Well of Souls using faulty calculations from the staff of Ra: "They're digging in the wrong place!"

This book combines three independent lines of research into the origins of the Necessary and Proper Clause. Professor Robert Natelson's research over several years tends to show that the private law of agency strongly informed the founding generation's theories of constitutionalism.[23] With specific reference to the Necessary and Proper Clause, he then traced the origins of the phrase "necessary and proper for carrying into Execution" to (primarily) private-law agency instruments that used similar language; his findings on the foundations of the Necessary and Proper Clause were published in 2004.[24]

At roughly the same time, without knowing of Professor Natelson's work, Professors Gary Lawson and Guy Seidman began exploring the relevance of British administrative law for founding-era constitutionalism, with particular emphasis on the so-called principle of reasonableness that required power delegated by Parliament to be exercised in an impartial, efficacious, proportionate, and rights-regarding manner. They principally sought to understand the background norms of administrative law that helped define the "executive Power," but the potential applications to understanding the genesis of the Necessary and Proper Clause were evident as a future project. This work was also first published in 2004.[25]

[23] *See* Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 Tex. Rev. L. & Politics 239 (2007); Robert G. Natelson, *The Constitution and the Public Trust*, 52 Buff. L. Rev. 1077 (2004): Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. Kansas L. Rev. 1 (2003).

[24] *See* Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 Case Western Reserve L. Rev. 243 (2004).

[25] Lawson and Seidman, *supra* note 16, at 51–57 (2004).

Entirely independent of both of these projects, Professor Geoffrey Miller had begun researching founding-era corporate charters, which he discovered often employed provisions similar in phrasing to the Necessary and Proper Clause. Given the quasi-governmental status of founding-era corporations – and the more-than-quasi-corporate status of colonial governments – he thought it eminently sensible to ask whether corporate law (in this eighteenth-century sense) might have influenced the final form of the Necessary and Proper Clause. That work lay dormant for some years until the preparation of Professor Miller's chapter for this book, but the project was conceived roughly contemporaneously with the other lines of inquiry collected here.

None of these three lines of research is part of the standard account of the Necessary and Proper Clause, but all hold promise as potential intellectual influences on the founding generation's choice of language in constructing the clause. Once the authors of this book all became aware of the parallel projects, the thought occurred of combining them into a single resource for those interested in the origins of the Necessary and Proper Clause. That has always been, and remains, the *raison d'être* for this book. We hope to demonstrate that modern puzzlement about the Necessary and Proper Clause's antecedents is the product of limited vision rather than limited materials. Far from suffering from a paucity of materials on the clause's origins, researchers have an extensive menu of such materials, and we hope to make that menu conveniently accessible here.

After the projects were combined, it was natural to ask whether they had common themes. It is easily evident that they do. All three projects explore applications of what we call, for lack of a better phrase, *public agency law*: the application of agency law principles to public actors.

Professor Natelson explicitly links the Necessary and Proper Clause to agency law. The founding generation, he argues, viewed government largely through the lens of agency; founding-era figures often described the duties of public officials in fiduciary terms and even analogized the Constitution to a private power of attorney. The language used in the Necessary and Proper Clause tracks the language found in many founding- and pre-founding-era private agency instruments, which used the words "necessary and proper" or some equivalent to give fiduciary agents incidental powers beyond those expressly described in the instruments. When one adds together the prevalence of such agency instruments, the wide knowledge of agency law among founding-era individuals (including nonlawyers) and the broad-based eighteenth-century consensus in favor

of viewing government through the lens of agency, it is natural to see the Necessary and Proper Clause as a vehicle for importing those fiduciary and agency principles to Congress.

Professors Lawson and Seidman see in the words "necessary and proper" a vehicle for incorporating into Article I fundamental background principles of eighteenth-century administrative law. By the time of the American founding, it was well established in English law that grants of discretionary authority to executive and judicial agents of Parliament carried the implied requirement that exercises of such authority be reasonable – that is, fair, efficacious, proportionate, and rights-regarding. This principle would unambiguously apply, even without specific reference, to the federal Constitution's grants of executive and judicial power; delegations of such power presumed that agents would have to exercise that power reasonably. It is less clear, however, whether such a principle would automatically apply to a constitutional delegation of legislative authority to Congress. Accordingly, if a drafter wanted the principle of reasonableness in the exercise of delegated power to apply to Congress, some kind of textual reference to the principle would be in order, and the language of the Necessary and Proper Clause is an ideal textual reference for this purpose. This approach to understanding the origins of the Necessary and Proper Clause, like that employed by Professor Natelson, has roots in an agency-oriented approach to governance.

Professor Miller's work studying corporate charters fits elegantly into this theme, because corporations in the eighteenth century, and indeed into the nineteenth century, were effectively public actors charged with essentially governmental tasks, such as constructing public works, schools, and poorhouses – or, less frequently but more grandly, extending governmental influence through exploration. Corporate charters in those days were not general authorizations to do business, as is typical of modern charters, but instead defined the powers and responsibilities of these quasi-public actors. Indeed, because corporations in this period frequently exercised monopoly privileges, the scope of "purposes and powers" clauses in their charters – the enumerations of power – was generally narrow. Clauses similar to the Necessary and Proper Clause were thus important to ensure that an organization with limited powers and purposes would not be frustrated in the essential conduct of its governmentally authorized activities but would still be confined to its assigned functions. This model of corporations as a form of governmental or quasi-governmental agents entrusted with specific tasks yet again sounds the theme of public agency law.

Thus, there are close, and even striking, connections among the agency law, administrative law, and corporate law explanations for the language of the Necessary and Proper Clause. There is enough convergence to permit reasonably confident assertions about the clause's actual origins. An obvious next question is whether there is enough convergence to support a general theory of the clause's actual meaning.

Although that may be an obvious next question, it is not one that this book seeks to pursue. We embarked on this project intending to avoid making any strong claims about the meaning of the Necessary and Proper Clause. Our mission in assembling and integrating our research has always been historical and descriptive, not interpretative. We (at least largely) hold to that intention here. In order to make claims, or even draw implications, about the meaning of the Necessary and Proper Clause, one must first set forth a theory of constitutional interpretation. We fervently wish to elide those kinds of broad issues in this book – if only because the authors do not necessarily agree about interpretative methodology. Professors Lawson and Seidman have elsewhere staked out a fairly strong position in favor of original meaning as the only appropriate tool of constitutional interpretation,[26] and they have a specific conception of original meaning in mind: They believe that constitutional interpretation must always take place from the standpoint of a hypothetical reasonable observer, both because that is what the Constitution commands and because it is the only possible form of interpretation for jointly authored documents. That approach structures some of their inquiries in this book. Professor Natelson, by contrast, believes that founding-era interpretative conventions establish that the subjective intentions of the ratifiers, *where discoverable*, determine the meaning of the Constitution, and when those intentions are not discoverable, one looks to objective meanings as they would be understood by a reasonable interpreter.[27] He employs that founding-era methodology – without necessarily declaring it "correct" or the only admissible methodology – in his contributions to this book. Professor Miller, for his part, is willing to say that he believes it important to consider the original understanding (however defined) when interpreting the Constitution, but further the deponent saith not. Given the range of disagreement, we

[26] *See id.* at 8–12; Gary Lawson and Guy Seidman, *Originalism As a Legal Enterprise*, 23 Const. Commentary 47 (2006).

[27] *See* Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 Ohio St. L.J. 1239 (2007).

choose jointly to avoid such interpretative issues to the extent possible and concentrate instead on providing raw material on the Necessary and Proper Clause's origins, which interpreters of all stripes can do with what they will.

Of course, each of us has his own research agenda beyond this book, of which the material presented herein may be one component. Each of us, therefore, might (or might not) in our individual projects seek to draw interpretative implications from the material developed herein. Accordingly, it would be artificial, and indeed silly, to try to craft all of the contributions to this book to imply or infer nothing at all about the underlying meaning of the Necessary and Proper Clause. It would be particularly odd if and when those individual thoughts on interpretation are reinforced or extended by the research of others – and there is too much reinforcement and extension in this volume to ignore.

We navigate between the Scylla of grand interpretative theory and the Charybdis of interpretative silence by retaining and declaring individual authorship of the contributions to this project. Chapters 2, 3, and 6 are attributable to Professors Lawson and Seidman; Chapters 4 and 5 are authored by Professor Natelson; and Chapter 7 is the work of Professor Miller. We hasten to add that this book is *not* an edited collection of essays. To the contrary, this is an integrated volume: The various chapters take close account of each other, and we think that they collectively form a remarkably coherent intellectual structure. We simply mean that we have not reduced the entire book to one voice or forbidden individual authors from offering thoughts or speculations about the ultimate meaning of the Necessary and Proper Clause from whatever perspective they deem appropriate. But *none* of the basic claims made in this book about the intellectual origins of the Necessary and Proper Clause depends to any significant degree on the interpretative claims –and they prove to be relatively few and far between – that any of us have chosen to offer.

Chapters 2 and 3 clear the decks by identifying some dead ends in the search for the origins of the Necessary and Proper Clause. Language similar to that in the clause, and in other constitutional provisions that contain qualifications on granted power, appeared frequently in British statutes throughout the eighteenth century. Chapter 2 accordingly conducts an extensive study of the use of power-granting and power-qualifying language in these British statutes, which reveals no discernible patterns to the use of adjectives, singly or in combination, in these enactments. It is not an overstatement to say that the eighteenth-century

British Parliament used phrases describing or qualifying the powers of statutory grantees essentially at random. If these statutes served as models or inspirations for American constitutional drafters, it would be fruitless to look for deeper origins of the clause or to plumb the clause's meaning in any systematic way.

Chapter 3 reveals that there is no reason to think that American drafters followed, or even paid attention to, their British parliamentary counterparts. There were reasons specific to the legislative process in England that accounted for the sloppy draftsmanship evident in British statutes – a sloppiness that was widely recognized and derided inside and outside Parliament. American drafting did not suffer from the same pathologies; a study of the language used in pre-1788 state constitutions shows far more care and attention to nuance than was evident across the ocean. The path is accordingly clear to seek other, more potent influences on the drafting and adoption of the Necessary and Proper Clause.

In Chapter 4, Professor Natelson offers his evidence for locating the origins of the clause in agency law. Professor Natelson first shows that the founding generation almost uniformly viewed government through the lens of agency law: Public actors were seen as fiduciaries, subject to the same kinds of restrictions on their power as private fiduciaries such as executors, factors, and guardians. He further shows founding-era familiarity with the doctrine of principals and incidents, in which agents were understood to have power to exercise authority not expressly granted by the instruments of agency if that authority was subsidiary to the accomplishment of the specified ends. He concludes that the language "necessary and proper for carrying into Execution" neatly incorporates these two large principles of agency law: A "necessary" law is one that conforms to the doctrine of principals and incidents, and a "proper" law is one that conforms to fiduciary norms appropriate for public actors.

In Chapter 5, Professor Natelson (re)examines the Necessary and Proper Clause's drafting and ratification history – a history that has been found by prior scholars to yield little of value. Viewed through the lens of the agency law principles described in Chapter 4, however, the clause's history takes more structured shape and exhibits a "public agency law" understanding of the clause, as a matter of both the knowable subjective intentions of the ratifiers and of the reasonable understandings of an objective public observer.