

WHAT *MCCULLOCH V. MARYLAND* GOT WRONG: THE ORIGINAL MEANING OF “NECESSARY” IS NOT “USEFUL,” “CONVENIENT,” OR “RATIONAL”

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McCulloch v. Maryland, echoing Alexander Hamilton nearly thirty years earlier, claimed of the word “necessary” in the Necessary and Proper Clause: “If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful . . . to another.” Modern caselaw has translated that understanding into a rational-basis test that treats the issue of necessity as all but nonjusticiable. The Supreme Court has never found a federal law unconstitutional on the ground that it was not “necessary . . . for carrying into Execution” a federal power.

Like Hamilton before him, Chief Justice Marshall, who authored the opinion, was simply wrong in his empirical claim about the meaning of “necessary.” We show, using founding-era dictionaries, an extensive corpus-linguistic study of founding-era sources, and intertextual and intratextual analysis, that the original meaning of “necessary” cannot plausibly be equated with “convenient,” “useful,” “conducive to,” or “rational.” The case against Marshall and Hamilton’s linguistic claim is simply overwhelming.

*However, that conclusion does not necessarily imply that executory laws are “necessary” only if “indispensable,” as the State of Maryland, echoing Thomas Jefferson, argued in *McCulloch*. While that strict meaning finds support in many of the linguistic sources that we examine, it is not inexorably the best meaning in the specific context in which the term “necessary” appears in the Constitution: a clause defining the incidental powers of agents. A better fit may be James Madison’s view that executory laws are necessary if they exhibit “a definite connection between means and ends,” showing “some obvious and precise affinity” between the laws and the*

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powers which they implement. In modern parlance drawn from another context, one might say that executory laws are necessary if they are congruent and proportional to the task to which they are put.

To be clear, we do not aim here to establish the correct original meaning of “necessary” in the Necessary and Proper Clause. Our principal goal is simply to show that Marshall and Hamilton’s linguistic claim about the meaning of “necessary” is false, not to defend a Madisonian interpretation of necessity. But engaging with the Madisonian definition allows us to explore the possible real-world implications of our linguistic findings. Because McCulloch’s interpretation has become canonical, two of us proceed to examine some of the leading cases involving the scope of federal power to see whether substituting a congruence-and-proportionality test for the test of usefulness, convenience, or rationality would make a significant difference in outcomes. Holding all other elements and applications of doctrine equal, we find only a few cases in which relying on this more historically accurate interpretation of “necessary” might make a difference—and those cases are already widely seen as anomalous under current doctrine. Nonetheless, there is value in applying the original meaning of “necessary” even in contexts where outcomes do not change, including focusing attention on the extent to which the Necessary and Proper Clause rather than the Commerce Clause is the key to understanding the scope of federal power.

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INTRODUCTION

It is often said that “necessity is the mother of invention.”¹ In the context of U.S. constitutional law, it may be *better* said that necessity is the *product* of invention—an invention of Chief Justice John Marshall and Alexander Hamilton, who jointly created a meaning for the word “necessary” that has profoundly shaped, or perhaps misshaped, the course of American legal development.

Article I, Section 8, Clause 18 of the Constitution grants Congress the power to make all laws “which shall be necessary and proper for carrying into Execution”² its own enumerated powers and the enumerated powers otherwise granted by the Constitution to federal actors.³ While the clause drew the ire of Antifederalists, who dubbed it “the Sweeping Clause”⁴ during

¹The precise origin of the phrase appears to be unknown, but some version of it has been in existence for at least several thousand years in multiple cultures. See *The Meaning and Origin of the Expression: Necessity Is the Mother of Invention*, THE PHRASE FINDER, <https://phrases.org.uk/meanings/necessity-is-the-mother-of-invention.html> (last visited Dec. 7, 2022).

²U.S. CONST. art. I, § 8, cl. 18.

³The clause gives Congress the power to execute “the foregoing Powers [enumerated in the first seventeen clauses of Article I, Section 8], and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” *Id.*

⁴See, e.g., Pierce Butler, *Objections to the Constitution (Aug. 30, 1787)*, in SUPPLEMENT TO MAX FARRAND’S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 249, 249 n.1 (James H. Hutson ed., 1987) (describing George Mason’s objection to the “sweeping Clause”). The Federalists, for whatever reason, accepted the Antifederalists’ label, 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”), which became the standard term for the clause into the twentieth century, see 1 FRANCIS NEWTON THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES

the ratification process, the limits of its grant of power were first meaningfully tested in court in the 1819 case *McCulloch v. Maryland*.⁵ In finding that Congress had the power to charter a national bank, Chief Justice John Marshall famously said of the word “necessary”: “If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is *convenient, or useful, or essential* to another.”⁶ That formulation has driven constitutional law for more than two centuries, validating a wide variety of “convenient” or “useful” policy inventions by Congress, including the federal power to print money and widespread federalization of criminal law, education, and many intricate and local aspects of manufacturing, mining, and agriculture. In modern parlance, laws under current doctrine are deemed “necessary” for effectuating federal powers if they employ “rational means”⁷ to achieve their ends. And if a means-ends connection between federal laws and federal powers requires only a rational basis, it is not surprising that no law has ever been found unconstitutional by the Supreme Court on the ground that it was not “necessary” for carrying into effect federal powers.

Chief Justice Marshall, however, did not invent this account of “necessary” as meaning “convenient” or “useful.” Instead, it originated with Alexander Hamilton during his defense of the first Bank of the United States in 1791. In defending the original Bank Bill, Hamilton wrote:

It is a common mode of expression to say, that it is *necessary* for a government or a person to do this or that thing, when nothing more is intended or understood, than that the interests of the government or person require, or will be promoted by, the doing of this or that thing.⁸

Two decades ago, one of us unscientifically tested Hamilton and Marshall’s linguistic assertion against an old-fashioned CD-ROM database

525 (1901). As far as we can tell, the modern name for the clause, the Necessary and Proper Clause, did not appear in a federal court opinion until 1926. *See Lambert v. Yellowley*, 272 U.S. 581, 596 (1926). We use the modern label in this article for ease of exposition.

⁵ 17 U.S. (4 Wheat.) 316 (1819). To be sure, at least some of the discussion in *McCulloch* was foreshadowed in the 1805 decision *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805). *See infra* notes 95–99 and accompanying text.

⁶ *McCulloch*, 17 U.S. at 413 (emphasis added).

⁷ *Sabri v. United States*, 541 U.S. 600, 605 (2004).

⁸ Alexander Hamilton, *Opinion as to the Constitutionality of the Bank of the United States*, in 3 THE WORKS OF ALEXANDER HAMILTON 445, 453 (Henry Cabot Lodge ed., 1904).

of founding-era materials and found exactly *no* usages of “necessary” meaning, or even approximating, “convenient” or “useful.”⁹ This article more systematically examines the linguistic claim that underlies one of our country’s most prominent constitutional doctrines. We take an extensive look at founding-era dictionaries and rely on the cutting-edge technique of corpus linguistics to examine, with considerably more sophistication than one of us could bring to bear two decades ago, a large database of founding-era texts. Our research proves that the framing generation—both in ordinary discourse and in the specialized context of the Necessary and Proper Clause—understood “necessary” to mean something considerably stronger than “convenient” or “useful.” Hamilton and Marshall’s empirical claim about linguistic usage was a pure invention.

Our principal thesis is a negative one: Hamilton and the Supreme Court were wrong about the ordinary uses of “necessary” in the founding era. We do not undertake to affirmatively establish the correct original meaning of “necessary.” Our conclusion does not prove that “necessary” means “indispensable,” as Thomas Jefferson claimed in the Washington Administration¹⁰ and the State of Maryland claimed during oral argument in *McCulloch*.¹¹ Indeed, while that narrow definition is considerably closer to the mark than is the Hamilton/Marshall interpretation, it likely overstates the case—as James Madison was quick to recognize. While the parties in *McCulloch* presented two extreme positions to the Court, Madison contended that neither of those extremes was correct. In the congressional debates on the first Bank Bill, Madison rejected the strict Jeffersonian position on necessity,¹² but he also warned against the Hamiltonian view:

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

⁹See Gary Lawson, *Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 245 n.56 (2005) (concluding that “Hamilton’s famous observation . . . appears to be blather”).

¹⁰See Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, in 19 THE PAPERS OF THOMAS JEFFERSON 275, 278 (Julian P. Boyd & Ruth W. Lester eds., 1974) (claiming that laws are only “necessary” if they are “means without which the grant of the power would be nugatory”).

¹¹See 17 U.S. at 367 (argument of Mr. Jones) (defining “necessary” as “indispensably requisite”).

¹²See 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 417 (Jonathan Elliot ed., 2d ed., 1836).

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.”¹³

Nearly three decades later, in the wake of *McCulloch*, Madison more precisely formulated his interpretation of necessity as requiring “a definite connection between means and ends,” in which laws are connected to executed powers “by some obvious and precise affinity.”¹⁴

This Madisonian account of “necessary,” which one Supreme Court Justice has recognized as the best account of the term’s original meaning,¹⁵ finds ready expression in an existing doctrine developed for a different constitutional provision. In *City of Boerne v. Flores*,¹⁶ the Supreme Court interpreted the word “appropriate” in Section 5 of the Fourteenth Amendment¹⁷ to require “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”¹⁸ Subsequent cases make clear that this congruence-and-proportionality test is considerably stricter than a rational-basis test, as a number of laws have been found unconstitutional under that standard.¹⁹ While two of us have expressed some doubts about whether this test represents the best account of what “appropriate” means in the Civil War amendments,²⁰ it appears to be an accurate fit for the word “necessary” in the Necessary and Proper Clause. At

¹³ 1 ANNALS OF CONG. 1947–48 (1791).

¹⁴ Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 THE WRITINGS OF JAMES MADISON 447, 448 (Gaillard Hunt ed., 1908).

¹⁵ See *Sabri v. United States*, 541 U.S. 600, 612–13 (2004) (Thomas, J., concurring).

¹⁶ 521 U.S. 507 (1997).

¹⁷ See U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); see also *id.* amend. XIII, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”); *id.* amend. XIX, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”); *id.* amend. XV, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”).

¹⁸ 521 U.S. at 520 (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”).

¹⁹ See, e.g., *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30 (2012); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Fla. Prepaid Postsecondary Educ. Expenses Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

²⁰ See STEVEN GOW CALABRESI & GARY LAWSON, *THE U.S. CONSTITUTION: CREATION, RECONSTRUCTION, THE PROGRESSIVES, AND THE MODERN ERA* 876 (2020); see also *Coleman*, 566 U.S. at 44 (Scalia, J., concurring) (“[O]ur ‘congruence and proportionality’ jurisprudence . . . make[s] no sense.”).

the very least, it is a far better fit than is the Hamilton/Marshall interpretation. The Supreme Court could easily adapt this well-developed test to assess the necessity of executory laws.

We emphasize again the narrowness of this article's conclusion. We are not offering here a comprehensive account of the meaning of the Necessary and Proper Clause. That project would require, at a minimum, consideration of the meaning of "necessary," of "proper," of the phrase "necessary and proper" as a unified whole, of the phrase "for carrying into Execution," of the agency-law origins of the clause and the distinction between principal and incidental powers, and, as John Mikhail has trenchantly pointed out,²¹ of the meaning of the enigmatic phrase "all other Powers vested by this Constitution in the Government of the United States." Those are all worthy topics for discussion,²² but we do not address them here. We concentrate only on the implausibility of interpreting "necessary" to mean "convenient" or "useful."

We also emphasize that we are not claiming that *McCulloch* was wrongly decided, that it should be overruled, or that all, or even most, of the many decisions relying either expressly or implicitly on the famous *McCulloch* interpretation of "necessary" should be overruled. The meaning of "necessary" is only one aspect of those decisions. Cases decided under a broad understanding of "necessary" might come out the same way under a narrower understanding because, for example, the law in question satisfies a "congruence and proportionality" test, it can be justified under some constitutional provision other than the Necessary and Proper Clause, a

²¹ See John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1047 (2014).

²² See generally Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993). On "proper," see Lawson, *supra* note 9, at 237. On the meaning and significance of "for carrying into Execution," see Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1882–83 (2005); and David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 B.Y.U. L. REV. 75, 172–74. On the agency-law origins of the Necessary and Proper Clause, see Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 52, 52–53 (2010). On the possible meanings of powers vested in the government of the United States, see Gary Lawson & Guy Seidman, *Authors' Response: An Enquiry Concerning Constitutional Understanding*, 17 GEO. J.L. & PUB. POL'Y 491, 509–12 (2019); and Mikhail, *supra* note 21. For attempts at an integrated account of the meaning of the Necessary and Proper Clause, see GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION 76–104 (2017); Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183 (2003); and John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063 (2015).

previous decision is supported by *stare decisis* principles even if wrong as an original matter, or for a combination of these reasons.

For the purpose of exploring the potential implications of our primary linguistic conclusion, in Part VI, two of us survey some leading federal-powers cases to see how they would fare under a congruence-and-proportionality test for necessity, *holding all other elements of doctrine as applied in those decisions stable*. That discussion does not deem any of those decisions to be correct or incorrect for the same reasons that we do not issue an ultimate judgment on *McCulloch*. There are simply too many factors that enter into those kinds of judgments for us to address here. Instead, we aim simply to fix a linguistic mistake, accepting any consequences that may follow from that correction.

The article is divided into six parts, plus a brief conclusion. Part I addresses the history of the Necessary and Proper Clause, which has been dealt with at great length elsewhere. Part II explores the Supreme Court's decision in *McCulloch v. Maryland* and its aftermath. Part III examines the meaning of "necessary" provided in founding-era dictionaries, which make clear that, in 1788, the word "necessary" did not mean "convenient" or "useful," much less "rational." Part IV consists of an original corpus-linguistic analysis of the textual and linguistic arguments on which the *McCulloch* definition of "necessary" rests. We briefly explore the history, strengths, and weaknesses of corpus-linguistic methods as relevant to this kind of inquiry. Then, three separate corpus analyses will test: (1) the similarity of the words identified as synonyms of "necessary" by the *McCulloch* Court; (2) Marshall's assertion that adverbs frequently qualified the meaning of the word "necessary"; and (3) Marshall's claim that the phrase "necessary and proper" as a whole meant something less than "indispensable." Ultimately, the article concludes that the word "necessary," as used in the Necessary and Proper Clause, did not mean "convenient" or "useful" at the time the Constitution was ratified or at the time *McCulloch* was decided. Part V examines how "necessary" was used in other documents in the founding era, such as instruments of agency. Unsurprisingly, these other sources confirm our findings about the term's public meaning. Part VI briefly reviews some leading cases involving congressional power to see if they would have come out the same way if—holding all other elements of doctrine as applied in those cases constant—"necessary" had been read to mean "needful and proper" or "congruent and proportional" rather than as meaning "convenient" or "useful" or "rational." We find a small number of

cases in which that substitution would likely make a difference, though those cases are already seen as somewhat anomalous even under current law.

Thus, we inject fresh empirical data into the more than two-centuries-old debate over the meaning of one of the Constitution's most important words.

I. THE DRAFTING AND RATIFICATION OF THE NECESSARY AND PROPER CLAUSE

A. *The New Learning*

For many years, conventional wisdom held that the Necessary and Proper Clause was “a masterpiece of enigmatic formulation,”²³ such that “no one, including the constitutional framers, knows the point of the phrase ‘necessary and proper.’”²⁴ And, indeed, if one looks solely at the sources typically consulted to learn about the drafting history of constitutional provisions—the records of the Constitutional Convention and the ratification debates—one will likely come away disappointed. Moreover, the phrase “necessary and proper” appeared in only one pre-Convention state constitution, in a provision dealing with emergency powers that authorized the legislature in case of invasion “to adopt such other measures as may be necessary and proper for insuring continuity of the government.”²⁵

A parade of distinguished scholars has lamented the lack of information about the clause's origins. For example, Bernard Siegan wrote that “the accounts of the 1787 Constitutional Convention are silent on the meaning of the necessary and proper power.”²⁶ Randy Barnett noted, “The 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.”²⁷ Mark Graber stated that the Committee of Detail, which drafted the clause, “gave no hint why it chose the language it did.”²⁸ One of us has argued that the words “necessary and proper for carrying

²³ JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT* 4 (1999).

²⁴ Mark A. Graber, *Unnecessary and Unintelligible*, 12 *CONST. COMMENT.* 167, 168 (1995).

²⁵ MASS. CONST. art. LXXXIII.

²⁶ BERNARD H. SIEGAN, *THE SUPREME COURT'S CONSTITUTION: AN INQUIRY INTO JUDICIAL REVIEW AND ITS IMPACT ON SOCIETY* 1 (1987).

²⁷ Barnett, *supra* note 22, at 185.

²⁸ Graber, *supra* note 24, at 168.

into Execution” are obviously more restrictive than Congress’s power “[t]o exercise exclusive Legislation in all Cases whatsoever”²⁹ over the District of Columbia or Congress’s power “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,”³⁰ but how much more restrictive the Necessary and Proper Clause is compared to the District of Columbia or Territory Clauses he did not say.³¹

Over the past two decades, however, the antecedents to the Necessary and Proper Clause have come into focus and shed some light on the mystery as scholars have looked beyond and beneath the standard sources. The most important development was Robert Natelson’s insight that the Necessary and Proper Clause was a standard clause in eighteenth-century agency instruments addressing the incidental powers of the agents—the agents in this case being the various entities empowered in the Constitution by “We the People.”³² “Necessary and proper” was one entry on a menu of options for describing the extent of an agent’s incidental powers that would go along with the express powers granted to the agent in the governing instrument.³³ Because the Committee of Detail was composed of four lawyers and a businessman, all of whom would be familiar with incidental-powers clauses in agency instruments, and because members of the founding-era public often had extensive experience as agents or principals in their day-to-day lives, it is not surprising that the clause’s language would seem familiar and thus generate little discussion.³⁴

This private-law agency account of the Necessary and Proper Clause dovetails with public-law accounts linking the Necessary and Proper Clause

²⁹U.S. CONST. art. I, § 8, cl. 17.

³⁰*Id.* art. IV, § 3, cl. 2.

³¹See CALABRESI & LAWSON, *supra* note 20, at 623.

³²U.S. CONST. pmbl.; see Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RESV. L. REV. 243 (2004). In roughly contemporaneous work, Natelson developed the predicate idea that the Constitution is an agency, or fiduciary, instrument. 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. & POL. 239 (2007); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004). Gary Lawson and Guy Seidman, with Natelson’s invaluable input and inspiration, subsequently authored a book-length development of the idea of a fiduciary Constitution. See LAWSON & SEIDMAN, *supra* note 22.

³³See Natelson, *supra* note 22, at 68–80 (describing at least five different formulae for expressing an agent’s incidental powers).

³⁴See LAWSON & SEIDMAN, *supra* note 22, at 86.

to basic administrative-law principles regarding subdelegated powers³⁵ and founding-era corporate law,³⁶ all of which concern “*public agency law*: the application of agency law principles to public actors.”³⁷ In 2010, one of us helped combine these three lines of analysis into a book³⁸ showing that, instead of springing from nowhere out of the Committee of Detail, the Necessary and Proper Clause had a wide range of antecedents that would have been well known to a founding-era audience.³⁹

More recently, John Mikhail has explored the role of James Wilson as the principal drafter of the clause,⁴⁰ though Wilson’s strong nationalist views may not have been wholly representative of the views of the broader public. Mikhail has also documented how the phrase “necessary and proper” appeared prominently in non-legal discourse.⁴¹ This research made a valuable addition to the corpus of existing work on the clause’s origins. However, the key question is not how “necessary” (and “necessary and proper”) would have been understood in a private letter but rather how the phrase would have been understood *in the specific context of an agency instrument that enumerates the powers of an agent*.⁴² In that respect, it makes sense to describe the word “necessary” in Article I, Section 8 as a “term of art.”⁴³ This conclusion emphatically *does not* suggest that the word, or other terms in the Necessary and Proper Clause, are terms “which only a trained lawyer or someone with specialized legal knowledge would be able to use or interpret correctly.”⁴⁴ The agency-law usage of “necessary” would have been both widely understood in its meaning and identified as a term of art in the specific context in which it appeared. As one of us has explained:

³⁵ See Gary Lawson & Guy I. Seidman, *Necessity, Propriety, and Reasonableness*, in THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE, *supra* note 22, at 120, 120–22.

³⁶ See Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, in THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE, *supra* note 22, at 144, 144.

³⁷ *Raiders of the Lost Clause: Excavating the Buried Foundations of the Necessary and Proper Clause*, in THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE, *supra* note 22, at 1, 5–6. Note that corporations in the eighteenth century were public entities operating under government charters. General incorporation statutes, which treat corporations as a private business form, were a nineteenth-century development. See Miller, *supra* note 36, at 147–48.

³⁸ See THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE, *supra* note 22.

³⁹ See generally *id.*

⁴⁰ See Mikhail, *supra* note 21, at 1096–1103.

⁴¹ See *id.* at 1114–21.

⁴² *Id.* at 1121–32.

⁴³ Natelson, *supra* note 22, at 119.

⁴⁴ Mikhail, *supra* note 21, at 1114.

Would reasonable eighteenth-century observers who were not lawyers actually understand the basic character of fiduciary law? Of course they would. In an era in which sudden deaths were frequent, communication was uncertain, and lawyers were scarce, ordinary people would be unlikely to get through life without being agents, principals, or both. “Anyone employed in business or commerce would be familiar with, *inter alia*, managers and factors. Anyone who owned land would likely be familiar with stewards. And virtually everyone would be familiar with executors and guardians.”⁴⁵

Thus, while the Necessary and Proper Clause received relatively little attention at the Philadelphia Constitutional Convention, that lack of attention is not surprising.

B. Ratification and Representations

The provision became the subject of increased debate during the ratification process. Some Antifederalists were alarmed by the Necessary and Proper Clause.⁴⁶ Interestingly, the focus of attention did not seem to be on the word “necessary.” Rather, Antifederalists mainly worried that the clause contained implied powers (or too many implied powers) and made Congress the sole judge of its own authority. The second claim was obviously wrong, as the clause specifies an objective test rather than, as in some other clauses, authorizing whatever laws Congress *deems* necessary and proper.⁴⁷ The first claim was correct in principle. The whole point of the Necessary and Proper Clause is to confirm and clarify the scope of Congress’s incidental, and therefore implied, powers. That means that there are, in fact, implied federal

⁴⁵Gary Lawson, *The Fiduciary Social Contract*, SOC. PHIL. & POL’Y, Summer 2021, at 25, 37 n.47 (quoting LAWSON & SEIDMAN, *supra* note 22, at 29).

⁴⁶See Natelson, *supra* note 22, at 94–96 (cataloging and summarizing the Antifederalist claims about the clause); John T. Valauri, *Originalism and the Necessary and Proper Clause*, 39 OHIO N.U. L. REV. 773, 805 (2013) (“Anti-Federalist opponents of the proposed Constitution reserved special scorn for provisions of that document such as the Necessary and Proper Clause which, they feared, might be interpreted to give Congress and the national government virtually unlimited powers.”); see also THE FEDERALIST NO. 33, *supra* note 4, at 201 (Alexander Hamilton) (explaining that the Necessary and Proper Clause, along with the Supremacy Clause, had “been the source of much virulent invective and petulant declamation against the proposed Constitution”).

⁴⁷For a detailed critique of this Antifederalist claim, see Lawson & Granger, *supra* note 22, at 276–85.

powers. Determining the scope of those implied powers is beyond the scope of this article. For present purposes, what matters is that very little in the Antifederalist critique of the clause during the ratification debates casts light on the meaning of the word “necessary.”

Nor did the Federalist response say much specifically addressing the meaning of “necessary.” Alexander Hamilton and James Madison—who would soon thereafter part company over the Necessary and Proper Clause’s meaning—both attempted to downplay the Antifederalists’ fears under the shared pseudonym “Publius.”⁴⁸ In the *Federalist Papers*, they claimed that the Necessary and Proper Clause’s purpose was to prevent the opponents of the national government from stymieing its efforts to execute its delegated powers,⁴⁹ not to expand those powers.⁵⁰ In fact, Hamilton insisted that “the constitutional operation of the intended government would be precisely the same” with or without the clause, describing it as “perfectly harmless.”⁵¹ This message was repeated practically universally by Federalists, with “no disagreement as to the meaning of the Clause expressed by supporters of the Constitution” at the ratifying conventions.⁵² For the purposes of understanding the original public meaning, it is significant that anyone who took the Federalists at their word would have believed that the clause only permitted the exercise of powers “incidental” to those expressly delegated.⁵³ However, the precise linguistic meaning of the phrase “necessary and proper” did not factor into this dialogue in a meaningful way.

⁴⁸Note, *Defending Federalism: Realizing Publius’s Vision*, 122 HARV. L. REV. 745, 746 (2008).

⁴⁹See THE FEDERALIST NO. 33, *supra* note 4, at 203 (Alexander Hamilton) (“But SUSPICION may ask, Why then was it introduced? The answer is that it could only have been done for greater caution, and to guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union.”); *see also* THE FEDERALIST NO. 44, *supra* note 4, at 284 (James Madison) (“Had the convention . . . adopt[ed] the second article of Confederation, it is evident that the new Congress would be continually exposed, as their predecessors have been, to the alternative of construing the term ‘expressly’ with so much rigor as to disarm the government of all real authority whatever, or with so much latitude as to destroy altogether the force of the restriction.”).

⁵⁰See J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 592 (2002).

⁵¹THE FEDERALIST NO. 33, *supra* note 4, at 202–03 (Alexander Hamilton).

⁵²Barnett, *supra* note 22, at 187.

⁵³*Id.*; *see also* Natelson, *supra* note 22, at 97–108 (exhaustively cataloging the Federalist representations regarding the incidental-powers understanding of the clause).

C. *The Bank of the United States Bill of 1791*

The meaning of “necessary” took center stage in Congress and the executive department just three years after the Constitution was ratified. The fledgling United States had experienced an economic crisis in the 1780s, from which it was just emerging in President George Washington’s first term.⁵⁴ The federal government was bankrupt, the Continental currency was worthless, and the states had adopted uncooperative economic policies.⁵⁵ Alexander Hamilton, the first Secretary of the Treasury, served as the most strenuous advocate of creating a Bank of the United States. He considered the establishment of a national bank to be a key aspect of his broader effort to “create an engine of economic growth for the United States.”⁵⁶ The proposed bank was largely modeled off the successful Bank of England⁵⁷ (perhaps more so than the unsuccessful Bank of North America, which had been chartered by the Continental Congress in 1781⁵⁸) and was bolstered by the economic theory of Adam Smith.⁵⁹ It would be a federally chartered, quasi-public corporation, with “the power to receive deposits, to provide savings accounts and manage trusts, and to issue ‘reserve notes.’”⁶⁰

The bank would also have a monopoly over the banknotes by which federal taxes and federal debts would be paid, even though Article I, Section 8 only granted the federal government the power to create monopolies in the

⁵⁴ See generally Charles J. Reid, *America’s First Great Constitutional Controversy: Alexander Hamilton’s Bank of the United States*, 14 U. ST. THOMAS L.J. 105, 112–16 (2018) (describing the unstable economic and political conditions of the 1780s).

⁵⁵ See *id.* at 112.

⁵⁶ *Id.* at 118.

⁵⁷ The Bank of England was established in 1694 to act as the English Government’s banker—a role it still plays. The Bank of England was a hugely successful commercial enterprise that led England to surpass France in the 100-year time period between 1694 and 1791. England became the master of all commerce and banking and was the first country to launch the Industrial Revolution. Whereas King Louis XIV of France (1643 to 1715) dominated seventeenth-century Europe, the United Kingdom, with its enormous colonial empire and the world’s most powerful navy, dominated the eighteenth century. Alexander Hamilton wanted to copy the Bank of England hoping that in the nineteenth and twentieth centuries, the United States would become, as it did, the preeminent power in the world. See Christian C. Day, *Hamilton’s Law and Finance—Borrowing from the Brits (and the Dutch)*, 47 SYRACUSE J. INT’L L. & COM. 1, 13–17, 28–28 (2019).

⁵⁸ See 21 JOURNALS OF THE CONTINENTAL CONGRESS 1187–89 (Gaillard Hunt ed. 1912) (1781).

⁵⁹ See Reid, *supra* note 54, at 118–19.

⁶⁰ CALABRESI & LAWSON, *supra* note 20, at 603.

form of patents and copyrights.⁶¹ And the federal government would possess this monopoly power in a legal culture which had long championed, and had been steeped in, the wisdom of the *Case of the Monopolies*.⁶² That decision was reported by Sir Edward Coke and held that only the sovereign King-in-Parliament, and not the King acting alone, had the power to create monopolies. In the United States, of course, sovereignty lies with “We the People of the United States” and not with “the President-in-Congress.” So, the creation of monopolies other than patents and copyrights would require a constitutional amendment under the reasoning of the *Case of the Monopolies* (and a related statute of monopolies, which Coke wrote as a Member of Parliament⁶³). In fact, the Boston Tea Party of December 16, 1773, was triggered in part by colonial objection to the British East India Company’s monopoly on the selling of tea.⁶⁴

The bill to establish a national bank was debated by the First Congress in 1791. It generated fierce opposition in the House of Representatives, only some of which was based on constitutional concerns.⁶⁵ For example, some southerners viewed the proposed bank as “a dangerous concentration of wealth and power,” fearing that it would favor the wealthy, the north, and Wall Street.⁶⁶ Constitutional concerns, however, featured prominently in the debates.

The Constitution did not expressly give Congress the power to create a bank or charter corporations. The proceedings within the Philadelphia Constitutional Convention were kept secret until 1836, but many people living in 1791, including then-Congressman James Madison, remembered

⁶¹ See U.S. CONST. art. I, § 8, cl. 8 (giving Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the *exclusive* Right to their respective Writings and Discoveries” (emphasis added)).

⁶² 74 Eng. Rep. 1131 (1602).

⁶³ See An Act Concerning Monopolies and Dispensations with Penal Laws, and the Forfeiture Thereof, 21 Jam., c. 3 (1624).

⁶⁴ On the anti-monopoly sentiment of the founding generation (and afterward), see Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL’Y 983 (2013).

⁶⁵ For a summary of policy concerns raised by James Madison, see Reid, *supra* note 54, at 133–34. For a summary and analysis of the congressional debate over the Bank Bill as a whole, see *id.* at 133–70. There seemed to be less Constitution-based opposition in the Senate, though the records from that body are sketchy. See MARK R. KILLENBECK, *M’CULLOCH V. MARYLAND: SECURING A NATION* 14–15 (2006).

⁶⁶ See Benjamin B. Klubes, *The First Federal Congress and the First National Bank: A Case Study in Constitutional Interpretation*, 10 J. EARLY REPUBLIC 19, 23 (1990).

very well that the Philadelphia Convention had specifically voted *not* to give Congress the enumerated power to charter corporations.⁶⁷ If any such power existed, it would have to be found in the Necessary and Proper Clause. Thus, opponents questioned whether the establishment of a bank was “necessary and proper” for Congress to carry into execution any of the federal government’s enumerated powers.

The constitutional arguments made against the bank were varied. Some members of Congress made the obvious argument that such a power would not be incidental but rather principal, and therefore it could not stem from an incidental powers clause.⁶⁸ However, a considerable portion of the debate focused on the meaning of the word “necessary” in the Necessary and Proper Clause.⁶⁹ The discussion was less enlightening than one might hope or expect.

⁶⁷ See 2 THE RECORDS OF THE FEDERAL CONVENTION 615–16 (Max Farrand ed., 1911).

⁶⁸ See 2 ANNALS OF CONG. 1899 (1791) (Joseph Gales ed., 1834) (statement of James Madison) (warning against the implication of “a great and important power, which is not evidently and necessarily involved in an express power”); *id.* at 1900 (claiming the power of incorporation “could never be deemed an accessory or subaltern power . . . ; it was in its nature a distinct, an independent and substantive prerogative”); *id.* at 1935 (statement of Michael Stone) (describing the creation of a bank as a “great and substantive power”); *id.* at 1941 (statement of William Giles) (calling bank creation “a distinct substantive branch of legislation . . . [which should] not be usurped as an incidental subaltern authority”). *But see id.* at 1959 (statement of Fisher Ames) (defending the power of incorporation as a “necessary incident” of various enumerated powers).

⁶⁹ See Reid, *supra* note 54, at 161 (“Gerry well recognized that a central point of disagreement was the meaning of the noun ‘necessary’ . . .”). There were numerous other potential constitutional obstacles to the bank that are beyond the scope of this article. First, Congress had no enumerated power to charter a federal corporation or bank, which raised the broad question about implied or incidental powers. This topic occupied much of the debate in the House. Second, Congress had no enumerated power to make banknotes, the only currency in which taxes could be paid or which could pay off the government’s debts. This plan would amount to the creation of a monopoly outside the realm of patents and copyrights. Creating a bank and creating a monopoly bank are two different things. In addition, Congress had only the enumerated power “To coin Money,” a phrase which connotes the minting of gold and silver coins—not transacting economic business in banknotes. *But see* Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL’Y 1017 (2008). In addition, the bank was an unconventional, headless fourth branch of the government with a small minority of federally appointed directors serving on a much larger board composed of potentially self-interested bankers, to whom the bank’s monopoly on the federal government’s banking business was highly profitable. Since the Bank of the United States did not serve a legislative or judicial function, it was a creature of the executive branch of the government, even though it was not under the supervision of the President. As such, it was the original headless fourth branch of the government.

Perhaps the strongest opponent of the bank in the House of Representatives⁷⁰ was James Madison. Only one of Madison's comments directly addressed the meaning of "necessary," though it specifically rejected the Hamilton/Marshall account: "[T]he proposed Bank could not even be called necessary to the Government; at most it could be but convenient."⁷¹ That statement constitutes a clear declaration that "necessary" means something more than "convenient." It is not, of course, a clear, positive declaration of precisely what "necessary" means; Madison would formulate such a definition nearly three decades later.⁷²

Other opponents also opined on the meaning of the word "necessary." James Jackson objected that a national bank could not be "necessary" because some areas of the country flourished without it,⁷³ suggesting that "necessary" means "indispensable." The reports of his comments give no further elaboration. Michael Stone contrasted necessary and proper laws with those that are merely "convenient, expedient, and beneficial"⁷⁴ and found "no necessity . . . for this bank."⁷⁵ William Giles said: "I have been taught to conceive that the true exposition of a necessary mean to produce a given end was that mean without which the end could not be produced."⁷⁶ Thus, several members advanced a strict understanding of necessity, though none provided reasoning or support for his claims.

The reported comments of the bank's defenders in the House⁷⁷ were not significantly more enlightening. Elbridge Gerry noted that "the popular and general meaning of the word 'necessary,' varies according to the subject and circumstances,"⁷⁸ but he did not provide a clear definition relevant to the subject and circumstances at hand. Several defenders insisted that the bank

⁷⁰The Senate at that time did not keep records of its debates. See Jessie Kratz, *Opening the Doors to Debate*, NAT'L ARCHIVES PIECES OF HIST. (Apr. 29, 2015), <https://prologue.blogs.archives.gov/2015/04/29/opening-the-doors-to-debate>. The normal records kept by individual members do not disclose any serious discussion of "necessary." See KILLENBECK, *supra* note 65, at 15.

⁷¹2 ANNALS OF CONG. 1901 (1791) (Joseph Gales ed., 1834) (statement of James Madison).

⁷²See Letter from James Madison to Spencer Roane, *supra* note 14.

⁷³See 2 ANNALS OF CONG. 1918 (1791) (Joseph Gales ed., 1834) (statement of James Jackson).

⁷⁴*Id.* at 1935 (statement of Michael Stone).

⁷⁵*Id.* at 1935–36.

⁷⁶*Id.* at 1941 (statement of William Giles).

⁷⁷Of course, the reported comments may or may not accurately reflect what was actually said. See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986).

⁷⁸2 ANNALS OF CONG. 1947 (1791) (Joseph Gales ed., 1834) (statement of Elbridge Gerry).

could satisfy even the strictest standard of necessity, deeming the bank “indispensable,”⁷⁹ “indispensably necessary,”⁸⁰ and a “means, without which the end could not be obtained.”⁸¹ Thus, they did not develop an alternative account of the term. Theodore Sedgwick argued that the Necessary and Proper Clause “did not restrict the power of the Legislature to enacting such laws only as are indispensable,”⁸² but he did not offer a precise definition of “necessary” beyond encompassing the “known and usual means”⁸³ for fulfilling ends.

The battle was again revived after Congress passed the Bank Bill and presented it to President Washington. When the bill arrived on Washington’s desk, the President decided to poll his cabinet. Attorney General Edmund Randolph and Secretary of State Thomas Jefferson, who believed that the Necessary and Proper Clause should be read narrowly, concluded that the bank was unconstitutional. Randolph asserted that the word “necessary” referred to “the natural means of executing a power,”⁸⁴ but he said nothing else specific about the word. Secretary of State Thomas Jefferson, who hated monopolies and had lobbied to ban them in the Bill of Rights, argued that the “constitution allows only the means which are ‘necessary’ not those which are merely ‘convenient’ for effecting the enumerated powers.”⁸⁵ “[A] little *difference* in the degree of *convenience*” between a bank and an alternative policy, he explained, “cannot constitute the necessity which the constitution makes the ground for assuming any non-enumerated power.”⁸⁶ Jefferson expressed concern that, if the word “necessary” were interpreted too broadly, there would be no enumerated power “which ingenuity may not torture into a *convenience*” so as to “swallow up all the delegated powers.”⁸⁷

⁷⁹ *Id.* at 1949.

⁸⁰ *Id.* at 1903 (statement of Fisher Ames); *see also id.* at 1956 (statement of Fisher Ames) (explaining that European central banks have been “indispensably necessary”).

⁸¹ *Id.* at 1924 (statement of Elias Boudinot).

⁸² *Id.* at 1911 (statement of Theodore Sedgwick).

⁸³ *Id.* at 1911–12.

⁸⁴ Edmund Randolph, *Opinion on the Constitutionality of the Bank*, 12 February 1791, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/?q=Author%3A%22Randolph%2C%20Edmund%22&s=1111311111&r=205>.

⁸⁵ Thomas Jefferson, *To George Washington from Thomas Jefferson*, 15 February 1791, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-07-02-0207>.

⁸⁶ *Id.*

⁸⁷ *Id.*

On the other hand, Treasury Secretary Alexander Hamilton, an arch-nationalist and the bank's leading advocate, understood the Necessary and Proper Clause quite differently. Foreshadowing the position the *McCulloch* Court would ultimately adopt, Hamilton claimed that, in both the "grammatical" and "popular sense," the word "necessary" "often means no more than *needful, requisite, incidental, useful, or conducive to.*"⁸⁸ According to Hamilton, giving the word "necessary" "the same force as if the word *absolutely* or *indispensibly* [sic] had been prefixed to it" would "beget endless uncertainty [and] embar[r]assment" since "[t]here are few measures of any government, which would stand so severe a test."⁸⁹ As a matter of principle, Hamilton believed that constitutional powers "ought to be construed liberally, in advancement of the public good."⁹⁰ In essence, Hamilton argued that Article I, Section 8, Clause 18 could be read to say that "Congress shall have Power . . . To make all Laws which shall be *convenient or useful* 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."

Hamilton made a slew of other careful structural, purposive, and consequentialist arguments in favor of the constitutionality of the Bank of the United States, and he indeed prefigured almost every argument in Chief Justice John Marshall's opinion. But the crux of it all came down to whether "necessary" meant "indispensable" or "essential" as Jefferson and Randolph implied or whether it meant "convenient" or "useful" as Hamilton claimed. No one put forward a clear intermediate alternative definition, such as "congruent and proportional."

Washington was a man of few words, and he never wrote down whether he agreed with Hamilton's bold claims about "necessary" meaning "convenient" and "useful." Perhaps he simply thought he could have averted many disasters in the Revolutionary War had there been an institution like the Bank of the United States. Washington was also one of the largest landholders in the United States when he died. As a real estate speculator and former general, Washington had dealt with banks, and he knew that taxes needed to be raised and troops needed to be paid—and he was well aware that banks played a role in achieving these goals. This background, plus

⁸⁸ Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank*, [23 February 1791], NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-08-02-0060-0003>.

⁸⁹ *Id.*

⁹⁰ *Id.*

Washington's close friendship with Hamilton, may have led Washington to sign the bill creating the First Bank of the United States into law in 1791. We are not inclined to impute to George Washington the position that "necessary and proper" means "useful or convenient," especially since Washington never said as much, and there were narrower constitutional grounds upon which Washington could justify his signing of the Bank Bill. We simply do not know Washington's views on this particular interpretative point.

II. NECESSITY IN THE SUPREME COURT

A. Preliminaries

Although President Washington ultimately signed the Bank Bill, his signature did not permanently settle either the constitutional or the policy controversy respecting the bank. In 1811, the bank's charter lapsed, and Congress declined to renew it, with thirty-five of the thirty-nine members of Congress who spoke during the debate advancing some form of constitutional argument, mostly contending that the bank was unconstitutional.⁹¹ Interest in reestablishing the bank resurfaced, however, during an economic downturn in the wake of the War of 1812.⁹² In 1815, James Madison, now President, accepted the bank's constitutionality as a matter of legislative and executive precedent, announcing that he was

[w]aiving the question of the constitutional authority of the Legislature to establish an incorporated bank as being precluded in my judgment by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation⁹³

It is not entirely clear what Madison meant when he referred to recognition of the bank's validity by the "judicial branch[]." The constitutionality of the

⁹¹ See PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 37 (5th ed. 2006).

⁹² *Id.* For a more detailed account of the conditions leading to the enactment of the second Bank, see KILLENBECK, *supra* note 65, at 53–72.

⁹³ James Madison, *Veto Message of January 30, 1815*, in 1 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897*, at 555, 555 (James D. Richardson ed., 1897).

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first bank was not tested in court, though the bank appeared as a party to a lawsuit on occasion.⁹⁴

Perhaps—and this is raw speculation—he referred to *United States v. Fisher*,⁹⁵ the Supreme Court’s first decision involving the Necessary and Proper Clause. The case had nothing to do with the bank. It concerned a statute giving the United States priority over the assets of debtors when they became insolvent and the United States was among the creditors.⁹⁶ The vast majority of the argument dealt with statutory interpretation, but counsel arguing against application of the statute did suggest that the law was unconstitutional:

Under what clause of the constitution is such a power given to congress? Is it under the general power to make all laws necessary and proper for carrying into execution, the particular powers specified? If so, where is the necessity or where the propriety of such a provision, and to the exercise of what other power is it necessary?⁹⁷

The government’s response was equally brief:

Congress have duties and powers expressly given, and a right to make all laws necessary to enable them to perform those duties, and to exercise those powers. They have a power to borrow money, and it is their duty to provide for its payment. For this purpose they must raise a revenue, and, to protect that revenue from frauds, a power is necessary to claim a priority of payment.⁹⁸

The Supreme Court, speaking through Chief Justice Marshall, sided with the government, in language that to some extent anticipates the later decision in *McCulloch*:

If the act has attempted to give the United States a preference in the case before the court, it remains to inquire whether the constitution obstructs its operation. . . .

⁹⁴ See KILLENBECK, *supra* note 65, at 63, 112, 116.

⁹⁵ 6 U.S. (2 Cranch) 358 (1805).

⁹⁶ Act of Mar. 3, 1797, ch. 20, § 5, 1 Stat. 511, 515.

⁹⁷ *Fisher*, 6 U.S. at 379.

⁹⁸ *Id.* at 384.

It is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the constitution in the government of the United States, or in any department or officer thereof.

In construing this clause it would be incorrect and would produce endless difficulties, if the opinion should be maintained that no law was authorised which was not indispensably necessary to give effect to a specified power.

Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution.

The government is to pay the debt of the union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has consequently a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe.⁹⁹

If President Madison in 1815 were aware of this decision, it might explain why he thought the judicial department had blessed the bank. The Court's opinion not only rejects the strict Jeffersonian line regarding necessity, but it also equates "necessary" with "conducive to,"¹⁰⁰ which was Hamilton's central linguistic claim in defense of the bank's constitutionality. If the only relevant question was whether the bank was "necessary," the Supreme Court would seem to have decided that question in 1805.

Madison nonetheless vetoed the bill on policy grounds, but he then signed a bill re-chartering a Second Bank of the United States in 1816.¹⁰¹ That action set the stage for what "[m]any scholars consider . . . the single most important opinion in the Court's history."¹⁰²

⁹⁹*Id.* at 396.

¹⁰⁰*Id.*

¹⁰¹ Act of Apr. 10, 1816, ch. 44, § 1, 3 Stat. 266, 266.

¹⁰² Daniel A. Farber, *The Story of McCulloch: Banking on National Power*, 20 CONST. COMMENT. 679, 679 (2004).

B. Arguments

The issue finally came to a head in 1819 when a case questioning the constitutionality of the national bank—widely believed to be a test case¹⁰³—reached the Supreme Court. The State of Maryland (and other states) had attempted to impose a tax on a local branch of the national bank. The tax applied only to the Bank of the United States and not to state-chartered banks. The cashier for the Baltimore branch, James McCulloch, refused to pay the tax,¹⁰⁴ giving rise to one of the most famous Supreme Court decisions in history. In his opinion for the Court, Chief Justice John Marshall would anticipate with characteristic perceptiveness the stakes of the case:

The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision.¹⁰⁵

Oral arguments in *McCulloch v. Maryland* were conducted over the course of nine days by six of “the very best advocates of the day.”¹⁰⁶ Counsel for both parties presented comprehensive arguments addressing the constitutionality of the bank,¹⁰⁷ including the existence of implied powers,¹⁰⁸ states’ rights under the Tenth Amendment,¹⁰⁹ and reliance interests.¹¹⁰ Both

¹⁰³ See KILLENBECK, *supra* note 65, at 90.

¹⁰⁴ CALABRESI & LAWSON, *supra* note 20, at 604–05.

¹⁰⁵ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 400 (1819).

¹⁰⁶ KILLENBECK, *supra* note 65, at 96–97.

¹⁰⁷ In addition to addressing the constitutionality of the bank, the advocates also advanced arguments as to whether a national bank could establish branches within the states and whether the states had the power to impose taxes on them—but these issues are beyond the scope of this article.

¹⁰⁸ Compare *McCulloch*, 17 U.S. at 323–24 (argument by Mr. Webster) (asserting that, even without the Necessary and Proper Clause, “the grant of powers itself necessarily implies the grant of all usual and suitable means for the execution of the powers granted”), *with id.* at 364 (argument by Mr. Jones) (“The constitution does not profess to prescribe the ends merely for which the government was instituted, but also to detail the most important means by which they were to be accomplished.”).

¹⁰⁹ *Id.* at 366 (argument by Mr. Jones).

¹¹⁰ *Id.* at 323 (argument by Mr. Webster).

sides agreed, however, that a central question was whether the bank was “necessary” to the execution of enumerated powers within the meaning of the Necessary and Proper Clause.¹¹¹ It was suggested that the bank was “necessary and proper” for carrying out:

the power of levying and collecting taxes throughout this widely-extended empire; of paying the public debts, both in the United States and in foreign countries; of borrowing money, at home and abroad; of regulating commerce with foreign nations, and among the several States; of raising and supporting armies and a navy; and of carrying on war.¹¹²

Counsel for McCulloch attributed a very broad meaning to the word “necessary.” For example, Daniel Webster asserted that necessary powers are those that “are *suited* and *fitted* to the object” and “*best* and *most useful* in relation to the end proposed.”¹¹³ Likewise, U.S. Attorney General William Wirt argued that “necessary” means “are those which are *useful* and *appropriate* to produce the particular end.”¹¹⁴ The words “[n]ecessary and proper,” he suggested, are “equivalent to *needful* and *adapted*.”¹¹⁵ Finally, William Pinkney, who also represented McCulloch, raised a distinct textual argument. “The word *necessary*, standing by itself, has no inflexible meaning,” he claimed, “it may be qualified by the addition of adverbs of diminution or enlargement, such as *very*, *indispensably*, *more*, *less*, or *absolutely necessary*.”¹¹⁶ Thus, advocates for the bank produced a wide array of possible synonyms for the word “necessary.”

An attorney for Maryland presented a competing set of synonyms consistent with Jefferson’s strict understanding of necessity. “The word ‘necessary,’ is said to be a synonyme of ‘*needful*,’” he claimed, “[b]ut both

¹¹¹ See *id.* at 331 (argument by Mr. Hopkinson) (“If the bank be not ‘necessary and proper’ [to carry out enumerated powers], it has no foundation in our constitution, and can have no support in this Court.”); *id.* at 353 (argument by the Attorney General) (“[If] the act of Congress establishing the bank was necessary and proper to carry into execution any one or more of the enumerated powers, the authority to pass it is expressly delegated to Congress by the constitution.”).

¹¹² *Id.* at 353–54 (argument by the Attorney General).

¹¹³ *Id.* at 324–25 (argument by Mr. Webster) (emphasis added).

¹¹⁴ *Id.* at 356 (argument by the Attorney General) (emphasis added).

¹¹⁵ *Id.* (emphasis added).

¹¹⁶ *Id.* at 388 (argument by Mr. Pinkney).

these words are defined ‘indispensably *requisite*,’ and, most certainly, this is the sense in which the word ‘necessary’ is used in the constitution.”¹¹⁷

Both parties recognized that the stakes of settling the meaning of the word “necessary” were high. On behalf of McCulloch, Webster argued that “if Congress could use no means but such as were absolutely indispensable to the existence of a granted power, the government would hardly exist.”¹¹⁸ Likewise, the Attorney General claimed that a “strict and literal” interpretation of the clause “would render every law which could be passed by Congress unconstitutional” and “annihilate the very powers it professes to create.”¹¹⁹ On the other hand, a lawyer for Maryland argued that “[t]o give [the clause] a more lax sense, would be to alter the whole character of the government as a sovereignty of limited powers.”¹²⁰ After all, as the state’s Attorney General pointed out, the proponents of the Constitution at the time of ratification denied allegations “that it contained a vast variety of powers, lurking under the generality of its phraseology.”¹²¹ Had such powers been “fairly avowed at the time,” he argued, the Constitution might never have been ratified.¹²²

At least two topics were conspicuously absent from these arguments. First, neither side addressed whether *United States v. Fisher* had already definitively resolved the meaning of “necessary” in the Necessary and Proper Clause. This omission may offer an interesting window into the early view of judicial precedent. Second, neither side mentioned the possibility of an intermediate standard for necessity between the Scylla of Hamiltonian laxness and the Charybdis of Jeffersonian strictness. The parties instead presented the Court with a very stark choice.

C. Decision

The Supreme Court ruled for McCulloch in a unanimous opinion written by Chief Justice John Marshall. This article does not attempt a comprehensive analysis of the opinion and the many methodological, interpretative, and substantive issues that it raises. We focus narrowly on the decision’s treatment of the constitutional requirement that laws executing

¹¹⁷ *Id.* at 367 (argument by Mr. Jones) (emphasis added).

¹¹⁸ *Id.* at 325 (argument by Mr. Webster) (emphasis omitted).

¹¹⁹ *Id.* at 354–55 (argument by the Attorney General).

¹²⁰ *Id.* at 367 (argument by Mr. Jones).

¹²¹ *Id.* at 372 (argument by Mr. Martin).

¹²² *Id.* at 373.

federal powers be “necessary.”¹²³ That treatment is lengthy, but it can be reduced to seven key propositions.

First and foremost, Marshall rejected the strict Jeffersonian definition of necessity in favor of Hamilton’s lax definition, for precisely the linguistic reason given by Hamilton in 1791—that the ordinary meaning of the word is not so strict.

Does [the word “necessary”] always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end¹²⁴

Interestingly, Marshall made no reference to his similar treatment of “necessary” fourteen years earlier in *Fisher*.

Second, Marshall claimed that “necessary” can be qualified by words of comparison. He asserted that it “admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary.”¹²⁵ Because the Imposts Clause allows a state to impose export duties without congressional consent when “*absolutely* necessary for executing its inspection laws,” the bare word “necessary” in the Necessary and Proper Clause must have a looser meaning than it has in the Imposts Clause.¹²⁶

Third, the Court determined that reading “necessary” strictly would have negative consequences because it would trammel the judgment of Congress:

The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial

¹²³For some thoughts by two of us on some of the broader issues raised by *McCulloch*, see CALABRESI & LAWSON, *supra* note 20, at 618–29.

¹²⁴*McCulloch*, 17 U.S. at 413–14.

¹²⁵*Id.* at 414.

¹²⁶*Id.* (emphasis added) (quoting U.S. CONST. art. I, § 10, cl. 2).

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 itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.¹²⁷

Fourth, Marshall noted that the only powers expressly given to Congress to punish lawbreaking concerned counterfeiting and piracy.¹²⁸ The power to punish anything else had to stem from the Necessary and Proper Clause, he reasoned, but the strict Jeffersonian understanding of “necessary” would not permit a court to infer such power:

Take, for example, the power “to establish post offices and post roads.” This power is executed, by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the post road, from one post office to another. And from this implied power, has again been inferred the right to punish those who steal letters from the post office, or rob the mail. 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. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a Court of the United States, or of perjury in such court. To punish these offences, is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment. . . .

[T]he power of punishment . . . is a means for carrying into execution all sovereign powers, and may be used,

¹²⁷ *Id.* at 415–16.

¹²⁸ *See* U.S. CONST. art. I, § 8, cls. 6, 10.

although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.¹²⁹

Fifth, Marshall insisted that conjoining “necessary” with “proper” ruled out the strict Jeffersonian construction because such a definition would render the word “proper” meaningless:

If the word “necessary” was used in that strict and rigorous sense for which the counsel for the State of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word [viz., “proper”], the only possible effect of which is, to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation, not straitened and compressed within the narrow limits for which gentlemen contend.¹³⁰

Sixth, and for Marshall “most conclusively,”¹³¹ if the Constitution did not contain the Necessary and Proper Clause, Congress would have presumptively enjoyed considerable discretion in executing its enumerated powers, so it must enjoy similar discretion in light of the clause’s inclusion:

To waste time and argument in proving that, without [the Necessary and Proper Clause], Congress might carry its powers into execution, would be not much less idle, than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, Congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional.¹³²

Finally, Marshall concluded that the word “necessary” should not be construed to mean “needful and proper” or “congruent and proportional” but should be watered down instead to the following easily satisfied test: “Let the

¹²⁹ *McCulloch*, 17 U.S. at 417–18.

¹³⁰ *Id.* at 418–19.

¹³¹ *Id.* at 419.

¹³² *Id.*

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.”¹³³

Taken together, Marshall’s propositions sufficed to decide the case. After concluding its discussion of the meaning of “necessary,” the Court explained that the bank easily satisfied the constitutional standard:

That [the bank] is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. . . .

But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. . . . [W]here the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.¹³⁴

This passage gives rise to two possible interpretations. First, it might mean that the bank satisfies any plausible standard of “necessary” less strict than literal indispensability. The fact that Marshall, in describing the meaning of “necessary,” elsewhere conjoined language of convenience or usefulness with stricter terms such as “needful” and “requisite” supports this view.¹³⁵

¹³³ *Id.* at 421.

¹³⁴ *Id.* at 422–23.

¹³⁵ For example, when discussing the inference of a congressional power to enact criminal laws beyond the narrow fields of counterfeiting and piracy, Marshall asks: “If the word ‘necessary’ means ‘needful,’ ‘requisite,’ ‘essential,’ ‘conducive to,’ in order to let in the power of punishment for the infraction of law; why is it not equally comprehensive, when required to authorize the use of means

Those words are odd company for a Hamiltonian account of necessity. Second, the passage might mean that the decision of whether the bank satisfies any standard less strict than literal indispensability is a political question that the courts cannot decide.

Those propositions might be wrong, but under either of them, it was not necessary (or proper) for the Court to endorse the Hamiltonian account of necessity. After all, the Court only needed to reject a strict definition of necessity; it did not need to further elaborate on the meaning of the clause. So, any language suggesting such an endorsement could be viewed as dictum—as was similar language in *United States v. Fisher*.

D. Critique

Indeed, to the extent that the Court sought to make the case for a Hamiltonian view, its arguments were notoriously weak—and, indeed, generally ill-suited to the task. Consider Marshall’s first six propositions in reverse order.

Chief Justice Marshall was obviously correct that, in the absence of the Necessary and Proper Clause, Congress would still have the ability to effectuate federal powers. That proposition flows easily from basic agency law: Grants of principal powers presumptively carry incidental powers in their wake. It requires an express provision, like that included in the Articles of Confederation,¹³⁶ to negate the ordinary presumption. That is why the Federalists in the ratification debates could, with credibility, say that the Necessary and Proper Clause confirmed and clarified rather than granted incidental powers in the national government. But that is a far cry from saying that those baseline agency-law incidental powers would allow Congress to “employ those [means] which, in its judgment, would most advantageously effect the object to be accomplished . . . [and] which tended directly to the execution of the constitutional powers of the government.”¹³⁷ It would certainly be possible to draft an agency instrument that gave the agent such a broad scope of incidental powers. In the absence of a specific clause, however, the agent would have only those incidental powers that would

which facilitate the execution of the powers of government, without the infliction of punishment?” *Id.* at 418.

¹³⁶See ARTICLES OF CONFEDERATION of 1781, art. II (“Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.” (emphasis added)).

¹³⁷*McCulloch*, 17 U.S. at 419.

normally accompany the principal powers. The Court offered no reason to think that its capacious account of incidental powers was the default rule for the Constitution. Moreover, as Robert Natelson has exhaustively documented, the phrase “necessary and proper” was among the *most restrictive* formulae available to eighteenth-century drafters to describe and circumscribe the incidental powers of agents.¹³⁸ Marshall’s assumption that the Necessary and Proper Clause could only expand, and not constrict, the common-law baseline of incidental powers was a transparently unwarranted assertion.

Marshall’s fifth argument, which focuses on the conjunction of “necessary” with “proper,” sought to establish *only* that the State of Maryland’s strict account of necessity was wrong, not that the lax Hamiltonian alternative account of necessity was right. Even on those limited terms, the argument is again transparently weak. It assumes that “necessary” and “proper” do the same work. Although Daniel Webster took this position during oral argument,¹³⁹ it is clearly wrong as a matter of both usage¹⁴⁰ and principle. Necessity describes a causal relationship between means and ends. Propriety could also describe such a relationship, but, in the context of agency instruments, it has a broader meaning which connotes the obligation to conform to fiduciary norms.¹⁴¹ “Necessary” and “proper” simply describe different things. And the terms complement rather than limit each other.

Marshall’s argument also fails if, as Samuel Bray has suggested in an intriguing article, the terms “necessary and proper” function as a hendiadys: “two terms, not fully synonymous, that together work as a single unit of meaning.”¹⁴² In other words, instead of reading each word sequentially, perhaps one should read “necessary and proper” as a unitary phrase with a single meaning. If that is the correct understanding of “necessary and proper,” an argument such as Marshall’s that attaches independent significance to each term is misguided.¹⁴³

¹³⁸ See Natelson, *supra* note 22, at 80.

¹³⁹ *McCulloch*, 17 U.S. at 324 (argument by Mr. Webster) (“These words, ‘necessary and proper,’ in such an instrument, are probably to be considered as synonymous.”).

¹⁴⁰ See Lawson & Granger, *supra* note 22, at 289–91.

¹⁴¹ See Lawson & Seidman, *supra* note 35, at 141–43.

¹⁴² See Samuel L. Bray, “*Necessary and Proper*” and “*Cruel and Unusual*”: *Hendiadys in the Constitution*, 102 VA. L. REV. 687, 689 (2016).

¹⁴³ An assessment of Professor Bray’s argument is beyond the scope of this article. But because the argument, if correct, calls into question the lifetime project of one of us to ascertain the original meaning of “proper,” see Lawson & Seidman, *supra* note 35; Lawson, *supra* note 9; Lawson &

The fourth argument, suggesting that a strict understanding of necessity would forbid Congress from passing enforcement laws for any crimes except counterfeiting and piracy,¹⁴⁴ is again addressed solely to the most extreme version of the State of Maryland's argument. It has no bite against a more moderate version of the Jeffersonian account of necessity—and certainly has no bite against any definition that falls in between Hamilton and Jefferson's descriptions.

Granger, *supra* note 22, and because a number of modern Supreme Court decisions have attached distinct significance to the word “proper,” *see* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 559 (2012); *Printz v. United States*, 521 U.S. 898, 923–24 (1997), a few comments are appropriate. First, most of the many examples of hendiadys that Professor Bray provides, *see* Bray, *supra* note 142, at 696–706, are drawn from literature or colloquial speech. Legal documents in general and the Constitution in particular are neither of those things. *See* John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321 (2018). Just as one would be more likely to look for metaphors in a poem than in a power of attorney (and probably more likely to look for technical words of art in the latter than in the former), perhaps it makes more sense to look for a hendiadys in a play or lunchtime conversation than in a formal legal document. Second, intratextually, the terms “necessary” and “proper” show up in other constitutional clauses, sometimes singly and sometimes in combination with other terms (e.g., “absolutely necessary”), which seems to cut in favor of assigning distinct meaning to each. Third, and finally, even if Professor Bray is ultimately right, the hendiadys label only has bite if the unitary meaning of “necessary and proper” refers only to causal means-ends connection. That is surely not right. Once one identifies the Necessary and Proper Clause as an incidental-powers clause, then the central question becomes which interpretative principles flow from that identification. If there were an established set of background rules for interpreting incidental-powers clauses in agency instruments in the eighteenth century (and there was), and if the phrase “necessary and proper” were a commonly used phrase in agency law at that time (and it was), and if all of the above would have been well known to the four agency lawyers and the agent-employing businessman on the Committee of Detail that drafted the clause (and it would have been), then it probably does not matter whether one parses “necessary” and “proper” in sequence to yield those interpretative principles or if one simply takes the phrase as a hendiadys that represents those principles. The principles are the principles. And if those principles went beyond a straightforward means-ends relationship and instead incorporated agency-law ideas such as a fiduciary duty of care, a fiduciary duty of loyalty, and a requirement not to exceed the scope of the granted agency (and they did), then little of consequence turns on whether one classifies the clause as a hendiadys or treats “necessary” and “proper” as distinct component parts of a set of fiduciary principles. In other words, perhaps we are dealing not so much with a hendiadys, in the literary sense of that term, as with a legal term of art.

¹⁴⁴For a modern version of Marshall's argument, *see* Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 5 (2011). For what we think is a potent rebuttal, *see* Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267 (2011).

Marshall’s third and fourth arguments are quite similar. Yes, it would be odd if there were one and only one means constitutionally available to Congress to exercise an enumerated power. That is a good argument against an interpretation of necessity—in an incidental powers clause—that is tantamount to a prohibition of incidental powers. But again, such an argument has no traction against any but the most strict definitions of “necessary.” And it is a monumental leap from that sound proposition to the claim that Congress therefore must be able to use any means that are “conducive” to its chosen ends. There is a lot of space between “conducive” and “indispensable.”

Finally, the comparison of “necessary” and “absolutely necessary” is yet again a persuasive argument against an interpretation of “necessary” as meaning literally “indispensable.” As we explain below, the word “necessary” is not frequently subject to qualification by words of comparison, and the fact that the meaning of “necessary” is sometimes reinforced by the adverb “absolutely” does not necessarily imply that the word also takes on a weak meaning.¹⁴⁵ The Court only successfully proved that “necessary” in the context of the Necessary and Proper Clause cannot plausibly assume the strongest possible meaning of which the word is linguistically capable.

If that were all that *McCulloch* sought to do, this article probably would not exist. But that is not all that *McCulloch* said. Marshall’s first argument rehashed Hamilton’s sweeping claim about linguistic usage. That claim purported not only to reject the State of Maryland’s view of necessity but also affirmatively to endorse the idea that a “necessary” law need only be “convenient,” “useful,” or “calculated to produce the end.” If posterity had treated the linguistic assertions in *McCulloch* as mere dicta, we would roll our eyes and move on. Posterity, however, has had very different ideas.

E. Reception

Virtually every aspect of *McCulloch* was controversial when the decision was issued. The language interpreting “necessary” was no exception. For example, in 1819, an author writing under the pen name “Amphictyon”¹⁴⁶ objected to the Court’s seeming adoption of the Hamiltonian view of

¹⁴⁵ See *infra* Section IV.D.

¹⁴⁶ This was a pseudonym for William Brockenbrough, a Virginia judge. See JOHN MARSHALL’S DEFENSE OF *MCCULLOCH V. MARYLAND* 1 (Gerald Gunther ed., 1969) [hereinafter MARSHALL’S DEFENSE]; KILLENBECK, *supra* note 65, at 124–25.

necessity because, in his view, it would authorize Congress to abolish state property taxes. After all, if Congress imposed a tax of its own, “[i]t 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.”¹⁴⁷ Founding-era jurist Spencer Roane bitterly criticized the opinion in a series of articles written under the pseudonym “Hampden.”¹⁴⁸ In a private letter, James Madison attacked *McCulloch*’s statement that “the expediency [and] constitutionality of means for carrying into effect a specified Power are convertible terms,” asserting that the Constitution might not have been ratified if it had been anticipated that such a “broad” and “pliant” “rule of construction would be introduced.”¹⁴⁹ Chief Justice Marshall took the unusual step of responding to the criticism, particularly the newspaper essays, under the pen names “A Friend to the Union” and “A Friend of the Constitution.”¹⁵⁰ He denied that the decision would result in “an enlargement of the powers of congress” and claimed that the Court had simply sought to “remind us that a constitution cannot possibly enumerate the means by which the powers of government are to be carried into execution.”¹⁵¹

Despite the controversy it generated, however, the decision had little impact on American law for the next several decades. For the most part, Congress and future presidents did not “act[] upon the Court’s generous definition of national power” until well after the Civil War.¹⁵² But *McCulloch v. Maryland* did generate one famous, and very influential, critic during this era: President Andrew Jackson.

¹⁴⁷ *A Virginian’s “Amphictyon” Essays*, in MARSHALL’S DEFENSE, *supra* note 146, at 52, 67.

¹⁴⁸ See Gerald Gunther, *John Marshall, “A Friend of the Constitution”*: In Defense and Elaboration of *McCulloch v. Maryland*, 21 STAN. L. REV. 449, 449 (1969).

¹⁴⁹ Letter from James Madison to Spencer Roane, *supra* note 14, at 449–50.

¹⁵⁰ See Gunther, *supra* note 148, at 449–50.

¹⁵¹ *Essays from the Alexandria Gazette: John Marshall, “A Friend of the Constitution”*, 21 STAN. L. REV. 456, 475, 477 (1969).

¹⁵² Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1130–32 (2001). For a book-length treatment of *McCulloch*’s reception and influence, see DAVID S. SCHWARTZ, *THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF MCCULLOCH V. MARYLAND* (2019).

Jackson vetoed the renewal of the Bank of the United States in July 1832.¹⁵³ He vetoed the bill based on a wide range of both constitutional and political considerations, many of which targeted the monopoly features of the bank.¹⁵⁴ We focus here only on those aspects that address the meaning of “necessary.”

Jackson did not object in principle to the concept of a national bank, which he thought “in many respects convenient for the Government and useful to the people.”¹⁵⁵ He objected, rather, because he believed that some of the specific “powers and privileges conferred on it can not be supposed necessary for the purpose for which it is proposed to be created, and are not, therefore, means necessary to attain the end in view, and consequently not justified by the Constitution.”¹⁵⁶ Specifically, the 1832 bill proposed a fifteen-year monopoly, which in Jackson’s view unduly limited *Congress’s own discretion* under the Necessary and Proper Clause, as he explained in his veto message:

If Congress possessed the power to establish one bank, they had power to establish more than one if in their opinion two or more banks had been “necessary” to facilitate the execution of the powers delegated to them in the Constitution. . . . But the Congress of 1816 have taken it away from their successors for twenty years, and the Congress of 1832 proposes to abolish it for fifteen years more. It can not be “*necessary*” or “*proper*” for Congress to

¹⁵³ Andrew Jackson, *Veto Message of July 10, 1832*, in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, *supra* note 93, at 1139, 1144–45. Consequently, for eighty-two years, until creation of the Federal Reserve Board in 1914, the United States had no central bank. During those eighty-two years with no Bank of the United States,

[t]hroughout this vast republic, from the St. Croix to the Gulph of Mexico, from the Atlantic to the Pacific, revenue [was] collected and expended, armies [were] marched and supported. The . . . treasure raised in the north [was] transported to the south, that raised in the east [was] conveyed to the west

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 408 (1819). Not only that, but the United States grew from twenty-two to forty-eight states, the economy and population exploded, and the United States became one of the world’s major financial powers. This perhaps suggests that judges should be humble about their consequentialist predictions.

¹⁵⁴ For a broader look at the constitutional significance of Jackson’s veto message, see CALABRESI & LAWSON, *supra* note 20, at 629–34.

¹⁵⁵ Jackson, *supra* note 153, at 1139.

¹⁵⁶ *Id.* at 1146.

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 is it “*proper*” in relation to themselves and their successors.¹⁵⁷

This argument does not challenge *McCulloch*’s account of means-ends relationships. Indeed, it emphasizes the vast discretion of Congress and objects that the monopoly features of the Bank Bill unduly trammel that discretion. More than anything, Jackson argues that the bill’s monopoly feature is not “proper.”

Jackson subsequently argued that Congress could not delegate to the bank the constitutional power to “coin Money [and] regulate the Value thereof.”¹⁵⁸ He contended, “It is neither necessary nor proper [for Congress] to transfer its legislative power to such a bank, and therefore unconstitutional.”¹⁵⁹ Again, this argument does not challenge *McCulloch*’s account of means-ends connections but simply reads the Necessary and Proper Clause to embody the basic agency-law principle against subdelegation of authority.¹⁶⁰

In sum, while President Jackson denied that *McCulloch* settled the constitutionality of the 1832 Bank Bill,¹⁶¹ nothing in his veto message directly addressed what constitutes a “necessary” connection between means and ends. If Jackson objected to a Hamiltonian account of necessity, he did not make that clear in his veto message.

The Civil War marked a permanent sea change in the role of the federal government. The Civil War Amendments and Reconstruction expanded the federal role far beyond anything contemplated in 1788. And that was only the beginning. The post-Civil War period saw the rise of Progressivism, with its expanded conception of the appropriate role for national government in regulating economic life. A new era of federal lawmaking took off with the Interstate Commerce Act of 1887 and the Sherman Antitrust Act of 1890, and it gathered speed after 1901, when Theodore Roosevelt became President. In the 1930s, the New Deal carried the Progressive vision to the next level, and

¹⁵⁷ *Id.* at 1146–47.

¹⁵⁸ U.S. CONST. art. I, § 8, cl. 5.

¹⁵⁹ Jackson, *supra* note 153, at 1149.

¹⁶⁰ See Gary Lawson, *A Private-Law Framework for Subdelegation*, in *THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE* 123 (Peter J. Wallison & John Yoo eds., 2022).

¹⁶¹ See Jackson, *supra* note 153, at 1144–45.

the Great Society of the 1960s continued the expansion of federal activity. While that expansion was driven by a mix of legal, political, and ideological factors far too complex for us to analyze in this article, one component of the engine driving that process was Marshall's interpretation of "necessary" in *McCulloch*.

Today, conventional wisdom attributes the constitutional validation of many modern federal laws and programs to an expansive reading of the Commerce Clause, but that is only part of the story. Certainly if "Commerce . . . among the several States" were not understood to encompass such activities as agriculture, contracting, insurance, manufacturing, and mining, the scope of federal power would be much smaller. But many of the seminal cases upholding an expanded federal role relied, at least in part, on the Necessary and Proper Clause, and at least some of those decisions implicated Marshall's interpretation of "necessary." In Part VI, two of us survey some of those cases to consider how, if at all, they would change if one substituted a Madisonian "congruence and proportionality" test for Hamilton's "convenience or conduciveness" test. For now, we simply highlight some of the legal effects of Marshall's interpretation.

Interestingly, the first use of *McCulloch*'s interpretation of "necessary" in a Supreme Court opinion came in a dissent. In *Hepburn v. Griswold*,¹⁶² the Court held that Congress could not make Civil War greenbacks, with delayed redemption in precious metals, legal tender. Justice Miller's dissenting opinion relied heavily on Hamiltonian language in *McCulloch*.¹⁶³ The dissent, of course, became a majority opinion the next term through the magic of political court-packing. The decision in *Hepburn* was overruled by *Knox v. Lee*,¹⁶⁴ which expressly relied on the Hamilton construction of *McCulloch*.¹⁶⁵ That construction was on its way to being settled law.

In the 1930s and 1940s, the Court decided a series of cases that have shaped constitutional law for the ensuing decades. Among the most notable cases were *NLRB v. Jones & Laughlin Steel Corp.*,¹⁶⁶ *United States v. Darby*,¹⁶⁷ and *Wickard v. Filburn*.¹⁶⁸ While they are still sometimes viewed

¹⁶² 75 U.S. (8 Wall.) 603, 625 (1869), *overruled by* The Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870).

¹⁶³ *See id.* at 629–31 (Miller, J., dissenting).

¹⁶⁴ 79 U.S. (12 Wall.) 457 (1870).

¹⁶⁵ *See id.* at 523.

¹⁶⁶ 301 U.S. 1 (1937).

¹⁶⁷ 312 U.S. 100 (1941).

¹⁶⁸ 317 U.S. 111 (1942).

simply as interpretations of the federal commerce power, it is now increasingly understood that those cases—all of which involve regulation of matters that *affect* commerce among the several states even if those matters are not *themselves* commerce among the several states—also involve, *sub silentio*, the Necessary and Proper Clause.¹⁶⁹ This understanding developed out of the seminal analysis in the 1914 *Shreveport Rate Cases*,¹⁷⁰ which allowed Congress to regulate intrastate rail rates as an incident to its power to regulate interstate rates.

As an original matter, Congress's power to leverage control of interstate commerce into control of intrastate commerce or non-commerce activities may depend on something beyond the scope of this article: the extent to which such regulation is truly incidental as opposed to, in Marshall's terms, "a great substantive and independent power, which cannot be implied as incidental to other powers."¹⁷¹ This article tracks only the development of Marshall's account of the causal connection required for laws to be "necessary."

Tracking that development is more difficult than one might suppose, because, for much of the last century, the Court has primarily described its holdings regarding congressional power in terms of the Commerce Clause, even when the Necessary and Proper Clause was actually doing the work in the background. Thus, there are surprisingly few express references to Marshall's definition of "necessary." Nonetheless, it is clear from the past century of caselaw that the Court implicitly accepted an extreme version of Marshall's formulation. It would take a book to examine this development.¹⁷² The key fact, however, is that the Supreme Court has *never* found a federal statute unconstitutional on the specific ground that it lacked a causal connection to an identifiable federal power.

Indeed, in recent decades, the Court has translated *McCulloch*'s definition of "necessary" into language that fits the post-New Deal "tiers of scrutiny"

¹⁶⁹ See Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996).

¹⁷⁰ 234 U.S. 342 (1914). For a discussion of the relationship between the Commerce Clause and the Necessary and Proper Clause in this line of cases, see CALABRESI & LAWSON, *supra* note 20, at 699–714.

¹⁷¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819). This fundamental idea was resurrected by Chief Justice Roberts in his opinion in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 559 (2012). For an extended analysis of this vital concept, see LAWSON & SEIDMAN, *supra* note 22, at 81–103.

¹⁷² See SCHWARTZ, *supra* note 152.

model of constitutional analysis: Executory laws are necessary, says the modern Court, if the legislative judgment of necessity has a *rational basis*.

One can perhaps trace this evolution of doctrinal language to *Katzenbach v. McClung*.¹⁷³ In that decision, the Court famously upheld application of Title II of the Civil Rights Act of 1964—which forbids discrimination on the basis of race, color, religion, or national origin in all public accommodations¹⁷⁴—to Ollie’s Barbeque, because some of the restaurant’s supplies traveled in interstate commerce.¹⁷⁵ The case represented an easy application of prior decisions such as *Darby*, which upheld Congress’s power to control intrastate wage contracts,¹⁷⁶ and *Wickard*, which evaluated effects on commerce based on classes of activities rather than specific activities.¹⁷⁷ In applying those straightforward precedents, however, the Court stated: “[W]here we find that the legislators, in light of the facts and testimony before them, have a *rational basis* for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.”¹⁷⁸

By that point in time, the Court had elaborated the “rational basis” inquiry to mean that “inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it.”¹⁷⁹ In other words, legislation has a rational basis if there is *any reasonably conceivable or imaginable* factual basis for it, whether or not those facts actually exist and whether or not the legislature actually relied on those supposed facts.¹⁸⁰ As applied to the Necessary and Proper Clause, this test comes very close to declaring the necessity of laws a political question or defining “necessary” to mean “rational”—an even more expansive understanding than that captured by “convenient” or “useful.”

For sixty years, the combination of an expansive conception of commerce, the rational-basis test for necessity, and the disappearance from

¹⁷³ 379 U.S. 294 (1964).

¹⁷⁴ 42 U.S.C. § 2000a(a) (2018).

¹⁷⁵ The statute defines “place of public accommodation” to include restaurants. *See id.* § 2000a(b)(2).

¹⁷⁶ 312 U.S. 100 (1941).

¹⁷⁷ 317 U.S. 111 (1942).

¹⁷⁸ *Katzenbach*, 379 U.S. at 303–04 (emphasis added).

¹⁷⁹ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938).

¹⁸⁰ *See Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483 (1955); Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 GEO. J.L. & PUB. POL’Y 373 (2016); Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 898 (2005).

doctrine both of the word “proper” and of the distinction between incidental and principal powers meant that Congress had essentially unlimited legislative jurisdiction. From 1937 to 1995, the only two laws found by the Supreme Court to exceed Congress’s enumerated powers directly regulated state governments and thus threatened state sovereignty.¹⁸¹ One of those decisions was overruled within a decade of its issuance,¹⁸² and the other relied on the Tenth Amendment as the basis for its holding.¹⁸³

In 1995, the Supreme Court reopened the door to constitutional claims asserting that Congress had exceeded its enumerated powers in *United States v. Lopez*, which held that Congress could not criminalize possession of a firearm within a thousand feet of a school.¹⁸⁴ The case was decided under the Commerce Clause; the majority opinion did not mention the Necessary and Proper Clause. The Court thus treated the power to regulate interstate commerce as itself including the power to regulate intrastate matters that substantially affect interstate commerce,¹⁸⁵ which obviated any need for the Court to address the meaning of “necessary.” The four dissenting Justices similarly couched their discussions entirely in terms of the commerce power. Justice Souter and Justice Breyer both strongly emphasized that congressional judgments about the effect of legislation on commerce should be reviewed under a rational-basis standard. Justice Souter claimed, “In reviewing congressional legislation under the Commerce Clause, we defer to what is often a merely implicit congressional judgment that its regulation addresses a subject substantially affecting interstate commerce ‘if there is any rational basis for such a finding.’”¹⁸⁶ Justice Breyer similarly observed that

¹⁸¹ See *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976); *New York v. United States*, 505 U.S. 144 (1992).

¹⁸² See *Usery*, 426 U.S. 833, *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

¹⁸³ 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.”). For a modest defense of deriving justiciable doctrine from the Tenth Amendment, see Gary Lawson, *A Truism with Attitude: The Tenth Amendment in Constitutional Context*, 83 NOTRE DAME L. REV. 469 (2008).

¹⁸⁴ 514 U.S. 549 (1995); see Steven G. Calabresi, “*A Government of Limited and Enumerated Powers*”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995).

¹⁸⁵ See *Lopez*, 514 U.S. at 559. Justice Thomas, while joining the majority opinion, doubted whether the commerce power included the power to regulate matters substantially affecting commerce. See *id.* at 584 (Thomas, J., concurring).

¹⁸⁶ *Id.* at 603 (Souter, J., dissenting) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 276 (1981)).

“we must ask whether Congress could have had a *rational basis* for finding a significant (or substantial) connection between gun-related school violence and interstate commerce.”¹⁸⁷ These comments could easily be adapted to what we view as the real underlying issue: whether regulating possession of guns near schools—an activity which by itself is obviously not “Commerce . . . among the several States”—is necessary and proper for carrying into execution some other power within Congress’s jurisdiction.

The connection between the rational-basis test and the Necessary and Proper Clause became explicit in the 2004 decision *Sabri v. United States*,¹⁸⁸ a relatively neglected but nonetheless important decision.¹⁸⁹ According to prosecutors, Sabri tried to bribe Minneapolis housing officials to obtain licenses and favorable zoning decisions for his property development. Those prosecutors, however, were not Minnesota state prosecutors. They were lawyers in the U.S. Attorney’s Office, who charged Sabri with violating a federal statute prohibiting bribery of state officials if the state agency—not the briber, but the bribed agency—receives more than \$10,000 in federal funds.¹⁹⁰ There is no requirement under the statute that the alleged bribery involve federal funds; a violation can be established if the state agency receives any such funds. Sabri challenged the law’s constitutionality. He won in the district court¹⁹¹ but lost in the Eighth Circuit, where the court found the statute constitutional as a necessary and proper means for executing the federal spending power.¹⁹² The court of appeals three times used the phrase “rationally related” to describe the inquiry under the Necessary and Proper Clause.¹⁹³ The Supreme Court also upheld the statute based on the same rationale. The Court expressly cited *McCulloch* as “establishing review for means-ends rationality under the Necessary and Proper Clause,”¹⁹⁴ and it had no trouble finding a rational basis in Congress’s desire to protect the integrity

¹⁸⁷ *Id.* at 618 (Breyer, J., dissenting).

¹⁸⁸ 541 U.S. 600 (2004).

¹⁸⁹ For a discussion of *Sabri*’s significance, see Gary Lawson, *Making a Federal Case Out of It: Sabri v. United States and the Constitution of Leviathan*, in *CATO SUPREME COURT REVIEW*, 2003–2004, at 119.

¹⁹⁰ 18 U.S.C. § 666(a)(2), (b).

¹⁹¹ See *United States v. Sabri*, 183 F. Supp. 2d 1145, 1153 (D. Minn. 2002).

¹⁹² See *United States v. Sabri*, 326 F.3d 937, 949–53 (8th Cir. 2003).

¹⁹³ See *id.* at 949–51.

¹⁹⁴ *Sabri v. United States*, 541 U.S. 600, 605 (2004).

of federally funded programs. And with that, the standard for necessity under the Necessary and Proper Clause officially became “rational basis.”¹⁹⁵

Thus, Marshall’s 1819 interpretation has ultimately made the necessity of legislation under the Necessary and Proper Clause all but nonjusticiable. Formally, a plaintiff can bring a challenge based on means-ends connections, and a court will not dismiss it for lack of jurisdiction. But that plaintiff will almost inevitably lose, given the laxity of the rational-basis test. And Marshall’s definition, in turn, ultimately relies on Hamilton’s 1791 claim respecting linguistic usage. There is nothing else in *McCulloch* that affirmatively supports the idea that “necessary” means “convenient.” Accordingly, it is of more than academic interest whether Hamilton and Marshall’s interpretation of the Necessary and Proper Clause was correct. In the next three Parts, we explore that question using dictionaries, corpus linguistics, and intertextual and intratextual analysis.

III. DICTIONARY DEFINITIONS OF “NECESSARY” AND RELATED TERMS

Because Hamilton and Marshall grounded their claims in ordinary usage, a good place to start—though not necessarily to finish—testing their arguments is to examine contemporary dictionaries. We agree with former Supreme Court Justice Antonin Scalia that dictionaries are an invaluable guide to learning the original public meaning of the words of a constitutional or statutory text.¹⁹⁶ Gregory Maggs has identified eight general-purpose dictionaries that were available during the founding era, plus Noah Webster’s dictionary that first appeared four decades after the founding, in 1828.¹⁹⁷ The most influential work was Samuel Johnson’s *Dictionary of the English Language*,¹⁹⁸ so that is where we begin.

The first edition of the dictionary was published in 1755. A sixth edition issued in 1785, right on the eve of the Constitution’s ratification. There is no

¹⁹⁵ Justice Thomas agreed with the Court’s result, but he doubted whether *McCulloch* had to be read so broadly and stated he would have decided the case without addressing the Necessary and Proper Clause. *See id.* at 611 (Thomas, J., concurring).

¹⁹⁶ *See Antonin Scalia v. Merriam-Webster*, MERRIAM-WEBSTER: WORDS MATTER, <https://www.merriam-webster.com/words-at-play/antonin-scalia-v-merriam-webster>.

¹⁹⁷ *See* Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 382–83 (2014). There were also a number of specialized law dictionaries, *see id.* at 390–93, but here we are exploring Hamilton and Marshall’s claim of ordinary meaning.

¹⁹⁸ *See id.* at 385 (describing Johnson’s dictionary as “the most famous and most cited” of the founding-era dictionaries).

difference in the definitions that we examine between those editions, but the later version includes several additional literary sources as references.

Because it is so central to the inquiry at hand, we reproduce in full the definition of “necessary” found in the 1785 edition:

1. Needful; indispensably requisite.

Being it is impossible we should have the same sanctity which is in God, it will be *necessary* to declare what is this holiness which maketh men be accounted holy ones, and called saints. *Pearson*.

All greatness is in virtue understood;

‘Tis only *necessary* to be good. *Dryden’s Aurengzebe*.

A certain kind of temper is *necessary* to the pleasure and quiet of our minds, consequently to our happiness; and that is holiness and goodness. *Tillotson*.

The Dutch would go on to challenge the military government and the revenues, and reckon them among what shall be thought *necessary* for their barrier. *Swift*.

2. Not free; fatal; impelled by fate.

Death, a *necessary* end,

Will come when it will come. *Shakespeare*.

3. Conclusive; decisive by inevitable consequence.

They resolve us not, what they understand by the commandment of the word; whether a literal and formal commandment, or a commandment inferred by any *necessary* inference. *White*.

No man can shew by any *necessary* argument, that it is naturally impossible that all the relations concerning America should be false. *Tillotson’s Pref.*¹⁹⁹

The definition offers no support for the *McCulloch* Court’s assertion that “necessary” means “useful” or “convenient.” The quotations from literature, which Johnson cites in the definition of “necessary” above, provide additional evidence of the word’s usage and serve to bolster the definition of “necessary” as synonymous with: (1) needful; (2) indispensable; (3) impelled by fate; or (4) conclusive and by inevitable consequence. For

¹⁹⁹2 SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (1785).

example, Shakespeare defines death as “necessary,” but it is certainly not “convenient” or “useful”!

Nor does the definition of “proper” support Marshall’s assertion that this word weakened the meaning of “necessary,” making it mean “convenient” or “useful.” We previously noted that one of us, along with Patricia Granger, had disputed that construction, arguing that “proper” adds a separate requirement in addition to that of necessity.²⁰⁰ That analysis turned out to be exactly right. Johnson’s 1755 edition dictionary (with no difference in the later edition) offers the following relevant definitions of the word “proper”: “1) Peculiar; not belonging to more; not common . . . 3) One’s own . . . 5) Fit; accommodated; adapted; suitable; qualified.”²⁰¹ Rather than describing a causal relationship, “proper” describes a *purposive* connection, which is why Lawson and Granger called it a “jurisdictional” term.²⁰² An action is “proper” if it is peculiarly appropriate to the actor. So, the original meaning of “proper” is not “convenient” or “useful.” After all, an action can be convenient or useful without being one’s own or distinctively appropriate to one’s exercise.

We now examine some of the words used to define “necessary” in Samuel Johnson’s *Dictionary*. First, the dictionary defines “necessary” to mean “needful.” This word constitutes the most potentially expansive definition of “necessary” that Johnson gives. The other words—“indispensably requisite,” “impelled by fate,” and “conclusive”—obviously offer no support to Hamilton and Marshall’s view. But according to Johnson, the word “needful” means “[n]ecessary; indispensably requisite.”²⁰³ So, the definition of “needful” also supports Jefferson and Maryland’s interpretation of the Necessary and Proper Clause.

Johnson’s literary references in the definition of “needful” hammer the point home even harder. For instance, the Book of Common Prayer said, “Give us all things that be *needful*, both for our souls and our bodies.” Needful certainly does not mean “convenient” or “useful” in this context. Shakespeare wrote, “Do you consent we shall acquaint him with it, As *needful* in our loves, fitting our duty.” Needful does not mean “convenient” or “useful” here, either. Likewise, Dryden wrote, “All things *needful* for

²⁰⁰ See Lawson & Granger, *supra* note 22, at 291–97; see also Lawson, *supra* note 9, at 249–55.

²⁰¹ 2 SAMUEL JOHNSON, *DICTIONARY OF THE ENGLISH LANGUAGE* (1755).

²⁰² Lawson & Granger, *supra* note 22, at 273.

²⁰³ JOHNSON, *supra* note 201.

defence abound. [Two guardsmen] walk the round.” Again, “needful” means more than “convenient” or “useful.” The dictionary quotes John Locke’s statement that, “[t]o my present purpose it is not *needful* to use arguments, to evince the world to be infinite,” as well as poet Joseph Addison’s lamentation that “[a] lonely desert and an empty land, Shall scarce afford, for *needful* hours of rest, A single house to their benighted guest.” All of the preceding examples imply that the object described as “needful” could not be relinquished without a cost—for example, in health, safety, or commitment to duty. In none of the examples included in the dictionary does “needful” mean “convenient” or “useful.”

Second, Johnson defines “necessary” to mean “indispensably requisite.” In turn, the dictionary defines “indispensable” as: “1) Not to be remitted; not to be spared; necessary.”²⁰⁴ For an example of usage, it quotes Woodward’s *Natural History*: “Rocks, mountains, and caverns, against which these exceptions are made, are of *indispensable* use and necessity, as well to earth as to man.” Here again, “indispensable” is not a synonym of “convenient” or “useful,” as geology is more than convenient or useful. And the dictionary defines “requisite” to mean “[n]ecessary; needful; required by the nature of things.”²⁰⁵ This definition, although somewhat circular for our purposes—citing “necessary” and “needful” to define “requisite”—shows that “requisite” cannot be equated to “convenient” or “useful,” either. To be “required by the nature of things” does not connote mere convenience.

Finally, this article suggests that a “congruence and proportionality” test, like the one *City of Boerne v. Flores* used to interpret “appropriate” in Section 5 of the Fourteenth Amendment, could serve as a modern synonym for “necessary and proper.” The definitions of these words in Samuel Johnson’s *Dictionary* provide support for our assertion. Johnson defined the noun “congruence” to mean: “Agreement; suitableness of one thing to another; consistency.”²⁰⁶ And he defined “congruent” used as an adjective to mean: “Agreeing; correspondent.”²⁰⁷ Johnson defined “proportional” as meaning: “Having a settled comparative relation; having a certain degree of any quality compared with something else.”²⁰⁸ Taken together, these definitions indicate that the phrase “congruent and proportional” would have been understood to

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

require a means “comparatively well suited” to achieve the desired end—not a requirement of absolute necessity, but certainly more restrictive than “convenient” or “useful.” So, we maintain that, both at the founding and today, this test would have captured the original meaning of the Necessary and Proper Clause at least more accurately than the Supreme Court’s definition in *McCulloch*.

Other dictionaries available during the founding era are consistent with Johnson’s dictionary. Among the definitions of “necessary,” one will find: “[n]eedful, indispensably requisite; conclusive, decisive by inevitable consequence; fatal, impelled by fate”;²⁰⁹ “[n]eedful, unavoidable, indispensable”;²¹⁰ “[t]hat which must be indispensably done or granted[,] that without which a thing cannot exist[,] impelled by an irresistible principle[,] conclusive[,] followed by inevitable consequence”;²¹¹ “[n]eedful, requisite, indispensable, unavoidable, inevitable, fatal, conclusive, decisive”;²¹² “[n]eedful, fatal, conclusive”;²¹³ and “[n]eedful[,] indispensably requisite[,] not free[,] impelled by fate[,] conclusive, decisive by inevitable consequence.”²¹⁴

Even Noah Webster’s 1828 *American Dictionary of the English Language* contains a consistent definition. Webster’s 1828 dictionary was the first dictionary of the English language as spoken in the United States, rather than the United Kingdom. This definition is of critical importance because it shows that in the United States, nine years *after* Marshall tried to redefine “necessary” to mean “convenient” or “useful,” ordinary Americans—and not Britisher poets, playwrights, political philosophers, or lawyers—were still reading “necessary” to mean “needful” or “congruent and proportional,” and not to mean “useful” or “convenient.” Because Webster’s definition of “necessary” is so significant, we quote it in full:

1) That must be; that cannot be otherwise; indispensably requisite. It is *necessary* that every effect should have a

²⁰⁹ JOHN ASH, *NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* (1775).

²¹⁰ NATHAN BAILEY, *AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY* 640 (20th ed. 1763).

²¹¹ BARCLAY’S *UNIVERSAL ENGLISH DICTIONARY* 723 (1792).

²¹² THOMAS DYCHE & WILLIAM PARDON, *A NEW GENERAL ENGLISH DICTIONARY* (17th ed. 1794).

²¹³ WILLIAM PERRY, *THE ROYAL STANDARD ENGLISH DICTIONARY* (1788).

²¹⁴ 2 THOMAS SHERIDAN, *A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* (4th ed. 1797); *see also* JOHN WALKER, *A CRITICAL PRONOUNCING DICTIONARY AND EXPOSITOR OF THE ENGLISH LANGUAGE* (1824) (defining “necessary” as “needful, not free”).

cause. 2) Indispensable; requisite; essential; that cannot be otherwise without preventing the purpose intended. Air is *necessary* to support animal life; food is *necessary* to nourish the body; holiness is a *necessary* qualification for happiness; health is *necessary* to the enjoyment of pleasure; subjection to law is *necessary* to the safety of persons and property. 3) Unavoidable; as a *necessary* inference or consequence from fact or arguments. 4) Acting from necessity or compulsion; opposed to free. Whether man is a *necessary* or a free agent is a question much discussed.²¹⁵

So, both at the time the Constitution was adopted and at the time *McCulloch* was decided, dictionary definitions of “necessary” were consistent. And none of them supported the meaning that *McCulloch* attributed to the word.

This linguistic evidence is unsurprising in light of the etymological roots of the word “necessary.” The *Barnhart Dictionary of Etymology* states that the English word can be traced back to at least 1380, then spelled “*necessarie*.”²¹⁶ It suggests that the word had been “borrowed, perhaps in some instances through Old French *necessaire*, and directly from Latin *necessarius*.”²¹⁷ That Latin term, in turn, derived from “*necesse*,” which meant “unavoidable, indispensable, [or] necessary.”²¹⁸ Broken down further, in Latin, “*ne*” meant “not,” and “*cessis*” referred to “withdrawal.”²¹⁹ Thus, the original Latin could be translated more literally to “no backing away.”²²⁰ A founding generation well-schooled in Latin²²¹ would have understood the significance of a term drawn from “*necessarius*.” So, necessary’s etymological roots also militate against the *McCulloch* Court’s interpretation of the term.

In sum, based on contemporary dictionary definitions and the word’s etymology, the best synonyms of “necessary” are “needful and proper” or “congruent and proportional,” not “useful” and “convenient.” In fact, relying

²¹⁵ NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

²¹⁶ ROBERT K. BARNHART & SOL STEINMETZ, THE BARNHART DICTIONARY OF ETYMOLOGY 697 (1988).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ See CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT 13 (1994).

solely on the dictionary definitions, one might even think that the best meaning is the strict one advanced by Jefferson and the State of Maryland. At the very least, however, these definitions offer no support for Hamilton and Marshall's position.

IV. CORPUS-LINGUISTIC ANALYSIS OF "NECESSARY"

In our quest to uncover the original meaning of the word "necessary" in the Necessary and Proper Clause, we rely not only on dictionaries but also on a new technique for investigating original public meaning, *corpus linguistics*. This technique allows us to demonstrate that ordinary American (and British) English speakers in fact used the word "necessary" in a manner consistent with the dictionary definitions discussed above.

Dictionaries are useful resources, but they have important weaknesses. For instance, dictionaries can provide evidence of the range of *permissible* uses of a word, but they are not always helpful for identifying a single ordinary meaning.²²² Moreover, dictionaries typically do not define phrases consisting of more than one word.²²³ And they might not always accurately reflect a word's contemporary *public* meaning. Samuel Johnson's *Dictionary*, after all, primarily quotes playwrights, poets, political philosophers, and prominent lawyers in its definitions.²²⁴ For instance, it suggests that "commerce" means more than to buy and sell by quoting a poet's reference to having commerce with God.²²⁵ We are somewhat skeptical that ordinary English speakers would have used the term "commerce" in such a fashion. Corpus linguistics offers an appealing supplemental resource because it draws from a wide variety of texts, including more sources written by ordinary members of the public.

This Part is divided into five sections. Section A introduces corpus linguistics and describes its strengths and weaknesses. Section B explains the methodology of the article's corpus-linguistic analysis of the word "necessary." The subsequent sections test the primary textual and linguistic arguments found in the *McCulloch* decision. Section C examines whether the synonyms proposed by counsel for *McCulloch* and accepted by the Court

²²² James C Phillips et al., *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J.F. 20, 22 (2016).

²²³ *Id.*

²²⁴ JOHNSON, *supra* note 201.

²²⁵ *Id.* ("Places of publick resort being thus provided, our repair thither is especially for mutual conference, and, as it were, *commerce* to be had between God and us.").

were closer in meaning to the word “necessary” compared to the synonyms proposed by counsel for Maryland. Section D tests the assertion by counsel for McCulloch, ultimately incorporated into the opinion, that the meaning of the word “necessary” may be qualified by comparative words, such as “more,” “most,” or “very.” Finally, Section E assesses Marshall’s linguistic conclusion that the word “necessary” had a less strict meaning when used in conjunction with the word “proper.” Our corpus-linguistic analysis indicates that the Framing generation understood “necessary” to mean at least “needful” and not “convenient” or “useful.” And it suggests that a test more consistent with the original meaning of the Necessary and Proper Clause might instead ask whether a law is “needful and proper” or, in modern terms, whether it is “congruent and proportional.”

A. Introduction to Corpus Linguistics

Corpus linguistics represents a novel approach to originalist research.²²⁶ In order to make an argument based on the original public meaning of a text, it can be helpful to establish how words were used by ordinary Americans at the time a given constitutional provision was adopted. However, researchers have often struggled to find relevant sources, “at least in sufficient quantity,”²²⁷ to make such arguments. Relying on a small number of hand-selected texts can give rise to suspicions that the author has “cherry-picked” sources.²²⁸ Corpus-linguistic research attempts to fill this void by importing the rigor of social science methodologies into historical research on original meaning. Its use is premised on the idea that “[t]he common usage of a given term in a given context is an empirical matter that may be quantified through corpus-based methodologies.”²²⁹

A corpus is a searchable database of texts.²³⁰ It may be general, containing materials from various genres, or subject-matter specific, such as a corpus of

²²⁶ See generally Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261 (2019) (describing the methods and theoretical underpinnings of using corpus linguistics for originalist legal research).

²²⁷ Phillips et al., *supra* note 222, at 21–22.

²²⁸ See Lee & Phillips, *supra* note 226, at 278.

²²⁹ Stephen C. Mouritsen, *Hard Cases and Hard Data: Assessing Corpus Linguistics as an Empirical Path to Plain Meaning*, 13 COLUM. SCI. & TECH. L. REV. 156, 162 (2011).

²³⁰ *Id.* at 161.

Supreme Court opinions.²³¹ The databases often contain thousands of texts,²³² alleviating concerns over small sample sizes. Searches yield objective results that can be described quantitatively.²³³

Corpora are often used to perform “concordance” and “collocate” analyses.²³⁴ A “concordance” lists sentences, excerpted from texts in the database, that contain a certain keyword.²³⁵ A concordance analysis is useful for learning about the contexts in which words are used.²³⁶ “Collocates” are the words that most frequently appear near a keyword.²³⁷ A researcher can limit his analysis to words that appear immediately before or after a keyword, or he can search for the words that most commonly appear within three or four words of the keyword.²³⁸ Collocate research is consistent with the canon of textual interpretation *noscitur a sociis*, which suggests that a word can be “known by its associates.”²³⁹ According to one scholar, though imperfect, a “concordance analysis . . . taken together with . . . collocation output, [can] demonstrate[] to a high degree of certainty” the ordinary meaning of a word.²⁴⁰

This methodology’s appeal is not purely academic. Courts across the country have indicated that they are open to considering corpus-linguistics-based textual arguments. For example, former Utah Supreme Court Justice Thomas Lee, a pioneer in the application of corpus-linguistic methods to legal analysis, has not only published multiple academic articles on the topic,²⁴¹ but has also relied on corpus methods from the bench.²⁴² In 2016, the Supreme Court of Michigan turned to corpus methods to interpret the meaning of the word “information” in a statute and, specifically, to determine

²³¹ *Id.* at 192.

²³² For example, the Corpus of Historical American English contains over 100,000 texts. *Texts*, COHA, <https://www.english-corpora.org/coha/help/texts.asp>.

²³³ Mouritsen, *supra* note 229, at 202.

²³⁴ *Id.* at 197, 199.

²³⁵ *Id.* at 197.

²³⁶ See Phillips et al., *supra* note 222, at 23, 25.

²³⁷ Mouritsen, *supra* note 229, at 200.

²³⁸ *Id.*

²³⁹ Lee & Phillips, *supra* note 226, at 291–92.

²⁴⁰ Mouritsen, *supra* note 229, at 201–02.

²⁴¹ *E.g.*, Lee & Phillips, *supra* note 226; Phillips et al., *supra* note 222.

²⁴² See, e.g., *State v. Rasabout*, 356 P.3d 1258, 1282 (Utah 2015) (Lee, J., concurring) (using a combination of collocate and concordance methods to confirm the meaning of the word “discharge”).

whether it could encompass false as well as true statements.²⁴³ It relied on both a collocate analysis²⁴⁴ and more contextualized concordance research.²⁴⁵ The court expressed confidence in this new methodology, asserting that “corpus linguistics . . . is consistent with how courts have understood statutory interpretation.”²⁴⁶ Corpus-linguistic analyses have appeared in federal court opinions, as well. For instance, a plurality opinion by the Sixth Circuit²⁴⁷ and a district court decision from the Middle District of Florida²⁴⁸ also relied on this methodology.

Corpus-linguistic methods have even found a somewhat receptive audience in the U.S. Supreme Court. The Court had informally relied on corpus-like methods before corpus linguistics was a recognized methodology of textual interpretation among legal academics. For example, one set of scholars described the majority opinion in *Muscarello v. United States*²⁴⁹—in which Justice Breyer performed searches in newspaper databases in order to assess the ordinary meaning of the phrase “carries a firearm”—as “a corpus-lite analysis.”²⁵⁰ More recently, the Court may have been influenced by a corpus-linguistic analysis in an amicus brief in the case *FCC v. AT&T Inc.*²⁵¹ In a 2018 dissent, Justice Thomas cited corpora for the proposition that “[t]he phrase ‘expectation(s) of privacy’ does not appear in . . . collections of early American English texts.”²⁵² And in a 2021 concurrence, Justice Alito stated that “[t]he strength and validity of an interpretive canon is an empirical question” and expressed hope that “perhaps someday it will be possible to evaluate [interpretive] canons by conducting . . . a corpus linguistics analysis,” though he did not attempt such an analysis in the opinion.²⁵³

²⁴³ *People v. Harris*, 885 N.W.2d 832, 838–39 (Mich. 2016).

²⁴⁴ *Id.* at 839 n.33.

²⁴⁵ *Id.* at 839 n.34.

²⁴⁶ *Id.* at 838 n.29 (emphasis omitted).

²⁴⁷ See *Fulkerson v. Unum Life Ins. Co. of Am.*, 36 F.4th 678 (6th Cir. 2022).

²⁴⁸ See *Health Freedom Def. Fund, Inc. v. Biden*, 599 F. Supp. 3d 1144 (M.D. Fla. 2022).

²⁴⁹ 524 U.S. 125 (1998).

²⁵⁰ Phillips et al., *supra* note 222, at 27.

²⁵¹ 562 U.S. 397 (2011); see Mouritsen *supra*, note 229, at 158–59, 191; Ben Zimmer, *The Corpus in the Court: ‘Like Lexis on Steroids’*, ATLANTIC (Mar. 4, 2011), www.theatlantic.com/national/archive/2011/03/the-corpus-in-the-court-like-lexis-on-steroids/72054.

²⁵² *Carpenter v. United States*, 138 S. Ct. 2206, 2238 (2018) (Thomas, J., dissenting).

²⁵³ *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1174 (2021) (Alito, J., concurring).

Although corpus linguistics shows great promise as a methodology, it should by no means be held up as the silver bullet of originalist research. For instance, no single clear meaning may stand out in an analysis.²⁵⁴ In such cases, corpus research causes no harm; it simply fails to answer the question at hand. More concerning, the methodology requires the researcher to make judgment calls related to research design and interpretation, which could open the door to bias.²⁵⁵ In particular, concordance analysis may be susceptible to so-called “confirmation bias,” which may cause a researcher to “perceive[] the words in the data presented” in a way that favors his preferred outcome.²⁵⁶ Finally, of course, evidence derived from a single method of analysis should not be considered in a vacuum.

We hope that this article can largely avoid these pitfalls. First, it does not seek a single, definitive meaning of the word “necessary” but rather attempts to test a series of specific linguistic arguments. Second, although judgment calls are an inescapable reality of research design, we attempt to be as transparent as possible regarding our methods and assumptions. In theory, this transparency would enable third parties to replicate the research and determine whether any variations of methodology might alter the conclusion.²⁵⁷ In order to avoid confirmation bias, this article relies on quantitative analyses of collocates in addition to an admittedly more subjective concordance analysis. Even the concordance analysis, however, employs objective sampling methods, and the relevant excerpts are made available in the appendix,²⁵⁸ leaving readers free to draw their own conclusions. Finally, the article does not rely solely on a corpus analysis to reach its conclusion.

While even the most earnest proponents of corpus linguistics concede that the methodology may not necessarily be “the best tool for determining the meaning of words,” at a minimum, it can serve to “point [researchers] in directions to further explore.”²⁵⁹ The fact that the linguistic arguments in *McCulloch* fail to align with the evidence produced by a corpus-linguistic analysis does not establish the original meaning of the word “necessary.” It demonstrates only what the original meaning most likely was *not*.

²⁵⁴Lawrence M. Solan, *Can Corpus Linguistics Help Make Originalism Scientific?*, 126 YALE L.J.F. 57, 57 (2016).

²⁵⁵*Id.* at 61.

²⁵⁶Mouritsen, *supra* note 229, at 202.

²⁵⁷*See id.*

²⁵⁸*See infra* Appendix.

²⁵⁹Lee & Phillips, *supra* note 226, at 302.

B. Methodology

This article employs five corpora that vary across important dimensions: four are American and one is British; three are general and two are specialized; and only one covers the entire time period of interest (1760 to 1849). The first two analyses rely exclusively on the American corpora. The final analysis, which seeks to escape the Constitution's influence on language use, draws on the British corpus as well as an American corpus containing texts published before 1787.

TABLE 1: KEY CHARACTERISTICS OF CORPORA

Corpus	Country	Years	Specialization	Details
Corpus of Founding Era American English (COFEA)	United States	1760–1799	General	https://lcl.byu.edu/projects/cofea/
Corpus of Historical American English (COHA)	United States	1810–2000	General	https://www.english-corpora.org/coha/help/texts.asp
Google Books	United States	1500–2010	General	https://www.english-corpora.org/googlebooks/help/tour_e.asp
Corpus of U.S. Supreme Court Opinions	United States	1790–present	Specialized	https://www.english-corpora.org/scotus/help/texts.asp
Hansard Corpus (British Parliament)	England	1803–2010	Specialized	https://www.english-corpora.org/hansard/help/texts.asp

In order to capture changes in language use over time, the results of the first two analyses are presented with respect to three distinct, thirty-year timeframes: the roughly three decades leading up to the Constitutional Convention (1760 to 1789); the three decades between the Convention and the *McCulloch* decision (1790 to 1819); and the three decades following the *McCulloch* decision (1820 to 1849). Unfortunately, most of the corpora do not contain texts spanning from 1760 to 1849. Thus, statistics describing the first time period reflect texts drawn from the COFEA and Google Books corpora. Statistics describing the second time period reflect texts drawn from the COFEA, COHA, Google Books, and Supreme Court corpora. Statistics describing the third time period reflect texts drawn from the COHA, Google Books, and Supreme Court corpora. Employing multiple corpora in each time period should diminish any concerns raised by reliance on different corpora in assessing texts from different time periods.

The three analyses are designed to be consistent with the standard academic approach to corpus-linguistic research. However, because this

article seeks to test the specific linguistic arguments advanced in *McCulloch*, it must apply traditional methods of corpus analysis in creative ways.²⁶⁰ We hope that transparency of execution will compensate for novelty of design.

The following three sections contain three different analyses. Section C attempts to determine whether the word “necessary” is more similar in meaning to the synonyms selected by Chief Justice Marshall or the synonyms proposed by counsel for the State of Maryland. It is common practice to gain insight into the meaning of a word by assessing its most common collocates.²⁶¹ However, we are not simply interested in learning the meaning of the word “necessary.” So, we evaluate the overlap between the top collocates of the word “necessary” and those of its proposed synonyms. Section D seeks to test Marshall’s assertion that the meaning of the word “necessary” is frequently qualified in degree by words of comparison. That section analyzes the frequency with which “necessary” is qualified by—or, in practice, immediately preceded by—such words.²⁶² However, because this information is meaningless in isolation, Section D also assesses how frequently the proposed synonyms are qualified by words of comparison. Finally, Section E examines the use of the phrase “necessary and proper” using a traditional concordance analysis.

C. Synonyms of “Necessary”

During oral argument in *McCulloch*, counsel for both McCulloch and the State of Maryland proposed various synonyms for the word “necessary,” in an effort to establish its meaning.²⁶³ A synonym has “the same or nearly the same meaning” as another word.²⁶⁴ Perfect synonyms can be used interchangeably. If two words are close synonyms, they should be frequently

²⁶⁰For example, “sense analysis” involves coding the “sense” in which a word is used in a sample of excerpts. Lee and Phillips described sense analysis as the “meat-and-potatoes of determining meaning from corpus analysis,” but it is not as well suited to addressing the specific arguments made in the *McCulloch* opinion. *See id.* at 308–09.

²⁶¹*See* Mouritsen, *supra* note 229, at 201.

²⁶²Frequency is measured as the percentage of the occurrences of the word in a database in which that word is qualified. Again, this methodology does not represent a significant departure from the standard approach. Sense analyses, likewise, may measure the percentage of instances in a sample in which a word is used in a given sense. *See, e.g.,* Lee & Phillips, *supra* note 226, at 308–09.

²⁶³*McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 324–25, 356 (1819).

²⁶⁴*Synonym*, MERRIAM-WEBSTER DICTIONARY, www.merriam-webster.com/dictionary/synonym.

used in similar contexts and, as a result, surrounded by similar words. Arguing for McCulloch, Daniel Webster suggested that “necessary” was synonymous with “proper,” “suitable,” “fitted,” “best,” and “most useful.”²⁶⁵ The Attorney General claimed that “necessary” meant “useful,” “appropriate,” “needful,” or “adapted.”²⁶⁶ On behalf of Maryland, Walter Jones argued that “necessary” meant “needful” in the sense of “indispensably requisite.”²⁶⁷ In the end, writing for a unanimous Court, Chief Justice Marshall equated “necessary” with the words “convenient,” “useful,” and “essential.”²⁶⁸ This Section aims to test whether Marshall truly chose the closest synonyms among those proposed.

The following analysis compares the collocates associated with the word “necessary” to those associated with the synonyms proposed by Maryland and the synonyms adopted by the Court. On behalf of Maryland, we selected the only two synonyms proposed: “needful” and “requisite.” On behalf of the victorious party and the Court, we selected “convenient,” and “useful,” two of the three synonyms mentioned in the opinion.²⁶⁹ The third synonym, “essential,” is omitted from this analysis because it was closer in meaning²⁷⁰ to the synonyms suggested by counsel for Maryland and might, therefore, muddle the results of the analysis.

For each of the five words—“necessary,” “needful,” “requisite,” “useful,” and “convenient”—we identified the top twenty collocates in each of the American corpora that contained texts published in the given timeframe. Specifically, we searched for collocates within three words on either side of

²⁶⁵ See *McCulloch*, 17 U.S. at 324–25 (argument by Mr. Webster) (“[N]ecessary and proper’ . . . are probably to be considered as synonymous. Necessarily, powers must here intend such powers as are suitable and fitted to the object; such as are best and most useful in relation to the end proposed.”).

²⁶⁶ *Id.* at 356 (argument by the Attorney General) (“The auxiliary means, which are necessary for this purpose, are those which are useful and appropriate to produce the particular end. ‘Necessary and proper’ are, then, equivalent to needful and adapted . . .”).

²⁶⁷ *Id.* at 366–67 (argument by Mr. Jones) (“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.”).

²⁶⁸ *Id.* at 413 (opinion of the Court).

²⁶⁹ *Id.* at 413.

²⁷⁰ *Essential*, JOHNSON, *supra* note 201, at 721 (defining “essential” as “[n]ecessary to the constitution or existence of any thing” and “[i]mportant in the highest degree; principal”).

the keyword.²⁷¹ If a corpus only included texts from a portion of the relevant timeframe, we identified the top collocates in that corpus for the portion of the timeframe for which texts were available. As a rule, we excluded “stop words,”²⁷² proper nouns, and collocates that only appeared once. If the twentieth collocate was tied in frequency with other collocates, we included all of the collocates that occurred with the same frequency (unless there were more than ten).

Using the statistical programming software R, we then identified the overlap between the top collocates of “necessary” in each corpus and the top collocates of a given synonym in each corpus within each of the three time periods. For instance, if “absolutely” were a top collocate of “necessary” only in the COFEA corpus and a top collocate of “requisite” only in the Google Books corpus, a match would still be generated. This methodology maximized the possibility of identifying overlapping collocates in each time period. One notable shortcoming, however, was the inability to match similar words with their plurals or other tenses.²⁷³

Table 2 shows the overlap among the top collocates of “necessary” and the proposed synonyms in the three decades leading up to the constitutional convention, the three decades between the convention and the *McCulloch* decision, and the three decades following the *McCulloch* decision. While the overlapping collocates vary somewhat across time, the overall trends do not. The two synonyms advocated by counsel for Maryland—“requisite” and “needful”—have more numerous and more substantive overlapping collocates with “necessary.” The overlapping collocates include adverbs such as “absolutely,” “essentially,” and “indispensably,” which convey the mandatory sense in which the words are used. Likewise, nouns such as “defence,” “supplies,” “sustain,” and “support” indicate that the objects of necessity were serious matters. It is difficult to imagine a “defence” or

²⁷¹ Because the Google Books corpus does not allow simultaneous searches for collocates on either side of a word, we identified the top ten collocates within three spaces before and after the search term.

²⁷² Consistent with common practice by corpus linguistics researchers, we excluded “stop words” (i.e., “and,” “if,” or “what”) from any list of collocates, using a standard collection of these words. See *Full-Text Stopwords*, MY SQL, <https://dev.mysql.com/doc/refman/8.0/en/fulltext-stopwords.html> (providing a list of “default stopwords”). It should be noted that the words “necessary” and “useful” are, themselves, stop words.

²⁷³ For example, “deem” would not be matched with “deemed,” nor would “supply” be matched with “supplies.”

“support” being described as simply convenient. The verb “enable” connotes something vital to accomplishing an end.

Conversely, the words that the Supreme Court purported to identify as synonyms—“convenient” and “useful”—share few collocates with “necessary.” The overlapping collocates consist largely of generic words such as “rendered,” “judged,” and “thought,” which provide little insight into any shared meaning. In fact, such words can be used in connection with words of very different meanings. For example, it is equally acceptable to say that something has been “rendered” or “judged” “unnecessary” as to say that something has been “rendered” or “judged” “necessary.” The words “information,” “execution,” and “proper” similarly provide little insight into substantive meaning.

In sum, the results of the analysis strongly indicate that “necessary” is used in contexts more similar to those in which “requisite” and “needful” are used. Thus, the synonyms proposed by counsel for Maryland were likely more accurate than those adopted by the Supreme Court.

TABLE 2: OVERLAPPING COLLOCATES

Synonym	1760–1789	1790–1819	1820–1849
Needful	Absolutely Judge Judged Supplies Support Thought	Absolutely Deemed	Carry Deem Preparations Support Sustain
Requisite	Absolutely Defence Essentially Highly Indispensably Supplies	Absolutely Carry Deem Deemed Indispensably Means Supplies Thought	Absolutely Deemed Defray Enable Indispensably Information Render
Useful	Render Rendered	Render Rendered Thought	Information Render
Convenient	Judge Judged	Execution Proper	Render

D. Qualification by Words of Comparison

The fact that a word is frequently used in conjunction with comparative words may indicate that the word can be understood to vary by degree. Arguing on behalf of McCulloch, Mr. Pinkney stated that the word

“necessary” “may be qualified by the addition of adverbs of diminution or enlargement, such as very, indispensably, more, less, or absolutely necessary.”²⁷⁴ The Court was convinced.²⁷⁵ Chief Justice Marshall wrote that the word “necessary” “has not a fixed character, peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports.”²⁷⁶ The analysis in this Section tests that argument.

Not all words can be qualified in this manner. For instance, to many English speakers, the phrase “very mandatory” may sound awkward whereas the phrase “very important” may not. The great British novelist George Orwell capitalized upon this distinction in his famous book *Animal Farm*.²⁷⁷ When the pigs had firmly established themselves as the governing elites of the farm, they issued a new rule: “All animals are equal, but some animals are more equal than others.”²⁷⁸ Of course, the irony lies in the fact that the concept of equality does not lend itself to qualification by degree. Either all of the animals on the farm are equal or they are not. According to this logic, if the meaning of “necessary” can be qualified, the word should frequently be preceded by comparative words such as “very,” “more,” or “most.” If not, it should rarely be preceded by such words.

To test this proposition, we found the percentage of occurrences of the word “necessary”—in each of the American corpora and in each timeframe—in which “necessary” was immediately preceded by “very,” “more,” or “most.” Using the search feature in each corpus, we found the number of times a phrase (e.g., “very necessary”) occurred and divided it by the total number of times the keyword (e.g., “necessary”) occurred in that same time period.²⁷⁹ To provide context, we collected the same statistics for the words

²⁷⁴ *McCulloch*, 17 U.S. at 388 (argument by Mr. Pinkney).

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 414 (opinion of the Court) (suggesting as examples the phrases “necessary, very necessary, absolutely or indispensably necessary”).

²⁷⁷ See generally GEORGE ORWELL, *ANIMAL FARM* (1964).

²⁷⁸ *Id.* at 112. In *Animal Farm*, the pigs promised to liberate the other farm animals from the farmer’s tyranny, but once they led a successful rebellion and ascended to power, they ruled as tyrannically as the farmer had done. Initially, the pigs advocated the idea that “[a]ll animals are equal.” *Id.* at 22. But eventually, they changed their position and justified their own special advantages under the proposition that “[a]ll animals are equal, but some animals are more equal than others.” *Id.* at 112.

²⁷⁹ Because the Google Books corpus does not allow for searches of multi-word phrases, we used the collocate feature to determine the number of times a qualifying word immediately preceded the keyword.

“needful,” “requisite,” “convenient,” and “useful.” Finally, we calculated the average percentage of occurrences²⁸⁰ in which the words were qualified by comparative words in each timeframe across corpora.

Table 3 shows the average percentage of occurrences in which each set of words was qualified by a given comparative word. Across time, “necessary” was rarely preceded by the comparative words “more,” “most,” and “very.” Likewise, the synonyms proposed by counsel for Maryland were rarely preceded by comparative words.²⁸¹ These findings indicate that “necessary,” like “needful” and “requisite,” does not lend itself to qualification. Similar to the word “equal” in the example from *Animal Farm*, it may simply not be possible to conceive of these words as varying by degree. Conversely, the synonyms accepted by the Supreme Court, “convenient” and “useful,” are frequently qualified.²⁸² In fact, they are qualified by the words “more,” “most,” or “very” in one fifth of the instances in which they appear in the historical corpus texts. The results indicate that Chief Justice Marshall was right to recognize that some words may be qualified by “degrees of comparison,” but the word “necessary” is apparently not among them.

TABLE 3: QUALIFICATION BY COMPARATIVE WORDS

Keyword	“More”	“Most”	“Very”	Combined
Necessary	1760–1789: 0.68% 1790–1819: 0.91% 1820–1849: 0.68%	1760–1789: 0.51% 1790–1819: 0.54% 1820–1849: 0.44%	1760–1789: 0.54% 1790–1819: 0.31% 1820–1849: 0.26%	1760–1789: 1.73% 1790–1819: 1.76% 1820–1849: 1.37%
Needful & Requisite	1760–1789: 0.52% 1790–1819: 0.42% 1820–1849: 0.81%	1760–1789: 0.23% 1790–1819: 2.33% 1820–1849: 1.20%	1760–1789: 0.91% 1790–1819: 0.31% 1820–1849: 0.15%	1760–1789: 1.66% 1790–1819: 3.07% 1820–1849: 2.15%
Convenient & Useful	1760–1789: 7.09% 1790–1819: 6.58% 1820–1849: 7.66%	1760–1789: 7.50% 1790–1819: 8.39% 1820–1849: 8.64%	1760–1789: 5.31% 1790–1819: 2.87% 1820–1849: 3.59%	1760–1789: 19.90% 1790–1819: 17.85% 1820–1849: 19.88%

Finally, the fact that “absolutely” and “indispensably”—both “degree adverbs”²⁸³—are among the most common collocates of “necessary,” “needful,” and “requisite”²⁸⁴ does not undermine the argument advanced in

²⁸⁰ The results are essentially the same when median is used instead of average.

²⁸¹ See Table 3.

²⁸² See *id.*

²⁸³ *Adverbs: Types*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/grammar/british-grammar/adverbs-types>.

²⁸⁴ See *supra* Section IV.C.

this Section. Chief Justice Marshall cited “necessary, very necessary, absolutely [and] indispensably necessary”²⁸⁵ as equivalent examples, all of which demonstrate that the word “necessary” can be understood to vary by degree. However, we suggest that the frequent collocates of “necessary” and the prototypical comparative words (i.e., “more,” “most,” and “very”) serve different purposes. As described above, the adverbs “very,” “more,” and “most” imply the possibility of something “less.” Conversely, “absolutely” and “indispensably” do not carry the same connotation.²⁸⁶

If “necessary” is understood in its strictest sense, then an adverb that simply reaffirms that meaning does not actually qualify it. In other words, the phrase “absolutely necessary” does not necessarily imply that something less than “absolute” necessity is possible. Returning one last time to the example from *Animal Farm*, had the pigs instead asserted that all animals were “completely equal” or “absolutely equal,” no reader would have inferred that some lesser degree of equality must have been possible.

E. “Necessary and Proper” as a Phrase

Finally, Chief Justice Marshall suggested that the meaning of the word “necessary” was altered by its inclusion in the phrase “necessary and proper.”²⁸⁷ In the opinion, Marshall wrote:

If the word “necessary” was used in that strict and rigorous sense for which the counsel for the State of Maryland contend, it would be an extraordinary departure from the usual course of the human mind . . . to add a word, the only possible effect of which is, to qualify that strict and rigorous meaning²⁸⁸

Although some modern scholars have reached similar conclusions,²⁸⁹ this article is not the first to question Marshall’s assertion. For instance, one of us, along with Patricia Granger, has suggested that “proper” simply describes

²⁸⁵ *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 414 (1819).

²⁸⁶ The only collocate that potentially cuts against this conclusion is “highly,” a frequent collocate of both “necessary” and “requisite” in the years leading up to the ratification of the Constitution.

²⁸⁷ *McCulloch*, 17 U.S. at 418–19.

²⁸⁸ *Id.*

²⁸⁹ See, e.g., Bray, *supra* note 142, at 737 (suggesting that the word “proper” “modifies and moderates ‘necessary,’” serving “as a rule of construction against taking ‘necessary’ in its strict, Jeffersonian sense”).

a different set of restrictions than does “necessary.”²⁹⁰ This Section explores whether the phrase “necessary and proper” conveys a less “rigorous” meaning than would the word “necessary” alone.

To test this proposition, we performed a concordance analysis, examining excerpts of historical texts in which the phrase was used. This question is well suited to concordance analysis because it requires an investigation into highly nuanced meaning that benefits from linguistic context. Because the inclusion of the phrase “necessary and proper” in the Constitution may have influenced its use in American texts after 1787, we relied on examples from an American corpus in the years 1770 to 1786 and from a British corpus containing parliamentary debates in the years 1803 to 1819.²⁹¹ The phrase only appeared six times in the British corpus, so we analyzed all six excerpts. We selected six of the first seven²⁹² excerpts returned from the American corpus.²⁹³ The results are included in the appendix at the end of this article.

As used in the historical texts, the phrase “necessary and proper” does not appear to mean anything close to “convenient” or “useful.” The concordance excerpts address such varied and high-stakes topics as planting a spy, performing military duties, acknowledging the sacrifices of war, establishing courts, removing judges, and solidifying alliances.²⁹⁴ For instance, one excerpt refers to “perform[ing] all the duties that are *necessary and proper* for a Quarter-Master General.”²⁹⁵ In another example, an officer explains to then-General George Washington that the Continental Army “undoubtedly [had] a Spy on [a certain] Island, Every *necessary and Proper* preparation having been made for that Purpose.”²⁹⁶ Across the Atlantic, John Adams promised that he “shall be ready, in behalf of the United States, to do whatever is *necessary and proper*” once the King of France was prepared to

²⁹⁰ Lawson & Granger, *supra* note 22, at 289.

²⁹¹ The Hansard Corpus begins in the year 1803. We analyzed texts spanning sixteen years in both corpora.

²⁹² We excluded one excerpt that was jumbled to the point of being nearly incomprehensible. The search results were not returned in date order or according to any other metric that might lead to a biased sample, as far as we can tell.

²⁹³ The Corpus of Founding Era American English was the only corpus that contained texts from this era and allowed searches of multi-word phrases. Although Google Books also contains texts from the eighteenth century, its current format does not permit searches of strings containing more than one word.

²⁹⁴ See Appendix.

²⁹⁵ See *id.*

²⁹⁶ See *id.*

invite the United States to accede to a treaty of alliance.²⁹⁷ In England, members of the House of Lords discussed how “a judge may be guilty of several acts . . . which would render his removal *necessary and proper*.”²⁹⁸ None of the forgoing examples lends itself well to a more flexible understanding of the phrase “necessary and proper.” In fact, if one replaces the phrase “necessary and proper” with “requisite” or “convenient” as one reads, it becomes all the more apparent that the phrase should not be understood to mean “convenient.”

Only one example potentially cuts against this conclusion. In a sermon, an American pastor asserted that it is “fit,” “wise,” and “necessary and proper” that the legislature align man’s laws with God’s laws.²⁹⁹ Certainly, the words “fit” and “wise” do not imply that the desired action is mandatory. Nonetheless, the pastor seemed to assert that only fear of eternal damnation will restrain people from making poor choices. Thus, citizens would only obey the laws of man if they align with the laws of God.³⁰⁰ No manner of legislation would be effective other than that deemed “necessary and proper.” If this interpretation is correct, the meaning of “necessary and proper” would be relatively consistent with the strict meaning that the other excerpts suggest.

V. A BRIEF NOTE ON AGENCY LAW

We submit that our linguistic analysis has effectively refuted the interpretation of “necessary” adopted by the *McCulloch* Court,³⁰¹ but we are

²⁹⁷Letter from John Adams to the Duc de la Vauguyon (May 1, 1781), in 5 THE DIPLOMATIC CORRESPONDENCE OF THE AMERICAN REVOLUTION 496, 496 (Boston: Nathan Hale and Gray & Bowen 1829) (emphasis added).

²⁹⁸Lord Harrowby, House of Lords, *Conduct of Judge Fox* (May 22, 1805), available at <https://hansard.parliament.uk/Lords/1805-05-22/debates/f3065096-1300-4569-a1ed-059549d5e646/ConductOfJudgeFox>.

²⁹⁹George Beckwith, Address at North-Parish (Jan. 26, 1783), available at <https://quod.lib.umich.edu/e/evans/N14091.0001.001/1:2?rgn=div1;view=fulltext>.

³⁰⁰*Id.*

³⁰¹All of the conclusions in this article are confirmed by looking at what might be the most persuasive source for the meaning of “necessary” in a late eighteenth-century American constitution: other late eighteenth-century American constitutions. The state constitutions crafted between 1776 and 1787 often used “necessary” and other adjectives, both alone and in combination. See Gary Lawson & Guy I. Seidman, *An Ocean Away: Eighteenth-Century Drafting in England and America*, in THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE, *supra* note 22, at 35, 42–49. One of us has elsewhere catalogued and analyzed every such usage. *Id.* The bottom line is that “[t]here was no usage of the term ‘necessary’ in state constitutions in which the term unambiguously means nothing more than ‘helpful’ or ‘related to in a rational fashion.’” *Id.* at 45. When state

not necessarily ready to endorse the alternative, Jeffersonian definition proposed by the State of Maryland. Although corpus linguistics and dictionary definitions are useful tools of textual interpretation, they must not be relied upon at the exclusion of other evidence of original meaning. While we do not purport to affirmatively establish the original public meaning of “necessary” in the Necessary and Proper Clause, we would be remiss not to consider the evidence that the phrase “necessary and proper” was actually a legal term of art.

McCulloch’s interpretation of the Necessary and Proper Clause was based on the common usage of “necessary,” but the phrase “necessary and proper” might also be interpreted as a widely used and understood term of art. The Constitution, after all, is a legal document, written in the language of the law.³⁰² Much of the “legal English” in the Constitution overlaps with ordinary English, and in those circumstances ordinary meaning and legal meaning are the same. But there are some terms in the Constitution that are unlikely to be part of common parlance. Other terms may appear in both common and technical parlance but shift meanings as they move from one context to the other.

The Necessary and Proper Clause seems to inhabit a twilight zone between common and technical speech. The phrase “necessary and proper” could readily appear in common discourse,³⁰³ but it could also appear in specialized legal contexts, such as agency instruments or corporate charters. Those agency-law usages, as we have explained, were accessible to ordinary people in a way that some technical legalisms (e.g., “Bill of Attainder” or “Privileges and Immunities”) might not have been. The phrase would be understood to hold a meaning in those agency-law settings that might differ from its meaning in common speech.

Evidence from the agency-law context actually cuts against the position taken by Jefferson and the State of Maryland.³⁰⁴ As a matter of pure linguistic meaning, drawn from dictionaries and corpus linguistics, one could easily conclude that the best meaning of “necessary” is indeed something like “indispensable.” That is not, however, the way the term was generally understood in the specific context of agency instruments.³⁰⁵ Incidental

constitutions meant “convenient,” they said “convenient.” *See id.* at 46–47. We have no reason to believe that the Federal Constitution was any different.

³⁰² *See* McGinnis & Rappaport, *supra* note 143.

³⁰³ *See* Mikhail, *supra* note 21, at 1114–21.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

powers were “necessary” not only if they were indispensable, but also if they were significantly important to the principal power.³⁰⁶ For example, a conveyance of a pond would carry as a necessary incident the conveyance of the fish because the fish “are so annexed to and so necessary to the well-being of the [property], that they shall accompany the land wherever it vests.”³⁰⁷ A power might also be necessary, and therefore incident, if it *customarily* accompanied a principal power. “For example, a factor (a person selling goods as an agent for someone else) could have the incidental power to extend credit to the customer if that was customarily a power held by factors of that type.”³⁰⁸

Because the Constitution is an agency instrument, this agency-law meaning is likely a more accurate account of the phrase “necessary and proper” in Article I than would be the purely ordinary-language meaning relied on by Jefferson and Maryland. It is also a far better account than Hamilton and Marshall’s suggestion of “useful” or “convenient.”³⁰⁹ One could certainly write an eighteenth-century agency instrument that gave an agent the power to use any means that were useful or convenient. But one would do so by specifying in the instrument that the agent had such discretion, perhaps by saying that the agent could use whatever means *the agent deemed* convenient, appropriate, or necessary.³¹⁰ There are clauses in the Constitution that confer such discretion on governmental actors, but the Necessary and Proper Clause is not among them.³¹¹

VI. CASELAW RECONSIDERED

We think we have established beyond a reasonable doubt that Hamilton and Marshall were simply wrong about both the ordinary usage of “necessary” and its meaning in the context of the Necessary and Proper Clause. That is all that we set out to establish. Professors Calabresi and Lawson, however, wish to venture one step further. This Part speaks only for them.

³⁰⁶ *Id.* at 1067.

³⁰⁷ 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 427–28 (4th ed. 1770).

³⁰⁸ LAWSON & SEIDMAN, *supra* note 22, at 83–84.

³⁰⁹ *Id.* at 87.

³¹⁰ See Natelson, *supra* note 22, at 72–75.

³¹¹ For a compendium of such clauses, see Lawson & Granger, *supra* note 22, at 277–78.

So far, our analysis has largely been limited to considering the two positions advocated by the parties in *McCulloch*. The definition of “necessary” put forward by the State of Maryland, which equated “necessary” with “indispensable,” would likely be correct if the term arose in an ordinary conversation.³¹² But in the context of the Necessary and Proper Clause, a provision designed to confirm and clarify rather than eliminate the incidental powers of Congress and one likely originally understood to comport with agency-law principles, that strict definition appears to be an imperfect fit. The *McCulloch* Court, however, only considered two possible definitions of the term, at the extremes of its potential range of meaning. We consider an alternative definition.

James Madison had previously proposed a definition of “necessary” that fell between the extreme positions argued in *McCulloch*.³¹³ According to Madison, a law is “necessary” if it exhibits a “definite connection between means and ends” and links the incidental and principal power “by some obvious and precise affinity.”³¹⁴ That intermediate account is consistent with the background rules of agency law for incidental powers; “if there were no Sweeping Clause, one would likely infer something very much like Madison’s standard as an implication from the grant of enumerated powers.”³¹⁵

A full defense of Madison’s position would require a separate article. But we suggest that a good way to express what Madison advocated—reflecting the relevant agency-law principles—is to say that Congress’s exercise of incidental powers must be *congruent and proportional* to the principal power being implemented. Such a test would be considerably more demanding than a test of convenience, usefulness, or rationality, but less demanding than a test of indispensability. Although it may not be a perfect expression of the original meaning of “necessary” in the Necessary and Proper Clause, it appears to be a closer approximation than the other proposed alternatives.

Our challenge to *McCulloch*’s statement that “necessary” means “useful” or “convenient” is bound to raise alarms among some readers that we propose a thorough spring cleaning of the attic of old federal-powers cases. That

³¹² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819).

³¹³ LAWSON & SEIDMAN, *supra* note 22, at 87.

³¹⁴ Letter from James Madison to Spencer Roane, *supra* note 14, at 448.

³¹⁵ Lawson, *supra* note 189, at 151.

absolutely is not the project of this article.³¹⁶ But we do hope that the insight into original meaning provided by this article will inform the courts' application of the clause going forward. In order to assess the potential impact of such an approach, we now see what happens if we substitute a congruence-and-proportionality inquiry for a convenience-and-rationality inquiry into some of the leading cases dealing with federal powers. In the end, we make a few minor suggestions for overrulings or clarifications of existing precedents that do not ultimately make much of a change in existing law.

We emphasize that we are not here trying to say whether any of the cases we examine are rightly or wrongly decided, in the abstract. That would involve considerations that far exceed the scope of this article. Rather, we assess the consequences of one change in doctrine, holding all else constant. We thus take for granted the current doctrine respecting the meaning of "proper" and "for carrying into Execution," the scope of the commerce power, the separation-of-powers doctrine, and every other element of doctrine except the cause-effect relationship described by "necessary." We are simply trying to isolate the effect of shifting to a congruence-and-proportionality test for necessity. Thus, when we say that a case was decided "correctly," we mean that it would come out the same way, all else equal, if one used a congruence-and-proportionality test for necessity while resolving all other matters, rightly or wrongly, as they were actually resolved in that case.

First on the list of "correctly" decided cases is *McCulloch v. Maryland* itself. The bank may not have been "indispensable" to executing federal fiscal powers, but the causal connection was "definite," in Madison's terms.³¹⁷ The Bank of the United States, by issuing banknotes, facilitated the federal government's ability to spend money, tax, and pay employees.³¹⁸ In theory, these purposes could have been accomplished with gold and silver coins, but it would have been a downright nuisance to rely on precious metals for currency—and, importantly, doing so might have *curtailed* the regulation of

³¹⁶Professor Lawson, to be sure, would make that part of his project in other places. *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233–37 (1994). But this article addresses only a narrow point that does not implicate the reach of the Commerce Clause, the distinction between principal and incidental powers, the requirement that executory laws "carry[] into Execution" other federal powers, or any other doctrines that elsewhere concern him.

³¹⁷*McCulloch*, 17 U.S. at 353–54 (argument by the Attorney General).

³¹⁸*Id.* at 356.

commerce instead of *carrying it into execution*. The only feature of the bank which was likely unconstitutional under a congruence-and-proportionality test was its establishment as a monopoly banker for the federal government, as President Andrew Jackson eloquently maintained in vetoing the renewal of the Bank of the United States.³¹⁹ The Supreme Court could have simply refused to enforce any language granting a monopoly to the bank and let matters go after that.

Although not the subject of a major court decision, a second important controversy over federal power in the antebellum Republic was the dispute over whether the Necessary and Proper Clause allowed Congress to make internal improvements which aided commerce, like the building of lighthouses, buoys, roads, and canals.³²⁰ This controversy likewise pitted Hamiltonians against Jeffersonians in the political departments. That public spending on such items is congruent and proportional to carrying into execution the commerce power is today self-evident, and it would have satisfied the Madisonian standard for a “definite” causal connection in the early nineteenth century, as well. “Clearly, the new nation desperately needed better infrastructure to integrate the economies of the several states, promote commerce and communication across its vast territory, and facilitate the commercial and agricultural development of millions of acres of unused land in the west.”³²¹

A third controversy that explicitly involved the Necessary and Proper Clause was Congress’s decision to authorize the printing of paper money during and after the Civil War—a power that Congress claimed it possessed under the Necessary and Proper Clause, even though Article I, Section 8, Clause 5 only gives Congress the power “[t]o coin Money,” which implies the minting of gold and silver coins.³²² When President Abraham Lincoln announced that the Treasury Department would be printing paper money during the bloody and close-fought U.S. Civil War, the federal budget and incoming tax revenues were in dire straits. So, it is not an exaggeration to say that the printing of paper money was *indispensable* to Congress’s exercise of the taxing and spending powers and, ultimately, the Union’s ability to win the war and to suppress the southern slaveholders’ rebellion. The printing of

³¹⁹ Jackson, *supra* note 153, at 1139.

³²⁰ See Paul Chen, *The Constitutional Politics of Roads and Canals: Inter-Branch Dialogue over Internal Improvements, 1800–1828*, 28 WHITTIER L. REV. 625 (2006).

³²¹ *Id.* at 626.

³²² *But see* Natelson, *supra* note 69.

paper money would easily pass a congruence-and-proportionality test for causal connection between means and ends under such circumstances. Even in peacetime after the Civil War, however, the test would still be satisfied. The printing of paper money followed the practice of all foreign nations, and it was again congruent and proportional to the collection of taxes, the payment of the government's debts, and the regulation of commerce.³²³ No problems arose equivalent to the creation of a monopoly, which attended *McCulloch v. Maryland*.

The next controversy that roiled the waters with respect to the scope of the Commerce and Necessary and Proper Clauses involved a federal law that forbade the carrying, not just selling, of lottery tickets across state lines. The Supreme Court upheld that law in *Champion v. Ames*.³²⁴ As two of us have written:

It is hard to see how carrying an item across State lines as a consumer and not as part of a sales transaction is itself an act of "commerce," unless one understands "commerce" to include all human interaction. The mere transport of the item is not itself a commercial act of buying or selling, though such acts may precede or follow it. Accordingly, any power that Congress has to regulate the interstate *transport* of items comes not from the Commerce Clause but from the Necessary and Proper Clause, as an incident of the power to regulate true acts of commerce.³²⁵

It would, as a practical matter, be impossible for the federal government to use its commerce power to police lottery tickets that were sold across state lines but not those lottery tickets that someone carried to a friend across a state line. The tickets do not care whether they are sold or merely transported, and there is no way to distinguish the tickets after the fact. Thus, Congress can use what Professor Akhil Reed Amar has called "the extension cord of the Necessary and Proper Clause"³²⁶ to facilitate its regulation of what was surely a pecuniary market in interstate gambling. A congruence-and-proportionality test would be satisfied.

³²³ See *Juilliard v. Greenman*, 110 U.S. 421, 440 (1884).

³²⁴ 188 U.S. 321, 363 (1903).

³²⁵ CALABRESI & LAWSON, *supra* note 20, at 697.

³²⁶ This term has not appeared in print, but Professor Amar confirms that he sometimes uses it in lectures.

Next, we examine the *Shreveport Rate Cases*.³²⁷ The Interstate Commerce Commission heard a case involving Texas railroads that set lower prices for intrastate shipment of goods than for out-of-state merchants using Texas rail lines.³²⁸ The Commission ordered the railroads to cease charging different rates for in-state and out-of-state transportation across equal distances.³²⁹ The Supreme Court ruled, in a landmark opinion by Justice Charles Evans Hughes, that Congress, and not the states, had the ultimate power to regulate interstate commerce, as well as wholly intrastate Texas commerce that had a significant impact on interstate commerce. The Court explained that Congress could regulate interstate commerce that had “such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.”³³⁰ Strictly speaking, the wholly intrastate Texas commerce was not “Commerce . . . among the several States,” but the regulation was congruent and proportional to the need to protect federal interstate commerce by regulating the intrastate commerce that was driving federal commerce out of business.³³¹ The Court applied a causal test that was obviously stricter than rational basis.³³² It did not rely on Marshall’s definition of necessity, so nothing would change if that definition were rejected.³³³ On the contrary, Justice Hughes articulated a standard rather similar to our proposed congruence-and-proportionality test: the regulation must be “essential or appropriate” to the exercise of the commerce power.³³⁴

Four years later, the Supreme Court decided *Hammer v. Dagenhart*.³³⁵ Congress had determined that goods made with child labor could not be shipped across state lines even if the goods themselves, unlike the pestilence of lottery tickets, were in and of themselves not a harmful and noxious nuisance.³³⁶ *Hammer* clearly involved the buying and selling of goods in a

³²⁷234 U.S. 342 (1914).

³²⁸*Id.* at 342–47.

³²⁹*Id.* at 347–49.

³³⁰*Id.* at 351.

³³¹*Id.* at 351–54.

³³²*Id.* at 358–60.

³³³*Id.*

³³⁴*See id.* at 351.

³³⁵247 U.S. 251, 271–72 (1918).

³³⁶*Id.*

national commercial market, and state lines were being crossed just as in *Champion v. Ames*.³³⁷ So long as one believes that the power to regulate includes the power to prohibit, there is no evident congruence or proportionality problem in *Hammer*, for the same reason as in *Champion*: one cannot tell by looking at a manufactured good by whom it was made.³³⁸ But that was not how the Supreme Court ruled. Instead, it held the law unconstitutional on the ground that “the mere fact that [the goods] were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power.”³³⁹

Justice Oliver Wendell Holmes addressed this concern in his dissent in *Hammer*.³⁴⁰ The federal law at issue was enacted with the support of representatives of the wealthy New England, Northeastern, and Midwestern states and was targeted at competition from poor Southern states, which did not have laws forbidding child labor. Factories were shutting down in New England and reopening in the Carolinas because it cost less to produce goods there. The result was what economists call a “race to the bottom”—the state that pays the lowest wage attracts the most industry. The U.S. Constitution does not bar races to the bottom, per se, but where the federal government has the constitutional power to act, it can end a race to the bottom by establishing uniform rules. As Justice Holmes wrote in his dissent:

The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries the State encounters the public policy of the United States which it is for Congress to express.³⁴¹

³³⁷ *Id.*

³³⁸ *Id.* at 276.

³³⁹ *Id.* at 272.

³⁴⁰ *Id.* at 277 (Holmes, J., dissenting).

³⁴¹ *Id.* at 281.

In 1941, Justice Holmes's dissent effectively became the unanimous majority opinion of the Supreme Court in *United States v. Darby*.³⁴²

Before that happened, however, the Court decided *NLRB v. Jones & Laughlin Steel Corp.*³⁴³ That case marked a turning point in Supreme Court jurisprudence: the Court switched from striking down a significant amount of federal legislation purportedly enacted under the commerce power to upholding almost all of it. Along with *Darby*, it remains one of the cornerstones of the Supreme Court's Commerce Clause jurisprudence today.

At issue in *Jones & Laughlin* was the constitutionality of the National Labor Relations Act of 1935, which for the first time gave employees of businesses engaged in interstate commerce a federally protected right to unionize.³⁴⁴ *Jones & Laughlin Steel Corp.* was a national corporation heavily engaged in interstate commerce.³⁴⁵ It had commercial operations in Pennsylvania, Michigan, Minnesota, Ohio, Tennessee, New York, Louisiana, and West Virginia.³⁴⁶ The company fired ten out of more than 80,000 employees for trying to form a union.³⁴⁷ The men sued under the National Labor Relations Act, and the National Labor Relations Board (NLRB) ordered *Jones & Laughlin Steel Corp.* to cease and desist from this unfair labor practice.³⁴⁸ The company challenged the NLRB's order in court, arguing based on then-existing caselaw that its firing of a mere ten workers had at most an indirect effect on interstate commerce.³⁴⁹ The company also argued, as caselaw clearly established in 1937, that manufacturing did not constitute commerce.³⁵⁰

Jones & Laughlin was written by Chief Justice Hughes, who had also written the opinion in the *Shreveport Rate Cases*.³⁵¹ Chief Justice Hughes rejected the company's constitutional challenge:

The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation"

³⁴² 312 U.S. 100, 115–16 (1941).

³⁴³ 301 U.S. 1 (1937).

³⁴⁴ *Id.* at 22.

³⁴⁵ *Id.* at 27.

³⁴⁶ *Id.* at 26–27.

³⁴⁷ *Id.* at 28–29.

³⁴⁸ *Id.* at 22.

³⁴⁹ *Id.* at 36.

³⁵⁰ *Id.* at 34.

³⁵¹ *Id.*; see also *The Shreveport Rate Cases*, 234 U.S. 342 (1914).

for its “protection and advancement”; to adopt measures “to promote its growth and insure its safety”; “to foster, protect, control, and restrain.” That power is plenary and may be exerted to protect interstate commerce “no matter what the source of the dangers which threaten it.” Although activities may be intrastate in character when separately considered, *if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.*³⁵²

The language requiring a “close and substantial” relation to an enumerated power and a means that is “essential and appropriate” to the exercise of that power evokes the concept of “congruence and proportionality” more than “rational basis.” Chief Justice Hughes likewise referred to “[t]he close and intimate effect which brings the subject within the reach of federal power.”³⁵³ The language indicates that the outcome of this case would not change if the test for necessity were congruence and proportionality.³⁵⁴ To all appearances, that is effectively the test that the Court actually employed.

For the past eighty-five years, *Jones & Laughlin* has universally been classified as a Commerce Clause case, but we view it as a Necessary and Proper Clause case instead. Firing and replacing ten intrastate employees for wanting to unionize a company of more than 80,000 employees is obviously *not* a regulation of commerce—buying and selling—or of traveling across state lines. Rather it is the regulation of a wholly intrastate activity that, when aggregated to include all such intrastate actions nationwide, has, as Chief Justice Hughes quite rightly explained, “a close and substantial relation” to interstate commerce.³⁵⁵ But the vehicle for regulating those activities with close and substantial relations to commerce is the Necessary and Proper Clause, not the Commerce Clause itself, which reaches only commerce among the several states. Thus, even if the four dissenting Justices were correct that “the power of Congress under the commerce clause does not extend to relations between employers and their employees engaged in

³⁵² *Jones & Laughlin*, 301 U.S. at 36–37 (emphasis added) (citations omitted).

³⁵³ *Id.* at 38.

³⁵⁴ *Id.* at 37–38, 40.

³⁵⁵ *Id.* at 37.

manufacture,”³⁵⁶ that conclusion would not decide the case unless the Necessary and Proper Clause could not fill the gap.

That brings us to *United States v. Darby*, decided in 1941.³⁵⁷ Congress had passed the Fair Labor Standards Act—a federal law which set a nationwide federal minimum wage and maximum hours of employment, enforced in part through a prohibition on interstate shipment of goods produced in violation of the Act.³⁵⁸ In other words, it used the same strategy that the Court had rejected in *Hammer v. Dagenhart*.³⁵⁹ Another provision of the Act went a step farther, directly imposing wage and hour conditions on businesses employing persons engaged in the production of goods for interstate commerce.³⁶⁰ Many of the workers affected by the federal Fair Labor Standards Act rarely, if ever, crossed a state line.

The Supreme Court overruled *Hammer* and upheld the law.³⁶¹ The Court invoked *McCulloch v. Maryland*, and therefore implicitly invoked the Necessary and Proper Clause, in reaching its unanimous decision upholding the law:

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 or the exercise of the power of Congress over it 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.³⁶²

This language resembles Marshall’s language in *McCulloch* more than the language of any of the cases previously discussed here. More pointedly, the Court also stated that Congress “may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities.”³⁶³ This language comes close to adopting a rational-

³⁵⁶ *Id.* at 76 (McReynolds, J., dissenting).

³⁵⁷ 312 U.S. 100 (1941).

³⁵⁸ *Id.* at 109.

³⁵⁹ 247 U.S. 251, 277 (1918).

³⁶⁰ *Darby*, 312 U.S. at 110.

³⁶¹ *Id.* at 115–17.

³⁶² *Id.* at 118 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

³⁶³ *Id.* at 121.

basis test, although the Court twice suggested that the regulated activities had a “substantial” effect on interstate commerce.³⁶⁴

Nonetheless, we doubt whether the outcome would change under a congruence-and-proportionality test. The Court found it key that, as with lottery tickets and goods manufactured by children, goods that end up in interstate commerce are impossible to distinguish from those that do not:

Congress was not unaware that most manufacturing businesses shipping their product in interstate commerce make it in their shops without reference to its ultimate destination and then after manufacture select some of it for shipment interstate and some intrastate according to the daily demands of their business, and that it would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces of lumber, cloth, furniture or the like which later move in interstate rather than intrastate commerce.³⁶⁵

As a result, the law Congress adopted seems to satisfy a congruence-and-proportionality test.

Unfortunately for the development of caselaw, neither Chief Justice Hughes in *Jones & Laughlin* nor Chief Justice Stone in *Darby* explain that their decisions were actually grounded in the Necessary and Proper Clause rather than the Commerce Clause.³⁶⁶ This oversight was doctrinally harmful for two reasons.

First, such opinions gave rise to the view that Congress could pass national laws on any commerce-related subject it wanted with impunity, regardless of federalism concerns. This misunderstanding led to a lot of bad federal lawmaking in contexts which were much closer cases under a congruence-and-proportionality standard than were *Jones & Laughlin* and *United States v. Darby*.

Second, the decisions led the Court, when it revived to some degree federalism jurisprudence in *United States v. Lopez*, to craft a “Commerce Power” test that depends on whether a wholly intrastate activity “*substantially* affected interstate commerce.”³⁶⁷ That is not the right test for

³⁶⁴ See *id.* at 119–20.

³⁶⁵ *Id.* at 117–18.

³⁶⁶ See *id.* at 105–126; Nat’l Lab. Rels. Bd. v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

³⁶⁷ 514 U.S. 549, 559 (1995) (emphasis added).

constitutionality, and it continues to misshape the law. “Commerce . . . among the several States” means “Commerce . . . among the several States,” and nothing but confusion is sown by trying to pack “necessary and proper” laws into the unpromising language of the Commerce Clause. Necessary and proper laws have their own clause, so perhaps the Court should consider using it.

The last key Necessary and Proper Clause case disguised as a Commerce Clause case from the New Deal era is *Wickard v. Filburn*.³⁶⁸ In that case, a farmer named Filburn sued Wickard, the Secretary of Agriculture, to enjoin enforcement of a penalty imposed under the Agricultural Adjustment Act of 1938 for the value of his wheat crop that was available for market in excess of the market quota established for his farm.³⁶⁹ Filburn argued that it was unconstitutional for the government to penalize him for the mere act of growing wheat on his own farm.³⁷⁰

The statute in question constituted a dubious New Deal effort to help impoverished farmers by raising the price of wheat.³⁷¹ In order to artificially raise the price of wheat, the federal government ordered farmers to grow less wheat in 1941 than they had grown previously.³⁷² Filburn was ordered to grow no more than 11.1 acres of wheat, but he sowed 23 acres of wheat instead.³⁷³ As a result, he was penalized \$117.11.³⁷⁴ Filburn refused to pay the penalty, arguing that Congress had no power to tell him what he could grow on his own land.³⁷⁵ In the past, Filburn had used the wheat he had grown in a variety of ways. He had: (1) sold the wheat; (2) fed the wheat to livestock on his farm, which livestock he then sold; (3) consumed the wheat with his family; and (4) set aside some portion of the wheat for the following seeding.³⁷⁶ Filburn did not disclose how he intended to dispose of the excess

³⁶⁸ 317 U.S. 111 (1942).

³⁶⁹ *Id.* at 113.

³⁷⁰ *Id.* at 113–14, 119.

³⁷¹ *See id.* at 128–29. In doing so, the New Dealers of course raised the price of bread to urban and suburban consumers in the midst of the Great Depression. Stephen B. Reed, *One Hundred Years of Price Change: The Consumer Price Index and the American Inflation Experience*, U.S. BUREAU LAB. STATS. (Apr. 2014), <https://www.bls.gov/opub/mlr/2014/article/one-hundred-years-of-price-change-the-consumer-price-index-and-the-american-inflation-experience.htm>.

³⁷² *See Wickard*, 317 U.S. at 114, 128.

³⁷³ *Id.* at 114.

³⁷⁴ *Id.* at 114–15.

³⁷⁵ *Id.* at 115, 119.

³⁷⁶ *Id.* at 114.

wheat he had grown in 1941, so we must assume it was a farm good, produced on his own farm, for his own family's personal consumption.

Article I, Section 8, Clause 3 provides that “[t]he Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”³⁷⁷ As far as we are aware, no one has ever argued that Congress has the power to order foreign Nations or the Indian Tribes not to grow crops for their own consumption on their own land. Since Congress has no more and no less power over commerce in the growing of produce “among the several States” as it has over commerce with “foreign Nations” or “with the Indian Tribes,” it is quite simply irrational to conclude that the Commerce Clause could be legitimately invoked in support of this law.

As a result, we arrive at the question whether the relevant provisions of the Agricultural Adjustment Act of 1938 are “necessary and proper for carrying into Execution” the Commerce Power. Here, it might matter whether “necessary” means “useful” and “convenient” or “congruent and proportional.”

The government argued that Filburn's actions impacted interstate commerce. In defense of the Act, it contended that any home-grown wheat that Filburn consumed on his farm depressed the price of wheat nationwide—assuming one looks, as we agree one should under governing doctrine, at all the home-grown wheat consumed in the United States.³⁷⁸ The government this time expressly relied on the Necessary and Proper Clause.³⁷⁹

Justice Jackson, writing for a unanimous Court in 1942, explained that because home-consumed wheat could significantly impact the public market, the relevant provision was constitutional:

One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such [home-grown] wheat

³⁷⁷U.S. CONST. art. I, § 8, cl. 3.

³⁷⁸*Wickard*, 317 U.S. at 127.

³⁷⁹*See id.* at 119 (noting that the government argued that application of the law to home production was “sustainable as a ‘necessary and proper’ implementation of the power of Congress over interstate commerce”).

overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. . . . This record leaves us in no doubt that Congress *may* properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.³⁸⁰

Justice Jackson's "overhangs the market" rationale for this provision breaks the barrier of congruence and proportionality. It effectively gives the federal government the power to regulate all aspects of life, subject only to the constraints of the Bill of Rights, since the argument can be applied to any activity. The collapse of the concept of a market in intrastate commerce, and its replacement with a fully national marketplace, means the federal government effectively has the power to regulate all acts of buying and selling.

This interpretation of the Necessary and Proper Clause could lead to absurd results. Under it, for example, Congress could presumably pass a law regulating family or friends sleeping at one's home (because it might overhang the market for hotels), how one cooks in one's kitchen (because it might overhang the market for restaurants), or even uncompensated sexual acts where prostitution is legal (because they might overhang the market for prostitution).³⁸¹ It may be "useful" or "convenient" or "rational" for the government to regulate home-grown wheat or sex between consulting adults in the privacy of their own homes, but it is not "congruent and proportional" to the exercise of any federal power. *Wickard v. Filburn* is wrongly decided in such a profound way that it must be overruled under what we propose is the correct standard for necessity.

The next prominent Commerce and Necessary and Proper Clause case is *Heart of Atlanta Motel, Inc. v. United States*.³⁸² This case involved the constitutionality of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, or national origin in places

³⁸⁰ *Id.* at 128–29 (emphasis added).

³⁸¹ *See id.* at 128.

³⁸² 379 U.S. 241 (1964).

of public accommodation, including hotels and restaurants.³⁸³ Prior to the passage of the 1964 Civil Rights Act, Black Americans, and even Black ambassadors from Africa, found it incredibly difficult to secure hotel and restaurant accommodations in roughly one third of the United States where “whites only” policies were in place and enforced.³⁸⁴ This national disgrace led to the passage of the Civil Rights Act of 1964.³⁸⁵ The Heart of Atlanta Motel refused to offer rooms to Black travelers, despite the Act’s mandate.³⁸⁶ Notably, it was located in downtown Atlanta, near two major highways, and approximately seventy-five percent of its guests came from out of state.³⁸⁷

The case presented a novel question. No one doubted that Congress could regulate the transportation of people across state lines; that lies clearly within the power to regulate interstate commerce.³⁸⁸ But the commercial lodging of those people, while clearly commerce, was not so clearly commerce among the several states.³⁸⁹ The Court nonetheless framed its ruling upholding the law solely in terms of an expansive view of the commerce power.³⁹⁰

That is not to say that the Necessary and Proper Clause was absent from the political and legal dialogue. For example, the Court quoted President Kennedy’s proposed civil rights bill, which included specific reference to the Necessary and Proper Clause.³⁹¹ Justice Black’s concurring opinion recognized the importance of the Necessary and Proper Clause³⁹² and found it more than adequate to support the law in light of the *Shreveport Rate Cases* and the aggregate effects of racial discrimination on commerce.³⁹³ As in *Darby*, if one looks at the class of activity rather than any one activity in isolation as precedent dictated, surely the result would not change under a congruence-and-proportionality test.

³⁸³ *Id.* at 242–43, 247.

³⁸⁴ *Id.* at 252–53.

³⁸⁵ *Id.* at 245–46.

³⁸⁶ *Id.* at 243.

³⁸⁷ *Id.* at 243, 261.

³⁸⁸ *See id.* at 356–57.

³⁸⁹ *Id.* at 255–58.

³⁹⁰ *See id.*

³⁹¹ *See id.* at 245–46.

³⁹² *See id.* at 270 (Black, J., concurring) (“The basic constitutional question . . . which this Court must now decide is whether Congress exceeded its powers to regulate interstate commerce and pass all laws necessary and proper to such regulation . . .”).

³⁹³ *See id.* at 271–75.

We have already discussed how *Katzenbach v. McClung*,³⁹⁴ a companion case to *Heart of Atlanta Motel*, characterized *McCulloch* as establishing a rational-basis test.³⁹⁵ That was a needless mistake. If Justice Black's analysis of necessity was correct in *Heart of Atlanta*, it was just as correct in *McCung*. These cases unfortunately continue the Court's long-standing error of treating Necessary and Proper Clause issues as Commerce Clause issues.

Next, we turn to *Perez v. United States*, the other pre-*Lopez* case that might come out differently under a congruence-and-proportionality standard.³⁹⁶ *Perez* was convicted under a federal statute prohibiting loan sharking, which typically takes place within the confines of a single state.³⁹⁷ Congress nonetheless federalized it, on the theory that loan sharking was often connected with organized crime, which had interstate effects.³⁹⁸ The Court agreed with this rationale in light of existing precedent,³⁹⁹ with Justice Stewart as the lone dissenter.⁴⁰⁰ Once again, the entire discussion was framed in terms of the commerce power; the Necessary and Proper Clause was not even mentioned.⁴⁰¹ Nonetheless, no one argued that street-corner loan sharking constituted "Commerce . . . among the several States."⁴⁰² Rather, Congress and the Court determined that the practice might have a "substantial effect" on such commerce.⁴⁰³ But the Commerce Clause is a Commerce Clause, not an Effects-on-Commerce Clause. If Congress can regulate activity that merely has an effect on commerce, it must be based on the rationale of the *Shreveport Rate Cases*: that such regulation is a permissible incident of the commerce power.⁴⁰⁴ Once the question is posed that way, the causal links between federal power and local loan sharking become even more attenuated than the connections in all the prior cases save *Wickard*. A chain of reasoning from loan sharking to local organized crime to national organized crime to regulation of interstate commerce might pass a rational-basis test that is tantamount to treating the question of necessity as

³⁹⁴ 379 U.S. 294 (1964).

³⁹⁵ See *supra* text accompanying notes 173–1180.

³⁹⁶ 402 U.S. 146 (1971).

³⁹⁷ *Id.* at 146–47, 154.

³⁹⁸ *Id.* at 147.

³⁹⁹ *Id.* at 150–56.

⁴⁰⁰ *Id.* at 157 (Stewart, J., dissenting).

⁴⁰¹ See *id.* at 146–58 (majority opinion).

⁴⁰² U.S. CONST. art. I, § 8, cl. 3.

⁴⁰³ *Perez*, 402 U.S. at 151–52.

⁴⁰⁴ See *supra* text accompanying notes 327–3334.

nonjusticiable, but any more serious inquiry at least raises questions about the congruence and proportionality of enacting federal criminal laws to deal with local street crime.

Finally, the Supreme Court drew a line in the 1995 decision *United States v. Lopez*.⁴⁰⁵ In that case, the Court determined that Congress could not prohibit the possession of guns within a thousand feet of a school—at least not without making a stronger showing of a connection to interstate commerce.⁴⁰⁶ Yet again, the Court cast its decision in terms of the Commerce Clause, reframing its caselaw to hold that Congress can rely on the commerce power to “regulate the use of the channels of interstate commerce[,] . . . regulate and protect the instrumentalities of interstate commerce, . . . even though the threat may come only from intrastate activities[,] . . . [and] regulate those activities having a substantial relation to interstate commerce.”⁴⁰⁷ The language sounds just like that found in prior cases, except that *Lopez* limits the last category to regulation of “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”⁴⁰⁸

Lopez clearly should have been decided under the Necessary and Proper Clause, which the majority nowhere cited.⁴⁰⁹ Under that clause, the same problems of congruence and proportionality that plagued *Perez* would also infect the Gun-Free School Zones Act. The Court would therefore reach the same result, but it would do so in a fashion truer to the original meaning of the constitutional provisions involved. We hope in future cases that the Court will use the congruence-and-proportionality interpretation of the Necessary and Proper Clause rather than the constitutionally dubious notion of substantial effects on commerce.

There are, of course, many more cases that we could discuss, most notably *United States v. Morrison*,⁴¹⁰ *Gonzales v. Raich*,⁴¹¹ *United States v. Comstock*,⁴¹² and *National Federation of Independent Business v. Sebelius*.⁴¹³ But our goal here is not to provide a comprehensive account of how we think

⁴⁰⁵ See 514 U.S. 549, 564–68 (1995).

⁴⁰⁶ See *id.*

⁴⁰⁷ *Id.* at 558–59.

⁴⁰⁸ *Id.* at 561.

⁴⁰⁹ See *id.* at 551–68.

⁴¹⁰ 529 U.S. 598 (2000).

⁴¹¹ 545 U.S. 1 (2005).

⁴¹² 560 U.S. 126 (2010).

⁴¹³ 567 U.S. 519 (2012).

the Court should decide cases. It is simply to show that replacing the current rational-basis standard for necessity with something far closer to the clause's original meaning, such as congruence and proportionality, would not by itself lead to dramatic changes in the caselaw. Indeed, the cases that would come out differently have probably already been limited to their facts.

CONCLUSION

Today, the meaning of the term “necessary” is rarely debated, or even mentioned, in the courts. Instead, the definition of “necessary” in *McCulloch* is treated as canonically dispositive of the question,⁴¹⁴ and attention turns to relatively implausible interpretations of “Commerce . . . among the several States.”⁴¹⁵ However, the evidence uncovered in this analysis suggests that the original meaning of the word “necessary” was much narrower than the meaning Chief Justice Marshall attributed to it—and certainly narrower than the meaning that caselaw over the past sixty years has given to it.⁴¹⁶

We aim to start a conversation rather than end one. This article does not purport to affirmatively establish the original meaning of the word “necessary.” It only tests the specific linguistic arguments on which the *McCulloch* decision rests. Our suggested reformulation in terms of congruence and proportionality is tentative; it would take a separate article even to begin to flesh out how that standard could be applied. In light of this article's conclusion—that corpus-linguistic evidence does not support the Court's reasoning in *McCulloch*—further research, employing corpus linguistics and other methods, is necessary to explore the original meaning of the phrase “necessary and proper.”

“Analysis of the Necessary and Proper Clause has historically begun and ended with *McCulloch*”⁴¹⁷ Perhaps it ought not end there.

⁴¹⁴ See Gardbaum, *supra* note 169, at 814.

⁴¹⁵ U.S. CONST. art. I, § 8, cl. 3.

⁴¹⁶ Gardbaum, *supra* note 169, at 814–19.

⁴¹⁷ *Id.* at 814.

APPENDIX: CONCORDANCE ANALYSIS RESULTS

A. United States Examples (COFEA Corpus 1770–1786)

Letter from George Washington to Brigadier General William Maxwell (Oct. 2, 1778)	Lord Stirling who is now in Jersey, and has the general command of the troops there, will be a better judge than I am of the <i>necessary and proper</i> dispositions to be made. You will therefore <i>implicitly obey him</i> , and either remain where you are at present with your whole Brigade, or detach such a part of it as His Lordship may direct.
Moses Mather, America's Appeal to the Impartial World 36 (1775)	[G]ive and grant unto the said Governor and Company, &c. that it shall and may be lawful for them, &c. to erect and make all <i>necessary and proper</i> judicatories; to hear and decide all matters and causes
Acts of Connecticut 1776	[A]nd do, and perform all the duties that are <i>necessary and proper</i> for a Quarter - Master General
George Beckwith, Discourses Delivered in Lyme, North-Parish, Lord's Day, January 26, 1783, at 8–9 (1783)	But the <i>apprehension of being eternally miserable in the other world</i> , strikes a dread on human nature, and becomes a powerful restraint from sin. For who can bear the thought of dwelling with devouring fire, and everlasting burnings, without horror? Hence how fit, how wise, how <i>necessary and proper</i> was it, for the good of mankind in the legislature, to guard and <i>enforce obedience to his just laws</i> , by annexing eternal rewards to the obedience of merit and demerit, since no other means could be powerful enough to attain the end.
Letter from Major General William Heath to George Washington (Sept. 6, 1776)	I was in Hopes this morning to have Given you Some fresh Intilligence, but have not yet Receiv(ed) it but Still Expect it, as we have undoubtedly a <i>Spy on the Island</i> , Every <i>necessary and Proper</i> preparation having been made for that Purpose the Last night
Letter from John Adams to the Duc de La Vauguyon (May 1, 1781)	By the Tenth Article of the Treaty of Alliance between France and America, the most Christian King and the United States agree, to <i>invite or admit, other Powers, who may receive Injuries from England, to make common Cause</i> with them, and to accede to that Alliance, under Such Conditions, as shall be freely agreed to and Settled between all the Parties. . . . It is only proper for me to Say, that whenever your Excellency shall have received his Majestys Commands, and shall judge it proper to take any Measures, either for Admitting or inviting this Republick to accede, I shall be ready in behalf of the United States to do, whatever is <i>necessary and proper</i> for them to do, upon the occasion.

B. England Examples (Hansard Corpus 1803–1819)

House of Lords (1805)	Lord Harrowby expressed his concurrence in the opinion that a judge may be guilty of several acts, besides those he may commit in his judicial capacity, which would render his removal <i>necessary and proper</i> ; there were also several acts of a judge, on which it may be proper to ground an address for removal, and still not amount to a cause for the more serious proceeding of impeachment.
House of Commons (1807)	If the crisis called for such a measure, he was convinced the militia colonels, who had already made so many sacrifices in the service of their country, would be willing to submit to this also; but, then, <i>they had a right to expect that the necessity of the sacrifice</i> should be proved: as the country also had a claim to be satisfied, that it was <i>necessary and proper</i> for the purposes of immediate defence to begin by breaking up so large a portion of the existing force.
House of Commons (1808)	He understood, that in granting such licences to some particular individuals, and refusing them to others, <i>much abuse had arisen</i> , contrary to the true meaning and intent of the legislature; he thought, therefore, that information upon this subject would be <i>necessary and proper</i> at any time to be laid before the house, but more particularly at a period when such an extensive system of blockade had been adopted
House of Commons (1808)	Lord H: Petty wished the money to be given to his majesty's ministers in the shape of a vote of credit, to be by them applied according as they should find it <i>necessary and proper</i> to make the advances. The right of either party to make peace, ought to have been kept perfectly free. . . . He had great satisfaction in thinking that this money was advanced to Sweden merely for the purpose of defending herself and procuring peace, and not for the purpose of exciting useless and destructive wars.
House of Commons (1808)	And, this being incontrovertibly a general principle, perfectly consonant to the law of nations, he contended, that there <i>never were circumstances which more loudly called for its application</i> , than those in which this country stood in relation to France and Denmark, when we took possession of the Danish fleet. But, having gone thus far in justifying the measure, he argued that the same reasons which rendered it <i>necessary and proper</i> that we should take possession of the fleet for a time, did not make it either necessary or proper that . . . we should retain possession of it in perpetuity.
House of Commons (1813)	But if the right hon. gentleman had not come up to his outline, he had called for no pledge which would prevent any

	<p>one from engrafting any amendment thought <i>necessary and proper</i> on the ulterior measure, and the more he heard this question discussed, the more conscientiously was he convinced, not only of its expediency, but of its actual necessity. The motion before them only acknowledged the principle, but bound them to no detail, and, in concurring with these propositions he considered himself as only doing that to which he stood pledged by the opinions he had formerly declared.</p>
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