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ABSTRACT

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 that one thing is convenient, or useful . . . to another." Modern case law 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 congressional law unconstitutional on the ground that it was not "necessary . . . for carrying into Execution" a federal power.*

Marshall, and Hamilton before him, were simply wrong in their 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.

That does not mean 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 sources that we examine, it does not constitute the best meaning in the specific context in which the term "necessary" appears in the Constitution: A clause defining the incidental powers of agents. In that setting, familiar from the law of agency, a better fit is 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 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*.

Our principal goal in this article is not to defend this Madisonian view of necessity but simply to show that Marshall and Hamilton's linguistic claim about the meaning of "necessary" is false. We do not offer a comprehensive account of the original meaning of the Necessary and Proper Clause beyond this simple observation. But because McCulloch's *dictum has become canonical, we examine some of the leading cases involving federal power to see whether substituting a congruence-and-proportionality test for the test of usefulness, convenience, or rationality would make a large difference in outcomes. Holding all other elements and applications of doctrine equal, we find only a few cases in which getting right the original meaning of "necessary" might make a difference – and those cases are already widely seen as anomalous under current doctrine. Nonetheless, there is value in getting such things right, 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.*

Table of Contents

Introduction

It is often said that "necessity is the mother of invention."[1] In the context of U.S. constitutional law, one perhaps should instead say 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.

Under Article I, section 8, clause 18 of the Constitution, Congress is granted power to make all laws "which shall be necessary and proper for carrying into Execution"[2] its own enumerated powers and the enumerated powers granted by the Constitution to non-congressional actors.[3] While the clause drew the ire of Antifederalists during the 1787-88 ratification process, who dubbed it "the Sweeping Clause,"[4] the limits of its grant of power were first meaningfully tested

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[1] The precise origin of the phrase appears to be unknown, but some version of it has been around for at least several thousand years in multiple cultures. *See* *The saying 'Necessity is the mother of invention' - meaning and origin. (phrases.org.uk)*.

[2] U.S. CONST. art. I, § 8, cl. 18.

[3] The clause gives Congress 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*.

[4] *See, 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 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 Clinton Rossiter ed., 1961) (Alexander Hamilton) (referring to "the sweeping clause, as it has been affectedly called), which was the standard term for the clause into the twentieth century. *See* 1 FRANCIS NEWTON THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 525 (1901). As far as we can tell,

in court in 1819 in *McCulloch v. Maryland.*[5] In finding that Congress had 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 that one thing is *convenient, or useful* . . . 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 other 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 did not uniquely invent this account of "necessary" as meaning "convenient" or "useful." 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

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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] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, (1819). To be sure, at least some of the discussion in *McCulloch* was foreshadowed in 1805 in *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805). *See infra* --.

[6] 17 U.S. (4 Wheat.) at 413.

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

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's and Marshall's linguistic assertion against an old-style CD-ROM database of founding-era materials and found exactly *no* usages of "necessary" meaning, or even approximating, "convenient" or "useful."[9] This article looks more systematically at the linguistic claim that underlies one of our most venerable constitutional doctrines. We use an extensive look at founding-era dictionaries and the new 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 uses to prove conclusively that the framing generation – both in ordinary discourse and in the specialized context of the Necessary and Proper Clause -- meant "necessary" to mean something considerably stronger than "convenient" or "useful." Hamilton's and Marshall's empirical claim about linguistic usage was a pure invention.

Our principal thesis in this article is a negative one: Hamilton and Marshall were wrong about the ordinary uses of "necessary" in the founding era. That does not prove that "necessary" means "indispensable," as was claimed by Thomas Jefferson in the Washington Administration[10] and by the State of Maryland in *McCulloch*.[11] Indeed, while that narrow definition is considerably closer to the mark than is the Hamilton/Marshall invention, it overstates the case – as James

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[8] *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank, in* 8 THE PAPERS OF ALEXANDER HAMILTON 97, 102 (Harold X. Syrett & Jacob E. Cooke eds., 1965)

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[9] *See* 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").

[10] *See Opinion on the Constitutionality of the Bill for Establishing a National Bank, in* 19 THE PAPERS OF THOMAS JEFFERSON 275, 278 (Julian P. Boyd ed., 1974) (claiming that laws are only "necessary" if they are "means without which the grant of the power would be nugatory").

[11] *See McCulloch*, 17 U.S. (4 Wheat.) at 367 (argument of Mr. Jones) (defining "necessary" as "indispensably requisite"')

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Madison was quick to recognize. While the parties in *McCulloch* presented two extreme positions to the Court, Madison had already realized that neither of those extremes was correct.

In the congressional debates on the first bank bill, Madison rejected the strict Jeffersonian line 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 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]

In the wake of *McCulloch* nearly three decades later, Madison more precisely formulated his account 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 view, as we explain in more detail in Part III, finds support in Samuel Johnson's 1755 *Dictionary of the English Language***,** which defined "necessary" as meaning: "1) Needful; indispensably requisite; 2) Not free; fatal; impelled by fate; 3) Conclusive; 4) Decisive by inevitable consequence."[15] Johnson's work was the leading dictionary of the English language available to the Framers of the U.S. Constitution. It provides no support for the Hamilton/Marshall position, nor do any of the other

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

[13] 1 ANNALS OF CONG. 1947-49 (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] SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE 189 (1755):

dictionaries available during the Founding era, which either repeat or reinforce Johnson's definition.

This Madisonian account of "necessary," which one Supreme Court Justice has recognized as the best account of the term's original meaning,[16] finds ready expression in an already-existing doctrine developed for a different constitutional provision. In *City of Boerne v. Flores,*[17] the Supreme Court interpreted the word "appropriate" in Section 5 of the Fourteenth Amendment[18] to require "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[19] Subsequent cases make clear that this congruence and proportionality test is considerably stricter than a rational basis test, as any number of congressional laws have been found unconstitutional under it.[20] While two of us have expressed some doubts about whether this is the best account of what "appropriate" means in the Civil War amendments,[21] it is an excellent fit with the word "necessary" in the Necessary and Proper Clause. At the very least, it is a far better fit than is the Hamilton/Marshall formulation. The Court could easily adapt this well-developed test to the necessity of executory laws.

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[16] *See Sabri*, 541 U.S. at 612-13 (Thomas, J., concurring in the judgment).

[17] 521 U.507 (1997).

[18] *See* U.S. CONST. amend. IV, § 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")l; *id.* amend. XV, § 2 ("The 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").

[19] 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. ").

[20] *See* Coleman v. Court of Appeals of Maryland, 566 U.S. 30 (2012); Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); Florida Prepaid Postsecondary Educ. Expenses Bd. v. College Savings Bank, 527 U.S. 627 (1999).

[21] *See* STEVEN GOW CALABRESI & GARY LAWSON, THE U.S. CONSTITUTION: CREATION, RECONSTRUCTION, THE PROGRESSIVES, AND THE MODERN ERA 876 (2020). *See also* Coleman v .Court of Appeals of Maryland, 566 U.S. 30, 44 (2012) (Scalia, J., concurring the judgment) ("our 'congruence and proportionality' jurisprudence . . . makes no sense").

We emphasize again the narrowness of our claim. 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,[22] 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,[23] but we do not discuss them here. We concentrate only on the implausibility of interpreting "necessary" as "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* dictum should be overruled. The meaning of "necessary" is only one piece of those decisions – and that is assuming that one regards the original meaning of "necessary" as a relevant input to constitutional decision-making. Cases decided under a broad understanding of "necessary" might come out the same way under a narrower understanding, either

[22] *See* John Mikhail, *The Necessary and Proper Clauses,* 102 GEO. L.J. 1045 (2014).

[23] On "proper," see Lawson, *supra* note 9 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 the meaning and significance of "for carrying into Execution," see Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005); 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 (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); Mikhail, supra note 22. 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); John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063 (2015).

because the law in question satisfies a "congruence and proportionality" test, can be justified under some clause other than the Necessary and Proper Clause, does not warrant overruling even if wrong as an original matter, or any or all of the above. In Part VI, we survey some leading 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 proclaim 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, with whatever consequences do or do not flow 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 makes clear that "necessary" in 1788 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* account of "necessary" rests. We briefly explore the history, strengths, and weaknesses of corpus-linguistic methods for 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 looks at

how "necessary" was used in other documents in the founding era, such as state constitutions and 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 as being "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 233-year-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,"[24] such that "no one, including the constitutional framers, knows the point of the phrase 'necessary and proper.' "[25] And, indeed, if one looks solely at the sources typically consulted for the drafting history of constitutional provisions – the records of the Constitutional Convention and the ratification debates – one will likely come away disappointed.

[24] JOSEPH M. LYNCH, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT 4 (1999).

[25] Mark A. Graber, *Unnecessary and Unintelligible*, 12 CONST. COMMENTARY 167, 168 (1995).

A parade of major scholars into the twenty-first century lamented the lack of information about the clause's origins. 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 said 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 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 than are the District of Columbia or Territory Clauses he did not say.[31] Moreover, the phrase "necessary and proper" appeared in only one pre-Convention state constitution, in a provision dealing with emergency powers that authorizes the legislature in case of invasion "to adopt such other measures as may be necessary and proper for insuring continuity of the government . . . ."[32]

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[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 23, at 185.

[28] Graber, *supra* note 25, at 168.

[29] U.S. CONST. art. I, § 8, cl. 17.

[30] *Id.* art. IV, § 3, cl. 2.

[31] *See* CALABRESI & LAWSON, *supra* note 21, at 623.

[32] MASS. CONST. OF 1780, art. LXXXIII.

Over the past two decades, however, the antecedents of the Necessary and Proper Clause have come into focus 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."[33] "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.[34] Because the Committee of Detail was composed of four lawyer 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 experiences 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.[35]

This private-law agency account of the Necessary and Proper Clause dovetails with public-law accounts linking the Necessary and Proper Clause to basic administrative law principles regarding subdelegated powers[36] and founding-era corporate law,[37] all of which concern "*public*

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[33] U.S. CONST. Preamble. *See* Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE WESTERN RESERVE 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. & POLITICS 239 (2007); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004). Gary Lawson and Guy Seidman subsequently authored a book-length development of the idea of a fiduciary Constitution. *See* LAWSON & SEIDMAN, *supra* note 23.

[34] *See* Natelson, *supra* note 23, at 68-80 (describing at least five different formulae for expressing an agent's incidental powers).

[35] *See* LAWSON & SEIDMAN, *supra* note 23, at 86-86.

[36] *See* Gary Lawson & Guy Seidman, *Necessity, Propriety, and Reasonableness*, *in* LAWSON, MILLER, NATELSON & SEIDMAN, *supra* note 23, at 120.

[37] *See* Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, *in* LAWSON, MILLER, NATELSON & SEIDMAN, *supra* note 23, at 144.

agency law: the application of agency law principles to public actors."[38] In 2010, one of us helped combine these three lines of analysis into a book[39] 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.

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. He has also documented how the phrase "necessary and proper" appeared prominently in non-legal discourse.[41] This is a valuable addition to the corpus of work on the clause's origins, but the key question is not how "necessary" (and "necessary and proper") would be understood in a private letter but rather how the phrase would be understood *in the specific context of an agency instrument that enumerates principal powers of an agent.* It is in that respect that it makes sense to describe the word "necessary" in Article I, section 8 as a "term of art."[42] This emphatically *does not* mean 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."[43] The agency-law usage of "necessary" was a term of

[38] Gary Lawson & Guy Seidman, *Raiders of the Lost Clause: Excavating the Buried Foundations of the Necessary and Proper Clause, in* LAWSON, MILLER, NATELSON & SEIDMAN, *supra* note 23, at 1, 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 37, at 147-48.

[39] *See* LAWSON, MILLER, NATELSON & SEIDMAN, *supra* note 23.

[40] *See* Mikhail, *supra* note 22, at 1096-1103.

[41] *See id*. at 1114-21

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[42] Natelson, *supra* note 23, at 119.

[43] Mikhail, *supra* note 22, at 1114.

art that would be widely understood both in its meaning and as a term of art in the specific context in which it appeared. As one of us has explained:

> 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."[44]

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

Matters heated up a bit during the ratification debates. Some Antifederalists were alarmed by the Necessary and Proper Clause.[45] Interestingly, the focus of attention did not seem to be on the word "necessary." Rather, Antifederalists mainly worried that the clause carried implied powers

[44] Gary Lawson, *The Fiduciary Social Contract*, 38 SOCIAL PHIL. & POL'Y 25, 37 n.47 (2021) (quoting LAWSON & SEIDMAN, *supra* note 23, at 55).

[45] *See* Natelson, *supra* note 23, at 94-96 (cataloguing 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 (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").

(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 with some other clauses, authorizing whatever laws Congress *deems* necessary and proper.[46] 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 powers. Determining the scope of those implied powers is a topic for another day. 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 dealing with 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." 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,[47] not to expand those powers.[48] 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."[49] This message was repeated practically universally by Federalists, with "no

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[46] For a detailed critique of this Antifederalist claim, see Lawson & Granger, *supra* note 23, at 76-85.

[47] *See* THE FEDERALIST NO. 33 (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 (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.").

[48] *See* J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 592.

[49] THE FEDERALIST NO. 33 (Alexander Hamilton).

disagreement as to the meaning of the Clause expressed by supporters of the Constitution" at the ratifying conventions.[50] 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.[51] However, the precise linguistic meaning of the phrase "necessary and proper" did not factor into this dialogue in a meaningful way.

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.[52] The federal government was bankrupt, the Continental currency was worthless, and the States had adopted uncooperative economic policies.[53] 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."[54] The proposed bank was largely modeled

[50] Barnett, *supra* note 23, at 187.

[51] *Id. See also* Natelson, *supra* note 23, at 97-108 (exhaustively cataloguing the Federalist reprsentations regarding the incidental powers understanding of the clause).

[52] *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).

[53] *See id.* at 112.

[54] *Id.* at 118.

off the successful Bank of England[55] (perhaps more so than the unsuccessful Bank of North America, which had been chartered by the Continental Congress in 1781[56]) and was bolstered by the economic theory of Adam Smith.[57] 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.'"[58] It would have a monopoly over the banknotes by which federal taxes and federal debts would be paid, even though the only power Article I, Section 8, Clause 8 gave to the federal government to create monopolies was the power to create patents and copyrights.[59] And the Bank would have this monopoly power in a legal culture which had long championed, and had been steeped in, the wisdom of *The Case of the Monopolies*,[60] which was reported by Sir Edward Coke and which claimed 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

[55] 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 period of time 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.

[56] *See* 21 J. CONTINENTAL CONG. 1187-89 (1781).

[57] *See* Reid, *supra* note 52, at 118-19.

[58] CALABRESI & LAWSON, *supra* note 1, at 603.

[59] *See* U.S. CONST. art. I, § 8, cl. 9 (giving Congress power "[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the *exclusive* Right to their respective Writings and Discoveries") (emphasis added).

[60] 74 Eng. Rep. 1131 (1602),

as a Member of Parliament and was passed in 1623[61]). 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.

The bill to establish a national bank was debated by the First Congress in 1791.[62] It generated fierce opposition, only some of which was based on constitutional concerns.[63] For example, some southerners viewed the proposed bank as "a dangerous concentration of wealth and power," fearing that it would favor the wealthy and the north and Wall Street.[64] Was the United States to be a nation of farmers or a mercantile industrial state? Constitutional concerns, however, featured prominently in the debates.

The Constitution did not expressly give Congress power to create a bank or charter corporations. The proceedings within the Philadelphia Constitutional Convention were kept secret until 1836, but many people then living in 1791, including Congressman James Madison, remembered very well that the Philadelphia Convention had specifically voted *not* to give Congress the enumerated power to charter corporations.[65] 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.

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

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

[63] For a summary of policy concerns raised by James Madison, see Reid, *supra* note 32, at 133-34. For a summary and analysis of the congressional debate over the Bank Bill as a whole, see *id.* at 133-70.

[64] Klubes, *supra* note 62, at 23.

[65] *See* 2 THE RECORDS OF THE FEDERAL CONVENTION 615-16 (Max Farrand ed., 1911).

Although the most obvious argument against such a power – which would loom large three decades later -- is that it would not be incidental but rather principal, and therefore could not stem from an incidental powers clause,[66] a good portion of the debate focused on the meaning of the word "necessary" in the Necessary and Proper Clause.[67] The results were less enlightening than one might hope or expect.

Perhaps the strongest opponent of the Bank in the House of Representatives[68] was James Madison. Only one of Madison's comments was addressed directly to 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."[69] That is 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

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[66] *See* 2 ANNALS OF CONG. 1950 (statement of James Madison) (warning against implication of "a great and important power which is not evidently and necessarily involved in an express power"); *id.*(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 1986 (describing the creation of a bank as a "great and substantive power") (statement of Michael Stone); *id*. at 1992 (calling bank creation " a distinct substantive branch of legislation * * * [which should] not be usurped as an incidental subaltern authority") (statement of William Giles). *But see id.* at 1959 (defending the power of incorporation as a "necessary incident" of various enumerated powers) (statement of Fisher Ames).

[67] *See* Reid, *supra* note 32, 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 of 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 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 its 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 a bizarre-headless fourth branch of the government with a small minority of federally appointed Directors serving on a much larger board of selfishly 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 act like Congress through bicameralism and presentment or before life-tenured judges, it was an entity of the executive branch of the government, even though it was not under the supervision of the President. It was the original headless fourth branch of the government.

[68] The Senate at that time did not keep records of its debates.

[69] 2 ANNALS OF CONG. 1949 (Statement of James Madison).

definition nearly three decades later.[70] James Jackson objected that a national bank could not be "necessary" because some areas of the country flourished without it,[71] 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"[72] and found "no necessity . . . for this bank."[73] 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."[74] Thus, several Members advanced a strict understanding of necessity, though none provided reasoning or support for their claims.

The reported comments of the Bank's defenders in the House[75] were not significantly more enlightening. Elbridge Gerry noted that "the popular and general meaning of the word 'necessary' varies according to the subjects and circumstances,"[76] but he did not provide a clear definition relevant for the subject and circumstances at hand. Several defenders insisted that the Bank could satisfy even the strictest standard of necessity, deeming the Bank "indispensable,"[77] "indispensably necessary"[78] and a "means, without which the end could not be obtained,"[79] and

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[70] *See supra* --.

[71] *See id*.at 1969 (statement of James Jackson).

[72] *Id*.at 1987 (statement of Michael Stone).

[73] *Id*.

[74] *Id*. at 1993 (statement of William Giles).

[75] Of 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).

[76] 2 ANNALS OF CONG. 1999 (statement of Elbridge Gerry).

[77] *Id*. at 2001.

[78] *Id.* at 1953 (statement of Fisher Ames); *see also id*. at 1956 (European central banks have been "indispensably necessary").

[79] *Id*.at 1974 (statement of Elias Boudinot).

thus 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,"[80] but he did not offer a precise definition of "necessary" beyond encompassing the "known and usual means"[81] for fulfilling ends.

The battle was again joined after Congress passed the bank bill and presented it to President Washington. When the bill arrived on George 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,"[82] but said nothing else specific about the word. Secretary of State Thomas Jefferson, who hated monopolies and had lobbied for a ban on 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."[83] "[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."[84] Jefferson expressed concern that, if the word "necessary" were interpreted too broadly, there would

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[80] *Id*. at 1962 (statement of Theodore Sedgwick).

[81] *Id*.

[82] Edmund Randolph, Opinion on the Constitutionality of the Bank (Feb. 12, 1791), https://founders.archives.gov/?q=Author%3A%22Randolph%2C%20Edmund%22&s=1111311111&r=205.

[83] Letter from Thomas Jefferson, Sec'y of State, to George Washington, President (Feb. 15, 1791), https://founders.archives.gov/documents/Washington/05-07-02-0207.

[84] *Id.*

be no enumerated power "which ingenuity may not torture into a *convenience*" so as to "swallow up all the delegated powers."[85]

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*."[86] According to Hamilton, giving the word "necessary" "the same force as if the word *absolutely* or *indispensibly* had been prefixed to it" would "beget endless uncertainty [and] embarrassment" since "[t]here are few measures of any government, which would stand so severe a test."[87] As a matter of principle, Hamilton believed that constitutional powers "ought to be construed liberally, in advancement of the public good."[88] 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 for 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 said or

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[85] *Id.*

[86] Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), https://founders.archives.gov/documents/Hamilton/01-08-02-0060-0003.

[87] *Id.*

[88] *Id.*

whether it meant "convenient" or "useful" as Hamilton said. No one put forward a clear intermediate alternative, such as whether "necessary" really meant "needful" or "congruent or proportional to."

Washington was a man of few words, and he never wrote down whether he agreed with Hamilton's bold claims about "convenient" and "useful" or whether 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. George Washington was one of the largest landholders in the United States when he died, and he never shared Jefferson's dream that America would be a slave-owning, aristocracy of farmers. 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 that banks played a role in this. This, plus Washington's friendship with Hamilton, who he treated like his son, 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 to 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 over 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 arguing that the Bank was unconstitutional.[89] Interest in reestablishing the bank resurfaced, however, during an economic downturn in the wake of the War of 1812.[90] In 1815, 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 nation . . . .[91]

It is not entirely clear what Madison meant by recognition of the Bank's validity by the "judicial branch[]." The constitutionality of the First Bank was not tested in court. Perhaps – and this is raw speculation – he referred to *United States v Fisher*,[92] the Court's first case 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 become insolvent and the United States was among the creditors.[93] The vast majority of the argument dealt with statutory

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

[90] *Id.*

[91] 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 555 (James D. Richardson ed., 1897)..

[92] 6 U.S. (2 Cranch) 358 (1805).

[93] Act of Mar. 3, 1797, ch. XX, § 5, 1 Stat. 511, 515.

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?"[94] 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."[95] The Court, 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.
>
> . . . .
>
> 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.

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[94] 6 U.S. (2 Cranch) at 379 (argument of Ingersoll).

[95] *Id.* at 384 (argument of Dallas).

> In construing this clause it would be incorrect and would produce endless difficulties, if the opinion should be maintained that no law was authorized 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.[96]

If President Madison in 1815 was aware of this decision, it would 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 equates "necessary" with "conducive to," which was Hamilton's central claim in defense of the Bank. 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 then signed a bill re-chartering a Second Bank of the United States in 1816.[97] That set the stage for what "[m]any scholars consider . . . the single most important opinion in the Court's history."[98]

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[96] *Id*. at 396.

[97] Act of Apr. 10, 1816, ch. 44, 3 Stat. 266.

[98] Daniel A. Farber, *The Story of* McCulloch: *Banking on National Power*, 20 CONST. COMMENTARY 379, 379 (2003-04).

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 case[99]—reached the Supreme Court. The State of Maryland 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 equally to all banks doing business in Maryland, as those other banks had state charters. The cashier for the Baltimore Branch, James McCulloch, refused to pay the tax,[100] giving rise to one of the most famous Supreme Court decisions in history. In his opinion, 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.[101]

Oral arguments in *McCulloch v. Maryland* were conducted over the course of nine days by six of "the very best advocates of the day."[102] Counsel for both parties presented very

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[99] *See* MARK R. KILLENBECK, *M'CULLOCH V. MARYLAND*: SECURING A NATION 90 (2006).

[100] CALABRESI & LAWSON, *supra* note 21, at 604.

[101] McCulloch v. Maryland, 17 U.S. 316, 400 (1819).

[102] KILLENBECK, *supra* note 99, at 96-97.

comprehensive arguments addressing the constitutionality of the bank,[103] including the existence of implied powers,[104] states' rights under the Tenth Amendment,[105] and reliance interests.[106] Both 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.[107] It was suggested that the bank was "necessary and proper" for carrying out

> the powers 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.[108]

Arguing for McCulloch, Daniel Webster asserted that necessary powers are those that "are *suitable* and *fitted* to the object" and "*best* and most *useful* in relation to the end proposed."[109] Likewise,

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[103] In addition to addressing the constitutionality of the national 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.

[104] *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.").

[105] *Id.* at 366 (argument by Mr. Jones).

[106] *Id.* at 323 (argument by Mr. Webster).

[107] *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.").

[108] *Id.* at 353-54 (argument by the Attorney General).

[109] *Id.* (argument by Mr. Webster) (emphasis added).

Attorney General, William Wirt argued that "necessary" means "are those which are *useful* and *appropriate* to produce the particular end."[110] The words "[n]ecessary and proper," he suggested, are "equivalent to *needful* and *adapted*."[111] 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." [112] 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 in line with Jefferson's strict understanding of necessity. "The word 'necessary,' is said to be a synonyme of '*needful*,'" he claimed, "[b]ut both these words are defined 'indispensably *requisite*;' and, most certainly, this is the sense in which the word 'necessary' is used in the constitution."[113]

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."[114] 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"[115] and "annihilate the very powers it professes to create."[116] On the other hand, a lawyer for Maryland

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[110] *Id.* at 356 (argument by the Attorney General) (emphasis added).

[111] *Id.* (emphasis added).

[112] *Id.* at 388 (argument by Mr. Pinkney).

[113] *Id.* at 366-67 (argument by Mr. Jones) (emphasis added).

[114] *Id.* 324-25 (argument by Mr. Webster).

[115] *Id.* at 354-55 (argument by the Attorney General).

[116] *Id.*

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."[117] 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."[118] Had such powers been "fairly avowed at the time" the Constitution might never have been ratified.[119]

At least two things were conspicuously absent from these arguments. One was whether *United States v. Fisher* had already definitively resolved the question what the Constitution means by "necessary." This omission is an interesting window into the early post-founding view of judicial precedent. Another absence was any reference to an intermediate standard for necessity between the Scylla of Hamiltonian laxness and the Charybdis of Jeffersonian strictness. The parties 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 look at the opinion and the many methodological, interpretative, and substantive issues that it raises. We focus narrowly on the decision's treatment of the requirement that laws executing federal powers be "necessary."[120]

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[117] *Id.* at 367 (argument by Mr. Jones).

[118] *Id.* at 372 (argument by Mr. Martin).

[119] *Id.* at 373 (argument by Mr. Martin).

[120] For some thoughts by two of us on some of the broader issues raised by *McCulloch,* see CALABRESI & LAWSON, *supra* note 21, at 618-29.

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:

> 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 end . . . .[121]

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

Second, Marshall claimed that "necessary" "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."[122] Because the Imposts Clause allows a State to impose export duties without congressional consent when "*absolutely* necessary for executing its inspection Laws,"[123] the bare word "necessary" in the Necessary and Proper Clause must have a looser meaning than it has in the Imposts Clause.

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[121] 17 U.S. (4 Wheat) at 413-14.

[122] *Id*. at 414.

[123] U.S. CONST. art. I, § 10, cl. 2 (emphasis added).

Third, giving "necessary" a strict reading would have bad consequences by trammeling on 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 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.[124]

Fourth, Marshall noted that the only powers expressly given to Congress to punish lawbreaking concerned counterfeiting and piracy.[125] The power to punish anything else had to stem from the Necessary and Proper Clause, but the strict Jeffersonian understanding of "necessary" would not permit an inference to 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

[124] 17 U.S. (4 Wheat.) at 415.

[125] *See* U.S. CONST. art. I, § 8, cls. 6 & 10.

> 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.
>
> . . . . The . . . power of punishment . . . is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.[126]

Fifth, Marshall insisted that conjoining "necessary" with "proper" ruled out the strict Jeffersonian construction, because it would render the word "proper" pointless:

> 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 strained and compressed within the narrow limits for which gentlemen contend.[127]

[126] 17 U.S. (4 Wheat) at 417-18.

[127] *Id*. at 418-19.

Sixth, and for Marshall "most conclusively,"[128] if the Constitution did not contain the Necessary and Proper Clause, Congress would have a Hamiltonian free hand in executing federal powers, so it must have an equally free hand given the Necessary and Proper Clause as a whole:

> 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. This clause, as construed by the state of Maryland, would abridge, and almost annihilate, this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy.
>
> We think so for the following reasons:
>
> 1st. The clause is placed among the powers of congress, not among the limitations on those powers.
>
> 2d. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted . . . .
>
> The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers

[128] *Id.* at 419.

> of congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.

A seventh ultimate proposition summarizes the first six. Through Marshall's legerdemain, the word "necessary" is not construed to mean "needful and proper" or "congruent and proportional" but is watered down instead to the following weak test: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[129]

Taken together, Marshall's propositions are likely good enough to decide the case before him. Keep mind that to rule for the Bank, the Court did not need to find that Hamilton's interpretation of "necessary" was correct. It needed only to find that the State of Maryland's interpretation was wrong and that the Bank would satisfy the constitutional requirement of necessity so long as the State was wrong. That is essentially what the Court said after its discussion of "necessary:'

> That it [the corporate 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

[129] *Id*. at 419-21.

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. Under the confederation, congress, justifying the measure by its necessity, transcended, perhaps, its powers, to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away, when it can be necessary to enter into any discussion, in order to prove the importance of this instrument, as a means to effect the legitimate objects of the government.

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. Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted 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.[130]

[130] *Id*.at 422-23.

This passage can mean either or both of two things. First, it might mean that the Bank satisfies any plausible standard of "necessary" less strict than literal indispensability. There is some support for this view of the opinion, in that Marshall typically conjoins Hamiltonian language of convenience or usefulness with other language that is stricter. 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 which facilitate the execution of the powers of government, without the infliction of punishment?" Here "conducive to" is accompanied by "essential, "requisite," and "needful." (We will explore the term "needful" in the next section, but we note for now that its eighteenth-century meaning was very close to "essential.".). Those words are odd company for a Hamiltonian account of necessity Second, the passage might mean that the decision whether the Bank satisfies any standard less strict than literal indispensability is a political question that the courts will not and cannot decide. Either or both of those propositions might be wrong, but under either of them, it is not necessary (or proper?) for the Court to endorse the Hamiltonian account of necessity. Any language suggesting such an endorsement is dictum – as it was 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 – the six that lead to his ultimate conclusion -- 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, as was included in the Articles of Confederation,[131] to negate that 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 the existence of incidental powers in the national government. But that is far removed 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." It would certainly be possible to draft an agency instrument which 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 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.[132] Marshall's assumption that the Necessary and Proper Clause could only expand, and not constrict, the common-law baseline of incidental powers was a bald and transparently unwarranted assertion. As a trained lawyer well versed in agency law, Marshall surely knew this.

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[131] *See* ARTICLES OF CONFEDERATION 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).

[132] *See* Natelson, *supra* note 23, at 80.

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, it is again a transparently weak argument. It assumes that "necessary" and "proper" do the same work. That was indeed the argument of Daniel Webster,[133] but it is clearly wrong as a matter of both usage[134] 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, has a broader meaning which connotes the obligation to conform to fiduciary norms.[135] "Necessary" and "proper" simply describe different things. They 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."[136] 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.[137]

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[133] *Id*. at 324 ("[t]hese words, 'necessary and proper,' in such an instrument, are probably to be considered as synonimous") (argument of Daniel Webster).

[134] *See* Lawson & Granger, *supra* note 23, at 289-91.

[135] *See* Lawson & Seidman, *supra* note 36, at 141-43.

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

[137] 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 36, Lawson, *supra* note 9; Lawson & Granger, *supra* note 23, and because a number of modern Supreme Court decisions have attached distinct significance to the word "proper," *see* National Federation of Independent Business 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 139, 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

The fourth argument, suggesting that a strict understanding of necessity would forbid Congress from passing enforcement laws for anything except counterfeiting and piracy,[138] is again addressed solely to the most extreme version of the State of Maryland's argument. It has no bite against a more calibrated version of the Jeffersonian account of necessity – and certainly has no bite against anything in between Hamilton and Jefferson.

The third and fourth arguments are quite similar. Yes, it would be odd if there was one and only one set of means in any given circumstance constitutionally available to Congress. That is a good argument against an interpretation of necessity – in an incidental powers clause -- that is tantamount to a prohibition on incidental powers. Again, that has no traction against any but the most extreme versions of strict necessity. And it is a monumental leap from that sound proposition to the further 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."

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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 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 was 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" was 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 agency-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 incorporate agency-law ideas such as a fiduciary duty of care, a 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.

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

The comparison of "necessary" and "absolutely necessary" is yet again a persuasive argument against an interpretation of "necessary" as literally "indispensable." The Court successfully shows that "necessary" in the context of the Necessary and Proper Clause cannot plausibly take the strongest possible meaning of which the word is linguistically capable.

If that is all that *McCulloch* sought to do, this article probably would not exist. And there is a very good case that that is all that *McCulloch should* have sought to do. If litigation is properly viewed as a form of dispute resolution, then perhaps all courts should do is to pass on the relative weights of the arguments put forward by the parties – even if both parties are in some important respects getting the law "wrong." The idea that courts should reach out and get the law (or the facts) "right" reflects a different model of litigation, in which courts are primarily declarers of law, and the disputes between parties are simply the vehicles through which courts perform that law-declaration function. On a dispute resolution model, it was enough for *McCulloch* to decide that the State of Maryland had not made its case, leaving in place the pre-decision status quo (which included a federal statute that was enacted in accordance with Article I, section 7 procedures and was therefore a "law")[139].

But that is not all that *McCulloch* said. Marshall's first argument was a rehash of Hamilton's sweeping claim about linguistic usage, which purports 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

[139] These two models of litigation are mostly closely associated with Lon Fuller (dispute resolution) and Owen Fiss (law declaration). The models are oversimplifications of the thought of two of the past century's subtlest legal minds, but they are nonetheless valuable as ideal types. For a more detailed analysis of the models and their implications for judging, see GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS 175-92 (2017).

linguistic claim as throwaway 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 it was issued. The dictum regarding "necessary" was no exception. For example, in 1819 "Amphictyon"[140] objected to the Court's seeming adoption of the Hamiltonian view of necessity because 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."[141] Spencer Roane bitterly criticized the opinion in a series of articles written as "Hampden."[142] In a private letter, James Madison attacked *McCulloch's* dictum 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." [143] 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

[140] This may have been a pseudonym for Virginia judge William Brockenbrough. *See* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 1 (Gerald Gunther ed., 1969) [hereinafter "MARSHALL'S DEFENSE"]

[141] *A Virginian's "Amphictyon" Essays, in* MARSHALL'S DEFENSE, *supra* note --, at 52, 66-67.

[142] *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).

[143] Letter from James Madison to Spencer Roane (Sept. 2, 1819), https://founders.archives.gov/documents/Madison/04-01-02-0455.

of the Constitution."[144] 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."[145]

Despite the controversy it generated, the case had little immediate 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.[146] Federal lawmaking took off with the Interstate Commerce Act of 1887 and the Sherman Act'snantitrust law of 1890 and gathered speed from 1901 when Theodore Roosevelt became President.

McCulloch v. Maryland did generate one famous and very influential critic: President Andrew Jackson who vetoed the renewal of the Bank of the United States in July 1832.[147] Jackson's veto was based on a wide range of both constitutional and political considerations, many of which targeted the monopoly features of the Bank; we focus her only on those parts that address the meaning of "necessary."[148]

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[144] *See* Gunther, *supra* note 143, at 449-50.

[145] John Marshall, *Essays from the "Alexandria Gazette,"* 21 STAN. L. REV. 456, 475, 477 (1969).

[146] Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1130-31 (2001).

[147] Veto Message of July 10, 1832, *in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1144-45 (James D. Richardson ed., 1897). 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 . . . ." 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 Supreme Court justices should be humble about their consequentialist predictions.

[148] For a broader look at the constitutional significance of Jackson's veto message, see CALABRESI & LAWSON, *supra* note 21, at 628-34.

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."[149] He objected, rather, 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."[150] 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:

> 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 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.[151]

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, it is an argument that the bill's monopoly feature is not "proper." The same is true of Jackson's subsequent argument that Congress could

[149] Veto Message, *supra* note 147, at 1139.

[150] *Id*. at 1145.

[151] *Id*. at 1146-47.

not delegate to the bank the constitutional power to "coin Money [and] regulate the Value thereof"[152]: "It is neither necessary nor proper to transfer its legislative power to such a bank, and therefore unconstitutional."[153] Again, this 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.[154]

In sum, while Jackson denied that *McCulloch* settled the constitutionality of the 1832 bank bill,[155] nothing in his message directly addressed what constitutes a "necessary" causal 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 sea change in the role of the federal government. The Civil War Amendments and Reconstruction obviously 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. The New Deal in the 1930s carried the Progressive vision to the next level, and the Great Society in 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 process, much less to address in a law review article, one piece of the engine driving that process was Marshall's dictum in *McCulloch.*

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[152] U.S. CONST. art. I, § 8, cl. 5.

[153] Veto Message, *supra* note 147, at 1149.

[154] *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).,

[155] *See* Veto Message, *supra* note147 at 1144-45.

While it is conventional today to ascribe the constitutional validation of the modern federal government to an expansive reading of the Commerce Clause, that is only part of the story. Certainly if "Commerce among the several States" was 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 dictum. In Part VI, we survey some of those cases to see 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 dictum.

Interestingly, the first use of the dictum in a Supreme Court opinion came in a dissent. In *Hepburn v. Griswold*,[156] 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 a Hamiltonian interpretation of *McCulloch*.[157] The dissent, of course, became a majority the next term through the magic of court-packing; the decision in *Hepburn* was overruled in *Knox v. Lee*,[158] which expressly relied on the Hamilton construction of *McCulloch*.[159] 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 ninety years. The most notable cases were *NLRB v. Jones & Laughlin Steel*

[156] 75 U.S. (8 Wall.) 603 (1869).

[157] *See id.* at 630-31 (Miller, J., dissenting).

[158] 79 U.S. (12 Wall.) 457 (1870).

[159] *See id.* at 523.

Corp.[160]*, United States v. Darby,*[161] and *Wickard v. Filburn.*[162] While they are still sometimes viewed 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 – really involve, sub silentio, the Necessary and Proper Clause,[163] following the seminal analysis from 1914's *Shreveport Rate Cases,*[164] 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 or non-commerce activities may depend on something beyond the scope of this article: The extent to which such regulation is truly incidental or is instead, in Marshall's terms, "a great substantive and independent power, which cannot be implied as incidental to other powers."[165] 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

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[160] 301 U.S. 1 (1937).

[161] 312 U.S. 100 (1941).

[162] 317 U.S. 111 (1942).

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

[164] 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 21, at 699-714.

[165] 17 U.S. (4 Wheat.) at 417. 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) (opinion of Roberts., C.J.). For an extended analysis of this vital concept, see LAWSON & SEIDMAN, *supra* note 23, at 81-103.

definition of "necessary." Nonetheless, it is clear from a century of cases that the Court implicitly accepted an extreme version of Marshall's formulation. It would take a book to examine all of the cases that led to this development. The key fact is that the Supreme Court has *never* found a congressional 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 the Hamilton/Marshall definition of "necessary" into language that fits the post-New Deal model of tiers of scrutiny: Executory laws are necessary, says the modern Court, if the legislative judgment of necessity has a *rational basis*.

One can perhaps trace this evolution in doctrinal language to *Katzenbach v. McClung,*[166] the famous case in which the Court upheld application of Title II of the Civil Rights Act of 1964, forbidding discrimination on the basis of race, color, religion, or national origin in all public accommodations,[167] to Ollie's Barbeque because some of the restaurant's supplies traveled in interstate commerce.[168] The case was an easy application of prior decisions such as *Darby*, which upheld Congress's power to control intrastate wage contracts, and *Wickard,* which evaluated effects on commerce based on classes of activities rather than specific activities. In applying those straightforward precedents, however, the Court said: "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."[169] By that point in time, the Court had elaborated the "rational basis" inquiry to mean that "inquiries, where the

[166] 379 U.S. 294 (1964).

[167] 42 U.S.C. § 2000a(a) (2018).

[168] The statute defines "place of public accommodation" to include restaurants. *See id*. at §2000a(b)(2).

[169] 379 U.S. at 383 (emphasis added).

legislative judgment is drawn into question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it."[170] In other words, legislation has a rational basis if there is *any 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.[171] As applied to the Necessary and Proper Clause, this comes very close to declaring the necessity of laws a political question or defining "necessary" to mean "rational" – an even more expansive understanding than is 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 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 laws found by the Court to exceed Congress's enumerated powers were two laws that directly regulated state governments and thus threatened what the Court regarded as a constitutional principle of state sovereignty.[172] One of those cases was overruled within a decade of its issuance,[173] and the other claimed that its holding came from the Tenth Amendment.[174]

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[170] United States v. Carolene Products Co., 304 U.S. 144, 154 (1938).

[171] *See* Williamson v. Lee Optical Co., 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: Litigation under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 898 (2005).

[172] *See* National League of Cities v. Usery, 426 U.S. 833 (1976): New York v. United States, 505 U.S. 144 (1992).

[173] *See* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (overruling *Usery*).

[174] *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).

In 1995, the Court reopened the door to claims of limited congressional power in *United States v. Lopez,*[175] which held that Congress could not criminalize possession of a firearm within 1000 feet of a school. 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,[176] 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 effects on commerce should be judged on 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.' "[177] Justice Breyer similarly observed: "[W]e 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."[178] These comments could easily be adapted to 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.

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[175] 514 U.S. 549 (1995). *See* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICHIGAN LAW REVIEW 752 (1995).

[176] *See* 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. *Sed ie.*at 584 (Thomas, J., concurring).

[177] *Id*. at 603 (Souter, J., dissenting) (quoting *Katzenbach v. McClung*).

[178] *Id*. at 618 (Breyer, J., dissenting).

That connection between the rational basis test and the Necessary and Proper Clause became explicit in 2004 in *Sabri v. United States*[179] – a relatively neglected but important decision.[180] According to prosecutors, Sabri tried to bribe some Minneapolis housing officials to get licenses and 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.[181] There is no requirement under the statute that the alleged bribery involve federal funds; it is enough if the state agency receives any. Sabri challenged the law's constitutionality. He won in the district court[182] 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.[183] The court of appeals three times used the phrase "rationally related" to describe the inquiry under the Necessary and Proper Clause.[184] The Supreme Court also upheld the statute on the same rationale. The Court expressly cited *McCulloch* as "establishing review for means-ends rationality under the Necessary and Proper Clause,"[185] and it had no trouble finding a rational basis in Congress's desire to protect the integrity

[179] 541 U.S. 600 (2004).

[180] 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*, 2003-2004 CATO SUP. CT. REV. 119.

[181] 18 U.S.C. § 666(a)(2), (b) (2028).

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

[183] *See* United States v. Sabri, 326 F.3d 937, 949-53 (8th Cir. 2003).

[184] *See id.* at 949, 950, 951.

[185] 541 U.S. at 605.

of federally funded programs. And with that, the standard for necessity under the Necessary and Proper Clause officially became "rational basis."[186]

Thus, Marshall's 1819 dictum has made the necessity of legislation under the Necessary and Proper Clause all but non-justiciable. Formally, one can bring a challenge based on means-ends connections, and the Court will not dismiss for lack of jurisdiction. But one will inevitably lose, given the laxity of the rational basis test. And Marshall's dictum, in turn, ultimately relies on Hamilton's 1791 claim about 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 were right. In the next three sections, we explore that question using dictionaries, corpus linguistics, and intertextual and intratextual analysis.

III. Dictionary Definitions of "Necessary" and Its Cognates

Because Hamilton and Marshall grounded their claims in ordinary usage, a good place to start – not necessarily to finish, but to start – to test their claims is with dictionaries. Gregory Maggs has identified eight general purpose dictionaries that were available in the founding era, plus Noah Webster's dictionary that first appeared in 1828, four decades after the founding.[187]

[186] Justice Thomas agree with the Court's result, but he doubted whether *McCulloch* had to be read to so broadly, *see id*. at 611 (Thomas, J., concurring in the judgment), and he would have decided the case without addressing the Necessary and Proper Clause.

[187] *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, 382-81 (2014). There were also a number of specialized law dictionaries, *see id.* at 390-93, but we are here exploring Hamilton and Marshall's claim of ordinary meaning.

The most influential work was *Samuel Johnson's Dictionary of the English Language*,[188] 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 difference in the definitions that we examine between those editions, but the later version includes several additional literary sources as references. Here is the definition of "necessary" from 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 an *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.* [189]

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[188] *See id*. at 385 (describing Johnson's dictionary as "the most famous and most cited" of the founding-era dictionaries).

[189] 2 SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (1785).

The quotations from literature, which Johnson uses in defining "necessary" and which appear above, will make the reader immediately realize that "necessary" is indeed a synonym for: 1) needful; 2) indispensable; 3) impelled by fate; or 4) conclusive and by inevitable consequence. For example, Shakespeare defines death as "necessary," but it is certainly not "convenient" or useful!"

We saw above that Chief Justice John Marshall mistakenly claimed that the word "proper" watered down the word "necessary," making it mean "convenient" or "useful." We also saw that Gary Lawson and Patricia Granger had disputed that construction, arguing that "proper" is a different noun to overcome than is "necessary"[190] Lawson and Granger turn out to be exactly right. Samuel Johnson's *Dictionary of the English Language* of 1755 (with no difference in the later edition) offers the following relevant definitions of the word "proper": "1) Peculiar; not belong to more; not common . . . , 3) One's own. It is joined with any of the possessives; as my proper, their proper . . . ;5) Fit; accommodated; adapted; suitable; qualified , , , .."[191] Rather than describing a causal relationship, "proper" describes a *purposive* connection, which is why Lawson and Granger call it a "jurisdictional"[192] term. An action is "proper" if it is peculiarly appropriate to the actor. The original meaning of "proper" is not "convenient" or "useful." Something can be convenient or useful but not be one's own or distinctively appropriate to one's exercise.

A third word, which is given as a meaning of "necessary' and on which we believe we should consult Samuel Johnson is: "needful." This is the most potentially expansive definition of "necessary" that Johnson gives. The others – "indispensably requisite,"

[190] *See* Lawson & Granger, *supra* note 23, at 291-97. *See also* Lawson, *supra* note 9, at 249-55.

[191] 2 SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (1755).

[192] Lawson & Granger, *supra* note 23, at 273.

"impelled by fate," "conclusive," – obviously give no support to Hamilton and Marshall. Unfortunately for them, Johnson, says the word "needful" means: "need and full; Necessary; Indispensably requisite."[193] If anything, the definition of "needful" supports Jefferson and Maryland! Johnson's literary references hammer the point home even harder. The book of Common Prayer says "Give us all things that be *needful*, both for our souls and our bodies." Needful certainly does not mean "convenient" or "useful" here. Shakespeare says that "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. "All things *needful* for defense abound. [two guardsmen] walk the round. *Dryden*." Again, "needful" means more than "convenient" or "useful." "To my present purpose it is not *needful* to use arguments, to evince the world to be infinite. *Locke*." "Needful" does not mean convenient" or "useful" here. And, finally, "A lonely desert, and an empty land, Shall scarce afford for *needful* hours of rest. *Addison*." Again, "needful" does not mean "convenient" or "useful" here.

A fourth word that is the noun at the root of "needful" is "need," and Johnson defines the noun "need" as follows: "1) Exigency; pressing difficulty; necessity; 2) Want: distressful poverty; 3) Want; lack of anything for use."[194] None of these definitions implies "convenient" or "useful," but they do imply something almost like "indispensable."

A fifth word that Samuel Johnson gives as one of the definitions of "necessary" is the word "essential". Here is how Johnson defines "essential": "1) Necessary to the Constitution or existence of any thing; 2) Importance in the highest degree; principal; and 3) Pure; highly rectified; subtilty elaborated; extracted so as to contain all the virtues of its elemental parts contracted into

[193] JOHNSON, *supra* note 191.

[194] *Id*.

a narrow compass."[195] Johnson's definition of "essential" is far stricter than defining that term as a synonym of "convenient" or "useful."

A sixth word that Johnson uses as a synonym for "necessary" is "indispensable": "1) Not to be remitted; not to be spared; necessary."[196] Woodw. is quoted here as saying "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.

We have suggested that in addition to "needful" being the most promising synonym for "necessary" in Article I, Section 8, clause 18, a more modern test of "congruence and proportionality," like the one *City of Boerne v. Flores* used to interpret "appropriate" in Section 5 of the Fourteenth Amendment, might work very well as a modern synonym for "necessary and proper." Samuel Johnson defines the noun "congruence" in the following terms: "Agreement; suitableness of one thing to another; consistency."[197] He defines the noun "congruity" as meaning: "1) Suitableness; agreeableness; 2) fitness, pertinence; 3) consequence of argument; reason; consistency . . .."[198] Johnson defined "congruence" used as an adjective as meaning: "1) agreement; suitableness of one thing to another; consistency."[199] Johnson defines the noun "proportional" as meaning: "Having a settled comparative relation; having a certain degree of any quality compared with something else."[200] Johnson then defines the adjective "proportionate":

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[195] *Id*.

[196] *Id*.

[197] *Id*.

[198] *Id*.

[199] *Id*.

[200] *Id*.

"Adjusted to something else, according to a certain rate or comparative relation."[201] As Locke says: "In the state of nature, one man comes by no absolute power to use a criminal according to the passions or heats of his own will, but only to retribute to him, so far as convenience dictates, what is *proportionate* to his transgressions."

In sum, the best dictionary definitions of "necessary" from Johnson's *Dictionary* are "needful and proper" or "congruent and proportional." In fact, if one goes purely by the dictionary definition, one might even think that the best meaning is the strict one advanced by Jefferson and the State of Maryland. At the very least, there is no support for the Hamilton/Marshall position.

If one looks at the other dictionaries available during the founding era, nothing changes. For definitions of "necessary," one will find: "Needful, indispensably requisite; conclusive, decisive by inevitable consequence; fatal, impelled by fate."[202] "Needful, unavoidable, indispensable."[203] "That which must be indispensably done or granted; that without which a thing cannot exist; impelled by an irresistible principle; conclusive; followed by inevitable consequence."[204] "Needful, requisite, indispensable, unavoidable, inevitable, fatal, conclusive, decisive."[205] "Needful, fatal, conclusive."[206] "Needful; indispensably requisite; not free; impelled by fate; conclusive, decisive by inevitable consequence."[207] For definitions of "needful," one

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[201] *Id.*

[202] JOHN ASH, NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775).

[203] NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (20th ed. 1763).

[204] BARCLAY'S UNIVERSAL ENGLISH DICTIONARY (1792).

[205] THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (17th ed. 1794.).

[206] WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY (1788).

[207] 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) (same definition).

finds: "necessary, wanting";[208] "necessary, useful";[209] "necessary; not to be done without; indispensably requisite";[210] and "necessary, indispensably requisite."[211]

The prosecution rests.

None of this linguistic evidence is surprising once one grasps the etymological roots of "necessary." One finds in the *Barnhart Dictionary of Etymology*: "*About 1380, necessarie* needed, required, essential, in Chaucer's translation of Boethius' *De Consolatione Philosophiae*; borrowed, perhaps in some instances through Old French *necessaire*, and directly from Latin *necessarius*, from *necesse* unavoidable, indispensable, necessary; originally, no backing away (*ne* -not + Latin *cessis* withdrawal, an abstract noun to *cedere* withdraw; see. CEDE)."[212] A founding generation well schooled in Latin[213] would have understood the significance of a term drawn from "necessarius."

There is one final dictionary definition of the word "necessary" which we think it is helpful to understand and which explains why modern readers should be outraged by Hamilton and Marshall's cavalier reading of "necessary" to mean "convenient" or "useful." Noah Webster's 1828 *American Dictionary of the English Language*, which was the first dictionary of English as spoken in the United States rather than the United Kingdom, had the same sturdy definition of

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[208] ASH, *supra* note 202

[209] BAILEY, *supra* note 203.

[210] BARCLAY'S, *supra* note 204.

[211] DYCHE & PARDON, *supra* note205-; PERRY, *supra* note 206; SHERIDAN, *supra* note 207.

[212] THE BARNHART DICTIONARY OF ETYMOLOGY 697 (Robert K. Barnhart, Ed. 1988).

[213] *See* CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT 13 (1994).

necessary as did Samuel Johnson's dictionary published in 1755 in Great Britain. Webster defined "necessary" as an adjective as follows:

> 1) That must be; that cannot be otherwise; indispensably requisite. It is necessary that every effect should have a cause. 2) Indispensible; 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.[214]

These quotations are of critical importance because they show that in the United States, as well as in the United Kingdom, nine years *after* John Marshall tried to redefine "necessary" to mean "convenient" or "useful," ordinary Americans -- and not Britisher poets, playwrights, and political philosophers or lawyers -- were still reading necessary to mean "needful" or "congruent and proportional" and not to mean "useful" or "convenient." As a matter of dictionary usage, both Samuel Johnson and Noah Webster agreed that **"**necessary**"** meant a whole lot more than "convenient" or "useful." This does not necessarily mean that *McCulloch v. Maryland* was wrongly decided. The law creating the Bank of the United States, without its objectionable monopoly feature, may well have been "needful and proper" or "proportional" or "congruent." It does mean, however, that the famous dictum from Chief Justice Marshall's opinion in *McCulloch v. Maryland* should be confined to the ashbin of history.

[214] NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

IV. Corpus Linguistics Analysis of "Necessary"

In our quest to undercover the original meaning of "necessary" in Article I, Section 8, clause 18, we rely not only on dictionaries, but also on a new technique for uncovering original public meaning called *corpus linguistics.* This technique allows us to prove that ordinary American, and some United Kingdom. speakers of English, in fact agreed with our reliance on some of the dictionary definitions discussed above. We firmly believe, based on a corpus linguistics analysis, that the Framing generation meant "necessary" to mean at least "needful" and not "convenient" or "useful" and that this conclusion on our part was not merely an artifact of the Framers' reliance on Samuel Johnson's *Dictionary of the English Language* of 1755 or 1785**.** The test that should be used for the meaning of the Necessary and Proper Clause is the test of whether a law is "needful and proper" or, in modern terms, whether it is "congruent and proportional."

We agree with former U.S. Supreme Court Justice Antonin Scalia that dictionaries are an invaluable guide to knowing the original public meaning of the words of a constitutional or statutory text. Nonetheless, dictionaries are not infallible. Johnson's *Dictionary*, for example, quotes primarily playwrights, poets, and political philosophers and high-achieving lawyers in offering his definitions. He thus says that "commerce" means more than buy, sell, or travel because a poet talked about having commerce with God![215] Forgive us for being skeptical, but an ordinary Englishmen might very well not have used the word "commerce" in such a highfaluting way. It may be that Samuel Johnson's *Dictionary* was too upper crust to catch the

[215] JOHNSON, *supra* note 191.

meaning ordinary speakers of English in the United States and in the United Kingdom had in 1787. The United Kingdom, for example, contains a notorious caste system of which language and accent are but a part. A potential solution to this problem is the growing appeal of corpus linguistics as a supplement to or even a replacement for dictionaries.

Corpus linguistics is thus a research tool quickly gaining popularity among originalist scholars. Section A of this Part introduces corpus linguistics and describes its strengths and weaknesses. Section B explains this article's methodology in using corpus linguistics to determine the original public meaning of "necessary" and to consider whether "convenient" or "useful" are synonyms for "necessary." The subsequent sections test the primary textual and linguistic arguments of the *McCulloch* decision. Section C examines whether the synonyms proposed by counsel for McCulloch and accepted by the Court were actually 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," when used in conjunction with the word "proper," meant something less than "indispensable."

A. Introduction to Corpus Linguistics

Corpus linguistics represents a novel approach to originalist research.[216] In order to make an argument based on the original public meaning of a text, it can be helpful to establish how

[216] *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).

words were used by ordinary Americans at the time a given constitutional provision was adopted.[217] However, researchers have often struggled to find relevant sources, "at least in sufficient quantity,"[218] 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.[219] 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.[220] Moreover, dictionaries typically do not define phrases consisting of more than one word.[221] 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."[222]

A corpus is a searchable database of texts. It may be general, containing materials from various genres, or subject-matter specific, such as a corpus of Supreme Court opinions. The databases often contain thousands of texts,[223] alleviating concerns over small sample sizes. Searches yield objective results that can be described quantitively. Corpuses are often used to perform "concordance" and "collocate" analyses. A "concordance" lists sentences, excerpted from

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[217] If the public meaning of a word would be a technical term of art, then ordinary usage would not be as helpful. *See infra* --.

[218] James C. Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. FORUM 20, 21-22 (2016).

[219] *See* Lee & Phillips, *supra* note 216, at 278.

[220] Phillips, Ortner & Lee, *supra* note 218, at 22.

[221] *Id*.

[222] 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).

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

texts in the database, that contain a certain keyword. A concordance analysis is useful for learning about the contexts in which words are used.[224] "Collocates" are the words that most frequently appear nearby a keyword. A researcher can limit his analysis to words that appear immediately before or after a keyword, or she can search for the words that most commonly appear within three or four words of the keyword. Collocate research is consistent with the canon of textual interpretation *noscitur a sociis*, which suggests that a word can be "known by its associates."[225] 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.[226]

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, 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,[227] but has also relied on corpus methods from the bench.[228] 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 whether it could encompass false as well as true statements.[229] Based on a collocate analysis, the court established that the word "information" was "regularly used in

[224] *See* Phillips, Ortner & lee., *supra* note 218, at 23, 25.

[225] Lee & Phillips, *supra* note 216, at 291-92.

[226] Mouritsen, *supra* note 222, at 201-02.

[227] *E.g.*, Lee & Phillips, *supra* note 216; Phillips,Ortner & Lee, *supra* note 218.

[228] *See, e.g.*, State v. Rasabout, 2015 UT 72, ¶¶ 88-92 (Lee, J., concurring) (using a combination of collocate and concordance methods to confirm the meaning of the word "discharge").

[229] People v. Harris, 885 N.W.2d 832, 838-39 (Mich. 2016).

conjunction with adjectives suggesting it may be both true and false."[230] It confirmed this finding using more contextualized concordance research.[231] The court expressed confidence in this new methodology, asserting that "corpus linguistics . . . is consistent with how courts have understood statutory interpretation."[232]

Corpus-linguistic methods have even found a receptive audience in the U.S. Supreme Court. The Court had informally relied on corpus 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*[233]—in which Justice Breyer performed searches in newspaper databases in order to assess the ordinary meaning of the phrase "carries a firearm"—as "a corpuslite analysis."[234] More recently, the Court appeared to have been influenced by a corpus-linguistic analysis in an amicus brief in the case *FCC v. AT&T*.[235] Finally, in a 2018 dissent, Justice Thomas cited corpuses for the proposition that "[t]he phrase 'expectation(s) of privacy' does not appear in . . . collections of early American English texts."[236]

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

[230] *Id.* at 839 & n.33.

[231] *Id.* at 839 & n.34.

[232] *Id.* at 839 n.29 (emphasis omitted).

[233] 524 U.S. 125 (1998).

[234] Phillips,Ortner & Lee, *supra* note 218, at 27.

[235] 562 U.S. 397 (2011); *see* Mouritsen *supra*, note 225, at 158-59, 191; Ben Zimmer, *The Corpus in the Court: 'Like Lexis on Steroids,'* ATLANTIC (Mar. 4, 2011), https://www.theatlantic.com/national/archive/2011/03/the-corpus-in-the-court-like-lexis-on-steroids/72054.

[236] Carpenter v. United States, 138 S. Ct. 2206, 2238 & n.4 (2018) (Thomas, J., dissenting).

stand out in an analysis.[237] In such cases, corpus research causes no harm; it simply fails to answer the question at hand. More concerningly, the methodology requires the researcher to make judgment calls related to research design and interpretation, which could open the door to bias.[238] 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.[239] Finally, the researcher must decide whether to interpret the meaning of an "abstract concept[] . . . thickly to include specific examples of the concept or thinly to define only the concept itself."[240]

This law review article hopes to 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, this article attempts to be as transparent as possible regarding its 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.[241] 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,[242] leaving readers free to

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[237] Lawrence M. Solan, *Can Corpus Linguistics Help Make Originalism Scientific?*, 126 YALE L.J. FORUM 57, 57 (2016).

[238] *Id.* at 61.

[239] Mouritsen, *supra* note 222, at 202.

[240] Solan, *supra* note 237, at 57, 63.

[241] *See* Mouritsen, *supra* note 222, at 202.

[242] *See* Appendix.B, *infra*.

draw their own conclusions. Finally, the article interprets the meaning of the word "necessary" thinly and does not address whether specific concrete examples may fall within its definition. Certainly, the purpose of this article is not to relitigate the question of whether the national bank itself was "necessary."

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."[243] 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*.

B. Methodology

This article employs five corpuses 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 (1760-1849). The first two analyses rely exclusively on the American corpuses. 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 Corpuses

Corpus	Country	Years	Specialization	Details
Corpus of Founding Era American English	United States	1760-1799	General	https://lcl.byu.edu/projects/cofea/

[243] Lee & Phillips, *supra* note 216, at 302.

(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 three decades leading up to the Constitutional Convention (1760-1789); the three decades between the Convention and the *McCulloch* decision (1790-1819); and the three decades following the *McCulloch* decision (1820-1849). Unfortunately, most of the corpuses 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 corpuses. Statistics describing the second time period reflect texts drawn from the COFEA, COHA, Google Books, and Supreme Court corpuses. Statistics describing the third time period reflect texts drawn from the COHA, Google Books and Supreme Court corpuses. Employing multiple corpuses in each period should diminish any concerns raised by reliance on different corpuses in assessing texts from different time periods.

The three analyses are, at a high level, designed to be consistent with the standard academic approach to corpus linguistics 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.[244] It is hoped that transparency of execution will compensate for novelty of design.

It is common practice to gain insight into the meaning of a word by assessing its most common collocates. However, this article is not simply interested in the meaning of the word "necessary." Section IV.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. Thus, it evaluates the overlap between the top collocates of the word "necessary" and its proposed synonyms. Likewise, Section IV.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.[245] However, because this information is meaningless in isolation, Section IV.D also assesses how frequently the proposed synonyms are qualified by words of comparison. Finally, Section IV.E examines the use of the phrase "necessary and proper" using a traditional concordance analysis.

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[244] For 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* Lee & Phillips, *supra* note 216, at 308-09.

[245] Frequency 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.*, *id.* at 299.

C. Synonyms of "Necessary"

During oral arguments, counsel for both McCulloch and the State of Maryland proposed various synonyms for the word "necessary," in an effort to establish its meaning. Arguing for McCulloch, Daniel Webster suggested that "necessary" was synonymous with "proper," "suitable," "fitted," "best," and "most useful."[246] The Attorney General claimed that "necessary" meant "useful," "appropriate," "needful," or "adapted."[247] On behalf of Maryland, Walter Jones argued that "necessary" meant "needful" in the sense of "indispensably requisite."[248] In the end, writing for a unanimous Court, Chief Justice Marshall equated "necessary" with the words "convenient," "useful," and "essential." This Section aims to test whether Marshall truly chose the closest synonyms among those proposed.

A synonym has "the same or nearly the same meaning" as another word.[249] Perfect synonyms can be used interchangeably. If two words are close synonyms, they should be frequently used in similar contexts and, as a result, surrounded by similar words. 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

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[246] McCulloch v. Maryland, 17 U.S. 316, 324-25 (1819) (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.").

[247] *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 . . . .").

[248] *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.").

[249] *Synonym*, MERRIAM-WEBSTER DICTIONARY (2020), https://www.merriam-webster.com/dictionary/synonym.

victorious party and the Court, we selected "convenient," and "useful," two of the three synonyms mentioned in the opinion. The third synonym, "essential," is omitted from this analysis because it was closer in meaning[250] 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 corpuses that contained texts published in the given timeframe. Specifically, we searched for collocates within three words on either side of the keyword.[251] 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,"[252] 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

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[250] *Essential*, JOHNSON, *supra* note 191, at 721 (defining "essential" as "[n]ecessary to the constitution or existence of any thing" and "[i]mportant in the highest degree; principal").

[251] 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.

[252] 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.

identifying overlapping collocates in each time period. One notable shortcoming, however, was the inability to match similar words with their plurals or other tenses.[253]

Table 2 shows the overlap among the top collocates of "necessary" and the proposed synonyms in the three decades leading up to the 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. 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 hard to imagine a "defence" or "support" being described as simply convenient. The verb "enable" connotes something vital to accomplishing an end.

Conversely, the words which 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.

[253] For example, "deem" would not be matched with "deemed," nor would "supply" be matched with "supplies."

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

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."[254] The Court was convinced. 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."[255] The analysis in this Section tests that argument.

As the Chief Justice recognized, 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. However, not all words can be qualified in this manner. For instance, to many English speakers, the phrase "very mandatory" may sound awkward while the phrase "very important" may not. The great British novelist George Orwell capitalized upon this distinction in his book *Animal Farm*. 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."[256] 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 corpuses 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

[254] McCulloch v. Maryland, 17 U.S. 316, 388 (1819) (argument by Mr. Pinkney).

[255] *Id.* at 413-14 (1819) (suggesting as examples the phrases "necessary, very necessary, absolutely or indispensably necessary").

[256] GEORGE ORWELL, ANIMAL FARM 112 (1946).

times the keyword (*e.g.*, "necessary") occurred in that same time period.[257] To provide context, we collected the same statistics for the words "needful," "requisite," "convenient," and "useful." Finally, we calculated the average percentage of occurrences[258] in which the words were qualified by comparative words in each timeframe across corpuses.

Table 3 shows the average percentage of occurrences in which each set of words was qualified by a given comparative word. Across time, "necessary" is rarely preceded by the comparative words "more," "most," and "very." Likewise, the synonyms proposed by counsel for Maryland were rarely preceded by comparative words. 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. 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. Not only is the difference large, but it is also statistically significant, and controlling for the corpus used and timeframe analyzed leads to no observable change in the results.[259] 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%**	1760-1789: **0.51%**	1760-1789: **0.54%**	1760-1789: **1.73%**

[257] 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.

[258] The results are essentially the same when median is used instead of average.

[259] *See* Appendix.A (regression analysis).

	1790-1819: **0.91%** 1820-1849: **0.68%**	1790-1819: **0.54%** 1820-1849: **0.44%**	1790-1819: **0.31%** 1820-1849: **0.26%**	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: **1.2%**	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: **7.5%** 1790-1819: **8.39%** 1820-1849: **8.64%**	1760-1789: **5.31%** 1790-1819: **2.87%** 1820-1849: **3.59%**	1760-1789: **19.9%** 1790-1819: **17.85%** 1820-1849: **19.88%**

Finally, the fact that "absolutely" and "indispensably"—both "degree adverbs"[260]—are among the most common collocates of "necessary," "needful," and "requisite"[261] does not undermine the argument advanced in this Section. Chief Justice Marshall cites "necessary, very necessary, absolutely [and] indispensably necessary"[262] as equivalent examples, all of which demonstrate that the word "necessary" can be understood to vary by degree. However, this articlesuggests 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. 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

[260] *Adverbs: Types*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/grammar/british-grammar/adverbs-types.

[261] *See infra* Section III.C.

[262] McCulloch v. Maryland, 17 U.S. 316, 413-14 (1819).

"completely equal" or "absolutely equal," no reader would have inferred that some lesser degree of equality must have been possible. (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.)

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." In his 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 offect [*sic*] of which is, to qualify that strict and rigorous meaning . . . .[263]

Although some modern scholars have reached similar conclusions,[264] this article is not the first to question Marshall's assertion. Gary Lawson and Patricia Granger, for instance, have suggested that, between the words "necessary" and "proper," "proper" was "the more restrictive term"[265] -- or, more precisely, that it describes a different set of restrictions than does "necessary." This Section explores whether the phrase "necessary and proper" conveys a less "rigorous" meaning than would the word "necessary" alone.

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[263] *Id.* at 418-19.

[264] *See, e.g.*, Bray, *supra* note 136, 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").

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[265] Lawson & Granger, *supra* note 23, at 289.

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 nuanced meaning that would be all but impossible to capture without 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.[266] The phrase only appeared six times in the British corpus, so we analyzed all six excerpts. We selected six of the first seven[267] excerpts returned from the American corpus.[268] The results are included in the appendix at the end of thisarticle.

As used in the historical texts, the phrase "necessary and proper" does not appear to mean anything less than "indispensable." 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. For instance, one excerpt refers to "perform[ing] all the duties that are *necessary and proper* for a Quarter-Master General." 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." 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 invite the United States to accede to a treaty of alliance. In England,

[266] The Hansard Corpus begins in the year 1803. We analyzed texts spanning sixteen years in both corpuses.

[267] 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.

[268] 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.

members of the House of Lords discussed how "a judge may be guilty of several acts . . . which would render his removal *necessary and proper*." 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 anything less than "indispensable."

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. Certainly, the words "fit" and "wise" do not imply that the desired action is mandatory. Nonetheless, the pastor seems to assert that only fear of eternal damnation will restrain people from making poor choices. Thus, citizens will only obey the laws of man if they align with the laws of God.[269] 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 excepts suggest.

V. A Brief Note on Agency Law and State Constitutions

Hamilton and Marshall made an argument about common usage, so we have focused our attention on common usage as well. It is quite possible, however, that common usage is the wrong place to look for the meaning of "necessary" in the Necessary and Proper Clause. The Constitution, after all, is not an act of common speech. It is a legal document, written in the

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

language of the law.[270] 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,[271] but 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 ("Bill of Attainder" or "Privileges and Immunities") might not have been, but the phrase would be understood to hold a meaning in those agency-law settings that might differ from its meaning in common speech.

This actually cuts against the position taken by Jefferson and the State of Maryland. 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, how the term was generally understood in the specific context of agency instruments. Incidental powers were "necessary" if they were indispensable, but also if they were significantly important to the principal power. For example, a conveyance of a pond would carry as a necessary incident conveyance of the fish because the fish "are so annexed to and so necessary to the well-being of the inheritance, that they shall accompany the land wherever it vests."[272] A power might

[270] *See* McGinnis & Rappaport, *supra* note 137.

[271] *See* Mikhail, *supra* note 22, at 1114-21.

[272] 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *427-28.(1765-69).

also be necessary, and therefore incident, if *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 extent credit to the customer if that was customarily a power held by factors of that type."[273] Because the Constitution is an agency instrument, this agency-law meaning is a better account of the phrase "necessary and proper" in Article I than would be the 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." 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 even necessary.[274] There are clauses in the Constitution that confer such discretion on governmental actors, but the Necessary and Proper Clause is not among them.[275]

All 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. One of us has elsewhere catalogued and analyzed every such usage.[276] The bottom line is that "[t[here was no usage of the term 'necessary' in state constitutions in which the term

[273] LAWSON & SEIDMAN, *supra* note 23, at 83-84.

[274] *See* Natelson, *supra* note 23, at 72-75.

[275] For a compendium of such clauses, see Lawson & Granger, *supra* note 23, at 277-78.

[276] *See* Gary Lawson & Guy I Seidman, *An Ocean Away: Eighteenth-Century Drafting in England and America*, *in* LAWSON, MILLER, NATELSON & SEIDMAN, *supra* note 23, at 42-49.

unambiguously means nothing more than 'helpful' or 'related to in a rational fashion.' "[277] When state constitutions meant "convenient," they said "convenient."[278]

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. It seems to us, however, that we can venture one step further.

The alternative definition of "necessary" to "convenient" or "useful" put forward in *McCulloch*, which equates "necessary" with "indispensable," would likely be correct if the term arose in an ordinary conversation. But in the specific context of the Necessary and Proper Clause, which is designed to confirm and clarify rather than eliminate the incidental power of Congress, that strict definition is a poor fit. James Madison, recall, put forth a definition for "necessary" that falls between the extreme positions argued in *McCulloch.* For 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."[279] That intermediate account is consistent with the background rules of agency law for incidental powers; "if there were no Sweeping Clause, one

[277] *Id*. at 45.

[278] *See id.* at 46-47.

[279] Madison, *supra* note 15, at 448.

would likely infer something very much like Madison's standard as an implication from the grant of enumerated powers."[280]

A full defense of Madison's position would be a separate article. But it does seem as though a good way to express what Madison – and the agency-law principles that he echoed – was aiming for is to say that Congress's exercise of incidental powers must be *congruent and proportional* to the principal power being implemented. That is considerably more demanding than a test of convenience, usefulness, or rationality, but less demanding than a test of indispensability. If it is not a perfect expression of the original meaning of "necessary" in the Necessary and Proper Clause, it is a closer approximation than the available alternatives.

Our challenge to the sanctity of *McCulloch's* dictum 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 power cases. That absolutely is not our project in this Article.[281] We want to see the Necessary and Proper Clause applied correctly in a proactive way in new cases that the Supreme Court decides, with a few minor suggestions for over-rulings or clarifications that do not make much of a change in existing law. Accordingly, 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 power.

We emphasize that we are not here trying to say whether any of those cases are rightly or wrongly decided, in the abstract. That would involve considerations that go far beyond the scope

[280] Lawson, *supra* note 1541, at 151.

[281] Professor 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 "carryi[] into Execution" other federal powers, or any other doctrines that elsewhere concern him.

of this article. Rather, we are just trying to assess the consequences of one change in doctrine, holding all else constant. We thus take for granted the current doctrine on the scope of the commerce power, the meaning of "proper" and "for carrying into Execution," the law of separation of powers, and every other element of doctrine except the cause-effect relationship described by "necessary." Nor do we question the application by the Court of those other doctrines in the cases we discuss. We are trying to isolate the effects of moving to a congruence and proportionality test for causal 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 the correct test for necessity while resolving all other matters, rightly or wrong as they were actually resolved in that case, in favor of the exercise of power.

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. The Bank of the United States, by issuing banknotes, greatly facilitated federal action in spending money, taxing money, and paying employees. In theory, this could have all been done with gold and silver coins, but it would have been a downright nuisance to have to rely on precious metals for currency – and, importantly, doing so might have *curtailed* commerce instead of *carrying it into execution*. The only feature of the Bank which was likely unconstitutional on 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. The Supreme Court could have simply refused to enforce any language about monopoly in the Bank and let matters go after that.

A second controversy over federal power in the antebellum Republic, which pitted Hamiltonians against Madisonians in the political departments, 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.[282] That public spending on such items is congruent and proportionate for 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."[283]

A third controversy that explicitly raised 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 had under the Necessary and Proper clause, even though Article I, Section 8, clause 5 only gives Congress the power "To coin money," which presumes the minting of gold and silver coins.[284] When President Abraham Lincoln announced that the Treasury would be printing paper money during the bloody and close-fought U.S. Civil War, the federal budget and incoming tax revenues were a total mess, and it is not an exaggeration to say that the printing of paper money was *indispensable* to the North's ability to win the war and to suppress the southern slaveholders' rebellion. It would easily pass a congruence and proportionality test for causal connection between means and ends.

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

[283] *Id*. at 626.

[284] *But see* Natelson, *supra* note 67

The printing of paper money in peacetime after the Civil War[285] followed the practice of all the foreign nations of the world, and it was again "congruent and proportional" to the collection of taxes, the payment of the government's debts, and the economy's growth. There were none of the problems with creation of a monopoly Bank which attended *McCulloch v. Maryland*.

The next case that roiled the waters as to the scope of the federal Commerce and Necessary and Proper Clauses is raised by the federal law upheld in *Champion v. Ames*,[286] which forbade the carrying, not just selling, of lottery tickets across state lines. As two of us have said:

> It is hard to see how carrying an item across State line 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.[287]

With that in mind: It would as a practical matter be impossible for the federal government to use its commerce power to police lottery tickets that were sold, but not those lottery tickets that a friend carried to you across a state line. The tickets do not care whether they are sold or merely transported, and there is no way on the face of the tickets to tell what is happening with them. Thus, Congress can use what Professor Akhil Reed Amar has called "the extension cord of the

[285] *See* Julliard v. Greenman, 110 U.S. 421 (1884).

[286] 188 U.S. 321 (1903).

[287] CALABRESI & LAWSON, *supra* note 21, at 697.

Necessary and Proper Clause"[288] to facilitate its regulation of what was surely a pecuniary market in interstate gambling.

The next stop in our saga is *The Shreveport Rate Cases.*[289] 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. The Supreme Court ruled, in a landmark opinion by Associate Justice Charles Evans Hughes, that Congress, and not the States, controlled interstate commerce, as well as wholly intrastate Texas commerce that has "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."[290] Strictly speaking, the wholly intrastate Texas commerce was not "Commerce among the several States," but it was congruent and proportionate to protect federal interstate commerce by regulating the intrastate commerce that was driving federal commerce out of business. The Court applied a causal test that was obviously stricter than rational basis. It did not rely on Marshall's dictum, so nothing would change if that dictum was rejected.

The next step in the saga came with the Supreme Court's opinion in *Hammer v. Dagenhart,*[291] a case in which Congress ruled 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. There was obviously buying and

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

[289] The Shreveport Rate Cases, 234 U.S. 342 (1914).

[290] *Id*. at 351.

[291] Hammer v. Dagenhart, 247 U.S. 251 (1918).

selling of lumber in a national commercial market going on in *Hammer v. Dagenhart*, and state lines were being crossed as in *Champion v. Ames*. 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:* You cannot tell by looking at lumber how it was made..

Justice Oliver Wendell Holmes addressed this issue in his dissent in *Hammer v. Dagenhart*. The federal law in *Hammer* was enacted by the wealthy New England, Northeastern, and Midwestern States and targeted at competition from poor southern States, which did not have laws forbidding child labor. Factories were shutting down in New England and re-opening in the Carolinas because it cost less to produce there, so the companies could lower their prices. This has the effect of causing what economists call a race to the bottom – the state that pays the lowest wage gets the most industry moving to it. The U.S. Constitution does not bar races to the bottom, per se, but where there is constitutional power for the federal government to act, it can end a race to the bottom by establishing uniform rules. As Justice Holmes wrote in dissent:

> The act does not meddle with anything applying 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 on the activities of the States. Instead of being encountered by a prohibitive tariff at their boundaries the State

encounters the public policy of the United States which it is for the Congress to express.[292]

In 1941, Justice Holmes' dissent became the unanimous majority opinion of the Supreme Court in *United States v. Darby Lumber Co*.[293]

Before that happened, however, the Court decided *National Labor Relations Board v. Jones & Laughlin Steel Corporation,*[294] in which the Supreme Court switched from striking down a significant amount of congressional Commerce Clause legislation to upholding almost all of it. Along with *Darby,* it is one of the cornerstones of the Supreme Court's Commerce Clause jurisprudence today in 2022.

Jones & Laughlin was written by Chief Justice Charles Evans Hughes, who also wrote the opinion in the *Shreveport Rates Cases*. The issue in *Jones & Laughlin* was whether Congress had power to pass the National Labor Relations Act of 1935, which for the first time gave employees in businesses engaged in interstate commerce a federally protected right to unionize. Jones & Laughlin Steel Corp. was a national corporation heavily engaged in interstate commerce. It had commercial operations in Pennsylvania, Michigan, Minnesota, Ohio, Tennessee, New York, Louisiana, and West Virginia. The company fired ten out of more than 80,000 employees for trying to form a union. 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. The company challenged the NLRB's action in court, arguing based on prior caselaw that its firing of a mere ten workers had at most an indirect effect on interstate

[292] *Id.* at 281 (Holmes, J., dissenting).

[293] 312 U.S. 100 (1941).

[294] 301 U.S. 1 (1937).

commerce. The company also argued, as case law clearly established in 1937, that manufacturing is not commerce.

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 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 or obstructions, Congress cannot be denied the power to exercise that control.* [295]

This language obviously sounds more like "congruence and proportionality" than "rational basis. Chief Justice Hughes also mentioned "[t]he close and intimate effect which brings the subject within the reach of federal power."[296] Hughes continued, in language that Chief Justice Rehnquist later used in *United States v. Lopez*[297]:.

> Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be expanded so as to embrace effects upon interstate commerce so indirect and remote that to embrace the, in view of our complex society, would effectually obliterate the distinction between what is

[295] 301 U.S. at 36-37 (emphasis added).

[296] *Id*.at 38.

[297] 514 U.S. 549 (1995).

> national and what is local and create a completely centralized government . . . . The question is necessarily one of degree . . . .
>
> That interstate activities, by reason of close and intimate relation to interstate commerce, may fall within federal control is demonstrated in the case of carriers who are engaged in both interstate and intrastate transportation.[298]

The last line is obviously a reference to the *Shreveport Rate Cases*. The overall language, including the reference to "substantial" effects and "close and intimate" relations, indicates that nothing would change in this case if the test for necessity was congruence and proportionality. In all likelihood, that is effectively the test that the Court actually employed.

Although everybody for eighty-five years has called *Jones & Laughlin* a Commerce Clause case, it is obviously 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 buying and selling or of travelling across a state line, but 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 says, "a close and substantial relation" to interstate commerce. But the vehicle for regulating those close and substantial relations is the Necessary and Proper Clause, not the Commerce Clause, 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 manufacture,"[299] that would not decide the case without also concluding that the Necessary and Proper Clause could not fill the gap.

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[298] 301 U.S. at 37-38.

[299] *Id.* at 76 (McReynolds, J., dissenting).

That brings us to *United States v. Darby* in 1941. 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 via a prohibition on interstate shipment of goods produced in violation of the Act's condition. In other words, it used the same strategy that the Court had rejected in *Hammer v. Dagenhart*. The Supreme Court overruled *Hammer* and upheld the law.[300] Another part of the Act imposed wage and hour conditions on businesses employing persons engaged in the production of goods for interstate commerce. That is a step beyond. Many of the workers affected by the federal Fair Law Standards Act rarely if ever crossed a state line. The Supreme Court invoked *McCulloch v. Maryland,* and therefore implicitly the Necessary and Proper Clause, in reaching its unanimous holding in *U.S. v. Darby* 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. See McCulloch v. Maryland, 4 Wheat. 316, 421."[301] This language sounds more like Marshall's dictum than any of the previous cases discusses here. More pointedly, the Court later said that Congress "may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities."[302] While not quite adoption of a rational basis test, it comes close, although the Court twice noted that there was a "substantial" effect on interstate commerce.[303] Nonetheless, we doubt whether anything would change with a congruence

[300] 312 U.S. at 115-17.

[301] *Id*. at 118-19.

[302] *Id.* at 121.

[303] *See id*. at 119, 120.

and proportionality test. The Court found it key that, as with lottery tickets and lumber, 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.[304]

That seems to meet a congruence and proportionality test.

Unfortunately for the law, neither Chief Justice Hughes in *Jones & Laughlin* nor Chief Justice Stone in *Darby* explain that their decisions were actually grounded on the Necessary and Proper Clause rather than the Commerce Clause. This was harmful for three reasons.

First, it left those on the political right convinced that these two decisions were illegitimate power grabs since wholly intrastate activities, of which there are many, are obviously not "Commerce . . . among the several States." This bred a certain cynicism among lawyers, which gave fuel to the wrong-headed Legal Realist school that all of law is just politics. Today, that view is held by many of the people of the United States and by many in Congress, in the White House and even in the Supreme Court itself. Deciding a critically important opinion like *Jones & Laughlin Steel Corp*. correctly is simply not good enough. The legitimate constitutional reasons

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[304] *Id*. at 117-18.

for the decision have to be clearly spelled out. Neither Chief Justice Hughes in *Jones & Laughlin Steel Corp*. nor Chief Justice Stone in *United States v. Darby* came even close to living up to their duty to explain how We the People's constitution had led them inexorably to the decisions they reached.

The second unfortunate consequence of these two badly written "Commerce Clause" opinions is that, together with a third opinion which we shall address shortly, they led the American people and everyone in Congress to think they could pass national laws on any federalism subject they wanted to with impunity. This led to a lot of bad federal law-making in contexts which were much closer cases under a congruence-and-proportionality standard than were the contexts in *Jones & Laughlin Steel Corp*. and *United States v. Darby*.

The third, and final, bad effect is that it led the Court, when it revived some measure of federalism in *United States v. Lopez*, to make the new test of what is in the "Commerce Power" depend on whether "a wholly intrastate activity *substantially* affected interstate commerce." That is not the right test for 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 New Deal so-called Commerce Clause case that is in fact a Necessary and Proper Clause case which we mention is *Wickard v. Filburn*.[305] In that case, a farmer named Filburn sued Wickard, the Secretary of Agriculture, to enjoin enforcement of a marketing penalty imposed under the Agricultural Adjustment Act of 1938 for the value of that part of his 1941 wheat

[305] 317 U.S. 111 (1942).

crop that was available for market in excess of the market quota established for his farm. Filburn argued that it was unconstitutional for the government to penalize him for the mere act of growing wheat on his own farm.

The statute in question was a wacky New Deal effort to help impoverished farmers by raising the price of wheat. In doing this, the New Dealers of course raised the price of bread to urban and suburban consumers in the midst of the Great Depression. To artificially raise the price of wheat, the federal government ordered farmers to grow less wheat in 1941 than they had grown previously. In Filburn's case, he was ordered to grow no more than 11.1 acres of wheat, but he sowed 23 acres of wheat instead. He was penalized $117.11 for doing this. Filburn refused to pay the penalty, arguing that Congress had no power to tell him what he could grow on his own land. Filburn had in the past: 1) sold wheat; 2) fed it to livestock on his farm, which livestock he then sold; 3) consumed with his family the wheat; and 4) set aside some portion for the following seeding. Filburn did not disclose how he intended to dispose of the excess wheat he had grown, 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 says that "The Congress shall have Power . . . To regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes."[306] 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 wheat 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

[306] U.S. CONST. art. I, § 8, cl. 3.

simply irrational to conclude that the Commerce Clause could be legitimately invoked in support of this law.

This brings us to the question of 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" or "convenient" or "congruent and proportional."

The government argued in defense of its law that any home-grown wheat that Wickard 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. The government this time expressly relied on the Necessary and Proper Clause.[307] Justice Jackson said in his unanimous opinion for the Court in 1942:

> "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 ad market conditions. This may arise because being in marketable condition such [home grown] wheat 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

[307] *See id*. at 119 (noting that the government argues that application of the law to home production was "sustainable as a 'necessary and proper' implementation of the power of Congress over interstate commerce").

> 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.[308]

Justice Jackson's "overhangs the market" rationale for this program breaks the barrier of congruence and proportionality. It gives the federal government total power over 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 national marketplace, means the federal government effectively has the power to regulate all acts of buying and selling. If so, Congress could presumably pass a law regulating the prices charged by prostitutes to their customers where prostitution is legal. Under *Wickard v. Filburn*, Congress could also pass laws regulating sexual acts of friendly fornication on the ground that such sex "overhangs the market" for prostitution. This is an absurd construction of the Necessary and Proper Clause. 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 proportionate" to the exercise of any federal power for the government to do so. *Wickard v. Filburn* is wrongly decided in such a profound way that it must be overruled once one applies the correct standard for necessity.

The next prominent Commerce and Necessary and Proper Clause case which the Supreme Court decided is *Heart of Atlanta Motel v. United States*.[309] This case involved the constitutionality of the Civil Rights Act of 1964, which prohibits discrimination on the basis of

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[308] *Id.* at 128-29.

[309] 379 U.S. 241 (1964).

race, color, religion, or national origin in places of public accommodation, including hotels and restaurants. In this case, the Heart of Atlanta Motel was located in downtown Atlanta, near two major highways, and approximately 75% of its guests were from out of state. Prior to the passage of the 1964 Civil Rights Act, Black Americans, and even Black ambassadors from free nations in Africa, found it incredibly hard to find hotel and restaurant accommodations in roughly one-third of the United States where "whites only" policies were in place and enforced. This national disgrace led to the passage of the Civil Rights Act of 1964, which forbade all forms oof such discrimination.

No one doubted that Congress could regulate the transportation of people across state lines; that was clearly within the power to regulate interstate commerce.[310] But the commercial lodging of those people after transit, while clearly commerce, was not so clearly commerce among the several States. The Court nonetheless framed its ruling in favor of the law solely in terms of an expansive view of the commerce power,[311] even though the Court quoted President Kennedy's proposed civil rights bill, which included specific reference to the Necessary and Proper Clause.[312] Justice Black's concurring opinion, however, recognized the importance of the Necessary and Proper Clause[313] and found it more than adequate to support the law given the *Shreveport Rate Cases* and a focus on the aggregate effects of racial discrimination on commerce.[314] As with

[310] *See id*. at 356-57.

[311] *See id*. at 255-58.

[312] *See id*. at 246.

[313] *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).

[314] *See id*. at 271-75.

Darby, if one looks at the class of activity rather than any one activity in isolation, surely the result would not change from formulating the inquiry as congruence and proportionality.

We have already seen how *Katzenbach v. McClung*,[315] a companion case to *Heart of Atlanta Motel*, characterized *McCulloch* as establishing a rational basis test.[316] That was a needless mistake. If Justice Black's analysis of necessity was correct in *Heart of Atlanta*, it was just as correct in *McClung*. These cases unfortunately continue the Court's long-standing error of treating matters as Commerce Clause issues when they are really Necessary and Proper Clause issues.

The other pre-*Lopez* case that might come out differently on a congruence-and-proportionality standard is *Perez v. United States*.[317] Perez was convicted under a federal statute prohibiting loan-sharking, which typically takes place on a street corner within the confines of a single State. Congress nonetheless federalized it, on the theory that loan sharking was often connected with organized crime, which had interstate effects. The Court agreed with this rationale given the prior case law,[318] with Justice Stewart the lone dissenter.[319] Once again, the entire discussion was framed in terms of the commerce power; the Necessary and Proper Clause was not event mentioned. Nonetheless, no one thinks that street-corner loan-sharking is "Commerce among the several States." Rather, Congress and the Court thought that it might have a "substantial effect" on such commerce. But the Commerce Clause is a Commerce Clause, not an Effects-on-Commerce Clause. If Congress can reach activity that has an effect on commerce, it must be on

[315] 379 U.S. 294 (1964).

[316] *See supra* --.

[317] 402 U.S. 146 (1971).

[318] *Id.* at 150-56.

[319] *Id.*at 157 (Stewart, J., dissenting.).

the rationale of the *Shreveport Rate Cases* that such regulation is a permissible incident of the commerce power. Once the question is posed that way, the causal links between federal power and local loan-sharking become even more attenuated than 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 a finding of non-justiciability, 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.

The Court drew a line in 1995 in *Lopez* by finding that Congress could not prohibit the possession of guns within 1000 feet of a school – at least not without making a stronger showing than it had about the connection to interstate commerce. Yet again, the Court cast its decision in terms of the Commerce Clause, restating its case law to hold that Congress can use the commerce power to "regulate the use of 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."[320] That sounds just like the 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."[321]

Lopez clearly should have been decided under the Necessary and Proper Clause, which the majority nowhere cited. 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 would do so in a fashion truer to the actual constitutional provisions

[320] 514 U.S. at 558-59.

[321] *Id*. at 561.

involved. We hope in future cases that the Court will use the congruence and proportionality understanding 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 including *United States v. Morrison*,[322] *Gonzalez v. Raich*,[323] *United States v. Comstock*,[324] and *National Federation of Independent Business v. Sebelius*.[325] But our goal here is not to provide a comprehensive account of how we think the Court should decide cases. It is simply to show that replacing the current rational basis standard for necessity with something far closer to original meaning, such as congruence and proportionality, would not by itself make dramatic changes in the case law. Indeed, the cases that would come out differently have probably already been limited to their facts.

VII. Conclusion

Today, the meaning of the term "necessary" is rarely debated, or even mentioned, in the courts. Instead, the dictum of *McCulloch* is treated as canonically dispositive of the question,[326] and attention turns to relatively implausible interpretations of "Commerce among the several States." However, the evidence uncovered in this analysis suggests that the original meaning of

[322] 529 U.S. 598 (2000).

[323] 545 U.S. 1 (2005).

[324] 560 U.S. 126 (2010).

[325] 567 U.S. 519 (2012).

[326] *See* Gardbaum, *supra* note 163, at 814.

the word "necessary" was much narrower than the meaning Chief Justice Marshall attributed to it – and certainly narrower than the meaning that case law over the past sixty years has given to it.

We aim to start a conversation rather than end it. This article does not attempt affirmatively to establish the original meaning of the word "necessary." It only tests the specific linguistic arguments on which the *McCulloch* decision rests. Our suggestion of 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*."[327] Perhaps it ought not end there.

[327] *Id.*

Appendix

A. Regression Analysis: Words of Qualification

The table below shows the results of a regression analysis. The dataset is composed of the percentages of the occurrences of the relevant words—"necessary," "needful," "requisite," "useful" and "convenient"—that are qualified—by "more," "most," or "very"—in each timeframe and each relevant corpus (for a total of 45 observations). There is no significant difference between the percentages of the occurrences of "necessary" that are preceded by a comparative word and the percentages of the occurrences of Maryland's proposed synonyms that are preceded by a comparative word. In other words, the difference cannot be distinguished from chance with 95% certainty. However, there is a large and statistically significant difference between the percentages of the occurrences of "necessary" that are qualified and the percentages of the occurrences of the Supreme Court's chosen synonyms that are qualified. In fact, using the percentages of the occurrences of the word "necessary" that are preceded by a comparative word as a baseline, Marshall's synonyms are associated with a 17-percentage-point increase in the frequency of "qualification," with a standard error of 3 percentage points. Controlling for the corpus used and timeframe analyzed leads to no observable change in the results.

Regression Analysis of Qualification by Comparison Words

	(1)	**(2)**	**(3)**
Maryland's Synonyms	0.008 (0.03)	0.008 (0.03)	0.008 (0.03)
Marshall's Synonyms	0.174*** (0.03)	0.174*** (0.03)	0.174*** (0.03)
Timeframe		Y	Y

Fixed Effects	
Corpus	Y
Fixed Effects	

B. Concordance Analysis Results

United States Examples (COFEA Corpus 1770-1786)

From George Washington to Brigadier General William Maxwell, 2 October 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 **necessary and proper** dispositions to be made. You will therefore **implicitly obey him**, and either remain where you are at present with your whole Brigade, or detatch such a part of it as His Lordship may direct.
America's appeal to the impartial world	[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 **necessary and proper** judicatories; to hear and decide all matters and causes . . . .
Acts of Connecticut 1776	[A]nd do, and perform all the duties that are **necessary and proper** for a Quarter - Master General
Discourses delivered in Lyme, North-Parish, Lord's Day, January 26, 1783. / By George Beckwith, A.M. Pastor of the Third Church in Lyme	But the **apprehension of being eternally miserable in the other world**, 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 **necessary and proper** was it, for the good of mankind in the legislature, to guard and **enforce obedience to his just laws**, by annexing eternal rewards to the obedience of merit and demerit, since no other means could be powerful enough to attain the end.
To George Washington from Major General William Heath, 6 September 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 **Spy on the Island**, Every **necessary and Proper** preparation having been made for that Purpose the Last night . . . .
From John Adams to the Duc de La Vauguyon, 1 May 1781	By the Tenth Article of the Treaty of Alliance between France and America, the most Christian King and the United States agree, to **invite or admit,**

	other Powers, who may receive Injuries from England, to make common Cause with them, and to acceed 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 acceed, I shall be ready in behalf of the United States to do, whatever is **necessary and proper** for them to do, upon the occasion.

England Examples (Hansard Corpus 1803-1819)

1805 House of Lords	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 **necessary and proper**; 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
1807 House of Commons	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, **they had a right to expect that the necessity of the sacrifice** should be proved: as the country also had a claim to be satisfied, that it was **necessary and proper** for the purposes of immediate defence to begin by breaking up so large a portion of the existing force
1808 House of Commons	He understood, that in granting such licences to some particular individuals, and refusing them to others, **much abuse had arisen**, contrary to the true meaning and intent of the legislature; he thought, therefore, that information upon this subject would be **necessary and proper** 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 . . . .
1808 House of Commons	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 **necessary and proper** 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
1808 House of Commons	And, this being incontrovertibly a general principle, perfectly consonant to the law of nations, he contended, that there **never were circumstances which more loudly called for its application**, 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 **necessary and proper** 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
1813 House of Commons	But if the right hon: gentleman had not come up to his outline, he had called for no pledge which would prevent any one from engrafting any amendment thought **necessary and proper** 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.