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NOTES

THE “RATIONAL FEDERALIST”: SYNTHESIZING NECESSITY AND PROPRIETY IN THE SWEEPING CLAUSE

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Today, the United States Supreme Court’s Necessary and Proper Clause jurisprudence sits cloaked in a mantle of uncertainty. Beneath this cloak lies a slew of conflicting tests which have left scholars befuddled as to the Clause’s true scope and meaning. This confusion has generated feverish debate among scholars with differing views of congressional power. Unfortunately, within this battleground of competing viewpoints lies no clear answer.

Despite this uncertainty, there can certainly be a more pellucid and effective interpretation of the Necessary and Proper Clause. This Note will argue that flexibility as to what constitutes a “necessary” law combined with a rigid standard for what makes a law “proper” enables Congress to execute its enumerated powers without overreaching. Part I outlines differing scholarly theories as to the legal origins of the Necessary and Proper Clause. Sections A, B, and C outline the theories that the Clause stems from principles of agency law, administrative law, and corporate law, respectively. Section D examines the implied powers theory of the Clause’s genesis. Next, Part II examines the Supreme Court’s early Necessary and Proper Clause jurisprudence—namely *McCulloch v. Maryland*, the seminal case which set the Clause in motion. Part III outlines four different categories of Necessary and Proper Clause interpretation that the Supreme Court has recently espoused.¹

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¹ It is important to note that this is not a comprehensive historical examination of the Supreme Court’s Necessary and Proper Clause jurisprudence—such an

Section A examines two broad forms: the “Rational Connection” approach and the “Chain-link” approach. Conversely, section B examines two narrow forms: the “One-step” approach and the “Federalist Restriction” approach. Finally, Part IV will argue that a combination of the “Rational Connection” approach and the “Federalist Restriction” is ultimately the soundest construction of the Necessary and Proper Clause.

I. LEGAL ORIGINS OF THE NECESSARY AND PROPER CLAUSE

The opacity of the Necessary and Proper Clause’s origin lies in the lack of debate over the clause at the Constitutional Convention.² Indeed, records of debates over the clause’s scope and meaning at the Convention are scant.³ The clause itself was added by the Convention’s Committee on Detail, spearheaded by James Wilson—a prominent lawyer from Maryland.⁴ Yet it was not until the pre-ratification debates that the clause generated meaningful arguments among the nation’s most eminent legal minds.⁵ The ambiguity shrouding the clause’s roots has inspired many legal scholars to ruminate as to its true origins, scope, and meaning. For example, Professors Gary Lawson, Geoffrey P.

inquiry is beyond the scope of this Note. Rather, this Note examines several recent Supreme Court cases that address the Clause for the purpose of categorizing its interpretational modes.

² Professor Randy E. Barnett offers a possible explanation for this lack of debate: “if the power to make law was already thought implicit in the enumerated powers scheme, then it is not surprising that the Clause would provoke no discussion at the Convention.” See Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 186–87 (2003).

³ See Gary Lawson et al., *Raiders of the Lost Clause: Excavating the Buried Foundations of the Necessary and Proper Clause*, in THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 1, 2–3 (2010) [hereinafter ORIGINS]. Moreover, scholars often question the accuracy of the historical record itself. Some suggest that early reports of the ratification debates are scant, unreliable, and possibly doctored. See Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 334 (1993) (citing James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 12–24 (1986)). In fact, early volumes of the *Annals of Congress* “were based on the notes of Thomas Lloyd, whose reportorial skills in 1789 were ‘dulled by excessive drinking,’ and whose manuscript was ‘periodically interrupted by doodling, sketches of members, horses, and landscapes, and by poetry.’” *Id.*

⁴ See John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1047 (2014).

⁵ See Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, in ORIGINS, *supra* note 3, at 84, 94.

Miller, Robert G. Natelson, and Guy I. Seidman contend that the “Sweeping Clause” was painted with shades of eighteenth-century agency, administrative, and corporate law, which ultimately give Congress incidental authority to effectuate its enumerated powers.⁶ Conversely, Professor John Mikhail suggests that the framers used a different brush—one varnishing broad strokes of implied and unenumerated powers stemming directly from the all “other powers” provision within the clause itself.⁷ This Part will examine each of these theories in turn.

A. *Origins in Agency Law*

Professor Natelson suggests that the framers intended the Sweeping Clause power to be exercised pursuant to fiduciary principles of agency.⁸ The founders’ intent was “to erect a government in which public officials would be bound by fiduciary duties to honor the law, exercise reasonable care, remain loyal to the public interest, exercise their power in a reasonably impartial fashion, and account for violations of these duties”⁹—an idea with roots embedded in the Lockean social compact.¹⁰ This fiduciary ideal permeated the Constitutional Convention. Several of the delegation’s most prominent figures, such as James Madison, Alexander Hamilton, John Dickinson, and George Washington, all considered government officials to be public trustees, servants, and agents of the people.¹¹ Moreover, most of the men who drafted the Constitution were either lawyers with personal fiduciary experience or businessmen who employed fiduciaries.¹² Therefore, one may safely infer that the drafters were well versed in the principles of the fiduciary duty and readily understood its implications for government officials.¹³

One of the most salient fiduciary duties is the duty to follow instructions and remain within authority. If a fiduciary action

⁶ See Lawson et al., *supra* note 3, at 5–6; see also Mikhail, *supra* note 4, at 1067.

⁷ See Mikhail, *supra* note 4, at 1047.

⁸ See Natelson, *supra* note 5, at 52.

⁹ *Id.* at 53.

¹⁰ *Id.* (positing that “the government ha[s] a fiduciary obligation to manage properly what ha[s] been entrusted to it.”) (citing John Locke, *The Second Treatise of Civil Government: An Essay Concerning the True Origin, Extent, and End of Civil Government*, in TWO TREATISES OF GOVERNMENT § 136, at 190 (Thomas I. Cook ed., 1947) (1690)).

¹¹ See Natelson, *supra* note 5, at 55.

¹² See *id.* at 56.

¹³ *Id.*

extends beyond its scope of authority, the reasonableness of the action becomes irrelevant.¹⁴ This is particularly germane when applied to the terms “necessary” and “proper;” if a law is not properly within Congress’s jurisdiction to enact, it is irrelevant whether the law is “necessary.”¹⁵ In both situations, the central inquiry is whether the actor in fact has the power to act, and that power is often determined by the doctrine of incidental powers.

In fiduciary relationships, the doctrine of incidental powers is instrumental in determining the scope of a fiduciary’s authority.¹⁶ This doctrine arises from the *Quando aliquis* maxim: “[w]hen someone grants something, he is seen to grant also that without which the thing itself cannot be.”¹⁷ Here, this means that the fiduciary’s power stems from both an explicit grant of authority and the implied powers incidental to effectuating that authority.¹⁸ James Madison applies this maxim to the Necessary and Proper Clause in *Federalist 44*:

Had the Constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government, by unavoidable implication. No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.¹⁹

This indicates that the Necessary and Proper power is an ancillary means of using Congress’s other enumerated powers—no more, no less. This interpretation is consistent with how the maxim applies in fiduciary relationships. For example, incidental to the power to operate as a corporation is the power to make bylaws.²⁰ Ultimately, such powers exist whether they are expressed or not, since they are incidental to the grant of authority.²¹

All in all, Professor Natelson’s agency theory blends well with the Necessary and Proper Clause—Congress is the agent,

¹⁴ See *id.* at 57.

¹⁵ See *infra* Part IV.B.

¹⁶ See Natelson, *supra* note 5, at 60.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ THE FEDERALIST NO. 44 (James Madison).

²⁰ See Natelson, *supra* note 5, at 63.

²¹ *Id.* at 64. (citing the maxim “*Expressio eorum quae tacite insunt nihil operatur*—“The expression of those things that are silently inherent has no effect.”).

the people are the principal, and Congress must not exceed the authority that the people have granted to it. Inherent in this relationship is Congress's fiduciary duty to honor the law, respect the public interest, and exercise its power according to express and incidental grants of authority.²²

B. *Origins in Administrative Law*

In addition to Professor Natelson's agency law theory, Professors Gary Lawson and Guy I. Seidman propose an administrative law background to the Necessary and Proper Clause. Since the Constitution is a public law charter, principles of public administration help to elucidate means of constitutional interpretation.²³ One such principle—the "principle of reasonableness"—facilitates the application of private agency law in a public setting by requiring proportionality and impartiality in public administration.²⁴

The principle of reasonableness posits that delegations of authority must be exercised reasonably.²⁵ At its core, it is a principle of statutory discretion; in seventeenth-century England, it applied generally to all delegated authority to prevent arbitrary and unreasonable exercises of power.²⁶ Lawson and Seidman theorize that this principle applies to Congress through the Necessary and Proper Clause.²⁷ They first note a structural anomaly—that no implementational clause is found in Articles II or III to enable the President or the Judiciary to take steps necessary and proper to implement their respective powers.²⁸ Rather, Congress alone is granted the power to implement Necessary and Proper laws. Lawson and Seidman suggest a reason for this—to avoid an argument that the principle of reasonableness applies only to implementational rather than legislative power, the drafters thought it necessary to codify such a restraint.²⁹ This is achieved through the Necessary and Proper

²² *Id.* at 53.

²³ See Gary Lawson & Guy I. Seidman, *Necessity, Propriety, and Reasonableness*, in ORIGINS, *supra* note 3, at 120.

²⁴ *Id.* at 120–21.

²⁵ See *id.* at 123.

²⁶ See *id.* at 124. The principle of reasonableness had been "powerfully restated" by English courts prior to the Constitutional Convention. *Id.* (citing *Leader v. Moxon*, 2 W. Bl. 924 (1781)).

²⁷ See *id.* at 135.

²⁸ See *id.* at 126.

²⁹ See *id.* at 135.

Clause, which gives Congress discretion to assist in the implementation of laws.

This theory is consistent with how the Federalists represented the Clause to the public prior to its ratification. For example, Alexander Hamilton opined that “the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article.”³⁰ If the clause is indeed mere surplusage, intended only to authorize those laws which serve powers expressly enumerated,³¹ then Lawson and Seidman’s theory fits with Hamilton’s language in *Federalist 33*. If Congress’s incidental powers would have accrued with or without the Necessary and Proper Clause as Hamilton suggests, then it necessarily follows that those powers would still be subject to the principle of reasonableness, as Lawson and Seidman suggest.³² In both cases, the clause superfluously codifies the incidental powers and limitations already inherent in legislative power.

Additionally, Lawson and Seidman employ a textual analysis to conclude that the Necessary and Proper Clause is an ideal vessel for incorporating the principle of reasonableness. They maintain that the term “necessary” requires efficacy, measuredness, and proportionality—all core aspects of fiduciary law and the principle of reasonableness.³³ Moreover, they interpret “proper” as describing regard for rights, impartiality, and a fixed scope of granted authority.³⁴ Thus, it is through the principle of reasonableness that fiduciary duties are extended to the public administration of laws. Through this extension, one can see the administrative law colorings which underlie the Necessary and Proper Clause.

C. *Origins in Corporate Law*

Professor Geoffrey P. Miller offers insight into the corporate law background of the Necessary and Proper Clause. He analogizes the Constitution to a corporate charter, as it sets forth

³⁰ THE FEDERALIST NO. 33 (Alexander Hamilton).

³¹ See Natelson, *supra* note 5, at 97.

³² See Lawson & Seidman, *supra* note 23, at 135 (“If the principle of reasonableness derives solely from the existence of delegated discretionary power, then it would follow that the constitutionally delegated authority of Congress . . . is subject to the same requirements of reasonableness as is the constitutionally delegated authority of the president and the courts.”).

³³ See *id.* at 141–42.

³⁴ See *id.* at 142.

powers and limits, grants privileges and rights, delegates authority, and specifies its purpose—all functions of corporate charters in the founding era.³⁵ Moreover, Miller observes that corporate charters from the colonial era were peppered with terms such as “necessary,” “proper,” and other similar scope provisions.³⁶ This is a meaningful analysis in light of the draftsmen’s familiarity with corporate practice.³⁷

In his review of colonial era corporate charters, Miller found that clauses limiting managerial bodies’ discretion were pervasive.³⁸ In these documents, governing entities are authorized to make laws “as they shall think fit,” “as shall be necessary,” and as “shall seem most convenient.”³⁹ Limiting vocabulary attached to such exercises of power include terms like “proper,” “expedient,” “fit,” “convenient,” “advisable,” “reasonable,” and “conducive to.”⁴⁰ There is an uncanny parallel between these terms’ use in corporate charters and in Necessary and Proper Clause interpretation, in that the language pattern always requires a fit between the ends recognized and the means employed.⁴¹

This background proves useful when interpreting the Necessary and Proper Clause. For example, Professor Miller hypothesizes that just as scope clauses in corporate charters convey no independent authority, neither does the Necessary and Proper Clause.⁴² Rather, scope clauses in both contexts serve only to modify delegated authority.⁴³ For example, corporate charters favored the term “necessary” over other limiting scope terms in contexts restricting lawmaking or rulemaking power.⁴⁴ Miller suggests that the reason for this was to protect against

³⁵ See Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, in *ORIGINS*, *supra* note 3, at 144, 146–47.

³⁶ *Id.* at 145.

³⁷ See *supra* text accompanying note 11. See also Miller, *supra* note 35, at 149 (“Given all this expertise, it would not be surprising if these men, when drafting the Necessary and Proper Clause, had employed concepts that were also current in corporate law practice of the time.”).

³⁸ Miller, *supra* note 35, at 150.

³⁹ *Id.*

⁴⁰ *Id.* at 152–53.

⁴¹ See *id.* at 145.

⁴² *Id.* at 155.

⁴³ *Id.*

⁴⁴ *Id.* at 167–68. Miller found that the term “necessary” appeared most frequently in the context of employment and rulemaking—two functions that can be considered “fundamental to achieving the goals of the enterprise.” *Id.* at 167.

broad grants of authority to corporate legislative bodies that might otherwise contravene state or federal law.⁴⁵

Miller's suggestion fits well with the means-ends construction: "[t]he term 'necessary,' when used as a limitation on legislative authority in corporate charters, thus apparently required that rules enacted for the governance of the institution be reasonably closely adapted to achieving the goals for which the institution was formed."⁴⁶ In the same vein, the term "proper" serves a modifying function in corporate charters. Miller found that the term "proper" appears most frequently in contexts where shareholders' interests are at stake.⁴⁷ Therefore, it makes sense that the term "proper" requires power to be exercised with its effects on corporate stakeholders in mind.⁴⁸ The parallel for the Necessary and Proper Clause is that Congress must consider the effect of its laws on individual citizens irrespective of whether the law is "necessary."⁴⁹

With these principles in mind, there is a compelling case for the influence of corporate charters upon the Constitution. Ultimately, such insight into the Necessary and Proper Clause suggests that there is a limited scope to its power, and that Congress's delegated authority ought not to be exceeded.⁵⁰

D. *Origins in the Doctrine of Implied Powers*

Professor John Mikhail, alternatively, takes a different approach to the scope and meaning of the Necessary and Proper Clause than Professors Lawson, Miller, Natelson, and Seidman. Mikhail emphasizes that the Clause is composed of three distinct provisions:

1. "Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers"
2. "Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States"

⁴⁵ *Id.* at 170.

⁴⁶ *Id.* at 170–71. In this context the "means" refer to laws enacted in furtherance of an enumerated power—the "end." See *supra* note 19 and accompanying text.

⁴⁷ For example, decisions to declare dividends, call meetings, levy a tax, set salaries, etc. See Miller, *supra* note 35, at 173–74.

⁴⁸ See *id.*

⁴⁹ *Id.* at 174.

⁵⁰ *Id.*

3. “Congress shall have Power...To make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in . . . any Department or Officer [of the United States].”⁵¹

Of these three provisions, Mikhail contends that the second, or the “all other powers” provision, is the most important one for interpreting the Clause, yet scholars have largely ignored it.⁵² According to Mikhail, the “all other powers” provision is more than just ancillary to Congress’s enumerated powers (its “foregoing” powers); rather, it refers to implied or un-enumerated powers embedded within the Constitution.⁵³ Thus, “all other powers” means more than just the incidental authority to carry into effect Congress’s enumerated powers. Under this interpretation, the “sweeping clause” encapsulates a broad scope of implied powers designed to give the government a vast measure of flexibility.⁵⁴

Mikhail draws support for this proposition from the fact that many of the Clause’s drafters were strong advocates for implied powers,⁵⁵ especially after experiencing the crippling weakness of the Articles of Confederation.⁵⁶ James Wilson in particular (the Clause’s primary draftsman) was an outspoken advocate of implied powers, and he had often sought to bolster congressional power with this doctrine.⁵⁷ For support, Mikhail looks to the fervent pre-ratification debate between the Federalists and

⁵¹ Mikhail, *supra* note 4, at 1046–47 (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 18).

⁵² *Id.* at 1047.

⁵³ *Id.* Mikhail proposes that “[t]he existence of implied or unenumerated powers is thus explicitly recognized by the precise text of the Constitution, much like the existence of unenumerated rights.” *Id.* Note the tension of this view with Professor Miller’s contention that “[t]he corporate law background suggests that the Necessary and Proper Clause does not grant independent lawmaking competence[,] does not grant general legislative power, and does not delegate unilateral discretion to Congress to define whether a given action is or is not constitutionally authorized.” Miller, *supra* note 35, at 175.

⁵⁴ See Mikhail, *supra* note 4, at 1123. *But see* Barnett, *supra* note 2, at 192 (“The only powers that are necessary and proper for the national government are those that were enumerated; the only proper unenumerated powers are those derived from the nature of a power that *was* expressed.”) (emphasis in original).

⁵⁵ See Mikhail, *supra* note 4, at 1047 (“The second Necessary and Proper Clause was intended . . . to declare and to incorporate into the Constitution the doctrines of implied and inherent powers that [James] Wilson, Robert Morris, Gouverneur Morris, Alexander Hamilton, and other prominent nationalists at the constitutional convention had advocated throughout the previous decade . . .”).

⁵⁶ See *id.* at 1088.

⁵⁷ See *id.* at 1061.

Anti-Federalists. Whereas the Federalists argued that the Clause was superfluous—a toothless provision that would have applied to Congress even without its inclusion⁵⁸—the Anti-Federalists berated the clause as one granting Congress “immense,” “unbounded” power.⁵⁹ Given the robust debate generated by the “all other powers” provision, one can infer that the drafters understood the opaque and potentially dangerous nature of this provision.

Significantly, Mikhail acknowledges and expands upon Miller’s corporate law thesis. Mikhail probes James Wilson’s background as a corporate lawyer and its potential influence on his role in drafting the Necessary and Proper Clause. For example, Wilson was a major shareholder and president of the Illinois-Wabash Company, “a principal shareholder of the Canaan Company,” and was immersed in both companies’ business and legal affairs.⁶⁰ In addition, he was principally involved in several other business affairs in a legal capacity.⁶¹ Furthermore, Mikhail offers examples of correspondence between Wilson and his business associates that are laden with concurrent uses of the terms “necessary” and “proper.”⁶² Ultimately, “[a]ll of these examples demonstrate that Wilson was intimately acquainted with the phrase ‘necessary and proper’ and similar language before he incorporated this phrase into the Constitution while serving on the Committee of Detail.”⁶³ Indeed, a corporate understanding of the Clause feels compelling.⁶⁴

⁵⁸ See *supra* note 30 and accompanying text. See also Barnett, *supra* note 2, at 187 (“[A]ny ambiguity in the wording was clarified by the Federalists’ public insistence during the ratification that the Clause only authorized the enactment of laws that were incidental to the enumerated powers, and that this power would have been inherent to the enumerated powers had there been no Necessary and Proper Clause at the end of the list.”).

⁵⁹ See Mikhail, *supra* note 4, at 1059–60 (emphasis omitted) (quoting *An Old Whig*, No. 2 (Fall 1787), in 3 THE FOUNDERS’ CONSTITUTION 239, 239 (Philip B. Kurland & Ralph Lerner eds., 1987)).

⁶⁰ See *id.* at 1110–11.

⁶¹ See *id.*

⁶² See *id.* at 1112–13.

⁶³ *Id.* at 1114.

⁶⁴ However, this inference should be made carefully. Mikhail also notes that the corporate inquiry is “merely the tip of the iceberg.” *Id.* He proceeds to argue that the phrase “necessary and proper” was commonplace and comprehensible to most common English speakers of this era, and also warns against the inference that the phrase is a highly technical concept derived strictly from corporate law. See *id.* at 1115.

In the end, only the Constitution's draftsmen can truly know the intended scope, meaning, and function of the Necessary and Proper Clause. However, inquiries into the fiduciary, administrative, and corporate law influences behind the clause shed light on its meaning. So, too, does a keen look at the structure of the Clause itself and its key draftsman's background. Certainly, with so much to consider, it is no surprise that the Supreme Court has struggled to espouse a truly pellucid interpretation of the Clause. In the parts that follow, this Note will examine the Supreme Court's conflicting Necessary and Proper Clause jurisprudence and categorize its dominant interpretations.

II. EARLY SUPREME COURT JURISPRUDENCE

The Supreme Court first addressed the Necessary and Proper Clause in *United States v. Fisher*.⁶⁵ There, the Court upheld a bankruptcy law which gave the United States priority over other creditors when debtors became insolvent.⁶⁶ The case gave Chief Justice John Marshall his first opportunity to interpret the kinds of laws that the Clause covers.

Almost immediately, Marshall relaxed the meaning of the word "necessary": "[I]t would be incorrect . . . if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power."⁶⁷ Marshall's language is inharmonious with Madison's conception of the necessary and proper power in *Federalist 44*. There, Madison imagined the quandary Congress would face without the Clause, when "exercising power *indispensably* necessary and proper, but, at the same time, not EXPRESSLY granted."⁶⁸ Marshall, on the other hand, employed far less stringent language: "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 [C]onstitution."⁶⁹ Here, the granted power was that of Congress to pay the debts of the Union, and the Court found the bankruptcy act in question to be a proper means of effectuating that power.⁷⁰ In the end,

⁶⁵ *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805).

⁶⁶ *Id.* at 384.

⁶⁷ *Id.* at 396.

⁶⁸ THE FEDERALIST NO. 44 (James Madison) (first emphasis added).

⁶⁹ *Fisher*, 6 U.S. (2 Cranch) at 396.

⁷⁰ *Id.*; see also U.S. CONST. art. I, § 8, cl. 1.

Marshall left the door ajar for a far more in-depth discussion of the Clause.

This discussion arrived in *McCulloch v. Maryland*, the seminal case for Necessary and Proper Clause interpretation.⁷¹ There, Chief Justice Marshall upheld the creation of the Bank of the United States as a necessary and proper exercise of Congress's power to borrow money.⁷² In doing so, he elucidated the Clause's scope and its implications for congressional power. Marshall explicitly noted that the power to establish a bank or create a corporation is not enumerated anywhere in the Constitution.⁷³ He also observed that the power to punish and the power to carry the mail are likewise not enumerated—rather, they are both conducive to the exercise of granted powers.⁷⁴ These examples illustrate his conviction that “necessary” does not mean “indispensably necessary.”⁷⁵ To read such unbending limits into the Clause would render it toothless and leave Congress with inadequate means to execute its enumerated powers.⁷⁶ Instead, Marshall averred that “necessary” simply means “convenient, or useful, or essential to another [enumerated power].”⁷⁷ He found structural support for this reading in Article I, § 10 of the Constitution, which prohibits states “from laying ‘imposts, or duties on imports or exports, except what may be *absolutely* necessary for executing its inspection laws.’ ”⁷⁸ The disparity between “necessary” and “absolutely necessary” indicates that the draftsmen knew how to create a rigid necessity standard and consciously refrained from doing so with the Necessary and Proper Clause.

⁷¹ *McCulloch v. State of Maryland*, 17 U.S. (4 Wheat.) 316 (1819). See also Gary Lawson & Neil S. Siegel, *Interpretation: Necessary and Proper Clause*, NAT'L CONST. CTR. (last visited May 18, 2019), <https://constitutioncenter.org/interactive-constitution/interpretations/necessary-and-proper-clause>.

⁷² *McCulloch*, 17 U.S. (4 Wheat.) at 424.

⁷³ *Id.* at 406.

⁷⁴ *Id.* at 416–17.

⁷⁵ This is the same argument espoused in *Fisher*. See *supra* notes 66–67 and accompanying text.

⁷⁶ *McCulloch*, 17 U.S. (4 Wheat.) at 415. Marshall emphasized the importance of a relaxed reading: “This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.” *Id.* (emphasis in original).

⁷⁷ *Id.* at 413.

⁷⁸ *Id.* at 414 (emphasis in original). Marshall also notes that structurally the clause is included in § 8, which describes the powers of Congress—not its limits. *Id.* at 419–20.

Although Marshall devoted much effort to probing the bank’s necessity, he spent little time addressing its propriety. Just because a law is “necessary”—incident to carrying into effect an enumerated power—it does not automatically follow that the law is “proper.” Despite the lack of discussion, this is a key takeaway from what is perhaps the most perennial language in the opinion: “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.”⁷⁹ The language here, namely “within the scope of the constitution,” “appropriate,” “plainly adapted,” and “not prohibited,” speak toward propriety.

Perhaps it becomes useful here to apply Professor Miller’s corporate interpretation of “proper.” According to Miller, laws must not “discriminate against or otherwise disproportionately affect the interests of individual citizens.”⁸⁰ Alternatively, perhaps “proper” means “within Congress’s domain or jurisdiction,” so as to not usurp the rights of states and individuals, as Professors Lawson and Granger suggest.⁸¹ Either way, Marshall’s “consist with the letter and spirit of the constitution” language indicates that, if nothing else, “proper” laws must not otherwise be in violation of the Constitution.⁸²

After *McCulloch*, we are left with a muddled approach to Necessary and Proper Clause interpretation. The takeaway is that “necessary” and “proper” laws are those which are convenient or useful to executing one or more of Congress’s enumerated powers and do not otherwise violate the Constitution. This is a nebulous inquiry that can easily be stretched for the sake of argument. However, it is an inquiry that has stood the test of time and continues to be interpreted to this day. The next part of this Note examines how the Supreme Court has both compressed and elasticized the Necessary and Proper Clause after *McCulloch*.

⁷⁹ *Id.* at 421.

⁸⁰ See Miller, *supra* note 35, at 175.

⁸¹ See Lawson & Granger, *supra* note 3, at 271 (emphasis omitted).

⁸² See *McCulloch*, 17 U.S. (4 Wheat.) at 421. Marshall addressed the holding in *McCulloch* five years later in *Osborn v. Bank of the United States*. 22 U.S. (9 Wheat.) 738, 860 (1824) (“The whole opinion of the Court, in the case of *M’Culloch v. The State of Maryland*, is founded on, and sustained by, the idea that the Bank is an instrument which is ‘necessary and proper for carrying into effect the powers vested in the government of the United States.’”).

III. CONFLICTING CATEGORIES OF INTERPRETATION

The Supreme Court's Necessary and Proper Clause jurisprudence has been mercurial throughout the years. With several conflicting interpretations, there is no clear answer to the question of the Sweeping Clause's scope. Instead, the Supreme Court has erratically given broad interpretations, narrow interpretations, and many in between. This Part divides the Supreme Court's necessary and proper jurisprudence into four different categories. Within the broad sphere lie the "Rational Connection" approach and the "Chain-link" approach. Conversely, the "One-step" approach and the "Federalist Restriction" are in the narrow sphere.

A. *Broad Interpretations*

Proponents of a broad interpretation of the Necessary and Proper Clause generally argue that it encompasses a vast amalgam of implied governmental powers that Congress may use to legislate for the Nation's general welfare.⁸³ One possible hook for this view is Madison's language in *Federalist 44*: "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included."⁸⁴ This language lends itself to a broad interpretation—"every particular power necessary" casts a broad net. Additionally, there are textual hooks in *McCulloch* that bespeak a broad construction of the Clause. In particular, recall Chief Justice Marshall's definition of "necessary" as merely convenient or useful.⁸⁵ As discussed herein, this definition is crucial in cases that take an expansive view of the Clause.

1. The "Rational Connection" Approach

In *Jinks v. Richland County, South Carolina*, the Supreme Court held that 28 U.S.C. § 1367(d) was necessary and proper for carrying into execution Congress's power "[t]o constitute Tribunals inferior to the Supreme Court," and to assure that

⁸³ See *supra* Part I.D.

⁸⁴ THE FEDERALIST NO. 44 (James Madison). Although the language itself might imply a broad construction, it is important to remember that *Federalist 44* was written to assuage the fears of the Anti-Federalists that the Clause would give Congress too much power.

⁸⁵ See *supra* note 77, and accompanying text.

those tribunals may fairly and efficiently exercise ‘[t]he judicial Power of the United States.’”⁸⁶ There, the Supreme Court of South Carolina held that 28 U.S.C. § 1367(d), which requires the tolling of state statutes of limitations while cases are pending in federal court, was unconstitutional when applied to lawsuits against a State’s political subdivisions.⁸⁷ The Supreme Court disagreed and upheld the law as a valid exercise of the Sweeping Clause power.⁸⁸

To uphold the law, the Court applied a two-prong analysis as to necessity and propriety. Justice Scalia, writing for the Court, cited to *McCulloch* for its lax definition of necessity, and he declared that “§1367(d) is ‘conducive to the due administration of justice’ in federal court, and is ‘plainly adapted’ to that end.”⁸⁹ Although not absolutely necessary, § 1367(d) provided an efficient alternative to the mediocre options previously available to federal judges in deciding whether to exercise supplemental jurisdiction over claims that would otherwise be time barred in state court.⁹⁰ Here, this was enough to satisfy the *McCulloch* definition of “necessary.” In accordance with *McCulloch*, the Court described the law as “conducive to the due administration of justice.”⁹¹ Furthermore, as to propriety, Scalia opined that § 1367(d) was “plainly adapted” to Congress’s enumerated power to constitute inferior courts, as “the connection between § 1367(d) and Congress’s authority over the federal courts [is not] so attenuated as to undermine the enumeration of powers set forth in Article I, § 8.”⁹²

The takeaway from *Jinks* is that a law that is an efficient alternative to its predecessor is both “necessary” and “proper” so long as its connection to an enumerated power is “not so attenuated.” Congress is given significant latitude under this

⁸⁶ *Jinks v. Richland Cty., S.C.*, 538 U.S. 456, 462 (2003) (citations omitted) (quoting U.S. CONST. art. I, § 8, cl. 9; U.S. CONST. art. III, § 1). The power “to constitute Tribunals inferior to the Supreme Court” is vested in Article I, § 8, clause 9 of the Constitution, and the “judicial Power of the United States” is vested in the Supreme Court in Article II, § 1.

⁸⁷ *Id.* at 458.

⁸⁸ *Id.* at 465.

⁸⁹ *Id.* at 462.

⁹⁰ *Id.* at 462–463.

⁹¹ *Id.* at 462 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 417 (1819)); see also *McCulloch*, 17 U.S. (4 Wheat.) at 418 (describing the power of punishment as “a right incidental to the power, and conducive to its beneficial exercise”).

⁹² *Jinks*, 538 U.S. at 464 (citing *McCulloch*, 17 U.S. (4 Wheat.) at 421).

standard. However, nowhere does the Court mention anything about implied powers. In this case, Congress is operating pursuant to an enumerated power. In fact, the Court omits language addressing Congress's "foregoing powers" or "all other powers" and instead inserts "Congress's Article I, § 8" power squarely into its recital of the Clause.⁹³ Thus, although ceding substantial discretion to Congress to carry out its ends, the Court makes clear that it is dealing with enumerated—not implied—power. Such is the nature of the rational connection approach; Congress is given leeway in employing its means, so long as there is a rational connection to an enumerated end.

The rational connection approach is also present in *Gonzalez v. Raich*. There, the Supreme Court applied a deferential rationality analysis allowing Congress to reach purely local activity as a necessary and proper means of executing its commerce power.⁹⁴ A concurring Justice Scalia declared that "the nature of the Necessary and Proper Clause . . . empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation."⁹⁵ Additionally, Scalia expounded that congressional means must be "appropriate" and "plainly adapted" to their enumerated ends.⁹⁶

The logical underpinnings in *Gonzalez* are similar to those in *Jinks*. Just as the standard for necessity was lax there, it remains so in *Gonzalez*. Scalia describes necessary laws as laws without which the effective exercise of an enumerated power would be undercut.⁹⁷ In other words, laws are probative of necessity if geared toward an activity that impedes the exercise of a granted power.⁹⁸ In both cases, the Court adhered to *McCulloch*'s broad standard of necessity. Additionally, the standard for propriety in *Jinks* is repeated in Scalia's concurring opinion in *Gonzalez*. The majority opinion in *Jinks* and Scalia's

⁹³ *Id.* at 461.

⁹⁴ *Gonzalez v. Raich*, 545 U.S. 1, 22 (2005) (holding that the Controlled Substances Act was a necessary and proper exercise of Congress's commerce power).

⁹⁵ *Id.* at 39 (Scalia, J., concurring).

⁹⁶ *Id.*

⁹⁷ *Id.* at 36. Here, the standard applies in the context of interstate commerce. Scalia looks to the Court's ruling in *United States v. Lopez*, where it recognized that non-economic activity "could be regulated as 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" *Id.* (citing *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

⁹⁸ *Gonzalez*, 545 U.S. at 36 (Scalia, J., concurring).

concurrence in *Gonzalez* both define proper laws as “appropriate” and “plainly adapted” to carrying out an enumerated power.⁹⁹ Again, the inquiry calls for a rational connection between appropriate means and legitimate ends.

Furthermore, the Court endorsed a strong application of the rational connection approach in *Sabri v. United States*. There, the Court upheld an Act of Congress proscribing bribery of state and local officials who were involved in entities that receive federal funds.¹⁰⁰ Justice Souter, writing for the majority, described the law as a necessary and proper exercise of Congress’s Spending Clause power to appropriate federal money to promote the general welfare.¹⁰¹ In determining the law’s necessity, the Court relied on efficient alternative reasoning, similar to that in *Jinks*.¹⁰² Souter opined that prior federal bribery laws were inadequate for protecting federal interests, and therefore Congress was acting within the scope of the Necessary and Proper Clause.¹⁰³ For support, the Court portrayed *McCulloch* as establishing a “means-ends rationality” for Necessary and Proper Clause inquiries.¹⁰⁴ Moreover, the Court claimed that to invalidate the law under the Necessary and Proper Clause, the petitioner would have to prove that it “ha[d] nothing to do with’ the congressional spending power.”¹⁰⁵ This implies that only some nexus is required between the law and an enumerated power—some rational connection to it. Only without a rational connection can legislation fail under this inquiry.

Ultimately, the rational connection approach falls on the broad side of Necessary and Proper Clause jurisprudence. It certainly gives Congress considerable discretion and flexibility in passing laws that are “necessary.” To pass muster, laws must generally be made in furtherance of an enumerated power by either replacing prior ineffective laws as in *Jinks* and *Sabri* or executing a larger regulatory scheme to prevent interference with enumerated powers as in *Gonzalez*. As for “proper” laws, they must merely be “plainly adapted” or “appropriate” to their

⁹⁹ *Id.* at 37, 39; *Jinks v. Richland Cty., S.C.*, 538 U.S. 456, 462, 464 (2003).

¹⁰⁰ *United States v. Sabri*, 541 U.S. 600, 602 (2004).

¹⁰¹ *Id.* at 605.

¹⁰² *See supra* note 90 and accompanying text.

¹⁰³ *See Sabri*, 541 U.S. at 606–7.

¹⁰⁴ *Id.* at 605.

¹⁰⁵ *Id.* at 608 (citing *United States v. Lopez*, 514 U.S. 549, 561).

ends. All in all, the rational connection approach instills a valuable measure of flexibility in Congress to “prescrib[e] the means by which government should, in all future time, execute its powers.”¹⁰⁶ On the flip side, it potentially turns the “necessary” inquiry into an accordion concept to be stretched over any measure of legislation. However, it is certainly not the broadest method of Necessary and Proper Clause interpretation put forth by the Supreme Court.

2. The “Chain-link” Approach

In *United States v. Comstock*, the Supreme Court upheld a federal statute (18 U.S.C. § 4248) that allowed civil commitment of sexually dangerous federal prisoners beyond the date the prisoner would otherwise be released.¹⁰⁷ Writing for the majority, Justice Breyer laid out an extensive five-step test to place § 4248 within the scope of the Necessary and Proper Clause. First, Breyer recounted the breadth with which the Clause permits Congress to legislate.¹⁰⁸ Specifically, Breyer cited Chief Justice Marshall’s standard from *McCulloch*—that Congress may enact laws which are “convenient, or useful.”¹⁰⁹ He determined that whether a law is necessary is ultimately within Congress’s purview.¹¹⁰ Second, Breyer cited to a long history of federal involvement in this area.¹¹¹ He recited several examples of the federal government giving mental health care to civilly committed federal prisoners.¹¹² Third, Breyer contended that Congress had sound reasons for enacting § 4248 in light of its “role as federal custodian.”¹¹³ Here, the inference comes not from

¹⁰⁶ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

¹⁰⁷ *United States v. Comstock*, 560 U.S. 126, 130 (2010).

¹⁰⁸ *Id.* at 133.

¹⁰⁹ *Id.* at 133–34 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 408).

¹¹⁰ *Id.* at 135 (“[T]he means adopted and the end to be attained, are matters for congressional determination alone.” (quoting *Burroughs v. United States*, 290 U.S. 534, 547–48 (1934))). Additionally, Breyer sidesteps an inquiry into § 4248’s propriety by declaring that “the present statute’s validity under provisions of the Constitution other than the Necessary and Proper Clause is an issue that is not before us.” *Id.* Instead, the Court assumes—but does not decide—that other Constitutional provisions, such as Due Process, would not prohibit the statute. *Id.* at 133.

¹¹¹ *Comstock*, 560 U.S. at 137. However, Breyer does note that “even a longstanding history of related federal action does not demonstrate a statute’s constitutionality.” *Id.*

¹¹² *Comstock*, 560 U.S. at 137–140.

¹¹³ *Id.* at 142. Significantly, Congress’s “role as federal custodian” is mentioned nowhere in the Constitution.

the Constitution, but from the Restatement (2d) of Torts § 319, which states that “one ‘who takes charge of a third person’ is ‘under a duty to exercise reasonable care to control’ that person”¹¹⁴ Thus, § 4248 does not carry into effect a specific enumerated power, but rather Congress’s common-law-derived “role as federal custodian.” Fourth, Breyer argued that § 4248 accommodates state interests. The law requires the Attorney General to encourage states to take custody of federal prisoners encompassed by the Act, and also requires the federal government to relinquish its authority when a State asserts its own.¹¹⁵ Finally, Breyer noted that the law is narrow in scope—it affects only a small amount of federal prisoners who are already in federal custody.¹¹⁶ Therefore, it does not confer a general police power on the federal government.¹¹⁷ Ultimately, amidst these five considerations, the Court concluded that § 4248 is “a ‘necessary and proper’ means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, [and] to provide appropriately for those imprisoned.”¹¹⁸

Breyer’s inquiry in *Comstock* is a far departure from the two-part tests discussed above to determine whether laws are “necessary” and “proper.” The concept of a “chain-link” is invoked here because Breyer, ironically, must “‘pile inference upon inference’ in order to sustain congressional action under Article I.”¹¹⁹ For example, without attaching § 4248 to an enumerated power, the Court made several inferences to come up with the “federal custodian power.” After quoting the Restatement (2d) of Torts for a Congressional duty to prevent people in federal custody from harming others,¹²⁰ Breyer postulated:

If a federal prisoner is infected with a communicable disease that threatens others, surely it would be ‘necessary and proper’ for the Federal Government to take action, pursuant to its role as federal custodian, to refuse . . . to release that individual

¹¹⁴ *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 319 (AM. LAW INST. 1963–64)).

¹¹⁵ *Id.* at 144–45.

¹¹⁶ *Id.* at 148.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 149. Note that none of these powers are expressly enumerated in the Constitution.

¹¹⁹ *Id.* at 146 (citing *United States v. Lopez*, 514 U.S. 549, 567).

¹²⁰ *Id.* at 142.

among the general public, where he might infect others. . . . And if confinement of such an individual is a 'necessary and proper' thing to do, then how could it not be similarly 'necessary and proper' to confine an individual whose mental illness threatens others to the same degree?¹²¹

Note the string of inferences here. The Court goes from the tort law duty of reasonable care, to the federal government hypothetically containing quarantined federal prisoners, to containing mentally ill prisoners who could hypothetically inflict similar harm, to a federal custodial power.¹²² Rather than an execution of enumerated power, we have a series of inferences—hence the term “Chain-link.” At no point throughout the inquiry does the Court mention which enumerated power § 4248 carries into effect. In vague terms, Breyer claims it to be “the same enumerated power that justifies the creation of a federal criminal statute,”¹²³ without specifying exactly which enumerated power that is. Ultimately, this is a very elasticized approach. The Sweeping Clause power is stretched from those laws, which are “convenient” and “useful” to the beneficial exercise of enumerated power and not otherwise in violation of the Constitution,¹²⁴ to a five-factor balancing test.

This approach recurs in *United States v. Kebodeaux*. There, the Court upheld the “Sex Offender Registration and Notification Act” (SORNA) as applied to an ex-military member under the Necessary and Proper Clause.¹²⁵ SORNA requires federal sex offenders to register in the state where they reside and applies to offenders who have already completed their sentences at the time the law was passed.¹²⁶ Respondent, Anthony Kebodeaux, was in the Air Force when he was convicted under the United States Code of Military Justice for having sex with a minor; subsequently, he received three months' imprisonment and was discharged from the Air Force.¹²⁷ By the time SORNA was enacted, he had already completed his sentence.¹²⁸ When

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 148.

¹²⁴ See *supra* Part II (discussing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

¹²⁵ *United States v. Kebodeaux*, 570 U.S. 387, 389 (2013). Justice Breyer wrote the majority opinion in this case as well.

¹²⁶ *Id.*

¹²⁷ *Id.* at 408 (Thomas, J., dissenting).

¹²⁸ *Id.*

Kebodeaux moved from El Paso, Texas to San Antonio without updating his registration, he was sentenced to a year and a day in prison.¹²⁹

In this case the Supreme Court had at its disposal two enumerated powers it could have potentially used to uphold SORNA as applied to Kebodeaux under the Necessary and Proper Clause: the Spending power and the Military Regulation power. The Court referenced a similar federal act—the “Wetterling Act”—and implied that it was a valid exercise of Congress’s Spending power.¹³⁰ Although SORNA does feel far removed from Congress’s power to spend for the general welfare, the Government did offer this argument to the Court.¹³¹ However, the Court glossed over this argument and did not apply it in its Necessary and Proper Clause inquiry. Second, there was an argument that SORNA could apply to Kebodeaux by virtue of Congress’s enumerated power to regulate the armed forces, since Kebodeaux was an Airman at the time of his offense.¹³² Indeed, the Court recognized this,¹³³ but did not limit its analysis to the combination of Military Regulation power and Necessary and Proper Clause power.

Instead, the Court employed the five-factor “Chain-link” approach used in *Comstock*. As in *Comstock*, the Court kicked off by assuming without deciding that SORNA does not violate the

¹²⁹ *Id.*

¹³⁰ *Id.* at 391 (majority opinion) (“Like SORNA, [the Wetterling Act] used the federal spending power to encourage States to adopt sex offender registration laws.”).

¹³¹ *Id.* at 410 (Thomas, J., dissenting). Justice Thomas does not find the Spending Power argument compelling. He contends that SORNA “does not execute Congress’ spending power because it regulates individuals who have not necessarily received federal funds of any kind.” *Id.* at 411.

¹³² *See id.* at 399 (majority opinion). Concurring in the judgment, Chief Justice Roberts advocates this approach, and he suggests that “Congress had the power, under the Military Regulation and Necessary and Proper Clauses of Article I, to require Anthony Kebodeaux to register as a sex offender. The majority, having established that premise and thus resolved the case before us, nevertheless goes on to discuss the general public safety benefits of the registration requirement.” *Id.* (Roberts, C.J., concurring). *But see id.* at 412 (Thomas, J., dissenting). “Kebodeaux had long since fully served his criminal sentence for violating Article 120(b) of the UCMJ and was no longer in the military when Congress enacted SORNA. Congress does not retain a general police power over every person who has ever served in the military.” *Id.* Furthermore, it is important to note that the Military Regulation power is only in the conversation here because of Kebodeaux’s military service. SORNA itself applies to civilians as well, thus it cannot be upheld in its entirety under this theory.

¹³³ *Id.* at 395 (majority opinion).

Ex Post Facto or Due Process Clauses,¹³⁴ thereby circumventing any analysis under the *McCulloch* requirement that necessary and proper laws must not otherwise be in violation of the Constitution.¹³⁵ The Court then proceeded with the *Comstock* analysis. First, it noted the breadth of the Necessary and Proper Clause, and it resolved that “Congress could reasonably conclude that registration requirements applied to federal sex offenders after their release can help protect the public from those federal sex offenders and alleviate public safety concerns.”¹³⁶ Second, the Court observed that the Federal Government has a long history of tracking federal prisoners to protect the public.¹³⁷ Third, the Court noted the government’s sound reasons for requiring registration—to protect the public from sex-offender recidivism.¹³⁸ Fourth, the law accommodates state interests because it only encourages States to adopt its definitions and requirements, rather than mandating them to do so.¹³⁹ Finally, the Court contended that the law’s application is reasonably narrow because *Kebedeaux* was “already subject to federal registration requirements that were themselves a valid exercise of federal power under the Military Regulation and Necessary and Proper Clauses.”¹⁴⁰

As in *Comstock*, the Court relied upon a chain of inferential reasoning. Here, the chain begins with Congress’s enumerated power to regulate the armed forces.¹⁴¹ Through that power, *Kebedeaux* was subject to federal registration requirements under the Wetterling Act.¹⁴² Then, because *Kebedeaux* was already subject to these requirements, Congress could rightly use the Necessary and Proper Clause—under the five-factor

¹³⁴ *Id.* at 389.

¹³⁵ *See supra* note 79 and accompanying text.

¹³⁶ *Kebedeaux*, 570 U.S. at 395. This is a source of discord for Justices Roberts and Thomas, who both fear that “public safety concerns” could amount to a federal police power. *See id.* at 401–02 (Roberts, C.J., concurring); *id.* at 412–13 (Thomas, J., dissenting).

¹³⁷ *Id.* at 396–97 (majority opinion).

¹³⁸ *Id.* This reasoning sounds somewhat like a recurrence of the “federal custodian” role that the Court imagined in *Comstock*.

¹³⁹ *Id.* at 398.

¹⁴⁰ *Id.* at 397.

¹⁴¹ *Id.* at 394.

¹⁴² *Id.* at 391. The Wetterling Act imposed federal penalties upon federal sex offenders who did not register at the state level. *Id.* The Court argues that under this Act, the Attorney General delegated his power to designate sex offenses to the Director of the Bureau of Prisons, who in turn designated the offense *Kebedeaux* was charged with under the Code of Military Justice. *Id.* at 391–92.

Comstock inquiry—to apply the modified yet similar registration requirements of SORNA to him.¹⁴³ Ultimately, this leaves us two steps and five factors away from an enumerated power, which was applied dubiously to begin with.¹⁴⁴ The takeaway is this: applying SORNA to *Kebodeaux* was not a necessary and proper exercise of an enumerated congressional power; rather, it was a “‘necessary and proper’ means for furthering [Congress’s] pre-existing registration ends.”¹⁴⁵

Notice what the “Chain-link” approach enables Congress to do. In both *Comstock* and *Kebodeaux*, Congress was not legislating in a manner “incidental to those powers which are expressly given.”¹⁴⁶ Rather, it appears that Congress was acting in furtherance of “*other laws* [it] has enacted in the exercise of its incidental authority.”¹⁴⁷ This gives Congress great discretion under the Sweeping Clause. Ultimately, although this approach does allow for flexibility in legislation, it is hard to imagine a law that cannot be masqueraded as “carrying into Execution”¹⁴⁸ some other law which is in turn incidental to enumerated authority.

B. *Narrow Interpretations*

Proponents of a narrow reading of the Clause find support in the Federalists’ pre-ratification arguments. The Federalists defended the Clause as superfluous.¹⁴⁹ They contended that legislation under this Clause could only serve expressly enumerated powers.¹⁵⁰ In fact, they averred that the Clause had to be expressly tied to a vested power and that Congress drew no substantive power from the Clause not already inherent in its other enumerated powers.¹⁵¹ Alexander Hamilton, for instance, viewed the Clause as “declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers.”¹⁵² He assuaged the Anti-federalists’

¹⁴³ *Id.* at 393–94.

¹⁴⁴ *See id.* at 412 (Thomas, J., dissenting).

¹⁴⁵ *Id.* at 399 (majority opinion).

¹⁴⁶ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819).

¹⁴⁷ *United States v. Comstock*, 560 U.S. 126, 168 (2010) (Thomas, J., dissenting) (emphasis in original).

¹⁴⁸ U.S. CONST. art. I, § 8, cl. 18.

¹⁴⁹ *See Natelson*, *supra* note 5, at 106.

¹⁵⁰ *Id.* at 97.

¹⁵¹ *Id.* at 116.

¹⁵² THE FEDERALIST NO. 33 (Alexander Hamilton).

fears that the Clause would allow Congress to usurp state power by proclaiming that “[t]he declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless.”¹⁵³ As discussed below, narrow readings pin the Clause very closely to enumerated power.

1. The “One-step” Approach

The “One-step” approach is exactly what it sounds like. Rather than leaning on a broad doctrine of implied powers or employing a five-factor inquiry, this approach mandates that statutes enacted under the Necessary and Proper Clause must explicitly be in furtherance of one or more of Congress’s enumerated powers. This approach keeps the Clause far more compressed than any of the approaches examined thus far.

Justice Thomas’s dissent in *United States v. Comstock* is perhaps the best articulation of this approach. Thomas responds to the majority’s five-step approach by resorting to the core of Necessary and Proper Clause jurisprudence: he breaks *McCulloch* down into a two-part test. First, the law must be directed toward an enumerated end; second, there must be a “necessary and proper fit” between the law and the enumerated power.¹⁵⁴ Critically, this test establishes a bright-line rule: “no matter how ‘necessary’ or ‘proper’ an Act of Congress may be to its objective, Congress lacks authority to legislate if the objective is anything other than ‘carrying into Execution’ one or more of the Federal Government’s enumerated powers.”¹⁵⁵

Under this inquiry, § 4248 necessarily fails because it is not directed toward an enumerated power. Despite the majority’s attempt to link it to “the same enumerated power”¹⁵⁶ that gives Congress the power to punish,¹⁵⁷ Thomas contends that Congress has the power to punish interference with an enumerated power.¹⁵⁸ Holding inmates past their release dates does not address any such interference. Furthermore, Thomas rebukes the majority’s notion that the “federal custodial” power derives from the Restatement of Torts. He points out “[t]hat citation [to

¹⁵³ *Id.*

¹⁵⁴ *United States v. Comstock*, 560 U.S. 126, 160 (2010) (Thomas, J., dissenting).

¹⁵⁵ *Id.* at 161 (quoting U.S. CONST. art. I, § 8, cl. 18). Subsequently, Thomas invokes the pre-ratification Federalist position that the Clause simply states what is already implicit. *Id.*

¹⁵⁶ *Id.* at 148 (majority opinion).

¹⁵⁷ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 416–17 (1819).

¹⁵⁸ *Comstock*, 560 U.S. at 169–70 (Thomas, J., dissenting).

the Restatement] is puzzling because federal authority derives from the Constitution, not the common law.”¹⁵⁹ Without an enumerated power, § 4248 does not make it past the first step of this approach; therefore, any further inquiry is redundant.

The “One-step” approach surfaces again in *NFIB v. Sebelius*. There, five justices declined to uphold the individual mandate of the Affordable Care Act as a necessary and proper exercise of Congress’s commerce power. In part III(A)(2) of the opinion, Chief Justice Roberts (writing alone) adopts a restrictive view of the Clause, echoing Thomas’s dissent in *Comstock*.¹⁶⁰ Roberts begins by omitting the “all other powers” language from his recital of the Clause, and inserting the term “enumerated” into the *McCulloch* definition.¹⁶¹ Note the consonance here with Thomas’s *Comstock* dissent—there *must* be an enumerated power for Congress to invoke the Necessary and Proper Clause. Moreover, Roberts expressly lays out the “proper” prong of the *McCulloch* inquiry, which the Court bypassed in *Comstock* and later in *Kebedeaux*; that is, laws that are inconsistent with the Constitution are not proper, regardless of their necessity.¹⁶² This fits markedly well with Thomas’s two-part interpretation of the *McCulloch* standard: the law must fit with an enumerated end and remain “consist[ent] with the letter and spirit of the constitution.”¹⁶³

Under the weight of this inquiry, the individual mandate collapses. Rather than providing an incidental exercise of enumerated power, the individual mandate “vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.”¹⁶⁴ This is because Congress is not regulating economic activity here—they are regulating inactivity.¹⁶⁵ To allow Congress this discretion would yield

¹⁵⁹ *Id.* at 173.

¹⁶⁰ *Nat’l Fed’n of Indep. Bus.’s v. Sebelius*, 567 U.S. 519, 559 (2012).

¹⁶¹ *Id.* at 560 (“The power to ‘make all Laws which shall be necessary and proper for carrying into Execution’ the powers enumerated in the Constitution, Art. I, § 8, cl. 18, vests Congress with authority to enact provisions ‘incidental to the [enumerated] power, and conducive to its beneficial exercise.’” (quoting *McCulloch*, 17 (4 Wheat.) U.S. at 418 (alteration in original))).

¹⁶² *Id.*

¹⁶³ *Id.* (alteration in original) (citing *McCulloch*, 17 U.S. (4 Wheat.) at 421).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* By allowing Congress to reach this far, such a conception of the Necessary and Proper Clause would work a substantial expansion of federal authority. No longer would Congress be limited to regulating under the Commerce Clause those who by some

potentially unbounded regulatory authority under the Necessary and Proper Clause.

Ultimately, the “One-step” approach is a straightforward, predictable, and easily applied test. Put simply, the primary question is “pursuant to which power is Congress legislating?” If the answer is not an enumerated power, then it is beyond the scope of the Necessary and Proper Clause. Certainly, this feels consistent with Alexander Hamilton’s position that the Clause simply articulates that which is already implied in the Constitution.¹⁶⁶ Admittedly, it does not allow for as much legislative flexibility as a broad reading of the clause—but it does create well-defined boundaries and predictability.

2. The “Federalist Restriction”

The “Federalist Restriction” mandates a reading of the Necessary and Proper Clause that hinges largely upon the meaning of “proper” and the scope of the Tenth Amendment. The crux of this approach is that despite a law’s necessity, it must not encroach upon state sovereignty. Federal laws that abridge the sovereign immunity of the States are not “proper,” and therefore, are not constitutional applications of the Necessary and Proper Clause.

The Court sums up the Federalist Restriction succinctly in *Printz v. United States*. There, the Court declined to uphold provisions of the Brady Handgun Violence Prevention Act as a necessary and proper exercise of Congress’s commerce power.¹⁶⁷ The Brady Act required state law enforcement officers to conduct background checks on prospective handgun purchasers, thereby forcing state officials to participate in a federal regulatory scheme.¹⁶⁸ The dissent would have held that Congress’s power to regulate handguns stems from its commerce power, and in turn enlisting state law enforcement officers to carry out the Brady

preexisting activity bring themselves within the sphere of federal regulation. Instead, Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it.

Id.

¹⁶⁶ THE FEDERALIST NO. 33 (Alexander Hamilton).

¹⁶⁷ *Printz v. U.S.*, 521 U.S. 898, 923–24 (1997).

¹⁶⁸ *Id.* at 898. The Court felt that doing so would upset the separation of powers, by transferring federal executive power to thousands of state law enforcement officers. *Id.* at 922.

Act was a necessary and proper execution of that power.¹⁶⁹ The majority, however, refrains from applying “the last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause.”¹⁷⁰ Instead, the Court proclaims that laws, whether they are executing an enumerated power or not, are not proper if they violate constitutional principles of state sovereignty.¹⁷¹ The inference here is that a law’s propriety trumps its necessity.¹⁷² The Court finds support for this idea in the words of Alexander Hamilton: “[The Brady Act] is not a La[w] . . . proper for carrying into Execution the Commerce Clause, and is thus, in the words of the Federalist, merely [an] ac[t] of usurpation which deserve[s] to be treated as such.”¹⁷³

Two years later in *Alden v. Maine*, the Court affirmed this view. There, the Court was asked to determine whether Congress could subject nonconsenting States to private suits in their own courts.¹⁷⁴ The dispute arose when plaintiffs sued the State of Maine (their employer) for violations of the Fair Labor Standards Act.¹⁷⁵ After their action was dismissed in federal court, the plaintiffs brought the same action in state court.¹⁷⁶ The Court ultimately sustained dismissal of the suit as a violation of the States’ sovereign immunity, declining to “conclude that the specific Article I powers delegated to Congress necessarily include, by virtue of the Necessary and Proper Clause or otherwise, the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers.”¹⁷⁷ The logic here is essentially the same as in *Printz*—regardless of a law’s necessity or the scope of Congress’s enumerated powers, it must not abridge principles of state sovereignty. In fact, the Court cites

¹⁶⁹ *Id.* at 941 (Stevens, J., dissenting).

¹⁷⁰ *Id.* at 923 (majority opinion).

¹⁷¹ *Id.* at 923–24.

¹⁷² Note the contrast between this approach and the “Chain-link” approach in *Comstock* and *Kebodeaux*. In those cases, the Court does not address whether the contested laws are “proper,” but instead focuses only on the laws’ necessity. Here, conversely, the Court does not address whether the Brady Act is “necessary,” but instead jumps immediately to whether the law is “proper.”

¹⁷³ *Printz*, 521 U.S. at 924 (internal quotation marks omitted) (citing THE FEDERALIST NO. 33, at 214 (Alexander Hamilton) (M. Walter Dunne ed., 1901)).

¹⁷⁴ *Alden v. Maine*, 527 U.S. 706, 730 (1999).

¹⁷⁵ *Id.* at 711–12.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 732.

language from *Printz* to emphasize the propriety of laws in light of state sovereignty.¹⁷⁸

A third articulation of the “Federalist Restriction” can be found in Justice Kennedy’s concurring opinion in *Comstock*. Although Kennedy ultimately vindicates § 4248 as constitutional under the Necessary and Proper Clause,¹⁷⁹ he also voices an insightful discussion of the Clause’s relationship to the Tenth Amendment. Kennedy avers that if a congressional exercise of Sweeping Clause power is constitutional, then it is not a power reserved to the States, and the two are mutually exclusive.¹⁸⁰ This comports with the “proper” prong espoused in *McCulloch*—precepts of federalism molded by the “the letter and spirit of the [C]onstitution,”¹⁸¹ indicate whether a law is in fact “proper.”¹⁸² Just as in *Printz* and *Alden*, there is a strong emphasis here on the law’s propriety rather than its bare necessity. There is an implication that “proper” federal laws cannot usurp the powers reserved to the States by the Tenth Amendment: “It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause”¹⁸³

Ultimately, under this approach, inquiries into the Necessary and Proper Clause are guided by principles of federalism. Interestingly, they focus almost entirely on the law’s propriety rather than its necessity. This places an effective cap on the Clause while still retaining flexibility as to necessity. Thus, Congress retains broad discretion as to its means, but cannot elasticize the Clause so much that it impedes the States’ prerogative.

IV. THE RATIONAL FEDERALIST APPROACH

To this point, this Note has examined four different methods of interpreting the Necessary and Proper Clause. Two broad: the “Rational Connection” and “Chain-link” approaches; and two narrow: the “One-step” and “Federalist Restriction” approaches.

¹⁷⁸ *Id.* at 732–33 (quoting *Printz*, 521 U.S. at 923–24); see also *supra* note 173 and accompanying text.

¹⁷⁹ *United States v. Comstock*, 560 U.S. 126, 150 (2010) (Kennedy, J., concurring).

¹⁸⁰ *Id.* at 153.

¹⁸¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

¹⁸² *Id.*

¹⁸³ *Comstock*, 560 U.S. at 153 (Kennedy, J., concurring).

Each approach has its advantages and disadvantages, but no one alone embodies the full depth of the Clause. As such, it is difficult to determine which is the true mantle of Necessary and Proper Clause jurisprudence.

All things considered, the most accurate interpretation lies not in one singular approach, but in a blend of the “Rational Connection” and the “Federalist Restriction” approaches. Although the former falls on the broad side of the spectrum and the latter on the narrow, the two taken together provide a useful balance of flexibility and restraint that could prove useful in future interpretations of the Clause. This Part will argue that the “Rational Connection” espouses the best interpretation of “necessary,” and that the “Federalist Restriction” best dictates which laws are “proper.” It is crucial that both prongs of the inquiry be considered, despite the Court’s trend of locking in on one or the other.¹⁸⁴ Ultimately, a synthesis of these two approaches creates the most efficient interpretation of the Necessary and Proper Clause.

A. *Laws that are “Necessary”*

The Rational Connection approach, although broad, provides an effective mode of interpreting the “necessary” prong of the Sweeping Clause. There are three important factors that make this approach effective: it is consistent with *McCulloch*, it embodies scholarly administrative and corporate law theories, and it gives Congress flexibility in executing its enumerated powers.

First, the “Rational Connection” approach as to necessity hardly deviates from *McCulloch*. Remember, Chief Justice Marshall broadly defines “necessary” as meaning not “absolutely necessary,” but simply “convenient” or “useful.”¹⁸⁵ Indeed, he declares that necessary laws must be “appropriate” and “plainly

¹⁸⁴ Alternatively, Professor Bray proposes that the clause could be interpreted as a hendiadys—that is, a figure of speech in which two terms separated by a conjunction form one single expression. Samuel Bray, “*Necessary and Proper*” and “*Cruel and Unusual*”: *Hendiadys in the Constitution*, 102 VA. L. REV. 687, 688 (2016). For example, one might describe a cow as “nice and fat,” meaning only one quality rather than that the cow is both “nice” and “fat.” *Id.* at 689. In the same vein, interpreting the Necessary and Proper Clause as a hendiadys would eliminate separate inquiries into necessity and propriety, and instead yield one inquiry into the connection between congressional action and an enumerated power. *Id.* at 737–38.

¹⁸⁵ *McCulloch*, 17 U.S. (4 Wheat.) at 413.

adapted.”¹⁸⁶ It is this very same language that permeates the Rational Connection approach. In both *Jinks* and *Gonzalez*, the Court upholds the necessity of congressional action as “conducive to the due administration of justice,” “plainly adapted,” and “appropriate.”¹⁸⁷ Essentially, this is the standard *McCulloch* contemplates.¹⁸⁸ Without adequate discretion to carry out the powers conferred to it by the Constitution, Congress would be unable “to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.”¹⁸⁹ By rejecting a rigid standard of necessity and allowing Congressional discretion, the Rational Connection upholds the mantle of *McCulloch*—as to necessity, at least.

Additionally, the discretion allowed in determining necessity under the Rational Connection approach is consistent with the administrative and corporate law theories of the Clause’s origins.¹⁹⁰ Recall Professors Lawson and Seidman’s theory that an administrative interpretation of necessity requires efficacy, measuredness, and proportionality.¹⁹¹ These qualities are all embodied in the Rational Connection approach. The approach is effective because it gives Congress ample leeway in executing its enumerated powers.¹⁹² It is measured and proportionate as well because it requires that acts of Congress be “appropriate” and “plainly adapted.”¹⁹³ Furthermore, the Rational Connection interpretation of “necessary” is consistent with the corporate law theory of the Clause’s origins.¹⁹⁴ Recall Professor Miller’s observation that the term “necessary” appeared in corporate charters to protect against broad grants of authority to corporate legislative bodies, and to require that enacted rules be “reasonably closely adapted” to institutional goals.¹⁹⁵ The Rational Connection approach radiates this same sentiment. For

¹⁸⁶ *Id.* at 421.

¹⁸⁷ *See supra* Part III.A.1; *see also* *Jinks v. Richland Cty., S.C.*, 538 U.S. 456, 462; *Gonzalez v. Raich*, 545 U.S. 1, 39.

¹⁸⁸ *See McCulloch*, 17 U.S. (4 Wheat.) at 418.

¹⁸⁹ *Id.* at 415.

¹⁹⁰ *See supra* Part I.

¹⁹¹ *See supra* Part I.B; *see also* Lawson & Seidman, *supra* note 23, at 141–42.

¹⁹² *See Jinks*, 538 U.S. at 462 (declaring that the Court “long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be ‘absolutely necessary’ to the exercise of an enumerated power.” (emphasis in original) (citations omitted)).

¹⁹³ *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring).

¹⁹⁴ *See supra* Part I.C.

¹⁹⁵ *See supra* note 46 and accompanying text.

example, in *Gonzalez*, Justice Scalia avers that under the Necessary and Proper Clause it is critical that “the means chosen are ‘reasonably adapted’ to the attainment of a legitimate end”¹⁹⁶ In both instances, there is a means-ends fit required to keep the governing body’s power from going unchecked.

Finally, the Rational Connection approach is useful in allowing Congress flexibility in its legislation. Certainly, the framers anticipated some degree of flexibility to enable Congress to carry out its enumerated powers. As James Madison wrote: “Without the SUBSTANCE of this power, the whole Constitution would be a dead letter.”¹⁹⁷ Chief Justice Marshall, too, emphasized the importance of flexibility in a government intended to endure.¹⁹⁸ The Rational Connection approach takes this into account. By rejecting an unyielding reading of the word “necessary,” the Court allows Congress to adapt accordingly to both an ever-changing nation and an ever-shifting constitutional gestalt.¹⁹⁹ Indeed, Marshall recognizes this: “[The Necessary and Proper Clause] is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.”²⁰⁰

That said, this approach must be taken carefully. As we have seen, the Rational Connection approach is an accordion concept and can be elasticized to allow Congress far more regulatory power than intended.²⁰¹ Such a broad reading can be malleated to encapsulate a plethora of implied powers not otherwise found in the Constitution.²⁰² However, it is crucial to remember that “the powers of the government are limited, and that its limits are not to be transcended.”²⁰³ Thankfully, the framers contemplated this by adding the phrase “and proper” to modify the word “necessary.” Therefore, it is absolutely

¹⁹⁶ *Gonzalez*, 545 U.S. at 37 (Scalia, J., concurring).

¹⁹⁷ THE FEDERALIST NO. 44 (James Madison) (emphasis in the original).

¹⁹⁸ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (declaring “we must never forget that it is a *constitution* we are expounding.” (emphasis in original)).

¹⁹⁹ See Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1, 2–3 (2013).

²⁰⁰ *McCulloch*, 17 U.S. (4 Wheat.) at 415 (emphasis in original).

²⁰¹ See *supra* Part III.A.1.

²⁰² See Mikhail, *supra* note 4, at 1128. Mikhail concludes that “the Constitution vests unenumerated powers in the Government of the United States—and that Congress in turn is assigned the legislative authority to carry those powers into execution, by enacting laws ‘necessary and proper’ to that end.” *Id.*

²⁰³ *McCulloch*, 17 U.S. (4 Wheat.) at 421.

imperative that courts do not forget the second prong of the inquiry mandated by Article I, § 8, Cl. 18 of the Constitution—that acts of Congress must be “proper.”

B. Laws that are “Proper”

The Federalist Restriction, although a slim inquiry, accords more weight to a law’s propriety than do the other three approaches. This aspect of the Necessary and Proper Clause inquiry is crucial for three reasons: it creates an ostensible cap on Congress’s Article I power, it reflects the fiduciary and corporate shades proposed by Professors Natelson and Miller, and it remains homogenous with the Clause’s originally intended scope.

First, the “proper” cap only allows the sheets of necessity to be pulled so far. In *McCulloch*, Chief Justice Marshall made it abundantly clear that laws upheld under this Clause must “be within the scope of the constitution,” and “consist with the letter and spirit of the constitution”²⁰⁴ to be proper. Yet, time and again the Court has upheld laws that are only remotely embodied in the Constitution—if at all—under the guise of “necessity.”²⁰⁵ This is indeed foreboding for the principle “that [t]he powers of the legislature are defined, and limited.”²⁰⁶

The Federalist Restriction protects against such legislative overreach by ensuring that laws which purport to carry out enumerated power are in fact proper exercises of congressional authority that do not otherwise intrude upon the province of states. As illustrated by *Printz* and *Alden*, laws that can be stretched to reach an enumerated power nevertheless must be struck down if they usurp state power or try to fit the states into a federal mold.²⁰⁷ Rather, it is imperative that Congress does not deviate from traditional precepts of federalism.²⁰⁸ Without due respect to federalism, the “necessary” prong may be used to

²⁰⁴ *Id.*

²⁰⁵ See e.g., *United States v. Comstock*, 560 U.S. 126, 142 (2010) (deriving a “federal custodian” power from the Restatement (2d) of Torts); *United States v. Kebodeaux*, 570 U.S. 387, 412 (2013) (Thomas, J., dissenting) (“Congress does not retain a general police power over every person who has ever served in the military.”).

²⁰⁶ *Kebodeaux*, 570 U.S. at 415 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176).

²⁰⁷ See *supra* Part III.B.2.

²⁰⁸ See *Lawson & Granger*, *supra* note 3, at 271 (positing that “proper” laws must “not usurp or expand the constitutional powers of any federal institutions or infringe on the retained rights of the states or of individuals”).

jettison enumerated powers in favor of a broad conception of implied, unenumerated power that permits laws merely for convenience or usefulness.²⁰⁹ Critically, the “proper” inquiry works as a bulwark to keep what is “necessary” from going unchecked.

Second, the Federalist Restriction reflects the fiduciary and corporate colors that Professors Natelson and Miller suggest permeate the Clause. Recall Professor Natelson’s agency law theory—if a fiduciary action extends beyond its scope of authority, the reasonableness of the action is irrelevant.²¹⁰ The same concept applies in the Federalist Restriction. If Congress legislates beyond its own powers and infringes upon the states, the necessity of that action becomes nugatory.²¹¹ Indeed, to act properly, Congress must not elasticize necessity to an extent that transcends the Tenth Amendment;²¹² otherwise it breaches its fiduciary duty to act as an agent of the people. Furthermore, Professor Miller’s corporate theory is reflected under this approach. Recall that Professor Miller observed the use of limiting vocabulary attached to grants of power in corporate charters²¹³ and posits that such terms served to protect against broad grants of power that could contravene state or federal law.²¹⁴ The Federalist Restriction approach does essentially the same thing. “Proper” serves as a limiting function upon the accordion concept of necessity to ensure that Congress does not exceed “the just bounds of its authority and make a tyrannical use of its powers.”²¹⁵ Under both theories, it is essential that the legislature does not wrongfully exercise powers it does not possess.

²⁰⁹ *Id.* at 331 (proclaiming that the Clause does not allow Congress “to regulate unenumerated subject areas to make the exercise of enumerated powers more efficient.”).

²¹⁰ *See supra* note 14 and accompanying text.

²¹¹ *See* *United States v. Comstock*, 560 U.S. 126, 153 (2010) (Kennedy, J., concurring) (“It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that the power is not one properly within the reach of federal power.”).

²¹² The Tenth Amendment states that: “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.” U.S. CONST. amend. X.

²¹³ *See supra* note 40 and accompanying text.

²¹⁴ *See supra* note 45 and accompanying text.

²¹⁵ THE FEDERALIST NO. 33 (Alexander Hamilton).

Finally, the Federalist Restriction accurately reflects the scope originally intended for the Clause. After the Constitutional Convention, there was strong push-back from anti-Federalists who feared that the Necessary and Proper Clause would enable the central government to abolish state legislatures, abolish state taxes, destroy state governments, and eventually lapse into tyranny.²¹⁶ In response, the Federalists defended the Clause as mere surplusage—as adding nothing to the powers of government that was not already inherent within the Constitution.²¹⁷ For example, in *Federalist 33*, Alexander Hamilton defended the Clause as “only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers.”²¹⁸ He believed that whether a law was proper “must always be determined by the nature of the powers upon which it is founded.”²¹⁹ This is a clear indication that congressional action pursuant to the Clause could only serve the powers expressly enumerated. Hamilton presented the Clause as a superfluous one that granted Congress no additional substantive power. In fact, he averred that the Clause “though it may be chargeable with tautology or redundancy, is at least perfectly harmless.”²²⁰ Conceptions such as these indicate that the Necessary and Proper Clause was never intended to bestow vast implied powers upon Congress.²²¹ The Federalist Restriction ensures that it does not. By championing the “proper” analysis, it ensures that “the powers reserved to the States consist of the whole, undefined residuum of power remaining after taking account of powers granted to the National Government.”²²²

²¹⁶ See Kurt Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1895 (2008).

²¹⁷ See Natelson, *supra* note 5, at 99.

²¹⁸ THE FEDERALIST NO. 33 (Alexander Hamilton).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ See Lash, *supra* note 216, at 1895. *But see* Mikhail, *supra* note 4, at 1050 (arguing that the Clause “necessarily refers to certain implied or unenumerated powers that the Constitution vests in the Government of the United States itself.”).

²²² *United States v. Comstock*, 560 U.S. 126, 153 (2010) (Kennedy, J., concurring).

Ultimately, it is this limited scope of the Clause espoused by the Federalists that might tend to taint *McCulloch*'s crown.²²³ Federalist supporters of the Constitution were steadfast in their conviction that it only granted expressly enumerated powers to Congress²²⁴—not the “vast mass of incidental powers” that Chief Justice Marshall uncovered.²²⁵ Breaking from the traditional representations of the Constitution's advocates,²²⁶ *McCulloch* embraced a broad conception of implied federal power.²²⁷ The Federalist Restriction, however, restores a limited scope to the Clause. By emphasizing the propriety of congressional action, it ensures that Marshall's “vast mass of incidental powers” is not so vast that it usurps those powers reserved to the States and to the people. This is imperative, since “the precepts of federalism embodied in the Constitution inform which powers are properly exercised by the National Government in the first place.”²²⁸

Ultimately, this often overlooked yet vital inquiry ensures that Congress is legislating pursuant to its enumerated powers. By creating a palpable limit on incidental power, reflecting the fiduciary and corporate aspects of the Clause, and staying true to the Clause's scope as originally represented, the “Rational Federalist” approach mandates an effective standard for Necessary and Proper Clause interpretation.

CONCLUSION

Amidst four different categories of interpretation, there is no predictable outcome for laws enacted pursuant to the Necessary and Proper Clause. It is unclear whether they require a mere

²²³ See Lash, *supra* note 216, at 1891–92. Upon an original understanding of the Tenth Amendment, Professor Lash argues that *McCulloch* is “almost certainly wrong.” *Id.* at 1892.

²²⁴ Lash, *supra* note 216, at 1892.

²²⁵ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

²²⁶ See Lash, *supra* note 216, at 1895 (noting that “advocates of the Constitution assured the ratifiers in the state conventions that Congress would have only expressly enumerated powers”).

²²⁷ Professor Lash frames the gravity of the *McCulloch* decision quite nicely: Marshall's construction of federal power has been embraced so widely and for so long that it takes some effort to appreciate the radical nature of his argument. So long as a law is ‘calculated to effect’ any of the objects entrusted to the government . . . Congress could employ *any* means so long as they were not ‘prohibited’ by the Constitution—regardless of the degree of necessity.

Lash, *supra* note 216, at 1944 (emphasis in original) (citations omitted).

²²⁸ *United States v. Comstock*, 560 U.S. 126, 153 (2010) (Kennedy, J., concurring).

rational connection to an enumerated power, or whether they must pass a five-factor inquiry; whether anything more than one step away from an enumerated power is too much, or if a necessary law may usurp state power. The answers to these questions remain shrouded in ambiguity—but they do not have to be.

There is a way to provide the flexibility required for effective governance while preventing a potential leviathan. A combination of the Rational Connection and Federalist Restriction approaches affords Congress an effective amount of leeway as to necessity, all the while keeping federal power reasonably compressed under the weight of propriety.