The Corporate Law Background of the Necessary and Proper Clause

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Abstract

This Article investigates the corporate law background of the Necessary and Proper Clause. It turns out that corporate charters of the colonial and early Federal periods bristled with similar clauses, often attached to grants of rulemaking power. Analysis of these charters suggests the following: the Necessary and Proper Clause does not confer general legislative power; does not grant Congress unilateral discretion to determine the scope of its authority; requires that there be a reasonably close connection between constitutionally recognized ends and legislative means; and requires that federal law may not, without adequate justification, discriminate against or otherwise disproportionately affect the interests of particular citizens vis-à-vis others. Although the historical evidence reported in this Article is by no means conclusive as to the meaning of the Necessary and Proper Clause today, it does provide valuable information about the meaning that lawyers of the Framing period would have attributed to the words of this important constitutional provision.

Introduction

The Necessary and Proper Clause is perplexing. Perhaps the single greatest source of congressional power; a cornerstone of the modern administrative state; a trump card authorizing federal domination over many issues of national life; a symbol, for some, of the power of governments to improve the life of their citizens—it is all these, and more. Yet its terms are anything but pellucid. What does "necessary" mean? What about "proper"? What is the relationship between these words? The Constitution itself offers little clue. The phrase emerged from the Committee of Detail without clarification.[1] The records of the Constitutional Convention provide scant evidence as to how the Framers understood the Clause,[2] and the ratifying debates are not illu-

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1 *See* Mark A. Graber, *Unnecessary and Unintelligible*, 12 Const. Comment. 167, 168 (1995) ("The Committee on Detail gave no hint of why it chose the language it did.").

2 *See* Bernard H. Siegan, The Supreme Court's Constitution: An Inquiry into Judicial Review and Its Impact on Society 1 (1987) ("[T]he accounts of the 1787 Constitutional Convention are silent on the meaning of the necessary and proper power.").

minating. Prior to the Supreme Court's 1819 decision in *McCulloch v. Maryland*,[3] the Clause appeared to have been nearly forgotten.

The odd contrast between the importance of the Clause and the lack of attention given to it during the Founding era suggests that its terms must already have been in common usage. "Necessary and proper" feels like a lawyer's clause—a standard provision, which, despite its importance, is not usually the subject of negotiation or debate. If the clause was indeed one commonly found in legal practice, it would be understandable why so few people found it worthy of analysis or attention at the time of its drafting.

The hypothesis that the Necessary and Proper Clause was part of the standard repertoire of attorneys at the time suggests a possible line of research: information about the provenance and meaning of the Necessary and Proper Clause might be found in legal practice.[4] In particular, such information might be gleaned by examining the conventions and usages of corporate law. The Constitution, after all, is *itself* a corporate charter—a document creating a body corporate and defining its powers. It would not be surprising, therefore, if terminology such as "necessary and proper" turned up in other, more quotidian charters. And if such terminology is indeed found in ordinary charters, we might be able to draw on these documents as a guide to interpreting the meaning of similar language in the Constitution.

This Article pursues that line of inquiry by analyzing corporate charters from the colonial and early Federal periods: instruments establishing the colonies, statutes creating the First and Second Banks of the United States, and charters granted by Connecticut and North Carolina from the colonial period through 1819 (the date of the Supreme Court's opinion in *McCulloch*). It turns out that terms such as "necessary," "proper," and "necessary and proper" were indeed ubiquitous in corporate practice. Hundreds of such provisions are found in the charters I reviewed, often modifying grants of rulemaking powers that directly parallel the Constitution's grant of legislative authority to Congress. As described below, an analysis of these charters yields some information about the possible meaning of the term "nec-

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3 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

4 To date, commentators on constitutional law have not fully appreciated the importance of the private law background of this and other constitutional provisions. *See* Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL'Y 107, 117 n.26 (2009) ("[P]rivate law linguistic and intellectual traditions are not widely known to those immersed in modern public and administrative law.").

essary and proper" in corporate practice at the time the clause was inserted into the Constitution.

This Article is structured as follows. Part I explores the parallel between the Constitution and corporate charters. Part II reports the historical data. Part III considers how corporate attorneys of the time might have understood the Necessary and Proper Clause and the grant of legislative power within which it is embedded. Part IV considers how understanding the corporate law background of the Clause could inform views of contemporary constitutional issues.

I. The Constitution as a Corporate Charter

This Article begins by developing the analogy between the Constitution and corporate charters of the day. The analysis here draws on prior work by Robert Natelson, who observed in 2004 that the language of the Necessary and Proper Clause has roots in English agency practice.[5] In this Article, I wish to explore a related but slightly different hypothesis: it is not agency principles *in general*, but rather one specific *application* of those principles—the corporate charter—that provides the most immediate parallel and best general framework for understanding the legal background of the Necessary and Proper Clause.[6]

The Constitution of the United States is a corporate charter. It establishes—to quote corporate language of the times—a "body politic and corporate."[7] It endows that body with attributes of corporations: a name, continuity of existence, succession of leadership, and the power to sue and be sued. It specifies the purposes for which the body is established: to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty.[8] It sets forth powers of the institution and establishes limits on the exercise of

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5 Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 Case W. Res. L. Rev. 243, 247 (2004); *cf.* Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. Rev. 117, 117 (2006) (outlining an "interpretivist model of administrative law based on the concept of fiduciary obligation in private legal relations such as agency, trust, and corporation").

6 For an interesting article deriving the principle of judicial review from the corporate law background, see Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 Yale L.J. 502 (2006).

7 *E.g.*, Act for the Promotion of Learning in the County of Davidson, ch. 29, 1785 N.C. Sess. Laws 25, 25. Technically, since the United States was already in existence under the Articles of Confederation, albeit in a different form, it might be more accurate to say that the Constitution of 1787 reestablished the United States as a corporate body rather than created it.

8 U.S. Const. pmbl.

those powers. It grants exclusive privileges and rights. It delegates authority to agents and specifies rules of governance. All of these functions are commonly found in corporate charters of the late eighteenth and early nineteenth centuries.

The Constitution is no less a corporate charter because it establishes a *government* body rather than a private association. The distinction we perceive today between public and private entities was not well developed during the colonial and early Federal periods. Corporate charters of those days were not private contracts; they were public acts, usually embodied in legislation. Many corporations established during this period were actual governmental bodies—towns given charters to operate in corporate form.[9] Even when the institutions were privately owned, they were often conceived of as serving a public purpose. Poorhouses and orphanages received charters to perform social services for persons in need,[10] navigation companies to clear out streams,[11] canal companies to cut passages for boat traffic,[12] bridge companies to raise spans over rivers and streams,[13] water companies to dig and maintain aqueducts,[14] and road companies to build and operate turnpikes[15]—all actions serving the general welfare. Schools also served public purposes; statutes incorporating academies in North Carolina were often justified on the ground that "the good education of youth has the most direct tendency to promote virtue and ensure happiness and prosperity to the community."[16] Although business corporations in the modern sense were chartered during this period without an explicit bow to public purposes, legal practice did not sharply distinguish between public and private corporations.

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9 *See, e.g.*, Act to Incorporate the Town of Plymouth, ch. 48, 1807 N.C. Sess. Laws 24, 24.

10 *E.g.*, Act to Erect a Poor House in the County of Lincoln, ch. 120, 1818 N.C. Sess. Laws 100, 100; Act to Incorporate the Female Orphan Asylum Society of Fayetteville, ch. 44, 1813 N.C. Sess. Laws 26, 26.

11 *See, e.g.*, Act to Incorporate the Broad River Navigation Company, ch. 32, 1811 N.C. Sess. Laws 21, 21.

12 *See, e.g.*, Act to Incorporate Two Companies for the Purpose of Cutting a Navigable Canal from Roanoak River to Meherrin River, ch. 34, 1804 N.C. Sess. Laws 22, 22–27.

13 *See, e.g.*, Act to Incorporate a Company to Build a Bridge Across the Yadkin River, ch. 39, 1816 N.C. Sess. Laws 26, 26–27.

14 *E.g.*, Act to Incorporate an Aqueduct Company in the City of Norwich, ch. 8, 1808 Conn. Pub. Acts 7, 7–8.

15 *See, e.g.*, Act to Establish a Turnpike Road from Mattamuskeet Lake to the Main Public Road on the East Side of Pungo River, ch. 121, 1818 N.C. Sess. Laws 62, 62–64.

16 Act to Erect an Academy at the Town of Edenton, in the County of Chowan, ch. 39, 1800 N.C. Sess. Laws 25, 25–26.

There is direct evidence that the Framers of the Constitution were aware of the parallel between the federal government and a corporation. Eric Enlow observes that one of the proposals to the Committee of Detail provided that "'[t]he United States shall be forever considered as one body corporate and politic in law.'"[17] This language is taken directly from corporate charters of the era.[18] During the debates at the Convention, Madison argued that legislation in a limited government was related to that government's constitution in the same way that a "corporation's bye laws [sic] [were related] to the supreme law within a State."[19] Madison was alluding to the nearly universal practice of including in corporate charters clauses explicitly subordinating the rulemaking authority of a corporation to the laws and constitutions of the political jurisdiction within which the corporation was formed.[20]

The corporate concept of the state remained salient to the early United States Supreme Court. In *Chisholm v. Georgia*,[21] Justice Iredell observed that

> [t]he word "corporations," in its largest sense, has a more extensive meaning than people generally are aware of. Any body politic (sole or aggregate) whether its power be restricted or transcendant [sic], is in this sense "a corporation." . . . In this extensive sense, not only each State singly, but even the *United States* may without impropriety be termed "corporations."[22]

Justice Marshall, the author of *McCulloch*, voiced the same view in 1823: "The United States is a government, and, consequently, a body politic and corporate, capable of attaining the objects for which

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17 Eric Enlow, *The Corporate Conception of the State and the Origins of Limited Constitutional Government*, 6 WASH. U. J.L. & POL'Y 1, 11 (2001) (quoting JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 559 (E. H. Scott ed., special ed. 1898)).

18 *See id.*

19 *Id.* at 11–12 (quoting JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 297 (E. H. Scott ed., special ed. 1898)).

20 *See, e.g.*, Act to Incorporate the Trustees of the Missionary Society of Connecticut, 1802 Conn. Pub. Acts 602, 604 (granting authority to execute "Laws and regulations . . . provided they be not contrary to the Laws of this State, or of the United States"); Act Incorporating Chauncy Gleason, Elias Cowles, and Their Associates, 1801 Conn. Pub. Acts 583, 583 (granting authority to execute "By-Laws, Ordinances and Regulations . . . not being contrary to this Act, and the Laws of this State, or of the United States"). For discussion of these clauses as a basis of the principle of judicial review, see generally Bilder, *supra* note 6.

21 Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

22 *Id.* at 447. For discussion, see Enlow, *supra* note 17, at 12–13.

it was created . . . . This great corporation was ordained and established by the American people . . . ."[23]

There is every reason to suppose that the members of the Committee of Detail who drafted the Necessary and Proper Clause were aware of this corporate law background. Four of the five members of the committee were lawyers: Edmund Randolph served as Attorney General of Virginia for ten years and would later serve as the first Attorney General of the United States;[24] John Rutledge trained at London's Middle Temple and was a drafter of South Carolina's 1776 Constitution, as well as a future Justice of the United States Supreme Court;[25] James Wilson was a prominent Pennsylvania lawyer and future Supreme Court Justice;[26] Oliver Ellsworth sat as a Connecticut judge and later became Chief Justice of the United States.[27] Each of these men was not only a prominent public lawyer, but also an active practitioner involved in a wide range of legal matters, including business law issues.[28] 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 the corporate law practice of the time.

II. THE DATA

I reviewed a sample of eighteenth-century and early nineteenth-century corporate charters. These included the federal charters of the First and Second Banks of the United States, the crown charters for the American colonies, the charter of the Massachusetts Bay Company, and charters issued by North Carolina and Connecticut from the colonial period through 1819, the date of Chief Justice Marshall's decision in *McCulloch v. Maryland*. I chose North Carolina and Connecticut based partly on considerations of tractability, given the enormous volume of laws that even then were being adopted by colonial and state legislatures. To reduce the possibility of bias, I selected two states that presented contrasting situations: Connecticut, a Northern and industrializing state with a substantial financial sector, including banks and insurance companies; and North Carolina, a Southern, agri-

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23 United States v. Maurice, 26 F. Cas. 1211, 1216 (C.C.D. Va. 1823) (No. 15,747) (Marshall, C.J.); *see also* Enlow, *supra* note 17, at 15–16.

24 Natelson, *supra* note 5, at 270.

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

cultural state with a less-developed financial sector.[29] This review identified 144 charters in Connecticut and 230 charters in North Carolina. The principal recipients of charters in North Carolina were towns, schools, and lodges, whereas Connecticut chartered substantial numbers of banks and insurance companies. This difference was not clear-cut, however, as Connecticut issued charters to towns and schools and North Carolina chartered banks and insurance companies. Other recipients of charters in one or both states included poorhouses, asylums, bible societies, library societies, missionary societies, aqueduct companies, turnpike companies, fishing companies, medical societies, canal companies, and manufacturing concerns. Overall, my investigation revealed an extraordinary incidence of clauses that, like the Constitution's Necessary and Proper Clause, serve to limit or define the discretion of persons charged with managing the corporate entities (I refer to these clauses as "scope" clauses because they modify the scope of agency).

Scope clauses appear even in early colonial charters. The 1663 crown charter to the organizers of the Carolina Colony conferred authority to bestow titles of honor "as they shall think fit," to make laws "as often as need shall require," to appoint judges in such manner as "shall seem most convenient," and to do all things "necessary" to provide for food and clothing to the colonists.[30] A 1665 restatement of that charter authorized the governor and council to make laws "as [shall be] necessary for the present good and welfare" and "as [shall be] necessary" for good government.[31]

The 1609 charter of the Virginia Colony authorized the grantees to build forts "according to their best Discretion" and to erect habitations "where they shall think fit and convenient."[32] The Virginia charter of 1611–1612 authorized the grantees to appoint officers "as they shall think fit and requisite" and to make laws "as to them from Time to Time, shall be thought requisite and meet."[33]

The Pennsylvania charter of 1681 gave William Penn and his successors the power to sell property "as they shall thinke fitt."[34] The

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29 Connecticut presented the added advantage that it was the home of Oliver Ellsworth, one of the members of the Committee of Detail. *See supra* note 26 and accompanying text.

30 5 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES 2743–53 (Francis Newton Thorpe ed., 1909).

31 *Id.* at 2756–61.

32 7 *id.* at 3783–89.

33 *Id.* at 3806.

34 5 *id.* at 3042.

Pennsylvania Charter of Liberties of 1682 similarly granted Penn and his successors the power to pass laws "that they shall think fit."[35]

The 1662 Connecticut charter authorized the grantees to make laws "as they shall think Fit, and Convenient," to elect officers "as they shall think fit and requisite," and to import goods "that are or shall be useful or necessary for the Inhabitants."[36]

The 1669 charter of the New Plymouth Colony authorized the grantees to take certain actions "from tyme to tyme as [shall be] necessary for their strength and safety."[37]

The Massachusetts Bay Company charter of 1629 authorized the grantees to appoint officers "as they shall thinke fitt and requisite" and to make laws and ordinances "as to them from tyme to tyme [shall be] thought meete."[38]

The Rhode Island charter of 1663 authorized the grantees to appoint officers and grant commissions "as they shall thinke fitt and requisite" and to adopt laws which "as to them shall seeme meete for the good nad [sic] welfare of the sayd Company."[39]

The Maryland charter of 1632 authorized the Baron of Baltimore and his successors to "make and constitute fit and Wholesome Ordinances," to sell lands "as they shall think convenient," and to "do all and singular other Things in the Premises, which to him or them shall seem fitting and convenient."[40]

The Georgia charter of 1732 gave the grantees the power to adopt laws as "shall seem necessary and convenient for the well ordaining and governing of the said corporation," to appoint officers "as shall by them be thought fit and needful," and to act "in such manner and ways and by such expenses as they shall think best."[41]

Scope terms also appear in the charters of the First and Second Banks of the United States. The First Bank's directors were empowered to establish offices "wheresoever they shall think fit," to employ such officers "as shall be necessary for executing the business of the said corporation," to deal with the corporate seal "at their pleasure," and to "ordain, establish, and put in execution, such by-laws, ordi-

35 *Id.* at 3051.

36 1 *id.* at 529–36.

37 3 *id.* at 1845.

38 *Id.* at 1846–53.

39 6 *id.* at 3215.

40 3 *id.* at 1677–86.

41 2 *id.* at 770–75.

nances and regulations, as shall seem necessary and convenient for the government of the said corporation."[42]

Relevant terms for the Second Bank are similar: the directors were authorized to establish branches "wheresoever they shall think fit," to manage the corporate seal "at their pleasure," and to "put in execution, such by-laws, and ordinances, and regulations, as they shall deem necessary and convenient for the government of the said corporation."[43]

Scope terms are ubiquitous in corporate charters from North Carolina and Connecticut. The drafters of these statutes utilized an impressive vocabulary of such terms. "Necessary" and "proper" are the most common, but "expedient,"[44] "fit,"[45] "convenient,"[46] "at pleasure,"[47] and "appertain"[48] are also observed with reasonable frequency. Less common are "beneficial,"[49] "advisable,"[50] "reasonable,"[51] "meet,"[52] "conducive to,"[53] "for the benefit of,"[54] and "according to their discretion."[55] Doublets, like the Constitution's "necessary and proper," are also attested: examples are "expedient and necessary,"[56] "necessary and expedient,"[57] "necessary or expedi-

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42 Act of June 1, 1789, ch. 10, 1 Stat. 190, 191–95 (establishing the First National Bank of the United States).

43 Act of Apr. 10, 1816, ch. 44, 3 Stat. 266, 269 (establishing the Second National Bank of the United States).

44 *E.g.*, Act to Incorporate the Town of Plymouth, ch. 48, 1807 N.C. Sess. Laws 24, 24.

45 *E.g.*, Act to Incorporate the North River and Adams Creek Canal Company, ch. 40, 1816 N.C. Sess. Laws 28, 28.

46 *E.g.*, Act to Incorporate the American Geological Society, ch. 32, 1819 Conn. Pub. Acts 367, 368.

47 *E.g.*, Act to Incorporate the Eagle Bank, ch. 1, 1811 Conn. Pub. Acts 65, 65.

48 *E.g.*, *id.*

49 *E.g.*, Act to Establish a Town on John Strother's Land, ch. 34, 1802 N.C. Sess. Laws 22, 22.

50 *E.g.*, Act to Establish an Academy in the County of Buncombe, ch. 43, 1801 N.C. Sess. Laws 27, 27.

51 *E.g.*, Act to Incorporate the Bridgeport Bank, 1806 Conn. Pub. Acts 741, 742.

52 *E.g.*, Act to Erect an Academy at the Town of Edenton, ch. 39, 1800 N.C. Sess. Laws 25, 25.

53 *E.g.*, 4 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 364 (Charles J. Hoadly ed., 1868).

54 *E.g.*, Act to Incorporate the Middlesex Fishing Company, 1807 Conn. Pub. Acts 774, 775.

55 *E.g.*, Act to Incorporate the Trustees of the Missionary Society of Connecticut, 1802 Conn. Pub. Acts 601, 602.

56 *E.g.*, Act to Establish a Town and Inspection of Tobacco and Flour in Caswell County, ch. 48, 1796 N.C. Sess. Laws 43, 43.

57 *E.g.*, Act to Establish a Seminary of Learning in the Town of Salisbury, ch. 54, 1798 N.C. Sess. Laws 27, 27.

ent,"[58] "fit and expedient,"[59] "proper and necessary,"[60] "necessary and proper,"[61] "necessary and convenient,"[62] "fit and proper,"[63] "suitable and necessary,"[64] and "necessary or convenient."[65]

III. Implications for Interpretation

Although the evidence presented so far establishes an unmistakable parallel between corporate charters and the Necessary and Proper Clause, the diversity of scope terms in these charters and the lack of explicit definitions interfere with the task of deriving clear meaning from the corporate law background. The words appear in a fantastic jumble, like a bed of fossilized dinosaur bones disordered by an ancient stream. Daniel Webster, in his brief to the Supreme Court in *McCulloch v. Maryland*, suggested that the Justices should simply give up trying to make much sense of the relevant terms: "These words, 'necessary and proper,' . . . are probably to be considered as synonimous [sic]. *Necessary* 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."[66] Excellent advocate that he was, Webster here seeks to elide any differences between "necessary" and

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58 *E.g.*, Act to Amend an Act, Entitled "An Act to Establish a Seminary of Learning in the Town of Fayetteville, and to Amend the Law for the Regulation of the Towns of Fayetteville and Hillsborough," ch. 81, 1809 N.C. Sess. Laws 28, 28.

59 *E.g.*, Act to Incorporate a Company to Build a Bridge Across the Yadkin River, ch. 39, 1816 N.C. Sess. Laws 26, 26.

60 *E.g.*, Act to Establish a Town at the Confluence of the Yadkin and Uharee Rivers in the County of Montgomery, ch. 96, 1794 N.C. Sess. Laws 37, 37.

61 *E.g.*, Act to Establish an Academy at Smithville, in the County of Brunswick, ch. 55, 1798 N.C. Sess. Laws 27, 28. Other charters using "necessary and proper" include: Act to Incorporate the Ocean Insurance Company of New-Haven, ch. 6, 1818 Conn. Pub. Acts 318, 321; Act Incorporating the Humphreysville Manufacturing Company, ch. 2, 1810 Conn. Pub. Acts 28, 29; Act to Incorporate the Union Insurance Company at New-London, 1805 Conn. Pub. Acts 709, 711; Act to Incorporate the New Haven Insurance Company, 1797 Conn. Pub. Acts 477, 479; Act to Incorporate the Trustees of the Milton Female Academy, ch. 104, 1818 N.C. Sess. Laws 90, 91; Act to Incorporate a Company to Improve, Clear Out, and Render Navigable Tranter's Creek, ch. 51, 1818 N.C. Sess. Laws 43, 44; Act to Incorporate the Trustees of Springfield Academy, in the County of Halifax, ch. 62, 1810 N.C. Sess. Laws 30, 30; Act to Incorporate the Newbern Marine Insurance Company, ch. 22, 1804 N.C. Sess. Laws 14, 15; Act to Establish an Academy in the Town of Wilmington, ch. 37, 1803 N.C. Sess. Laws 93, 93.

62 *E.g.*, Act to Incorporate the Ocean Insurance Company of New-Haven, ch. 6, 1818 Conn. Pub. Acts 318, 319.

63 *E.g.*, 9 The Public Records of the Colony of Connecticut, *supra* note 53, at 117 (act establishing Yale College).

64 *E.g.*, Act for Incorporating Part of the Town of Guilford, ch. 17, 1815 Conn. Pub. Acts 247, 251.

65 *E.g.*, Act to Incorporate the Bridgeport Bank, 1806 Conn. Pub. Acts 741, 741.

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

"proper," and then to equate them both with other scope terms such as "fit," "best," and "useful." This strategy served the interests of his client, McCulloch, who claimed that the federal government had the authority to charter the Bank of the United States notwithstanding the lack of express constitutional authority to do so.

Despite Webster's skepticism, however, a little paleontology can uncover information pertinent to the meaning of "necessary and proper" in the Constitution. First, our examination of the corporate law background will suggest that the "necessary and proper" language does not, on its own, confer any authority on Congress; instead, the clause acts as a limitation on the authority to enact legislation granted by other language in Article I, Section 8, Clause 18. Second, to the extent it grants any powers at all, the Necessary and Proper Clause does not grant general legislative powers but only powers that are tied to specific constitutional grants of authority. Third, the corporate law background does not support an interpretation that allows Congress to decide what is within its legislative power. Fourth, the use of the doublet "necessary and proper" indicates a unique conveyance of authority. Fifth, the term "necessary" carries a requirement that the legislative means chosen be reasonably closely related to the constitutionally recognized end being pursued. Sixth, the term "proper" creates a mandate that the legislature minimize harm to individual citizens and also avoid unnecessary disparate treatment.

1. There is no evidence in the corporate law background that the Necessary and Proper Clause, standing by itself, confers any authority on Congress. Scope clauses in colonial and early federal charters do not convey independent authority. They are adjectival—modifying authority otherwise granted. It is evident that the same is true of the Necessary and Proper Clause. By its own terms it grants no authority to enact legislation; that power is conferred elsewhere in Article I, where Congress is granted the power to make "Laws . . . for carrying into Execution" the powers of the national government.[67] The Necessary and Proper Clause of the Constitution, like scope clauses in corporate charters, was inserted as a means of modifying this basic authority.[68]

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67 U.S. CONST. art. I, § 8, cl. 18.

68 Lawson and Granger make the same observation about the lack of independent force to the Necessary and Proper Clause, although they base their conclusion on evidence other than corporate charters. *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 274–75 (1993).

2. The corporate law background suggests that the Necessary and Proper Clause, to the extent it confers any power at all, does not confer general legislative power on Congress. This conclusion can be derived by negative implication from the many grants of legislative authority found in corporate charters of the times. Those grants are almost always general in form: the board members are given authority, in the words of a 1798 North Carolina charter, to make laws and regulations "for the government of the Academy and preservation of religion, order and good morals therein."[69] To like effect, an 1802 Connecticut statute incorporating the Hartford Insurance Company authorized the company "to ordain and put in execution, such By-Laws and regulations as shall be deemed necessary and convenient, for the well ordering and governing said Corporation."[70] These and many other grants conferred rulemaking power in the broadest terms, covering all matters having to do with the welfare of the institution. That the breadth of these grants is not accidental is demonstrated by the fact that such clauses were typically accompanied by qualifications requiring that any such regulations not be otherwise contrary to law.[71] The Necessary and Proper Clause, in contrast, does not grant general legislative authority; it limits Congress's lawmaking authority to actions that are necessary and proper for carrying into execution the powers expressly granted.[72] The contrast between the general legislative power found in corporate charters and the restricted grant found in the Constitution suggests that Congress is not given any general lawmaking power.

3. The corporate law background also suggests that the Constitution does not grant Congress unilateral discretion to define whether a given action is within its legislative power.[73] Most corporate law char-

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69 Act to Establish an Academy at Smithville, ch. 55, 1798 N.C. Sess. Laws 27, 28.

70 Act to Incorporate the Hartford Insurance Company, 1803 Conn. Pub. Acts 650, 650.

71 *See, e.g.*, Act to Erect a Poor House in the County of Lincoln, ch. 120, 1818 N.C. Sess. Laws 100, 100 (adding a proviso limiting authority to be exercised "not inconsistent with the constitution and laws of this State and of the United States"); Act to Incorporate a Company for the Purpose of Clearing Out and Rendering Navigable Newport River, ch. 30, 1811 N.C. Sess. Laws 26, 26 (similar proviso); Act to Incorporate the Union Insurance Company at New-London, 1805 Conn. Pub. Acts 709, 710 (providing that authority not be used "contrary to this Charter, and the Laws of this State or of the United States"); Act to Incorporate the Middletown Insurance Company, 1802 Conn. Pub. Acts 653, 654 (same).

72 The Constitution makes this even clearer by stating that the Congress shall possess "all legislative powers *herein granted*." U.S. CONST. art. I, § 1 (emphasis added).

73 This point is also stressed by Lawson and Granger, although on grounds other than an analysis of corporate charters. *See* Lawson & Granger, *supra* note 68, at 276 ("[T]he clause does not explicitly designate Congress as the sole judge of the necessity and propriety of executory laws.").

ters of the era contained language recognizing the discretion of the corporate managers to judge for themselves whether the conditions of the scope clause were satisfied. We thus observe phrases such as "as to them shall seem necessary,"[74] "as to them shall seem meet,"[75] "which they may deem necessary,"[76] "as they shall think proper,"[77] "as they shall judge most convenient,"[78] "as to them may seem most convenient,"[79] "as they shall deem necessary and convenient,"[80] "as shall be deemed necessary and convenient,"[81] "as they may deem proper and necessary,"[82] "in such manner as shall best appear,"[83] "when they shall think fit,"[84] "as they . . . may think most beneficial,"[85] "as they shall judge necessary,"[86] "as to them may appear necessary,"[87] "as

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74 *E.g.*, Act to Incorporate the Town of Plymouth, ch. 48, 1807 N.C. Sess. Laws 24, 24.

75 *E.g.*, Act to Establish a Seminary of Learning at Spring Hill, ch. 36, 1802 N.C. Sess. Laws 24, 24.

76 *E.g.*, Act to Establish a Seminary of Learning in the County of Montgomery, ch. 47, 1797 N.C. Sess. Laws 18, 18.

77 *E.g.*, Act to Incorporate the Thames Insurance Company at New London, ch. 8, 1818 Conn. Pub. Acts 324, 326; Act to Incorporate the Ocean Insurance Company of New-Haven, ch. 6, 1818 Conn. Pub. Acts 318, 321; Act to Incorporate the Bridgeport Bank, 1806 Conn. Pub. Acts 741, 743; Act to Incorporate the New-Haven Insurance Company, 1797 Conn. Pub. Acts 477, 479; Act to Incorporate a Company for the Purpose of Rendering Navigable Great and Little Contentnea Creeks, ch. 16, 1815 N.C. Sess. Laws 18, 18; Act to Establish a Town at the Place Fixed upon for the Court House in the County of Surry, ch. 58, 1790 N.C. Sess. Laws 26, 26.

78 *E.g.*, Act to Establish a Town at the Place Fixed upon for the Court House in the County of Surry, ch. 58, 1790 N.C. Sess. Laws 26, 26.

79 *E.g.*, Act to Establish a Town at the Confluence of the Yadkin and Uharee Rivers, ch. 96, 1794 N.C. Sess. Laws 37, 37.

80 *E.g.*, *id.* The same phrase occurs in the charter of the Second Bank of the United States. Act of Apr. 10, 1816, ch. 44, 3 Stat. 266, 269.

81 *E.g.*, Act to Incorporate the Derby Fishing Company, 1806 Conn. Pub. Acts 737, 738; Act for Incorporating a Company to Clear the Channel of Connecticut River, 1800 Conn. Pub. Acts 542, 542.

82 *E.g.*, Act to Establish an Academy in Mecklenberg County, ch. 44, 1811 N.C. Sess. Laws 23, 24.

83 *E.g.*, Act for Establishing an Academy in Murfreesborough, ch. 95, 1794 N.C. Sess. Laws 36, 37.

84 *E.g.*, Act to Incorporate the Newbern Steam Boat Company, ch. 93, 1817 N.C. Sess. Laws 70, 71.

85 *E.g.*, Act to Establish a Town on John Strother's Land, ch. 34, 1802 N.C. Sess. Laws 22, 22.

86 *E.g.*, Act to Incorporate the Bridgeport Bank, 1806 Conn. Pub. Acts 741, 743.

87 *E.g.*, Act to Establish a Seminary of Learning in the Town of Hertford, ch. 48, 1819 N.C. Sess. Laws 43, 44; Act to Establish Wayne Academy, ch. 111, 1818 N.C. Sess. Laws 96, 96; Act to Establish a Seminary of Learning in Robeson County, ch. 105, 1812 N.C. Sess. Laws 38, 38; Act to Revive and Amend an Act to Establish an Academy in the County of Currituck, ch. 70, 1810 N.C. Sess. Laws 34, 34; Act to Establish an Academy in Trenton, ch. 46, 1807 N.C. Sess. Laws 29, 29; Act to Establish an Academy in the County of Greene, ch. 43, 1804 N.C. Sess. Laws 32, 32; Act to Establish an Academy at the Court-House in Caswell County, ch. 37, 1802 N.C. Sess.

they may deem expedient,"[88] and so on. Similar language is found in the charters of the First and Second Banks of the United States: the directors of the First Bank were empowered to "ordain, establish, and put in execution, such by-laws, ordinances and regulations, *as shall seem* necessary and convenient for the government of the said corporation,"[89] while the directors of the Second Bank were authorized to "ordain, establish, and put in execution, such by-laws, and ordinances, and regulations, *as they shall deem* necessary and convenient for the government of the said corporation."[90]

In contrast with the common practice in corporate charters of recognizing the authority of the institution or its managers to determine the scope of their own authority, the Constitution is conspicuously silent on this point. The Necessary and Proper Clause does not say, as it easily could have said, that Congress shall have power to "make all Laws which *as to it shall seem* necessary and proper" to carry into execution the powers of the federal government, or which "*it shall judge* necessary and proper," or which "*it may deem* necessary and proper." Instead, the language is simply "which *shall be* necessary and proper."[91] Judged against the corporate law background, the omission of language conferring authority to self-determine the scope of legislative power appears unlikely to have been accidental. It implies that Congress does not have sole or unilateral authority to determine the scope of its own legislative power, and rather that some other body (i.e., the Supreme Court) can reject congressional judgment on this score.

4. Inferences about the use of the doublet "necessary and proper" can be drawn from the corporate law background. The combination of these terms in the constitutional clause poses an interpretive dilemma. If "necessary" is simply a heightened form of "proper"—that is, if everything that is necessary is, by logical implication, also proper—then there would be no reason to include the word "proper" in the clause; all the work would be done by "necessary." The problem cannot be avoided by interpreting "and" to mean "or": "necessary *or* proper" would also involve superfluity because then "necessary" would add nothing. Other things equal, it appears unde-

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Laws 35, 35; Act to Establish an Academy in the Town of Wadesborough, ch. 35, 1802 N.C. Sess. Laws 23, 24; Act to Establish an Academy in the County of Wilkes, ch. 42, 1801 N.C. Sess. Laws 27, 27.

88 Act to Incorporate the New-London Bank, 1807 Conn. Pub. Acts 781, 783.

89 Act of Feb. 25, 1791, ch. 10, 1 Stat. 191, 192 (emphasis added).

90 Act of Apr. 10, 1816, ch. 44, 3 Stat. 266, 269 (emphasis added).

91 U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

sirable to interpret constitutional terms in a way that makes any of them superfluous.

Daniel Webster's approach to this problem was to see "necessary" and "proper" as synonyms.[92] Essentially, his suggestion to the Supreme Court was to view the doublet as a sort of rhetorical flourish—a phrase that sounds attractive but has little content. Webster's idea of seeing the terms as synonymous makes it irrelevant whether "and" or "or" is used, since either would convey the same information, but it fails to resolve the scandal of superfluity. If "necessary" and "proper" mean the same thing, the Framers could have been content with either. Even worse, by conflating the terms, Webster discounted the meaning of both. "Necessary" and "proper" seem different as a matter of ordinary speech, but if they mean the same thing in the Constitution, then it appears that they cannot mean much at all. This, of course, was Webster's intention, but it is not a satisfactory solution to the problem of interpretation.

In considering the implications of the corporate law background, we can begin with the fact that the clause in question is a *doublet*—a combination of two scope words. Corporate practice frequently used doublets. A close investigation reveals that the use of such terms is not randomly distributed. Doublets are uncommon or absent in ordinary grants of corporate authority—determining times for meeting, declaring a dividend, acting with respect to the corporate seal, hiring employees, setting salaries, defining terms and conditions of employment, purchasing property, erecting buildings, appointing or electing trustees, raising money by lotteries, paying dividends, or increasing the capital stock. But doublets *are* often observed in clauses granting legislative powers to directors, commissioners, or trustees—the very clauses most analogous to the grant of legislative authority associated with the Necessary and Proper Clause. The heavy use of doublets in grants of corporate rulemaking power suggests that the presence of a doublet in the Constitution is not accidental: the concentration of this trope in one specific type of corporate law provision seems to have meaning.

What distinguishes legislative grants from other authority-conferring clauses? A possible answer is that legislative-power clauses in corporate charters, in contrast with most other grants of authority, confer very broad power both as to means and ends. When the legislators wished to impose a meaningful scope limitation on the exercise

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

of such broad-ranging authority, therefore, they may have included a doublet to emphasize that the restriction being imposed was to apply comprehensively to all aspects of the decision being taken. Even if the particular terms in the doublet have no independent meaning—if, as Webster argued, "necessary" and "proper" are mere synonyms—the fact that the Committee of Detail chose to include them both could still have significance: a rhetorical flourish, perhaps, but one that conveys information all the same (consider John Hancock's signature on the Declaration of Independence!).

5. We wish, however, to find in the corporate law background more useful information about "necessary" and "proper"—information that would give these terms some degree of distinctive meaning and defend the Necessary and Proper Clause against the accusation of superfluity. Consider first the term "necessary." This word is not defined in corporate charters, and it is clear that it was not used with a precise, definite, and generally understood meaning. But it does not follow that we should throw up our hands. While the term displays substantial variance in application, it also manifests a reasonably discernible average meaning.

Colonial and early federal lawmakers employed a substantial but limited number of scope terms when modifying grants of agency authority. Although these terms are not precisely defined, we can line them up in some rough order of the severity of the restriction. This can give us a sense, if not of their *cardinal* meaning, at least of their *ordinal* meaning: their placement vis-à-vis other words on a scale of severity of restriction. If we do this, it is obvious that the term "necessary" is the most restrictive of all the terms we observe in the lexicon. It is certainly more restrictive than terms such as "at pleasure" or "according to their discretion," which recognize nearly unchecked freedom of action, but is also more restrictive than terms like "expedient," "fit," "convenient," "beneficial," "reasonable," "meet," or "advisable," which appear to require only that the means undertaken have a tendency to advance the objects of the institution. Whatever "necessary" means, it clearly requires more by way of a means-end connection than other scope words found in corporate charters of the day. This fact suggests that the word "necessary," although it did not have a definite meaning, at least had a central tendency that is more demanding than other terms that were readily available to the Framers.

Further information on the meaning of "necessary" can be gleaned from an examination of the context in which this term is used in corporate law charters. These charters contain a number of stan-

dardized provisions that can be associated with common scope terms. For example, many charters set forth rules for *when* the managers of a corporation must undertake certain actions, such as setting a meeting time or declaring a dividend. The term "necessary" is almost never associated with such timing rules. Instead, we find: "[when] convenient,"[93] when they "shall judge proper,"[94] "when they shall think proper,"[95] when "they may think it expedient,"[96] "as they may think proper,"[97] "at any time or times they may think proper,"[98] "as they may judge expedient,"[99] "when they shall think fit,"[100] and "as they shall deem most convenient."[101] It is evident that the use of scope terms in these timing rules is not accidental. They are employed for the purpose of conveying a broad degree of discretion to agents over matters that are not fundamental to the achievement of the enterprise's goals.

Another example concerns actions undertaken with respect to the corporate seal. Many charters of the era give the company being formed the right to a common seal and specify a wide range of actions that the managers may undertake with respect to the seal, including changing, altering, breaking, or recreating it. The charters almost never use the scope term "necessary" with respect to these actions, instead specifying that the managers may act at "pleasure"[102] or as

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93 Act to Establish a Seminary of Learning in the County of Montgomery, ch. 47, 1797 N.C. Sess. Laws 18, 18.

94 Act to Incorporate the Bridgeport Bank, 1806 Conn. Pub. Acts 741, 745.

95 Act to Erect an Academy at the Town of Edenton, ch. 39, 1800 N.C. Sess. Laws 25, 25.

96 Act for the Government of Elizabeth City, ch. 93, 1816 N.C. Sess. Laws 31, 32.

97 Act to Establish an Academy in the County of Buncombe, ch. 93, 1805 N.C. Sess. Laws 27, 28.

98 1816 N.C. Sess. Laws at 31.

99 Act to Incorporate the Aetna Insurance Company, ch. 34, 1819 Conn. Pub. Acts 370, 372.

100 Act to Incorporate the Newbern Steam Boat Company, ch. 93, 1817 N.C. Sess. Laws 70, 71.

101 Act to Incorporate the American Geological Society, ch. 32, 1819 Conn. Pub. Acts 367, 368. In the rare cases where the term "necessary" is used in this context, its effect is usually to enlarge rather than reduce the agent's scope of discretion. The company may be instructed, for example, to publish notice of a meeting in newspapers other than the one specified in the statute if "necessary." Act to Incorporate the New-Haven Fire Insurance Company, ch. 18, 1813 Conn. Pub. Acts 131, 131; Act to Incorporate the Middletown Fire Insurance Company, ch. 1, 1813 Conn. Pub. Acts 17, 17; Act to Incorporate the New-Haven Bank, 1792 Conn. Pub. Acts 431, 431.

102 Act to Incorporate a Saving Society in the City of Hartford, ch. 33, 1819 Conn. Pub. Acts 368, 369; Act to Incorporate the American Geological Society, ch. 32, 1819 Conn. Pub. Acts 367, 368; Act to Incorporate the Ocean Insurance Company of New-Haven, ch. 6, 1818 Conn. Pub. Acts 318, 319; Act for Incorporating Part of the Town of Guilford, ch. 17, 1815 Conn. Pub. Acts 247, 248; Act to Incorporate the New-Haven Fire Insurance Company, ch. 18, 1813 Conn.

they shall think "proper"[103] or "fit."[104] Here again, the use of scope terms is not accidental. Actions with respect to the seal are ministerial, technical, and not fundamental to the realization of the institution's goals or purposes. It is not surprising, therefore, that the scope terms used with respect to such actions convey a broad degree of freedom on the part of the corporation and its managers.

We may also consider clauses dealing with conditions of employment or salaries of officers. Charter provisions conferring these authorities typically employ terms such as: "as they may deem proper,"[105] "if they think proper,"[106] as they "shall think fit,"[107] "as they may think proper,"[108] as they may or shall "judge reasonable,"[109] "as shall appear to them reasonable,"[110] "as they may think proper,"[111] or "as they judge reasonable."[112] Again, it appears that the omission of the term "necessary" from such clauses is not accidental. Decisions

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Pub. Acts 130, 131; Act to Incorporate the Hartford Fire Insurance Company, ch. 1, 1810 Conn. Pub. Acts 4, 4; Act to Incorporate the Union Insurance Company at New-London, 1805 Conn. Pub. Acts 709, 710; Act to Incorporate the Middletown Insurance Company, 1803 Conn. Pub. Acts 653, 654; Act to Incorporate the Hartford Insurance Company, 1802 Conn. Pub. Acts 650, 650; Act to Incorporate the Trustees of the Missionary Society of Connecticut, 1802 Conn. Pub. Acts 601, 604; Act to Incorporate the New-Haven Insurance Company, 1797 Conn. Pub. Acts 477, 478; Act to Incorporate the Norwich Bank, 1796 Conn. Pub. Acts 443, 443; Act to Incorporate the New-Haven Bank, 1792 Conn. Pub. Acts 431, 431; Act to Incorporate the Newbern Marine Insurance Company, ch. 22, 1804 N.C. Sess. Laws 14, 14–15.

103 Act to Establish an Academy at Williamston, ch. 45, 1816 N.C. Sess. Laws 33, 33; Act to Erect an Academy at the Town of Edenton, ch. 39, 1800 N.C. Sess. Laws 25, 25.

104 9 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 53, at 115.

105 Act to Establish an Academy in Camden County, ch. 74, 1810 N.C. Sess. Laws 35, 35; Act to Establish an Academy at Plymouth, ch. 73, 1810 N.C. Sess. Laws 35, 35; Act to Establish an Academy in the Upper Part of Pasquotank County, ch. 78, 1809 N.C. Sess. Laws 24, 24.

106 Act to Establish a Seminary of Learning in Elizabeth Town, ch. 72, 1810 N.C. Sess. Laws 34, 35.

107 Act to Incorporate the North River and Adams Creek Canal Company, ch. 40, 1816 N.C. Sess. Laws 28, 28.

108 Act to Establish an Academy in the Town of Snow-Hill, ch. 104, 1812 N.C. Sess. Laws 58, 58.

109 Act to Incorporate the Ocean Insurance Company of New-Haven, ch. 6, 1818 Conn. Pub. Acts 318, 320; Act to Incorporate the Middlesex Fishing Company, 1807 Conn. Pub. Acts 774, 775; Act to Incorporate the Bridgeport Bank, 1806 Conn. Pub. Acts 741, 741; Act to Incorporate the New-Haven Bank, 1792 Conn. Pub. Acts 431, 432.

110 Act to Incorporate the Norwich Bank, 1796 Conn. Pub. Acts 443, 445.

111 An Act to Incorporate the Thames Insurance Company at New London, ch. 8, 1818 Conn. Pub. Acts 324, 326; Act to Incorporate the Ocean Insurance Company of New-Haven, ch. 6, 1818 Conn. Pub. Acts 318, 320; Act to Incorporate the Union Insurance Company at New-London, 1805 Conn. Pub. Acts 709, 711.

112 Act Incorporating the Humphreysville Manufacturing Company, ch. 2, 1810 Conn. Pub. Acts 28, 29; Act Incorporating the Middletown Manufacturing Company, ch. 1, 1810 Conn. Pub. Acts 41, 42.

setting terms and conditions of employment for officers or establishing salaries are obviously ones that need to be committed to the broad discretion of the managers of a company.

Consider also actions by corporate directors with respect to dividends. Charters of this period typically authorize directors to declare dividends "as they shall think proper,"[113] "as shall appear to the directors advisable,"[114] "as to them shall appear fit and proper,"[115] "as shall appear to them proper,"[116] and as "to them may appear proper."[117] Once again, the omission of the term "necessary" from these clauses appears to have been intentional. Like the other powers just discussed, the decision whether to declare a dividend is a matter requiring judgment, but not one that is fundamental to achieving the goals of the enterprise (it would be odd to say that the directors found it "necessary" to declare a dividend).

What about clauses conferring general executive authority on directors, commissioners, or trustees? Here again, the scope clauses only rarely contain the term "necessary."[118] Instead, terms used in this context include: to do that "which to them shall or may appertain to do,"[119] to "do and execute all acts and things to them appertaining,"[120] to "put in execution whatever they may judge to be for the benefit of the Company,"[121] "to do and cause to be executed all such acts and

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113 Act to Incorporate the Thames Insurance Company at New London, ch. 8, 1818 Conn. Pub. Acts 324, 326; Act to Incorporate the Ocean Insurance Company of New-Haven, ch. 6, 1818 Conn. Pub. Acts 318, 321; Act to Incorporate the New-Haven Fire Insurance Company, ch. 18, 1813 Conn. Pub. Acts 131, 134; Act to Incorporate the Middletown Fire Insurance Company, ch. 1, 1813 Conn. Pub. Acts 113, 115; Act to Incorporate the Bridgeport Bank, 1806 Conn. Pub. Acts 741, 743; Act to Incorporate the New-Haven Insurance Company, 1797 Conn. Pub. Acts 477, 479.

114 Act to Incorporate the Middlesex Fishing Company, 1807 Conn. Pub. Acts 774, 776.

115 Act Incorporating the Humphreysville Manufacturing Company, ch. 2, 1810 Conn. Pub. Acts 28, 29.

116 Act Incorporating the Middletown Manufacturing Company, ch. 1, 1810 Conn. Pub. Acts 41, 43.

117 Act to Incorporate the Phoenix Bank, ch. 2, 1814 Conn. Pub. Acts 148, 151; Act to Incorporate the Eagle Bank, ch. 1, 1811 Conn. Pub. Acts 65, 68.

118 For an exception, see Act to Incorporate the Trustees of the Missionary Society of Connecticut, 1802 Conn. Pub. Acts 601, 602 ("to transact all business necessary to attain the ends of the Society").

119 Act to Incorporate the Union Insurance Company at New-London, 1805 Conn. Pub. Acts 709, 710; Act to Incorporate the Middletown Insurance Company, 1803 Conn. Pub. Acts 653, 654; Act to Incorporate a Company for Mutual Assurance Against Fire, 1801 Conn. Pub. Acts 550, 550; Act to Incorporate the New-Haven Bank, 1792 Conn. Pub. Acts 431, 431.

120 Act to Incorporate the Derby Fishing Company, 1806 Conn. Pub. Acts 737, 738.

121 Act to Incorporate the Middlesex Fishing Company, 1807 Conn. Pub. Acts 774, 776.

things as to them may appertain,"[122] "to do and execute all and singular the matters, and things, which to them shall or may appertain,"[123] and to "do and act in all things whatever that may tend to the profit" of the corporation.[124] We may infer that the omission of "necessary" from these clauses sprang from a wish, on the part of the drafters, not to unduly saddle the ability of the managers to undertake useful but unforeseeable actions on behalf of their organizations.[125] At least for these charters, the drafters apparently felt that the word "necessary" would impose undesirable limitations on the exercise of executive discretion.

Contrast the foregoing powers with ones where the word "necessary" *does* appear in corporate charters. The most prominent example is the decision whether to hire employees. When power to hire employees is conferred, it is typically qualified by scope terms such as: "as they may deem necessary,"[126] "as they shall judge necessary,"[127] "as they judge necessary,"[128] "which shall be necessary,"[129] "as shall be necessary,"[130] as they may or shall "find necessary or convenient,"[131]

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122 Act to Incorporate the Eagle Bank, ch. 1, 1811 Conn. Pub. Acts 65, 65; Act to Incorporate the New-London Bank, 1807 Conn. Pub. Acts 781, 781.

123 Act to Incorporate the Thames Insurance Company at New London, ch. 8, 1818 Conn. Pub. Acts 324, 325; Act to Incorporate the Middletown Fire Insurance Company, ch. 1, 1813 Conn. Pub. Acts 113, 113.

124 Act Establishing an Academy at Laurel Hill, ch. 77, 1809 N.C. Sess. Laws 27, 27.

125 The word "necessary" is used in Act Concerning Library Companies, ch. 10, 1818 Conn. Pub. Acts 328, 329 (granting general executive authority to "do all acts necessary and proper for the well ordering of the affairs of such corporation").

126 Act to Incorporate the Town of Clinton, ch. 84, 1818 N.C. Sess. Laws 76, 76; Act to Establish an Academy in the Town of Snow-Hill, ch. 104, 1812 N.C. Sess. Laws 38, 38; Act to Establish an Academy in Camden County, ch. 74, 1810 N.C. Sess. Laws 35, 35; Act to Establish an Academy at Plymouth, ch. 73, 1810 N.C. Sess. Laws 35, 35; Act to Establish an Academy in the Upper Part of Pasquotank County, ch. 78, 1809 N.C. Sess. Laws 24, 24; Act to Establish an Academy in Beaufort County, ch. 75, 1808 N.C. Sess. Laws 29, 29; Act to Establish an Academy in Nixonton, ch. 36, 1803 N.C. Sess. Laws 32, 32; Act to Establish a Seminary of Learning in the County of Montgomery, ch. 47, 1797 N.C. Sess. Laws 18, 18.

127 Act to Incorporate the Aetna Insurance Company, ch. 34, 1819 Conn. Pub. Acts 370, 372; Act to Incorporate the New-Haven Fire Insurance Company, ch. 18, 1813 Conn. Pub. Acts 131, 132; Act Incorporating the Middletown Manufacturing Company, ch. 1, 1810 Conn. Pub. Acts 41, 42; Act to Incorporate the Hartford Fire Insurance Company, ch. 1, 1810 Conn. Pub. Acts 25, 26; Act to Incorporate the Bridgeport Bank, 1806 Conn. Pub. Acts 741, 743.

128 Act Incorporating the Humphreysville Manufacturing Company, ch. 2, 1810 Conn. Pub. Acts 28, 29.

129 Act for Incorporating Part of the Town of Guilford, ch. 17, 1815 Conn. Pub. Acts 247, 251.

130 Act to Incorporate the Phoenix Bank, ch. 2, 1814 Conn. Pub. Acts 148, 152.

131 Act to Incorporate the American Geological Society, ch. 32, 1819 Conn. Pub. Acts 367, 368; Act to Incorporate the Connecticut Assylum [sic] for the Education and Instruction of Deaf and Dumb Persons, ch. 3, 1816 Conn. Pub. Acts 256, 257.

"as to them shall appear necessary,"[132] "as to them shall appear necessary and proper,"[133] "as shall be necessary for executing the business of said corporation,"[134] or "as may be necessary."[135]

The pattern here is too strong to be accidental. Why is the scope term "necessary" heavily favored in the employment context while being absent or virtually absent in the other contexts just discussed? We may surmise that for a small corporation that is just being formed, the decision whether to hire an employee and who to hire *is* fundamental to achieving the goals of the enterprise.

The other context in which the word "necessary" frequently appears is the one most analogous to the Necessary and Proper Clause of the Constitution—clauses conferring general lawmaking or rulemaking power on the corporation or its directors, commissioners, or trustees. This context displays a wide variance of scope terms, but the word "necessary" appears more frequently than any other.[136] Typical usages here include: as may "appear necessary,"[137] "as to them

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132 Act to Incorporate a Saving Society in the City of Hartford, ch. 33, 1819 Conn. Pub. Acts 368, 370.

133 Act to Incorporate the Trustees of the Milton Female Academy, ch. 104, 1818 N.C. Sess. Laws 90, 91; Act to Incorporate the Trustees of the Springfield Academy, ch. 62, 1810 N.C. Sess. Laws 30, 30; Act to Establish an Academy at Smithville, ch. 55, 1798 N.C. Sess. Laws 27, 28.

134 Act to Incorporate the Newbern Marine Insurance Company, ch. 22, 1804 N.C. Sess. Laws 14, 16.

135 Act to Incorporate the Town of Plymouth, ch. 48, 1807 N.C. Sess. Laws 24, 24. Even when "necessary" is not used in grants of hiring authority, the scope term employed tends to indicate a demanding standard. *See* Act to Establish an Academy at Enfield, ch. 51, 1818 N.C. Sess. Laws 50, 51 ("as they may deem proper"); Act to Incorporate the Newbern Steam Boat Company, ch. 93, 1817 N.C. Sess. Laws 70, 71 ("as they shall judge requisite"); Act to Incorporate the North River and Adams Creek Canal Company, ch. 40, 1816 N.C. Sess. Laws 28, 28 (same); Act to Establish an Academy in Carteret County, ch. 64, 1810 N.C. Sess. Laws 35, 35 (same); Act to Establish an Academy in Onslow County, ch. 83, 1809 N.C. Sess. Laws 29, 29 (same).

136 The second most common scope term found in grants of rulemaking authority is "proper." *See infra* text accompanying notes 155–71. A number of other scope terms are also evidenced in this context. *See, e.g.*, Act to Incorporate the New-London Bank, 1807 Conn. Pub. Acts 781, 781 ("as may be deemed expedient"); Act to Incorporate the New-Haven Bank, 1792 Conn. Pub. Acts 431, 431 ("as shall be convenient"); Act to Erect a Poor House in the County of Lincoln, ch. 120, 1818 N.C. Sess. Laws 100, 100 ("as to them may seem meet"); Act to Incorporate the Trustees of the Milton Female Academy, ch. 104, 1818 N.C. Sess. Laws 90, 91 ("as are usually made"); Act to Incorporate a Company to Build a Bridge Across the Yadkin River, ch. 39, 1816 N.C. Sess. Laws 26, 26 ("as the directors may deem fit and expedient"); Act to Incorporate the Town of Plymouth, ch. 48, 1807 N.C. Sess. Laws 24, 24 ("as they may deem expedient"); Act to Establish a Town at the Place Fixed upon for the Court House in the County of Surry, ch. 57, 1790 N.C. Sess. Laws 25, 25 ("as they shall judge most convenient"); 4 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 53, at 364 ("as to them shall seem meet and most conducive to the aforesaid end thereof").

137 Act to Establish a Seminary of Learning in the Town of Hertford, ch. 48, 1819 N.C. Sess.

shall appear right and necessary,"[138] as they may or shall "deem proper and necessary,"[139] which or as "they may deem necessary,"[140] as they "may consider necessary and proper,"[141] "necessary and proper,"[142] as may or shall be "necessary and proper,"[143] as shall "seem necessary,"[144] as shall or may "be necessary,"[145] "as they shall

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Laws 43, 44; Act to Establish Wayne Academy, ch. 111, 1818 N.C. Sess. Laws 95, 95; Act to Establish a Seminary of Learning on the Lands of James Hilliard in the County of Nash, ch. 108, 1818 N.C. Sess. Laws 93, 93; Act to Establish a Seminary of Learning on the Lands of John Martin, ch. 107, 1818 N.C. Sess. Laws 92, 93; Act to Incorporate the Town of Oxford in the County of Granville, ch. 45, 1816 N.C. Sess. Laws 34, 34; Act to Incorporate the Town of Charlotte in the County of Mecklenberg, ch. 17, 1815 N.C. Sess. Laws 18, 19; Act to Establish a Seminary of Learning in Robeson County, ch. 105, 1812 N.C. Sess. Laws 58, 58; Act to Establish a Seminary of Learning in the County of Moore, ch. 43, 1811 N.C. Sess. Laws 23, 23; Act to Revive and Amend an Act to Establish an Academy in the County of Currituck, ch. 70, 1810 N.C. Sess. Laws 34, 34; Act to Establish an Academy at Swansborough, ch. 67, 1810 N.C. Sess. Laws 36, 36; Act to Incorporate the Trustees of the Springfield Academy, ch. 62, 1810 N.C. Sess. Laws 30, 30; Act for the Promotion of Learning and Scientific Knowledge in the County of Stokes, ch. 80, 1809 N.C. Sess. Laws 23, 23; Act to Establish an Academy on Richland Swamp, ch. 74, 1808 N.C. Sess. Laws 29, 29; Act to Establish an Academy in Trenton, ch. 66, 1807 N.C. Sess. Laws 29, 29; Act to Establish an Academy in the County of Greene, ch. 43, 1804 N.C. Sess. Laws 32, 32; Act to Establish an Academy at the Court-House in Caswell County, ch. 37, 1802 N.C. Sess. Laws 35, 35; Act to Establish an Academy in the County of Wilkes, ch. 42, 1801 N.C. Sess. Laws 27, 27; Act to Establish an Academy at Smithville, ch. 55, 1798 N.C. Sess. Laws 22, 23.

138 Act to Establish a Turnpike Road from Mattamuskeet Lake to the Main Public Road on the East Side of Pungo River, ch. 72, 1818 N.C. Sess. Laws 62, 62–63.

139 Act to Establish an Academy in Mecklenberg County, ch. 44, 1811 N.C. Sess. Laws 23, 24; Act to Establish an Academy in the Town of Wadesborough, ch. 35, 1802 N.C. Sess. Laws 23, 24.

140 Act to Incorporate the American Geological Society, ch. 32, 1819 Conn. Pub. Acts 367, 368; Act to Incorporate the Connecticut Assylum [sic] for the Education and Instruction of Deaf and Dumb Persons, ch. 3, 1816 Conn. Pub. Acts 256, 257; Act to Incorporate the Camden Bible Society, ch. 128, 1819 N.C. Sess. Laws 81, 81; Act to Establish a Female Academy in the County of Orange, ch. 110, 1818 N.C. Sess. Laws 94, 94; Act to Establish an Academy in the Town of Snow-Hill, ch. 104, 1812 N.C. Sess. Laws 58, 58; Act to Establish an Academy at Plymouth, ch. 73, 1810 N.C. Sess. Laws 35, 35; Act to Establish an Academy in Beaufort County, ch. 75, 1808 N.C. Sess. Laws 29, 29; Act to Authorize the Trustees of the Lumberton Academy, to Raise a Certain Sum by Way of Lottery to Complete the Building of Said Academy, ch. 39, 1802 N.C. Sess. Laws 26, 26.

141 Act to Establish an Academy in the Town of Wilmington, ch. 37, 1803 N.C. Sess. Laws 35, 36.

142 Act to Incorporate a Company to Improve, Clear Out, and Render Navigable Tranter's Creek, ch. 51, 1818 N.C. Sess. Laws 43, 44.

143 Act to Incorporate the Ocean Insurance Company of New-Haven, ch. 6, 1818 Conn. Pub. Acts 318, 321; Act to Incorporate the Union Insurance Company at New-London, 1805 Conn. Pub. Acts 709, 711.

144 Act to Incorporate the Norwich Bank, 1796 Conn. Pub. Acts 443, 443; Act to Incorporate the Trustees of the Milton Female Academy, ch. 104, 1818 N.C. Sess. Laws 90, 91; Act for the Governance of Elizabeth City, ch. 43, 1816 N.C. Sess. Laws 31, 31; Act to Incorporate the Town of Charlotte in the County of Mecklenberg, ch. 17, 1815 N.C. Sess. Laws 18, 18; Act to Incorporate the Town of Plymouth, ch. 48, 1807 N.C. Sess. Laws 24, 24.

judge necessary and convenient,"[146] "as shall be necessary or convenient,"[147] "as shall be deemed necessary and convenient,"[148] "as they shall deem necessary or convenient,"[149] as "shall appear necessary or expedient,"[150] "as shall be thought necessary,"[151] "suitable and necessary,"[152] and "by them deemed necessary."[153]

Why does the term "necessary" appear so frequently in grants of rulemaking authority? It appears likely that the scope restriction, where it appears in these clauses, was a response to the perceived breadth of the authority being conferred. Legislatures commonly manifested misgivings about broad grants of rulemaking power, often stipulating that the exercise of such powers could not be repugnant to state or federal law.[154] Because the authority conferred by a grant of rulemaking power was so extensive, legislatures also appear, in many

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145 Act to Incorporate an Aqueduct Company in the City of Norwich, ch. 8, 1808 Conn. Pub. Acts 7, 8; Act to Establish an Academy at Enfield, ch. 51, 1819 N.C. Sess. Laws 50, 51; Act to Establish an Academy in the Town of Haywood in Chatham County, ch. 109, 1818 N.C. Sess. Laws 94, 94; Act to Establish the Laurencville [sic] Academy in the County of Montgomery, ch. 34, 1818 N.C. Sess. Laws 32, 33; Act to Establish an Academy in Carteret County, ch. 64, 1810 N.C. Sess. Laws 35, 35; Act to Establish an Academy in Onslow County, ch. 83, 1809 N.C. Sess. Laws 29, 29; Act to Incorporate the Town of Williamsborough in the County of Granville, ch. 67, 1808 N.C. Sess. Laws 28, 28; Act Establishing an Academy in the County of Granville, ch. 25, 1779 N.C. Sess. Laws 21, 21.

146 Act to Incorporate the Thames Insurance Company at New London, ch. 8, 1818 Conn. Pub. Acts 324, 325.

147 Act to Incorporate the Bridgeport Bank, 1806 Conn. Pub. Acts 741, 741.

148 Act to Incorporate the Ocean Insurance Company of New-Haven, ch. 6, 1818 Conn. Pub. Acts 318, 319; Act to Incorporate the New-Haven Fire Insurance Company, ch. 18, 1813 Conn. Pub. Acts 131, 131; Act to Incorporate the Middletown Fire Insurance Company, ch. 1, 1813 Conn. Pub. Acts 113, 113; Act Incorporating the Humphreysville Manufacturing Company, ch. 2, 1810 Conn. Pub. Acts 28, 29; Act Incorporating the Middletown Manufacturing Company, ch. 1, 1810 Conn. Pub. Acts 41, 41; Act to Incorporate the Hartford Fire Insurance Company, ch. 1, 1810 Conn. Pub. Acts 25, 25; Act to Incorporate the Middletown Insurance Company, 1802 Conn. Pub. Acts 653, 654; Act to Incorporate the Hartford Insurance Company, 1802 Conn. Pub. Acts 650, 650; Act to Incorporate a Company for Mutual Assurance Against Fire, 1801 Conn. Pub. Acts 550, 550; Act for Incorporating a Company to Clear the Channel of Connecticut River, 1800 Conn. Pub. Acts 542, 542.

149 Act to Incorporate the Trustees of the Missionary Society of Connecticut, 1802 Conn. Pub. Acts 601, 604.

150 Act to Amend an Act, Entitled "an Act to Establish a Seminary of Learning in the Town of Fayetteville, and to Amend the Law for the Regulation of the Towns of Fayetteville and Hillsborough," ch. 81, 1809 N.C. Sess. Laws 23, 23.

151 Act to Establish an Aqueduct Company in the Town of Windham, 1807 Conn. Pub. Acts 777, 778.

152 Act for Incorporating Part of the Town of Guilford, ch. 17, 1815 Conn. Pub. Acts 247, 251.

153 Act to Incorporate the Aetna Insurance Company, ch. 34, 1819 Conn. Pub. Acts 370, 371.

154 *See supra* note 20 and accompanying text.

cases, to have imposed relatively stringent limits on the exercise of that authority by utilizing "necessary" as a scope term.

The 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. As applied to the Constitution's Necessary and Proper Clause, the analysis suggests that, to be "necessary," there must be a reasonably close connection between constitutionally recognized legislative ends and the means chosen to accomplish those ends.

6. Finally, the corporate law background may provide information about the meaning of the term "proper." We have already seen that "necessary" and "proper" had different meanings in corporate charters: the former is used within contexts that do not perfectly coincide with the usage of "proper." We now investigate whether the term "proper" has a distinctive context of its own, independent of other scope terms.

"Proper" is the second most common scope term (after "necessary") in general grants of legislative authority to corporations or their directors, commissioners, or trustees. In addition to the usages together with "necessary" just described, these include: "as to them may appear proper,"[155] as they may or shall "deem proper,"[156] as "to them may seem proper,"[157] "as they shall think fit and proper,"[158] as they shall or may "think proper,"[159] as they may "think expedient and

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155 Act to Establish a Seminary of Learning in the County of Montgomery, ch. 47, 1797 N.C. Sess. Laws 18, 18.

156 Act to Incorporate the Middletown Insurance Company, 1802 Conn. Pub. Acts 653, 656; Act to Establish an Academy in Nixonton, ch. 36, 1803 N.C. Sess. Laws 32, 32; Act to Establish an Academy in the Town of Wadesborough, ch. 35, 1802 N.C. Sess. Laws 23, 24.

157 Act to Incorporate the Trustees of the Nutbush Mineral Springs Academy, ch. 65, 1810 N.C. Sess. Laws 32, 32.

158 9 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 53, at 117.

159 Act to Appoint Commissioners for the Town of Chapel Hill, ch. 80, 1818 N.C. Sess. Laws 61, 62; Act to Establish a Turnpike Road from Mattamuskeet Lake to the Main Public Road on the East Side of Pungo River, ch. 71, 1818 N.C. Sess. Laws 62, 62; Act to Establish a School by the Name of New Prospect in Perquimons County, ch. 74, 1817 N.C. Sess. Laws 62, 62; Act to Incorporate a Company for the Purpose of Rendering Navigable Great and Little Contentnea Creeks, ch. 16, 1815 N.C. Sess. Laws 18, 18; Act to Establish an Academy on the Lands of Thomas B. Littlejohn, Adjoining the Court-House in Granville County, ch. 46, 1811 N.C. Sess. Laws 24, 24; Act to Incorporate the Broad River Navigation Company, ch. 32, 1811 N.C. Sess. Laws 21, 21; Act to Establish an Academy on the Land of William M. Sneed, in the County of Granville, ch. 66, 1810 N.C. Sess. Laws 35, 35.

proper,"[160] "as may seem requisite and proper,"[161] and "as to them may appear just and proper."[162]

The term "proper" also appears distinctively in several scope clauses where the term "necessary" is largely absent. It is the dominant term conditioning grants of authority to declare a dividend: "as they shall think proper,"[163] "as to them shall appear fit and proper,"[164] "as shall appear to them proper,"[165] and as they "may judge proper."[166] The term "proper" appears in clauses authorizing managers to determine salaries or conditions of employment. Usages here include: "as they may deem proper,"[167] and if or as "they think proper."[168] The term also appears in grants of authority for discretionary acts, such as setting a meeting time, declaring dividends, or levying

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160 Act to Incorporate the Allemance Library Society in the County of Guilford, ch. 107, 1819 N.C. Sess. Laws 72, 73.

161 Act to Incorporate the Leaksville Toll Bridge Company, ch. 83, 1818 N.C. Sess. Laws 75, 75; Act to Incorporate the Clinton Toll Bridge Company, ch. 73, 1818 N.C. Sess. Laws 65, 65; Act to Incorporate a Company to Build a Bridge Across the Yadkin River, ch. 39, 1816 N.C. Sess. Laws 26, 26.

162 Act to Incorporate the Town of Clinton, ch. 84, 1818 N.C. Sess. Laws 6, 7; Act to Incorporate the Town of Hookerton in Greene County, ch. 52, 1817 N.C. Sess. Laws 49, 50.

163 Act to Incorporate the Thames Insurance Company at New London, ch. 8, 1818 Conn. Pub. Acts 324, 326; Act to Incorporate the Ocean Insurance Company of New-Haven, ch. 6, 1818 Conn. Pub. Acts 318, 321; Act to Incorporate the New-Haven Fire Insurance Company, ch. 18, 1813 Conn. Pub. Acts 131, 134; Act to Incorporate the Middletown Fire Insurance Company, ch. 1, 1813 Conn. Pub. Acts 113, 115; Act to Incorporate the Bridgeport Bank, 1806 Conn. Pub. Acts 741, 743; Act to Incorporate the New-Haven Insurance Company, 1797 Conn. Pub. Acts 477, 479.

164 Act Incorporating the Humphreysville Manufacturing Company, ch. 2, 1810 Conn. Pub. Acts 28, 30.

165 Act Incorporating the Middletown Manufacturing Company, ch. 1, 1810 Conn. Pub. Acts 41, 43.

166 Act to Incorporate the Phoenix Bank, ch. 2, 1814 Conn. Pub. Acts 148, 149; Act to Incorporate the Eagle Bank, ch. 1, 1811 Conn. Pub. Acts 65, 66. Only rarely do we find other scope terms in grants of dividend authority. *See* Act to Incorporate the Middlesex Fishing Company, 1807 Conn. Pub. Acts 774, 776 ("as shall appear to the directors advisable"); Act to Incorporate the North River and Adams Creek Canal Company, ch. 40, 1816 N.C. Sess. Laws 28, 28 (as the directors "shall judge necessary").

167 Act to Establish an Academy in Camden County, ch. 74, 1810 N.C. Sess. Laws 35, 35; Act to Establish an Academy at Plymouth, ch. 73, 1810 N.C. Sess. Laws 35, 35; Act to Establish an Academy in the Upper Part of Pasquotank County, ch. 78, 1809 N.C. Sess. Laws 24, 24.

168 Act to Incorporate the Thames Insurance Company at New London, ch. 8, 1818 Conn. Pub. Acts 324, 326; Act to Incorporate the Ocean Insurance Company of New-Haven, ch. 6, 1818 Conn. Pub. Acts 318, 321; Act to Incorporate the Union Insurance Company at New-London, 1805 Conn. Pub. Acts 709, 711; Act to Amend an Act to Establish a Seminary of Learning in Elizabeth Town, ch. 72, 1810 N.C. Sess. Laws 34, 35. Some scope terms other than "proper" are also found in this context. *See* Act to Incorporate the New-Haven Bank, 1792 Conn. Pub. Acts 431, 432 ("reasonable"); Act to Incorporate the North River and Adams Creek Canal Company, ch. 40, 1816 N.C. Sess. Laws 28, 28 ("fit").

a tax. Usages here include: as they may or shall "think proper,"[169] as they "judge proper,"[170] or as they "deem proper."[171]

Each of these contexts where "proper" plays a distinctive role is one affecting the interests of corporate stakeholders. The decision to declare a dividend affects the interest of shareholders; the decision as to when to call a meeting or levy a tax affects the interests of those who are supposed to attend the meeting or pay the tax; the decision to set salaries or conditions of employment affects the interests of the employee; the decision to adopt rules for the governance of an institution affects the interests of everyone who is subject to the rules. Where the term "proper" is absent or rare—contexts such as hiring employees, purchasing property and erecting buildings, appointing or electing new trustees, or general spending authority—the relevant relationships are not between the corporation and its stakeholders but rather between the corporation and a third party acting at arms length (e.g., job candidates, people who might sell property or provide services to the company, nominees for managerial positions, vendors).

The term "proper" might therefore convey the idea that, in carrying out a given authority, the company or its managers should design the actions taken so as to consider the effects on stakeholders in the firm. As applied to the Constitution's Necessary and Proper Clause, the message could be that laws must not only serve the general interest of the country as a whole, but must also take into account the individual interests of particular citizens. Even if a law qualifies as "necessary," it could thus still be outside congressional authority if,

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169 Act to Incorporate the Phoenix Bank, ch. 2, 1814 Conn. Pub. Acts 148, 148–49; Act to Incorporate the Eagle Bank, ch. 1, 1811 Conn. Pub. Acts 65, 66; Act to Incorporate the Derby Bank, ch. 1, 1809 Conn. Pub. Acts 17, 18; Act to Incorporate the New-London Bank, 1807 Conn. Pub. Acts 781, 782; Act to Establish an Academy at Williamston in the County of Martin, ch. 45, 1816 N.C. Sess. Laws 33, 33; Act for the Governance of Elizabeth City, ch. 43, 1816 N.C. Sess. Laws 31, 31; Act to Establish an Academy in the Town of Buncombe, ch. 43, 1805 N.C. Sess. Laws 27, 28.

170 Act to Incorporate the Bridgeport Bank, 1806 Conn. Pub. Acts 741, 742.

171 Act to Incorporate the Phoenix Bank, ch. 1, 1814 Conn. Pub. Acts 148, 150; Act to Incorporate the Eagle Bank, ch. 1, 1811 Conn. Pub. Acts 65, 66. Other scope terms are sometimes associated with discretionary timing authority. *See, e.g.*, Act to Incorporate the American Geological Society, ch. 32, 1819 Conn. Pub. Acts 367, 368 ("as they shall deem most convenient"); Act to Incorporate the Aetna Insurance Company, ch. 34, 1810 Conn. Pub. Acts 370, 372 ("as they may judge expedient"); Act to Incorporate the New-Haven Bank, 1792 Conn. Pub. Acts 431, 432 ("shall judge necessary"); Act to Incorporate the Newbern Steam Boat Company, ch. 93, 1817 N.C. Sess. Laws 70, 71 ("when they shall think fit"); Act for the Governance of Elizabeth City, ch. 43, 1816 N.C. Sess. Laws 31, 32 ("when they may think it expedient"); Act to Incorporate the Town of Hamilton, ch. 45, 1804 N.C. Sess. Laws 34, 34 ("as often as circumstances shall render it necessary").

without adequate justification, it discriminates against or disproportionately affects the interests of individual citizens vis-à-vis others.[172]

IV. The Clause Today

The results of the foregoing historical analysis should be viewed with appropriate caution. The key terms "necessary" and "proper" have no definite meaning in corporate practice, although I have argued that an approximate meaning can be attributed to them. Even if the data I have examined are representative of early American legal practice, there is no proof that the wording of the Necessary and Proper Clause was borrowed from corporate charters or that the corporate law background had any influence on the members of the Committee of Detail, much less on the other delegates at the Convention or the participants in the ratifying debates. The interpretation of the Constitution, moreover, is not necessarily constrained by how similar words would be understood in a different legal context—a point stressed in the clearest possible terms in *McCulloch v. Maryland*.[173] And the meaning of the Necessary and Proper Clause today is not necessarily governed by inferences about original understanding.

These caveats notwithstanding, it is useful to consider how an interpretation of the Clause based on the corporate law background might change or alter current usages or understandings. It is conventional, today, to see the Necessary and Proper Clause as conferring broad authority on Congress. This expansive view of the Clause is so deeply ingrained in contemporary constitutional theory that even good theorists fail to see that the clause could be interpreted in any other way. Professor John Manning, for example, announces in a recent article that the Necessary and Proper Clause "obviously gives Congress rather substantial incidental authority to implement the enumerated powers."[174] With all due respect to Professor Manning and others of similar views, there is nothing "obvious" about the view that

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172 The interpretation of "proper" advanced here has points of similarity with the view expounded by Lawson and Granger in their article. *See* Lawson & Granger, *supra* note 68. Based on historical, linguistic, and structural analysis, Lawson and Granger argue that the term "proper" requires that laws must be "peculiarly within Congress's domain or jurisdiction" and must not infringe the retained rights of the states or of individuals. *See id.* at 271. The results of their analysis are potentially congruent with the view expressed here since legislation that interferes with retained rights of individuals is also likely to discriminate against or disproportionately affect the interests of particular people without adequate justification or excuse.

173 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) ("[W]e must never forget, that it is *a constitution* we are expounding.").

174 John F. Manning, *Clear Statement Rules and the Constitution*, 110 Colum. L. Rev. 399, 433–34 (2010).

the Necessary and Proper Clause confers extensive powers on Congress. The language of the Clause certainly does not suggest such a view. Nor, as discussed above, does the corporate law background. Drafters of corporate charters used scope terms as a way of constraining the authority of corporate agents, and the term "necessary and proper" was one of the most restrictive, if not the most restrictive, of such terms found in the repertoire of colonial and early Federal-era corporate attorneys.

To be sure, not all commentators share Professor Manning's uncritical view that the Necessary and Proper Clause is an expansive grant of authority. Judge Douglas Ginsburg and Steven Menashi, in a recent commentary, interpret the clause as follows:

> "Necessary and Proper" is the language of strict scrutiny: the Congress may pass laws which are *necessary* to secure a *proper* government interest; whatever is not necessary is not authorized. [Chief Justice] Marshall, however, transformed the clause into a species of rational basis review [in *McCulloch v. Maryland*]: the Congress may pass laws that are "adapted" (that is, rationally related) to any *legitimate* government interest. And so the constitutional presumption of liberty was reversed. Instead of adhering to the constitutional design of limited and enumerated powers—in short, the view that what the Constitution does not authorize the National Government to do it prohibits the National Government from doing—the courts decided, rather than confront the legislature, that the National Government may do whatever the Constitution does not prohibit.[175]

The history analyzed above suggests that, regardless of the meaning of the clause today, Judge Ginsburg and Menashi offer a better account of its historical meaning.[176]

How would the common law background assist in the application of the Necessary and Proper Clause to contemporary constitutional questions? We can explore this issue through the lens of an important case that was recently decided by the Supreme Court: *United States v. Comstock*.[177] That case addressed the question whether Congress has the power to authorize the federal government to place "sexually dan-

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175 Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 252, 262 (2010) (footnotes omitted).

176 *See also* Richard Epstein, *Executive Power in Political and Corporate Contexts*, 12 U. PA. J. CONST. L. 277, 288–89 (2010) (articulating a similar position).

177 United States v. Comstock, 130 S. Ct. 1949 (2010).

gerous" persons in indefinite civil commitment.[178] A broad reading of the Necessary and Proper Clause, consistent with the consensus view of academics, as expressed in the views of Professor Manning, would have suggested an affirmative answer to this question. Congress no doubt has the authority to enact criminal statutes to carry out the powers expressly conferred on the federal government by the Constitution. Having the authority to enact a criminal statute, Congress can also create prisons to house federal prisoners. And once federal prisons are in place, Congress surely has the authority to treat prisoners who suffer from illnesses, including mental illnesses. The traditional definition of mental illness is surely expansive enough to include the condition of being a dangerous sex offender, since people of sound mind do not commit sexual abuse. Therefore, Congress can authorize federal officials to civilly commit sexually dangerous prisoners in its custody—a power that naturally also extends to such persons who are charged with federal crimes but never convicted because they are found incompetent to stand trial. The upshot of this chain of logic is that, because the end is legitimate, Congress has the constitutional authority to use civil commitment as a means necessary and proper to carry out the end.

The corporate law background of the Necessary and Proper Clause suggests a somewhat different analysis. First, the Necessary and Proper Clause does not itself create authority to enact the statute in question.[179] That authority must come from one of the Constitution's explicit grants of authority. No doubt Congress has authority to enact laws to carry into effect its authorized powers, including (but not limited to), for example, the power to regulate interstate commerce, the power to punish counterfeiters, or the power to govern federal enclaves.[180] No doubt, also, Congress has the authority to create federal prisons to house people convicted of federal offenses. These measures can easily be understood as having a reasonably close connection between constitutionally recognized legislative ends and the means chosen to accomplish those ends. But the power of Congress to hold under civil confinement persons whose terms of imprisonment have ended—or those who have never been imprisoned at all, because they are found to be incompetent to stand trial—is far more

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178 *See id.* at 1954. The statute at issue was Title III of the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act), Pub. L. No. 109–248, 120 Stat. 617 (codified at 18 U.S.C. § 4248 (2006)).

179 *See supra* notes 67–68 and accompanying text.

180 *See* U.S. CONST. art. I, § 8, cls. 3, 6, 17.

questionable. The doublet "necessary and proper" suggests that Congress must stay within the scope of delegated authority across all dimensions of the decision being taken. While Congress certainly can authorize federal officials to hold prisoners while they are being charged with federal crimes, and also to incarcerate persons convicted of federal crimes, these powers do not translate over into an authority to hold persons who have been accused of federal crimes but who have either not been convicted on grounds of incompetence or who have completed their sentences. This latter dimension of federal action requires independent constitutional authorization. For such federal authority to be valid, it would need to be "necessary"—it would need to have a reasonably close connection to a constitutionally recognized legislative end. But what legislative end could be imagined for civilly committing sexually dangerous persons? Surely the end is to keep them out of the community so that they do not commit more crimes. But sexual predation is not a federal crime, at least unless it is related to an enumerated federal interest.[181] The upshot of the analysis is that, viewed from the standpoint of the corporate law background, the statute in question probably exceeds congressional authority under the Constitution.

When the Supreme Court reached the issue, in May 2010, it opted for an expansive reading of the Clause that has little to recommend it from the standpoint of the corporate law background. Justice Breyer, writing for the Court, began on the wrong foot by confusing the two functions of Article I, Section 8, Clause 18. That clause grants Congress the power to enact laws implementing the powers expressly granted elsewhere in the Constitution, and it conditions that power by requiring that any such legislation be "necessary and proper" for carrying into execution the enumerated powers.[182] Justice Breyer's opinion conflated these functions, thereby suggesting—erroneously, from the standpoint of the corporate law history of the Clause—that the term "necessary and proper" is in fact an *expansion* of federal authority instead of a *limitation* on a grant of power.[183] Ignoring the plain language of the clause, which requires that all laws implementing congressional powers be both "necessary" and "proper," Justice Breyer substituted other language that the Framers of the Constitution did

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181 For example, Congress could punish sexual predation in the District of Columbia pursuant to its authority under Article I, Section 8, Clause 17 to enact rules to govern federal enclaves.

182 U.S. CONST. art. I, § 8, cl. 18.

183 *Comstock*, 130 S. Ct. at 1956 ("[T]he Necessary and Proper Clause grants Congress broad authority to enact federal legislation.").

not use, reading *McCulloch v. Maryland* as interpreting the term "necessary and proper" to mean "convenient, or useful," or "conducive."[184] Justice Breyer then compounded the error by viewing the scope term as requiring only a rational basis: there need only be a rational relationship between a legitimate congressional purpose and the means chosen to accomplish that purpose in the legislation.[185] Having mangled the historical meaning of the clause nearly beyond recognition, the Court had little trouble concluding that the statute in question was well within the power of Congress under the Necessary and Proper Clause, even assuming, for argument's sake, that the challenged scheme was not otherwise supportable under any specific grant of constitutional authority.[186]

Justice Breyer deserves an "F" for his lack of fidelity to the corporate law background. But Supreme Court Justices are not historians. Their concern is not fidelity to history, but rather the task of adapting authoritative language derived from the past to the regulation of present-day realities. The Justices who joined the majority opinion in the *Comstock* case evidently considered it important that Congress have sweeping powers to deal with the vexing issues that confront the nation going forward—not only the problems of dangerous sexual offenders, but also troubling matters such as financial crises, terrorism, illegal immigration, healthcare, national security, drug addiction, domestic abuse, energy policy, environmental threats, and much else besides. Reasonable people may disagree about whether Congress should in fact enjoy virtually unchecked authority to promote its view of the public interest. But the Supreme Court, whose opinion is final whether or not based on a distorted idea of historical meanings, has sided with those who favor a broad reach for congressional authority. The Court has made it clear that it is not going to stand in the way of expansive exercises of federal authority, at least when individual rights are not involved. History, if not an authoritative guide to interpretation, will at least be the judge of the wisdom of the Court's decision.

Conclusion

This Article has investigated the corporate law background of the Necessary and Proper Clause. The remarkable incidence of scope clauses in corporate charters of the era, including many using the

184 *Id.*

185 *Id.*

186 *Id.* at 1965.

terms "necessary," "proper," and "necessary and proper," suggests that these documents could have been a source of the constitutional provision, or at least that similar interpretative principles might apply in both contexts. Chief Justice Marshall, for one, appears to have understood the analogy. When he famously pronounced that "we must never forget, that it is *a constitution* we are expounding,"[187] he was contrasting the appropriate methodology for interpreting the Constitution with an approach that would be appropriate for another unnamed type of legal document. The obvious candidate is the corporate charter. Although Marshall rejected the salience of the parallel, his apparent reference to corporate charters highlights the importance of these instruments as part of the legal background of America's fundamental law.

An examination of corporate charters of the Founding era provides guidance on questions of interpretation. The corporate law background suggests that the Necessary and Proper Clause does not grant independent rulemaking authority, 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. The use of the doublet "necessary and proper" is probably meaningful, and suggests that Congress must stay within the scope of delegated power across all dimensions of the decision being taken. For a law to be "necessary," the analysis suggests that there must be a reasonably close connection between constitutionally recognized legislative ends and the means chosen to accomplish those ends. To be "proper," the analysis suggests that a law must not, without adequate justification, discriminate against or otherwise disproportionately affect the interests of individual citizens.[188] These conclusions must be viewed with caution, especially as guides for interpretation today, given the long history of interpretation that has given new meanings to the old constitutional language. Nonetheless, the analysis presented here offers perspective and adds texture to the historical understanding of this most important constitutional provision.

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187 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

188 This interpretation of the term "necessary and proper," derived from the corporate law background, appears to be generally consistent with Lawson and Seidman's account of the clause as referring to a principle of reasonableness requiring delegated authority to be exercised in a measured, proportionate, and rights-regarding fashion. *See* Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 48–54.