

THE NEW JURISPRUDENCE OF THE NECESSARY AND PROPER CLAUSE

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Several recent Supreme Court decisions evidence reinvigorated principles of federalism and an increased willingness to strike down legislation as beyond the power of Congress. In this article, Professor Beck considers this trend in light of the persistent debate surrounding the implied powers of Congress under the Necessary and Proper Clause. Because the Necessary and Proper Clause represents the outer boundary of congressional authority, consideration of this provision necessarily illuminates discussions of state sovereignty and reserved powers.

*The article begins with an historical overview of the Framers' understanding of the Necessary and Proper Clause, leading up to the Supreme Court's decision in *McCulloch v. Maryland*. The Court's decision in *McCulloch*, through Chief Justice Marshall, laid the groundwork for our modern understanding of the clause. An historical account of the Necessary and Proper Clause demonstrates that the "propriety" limitation is best understood as requiring an appropriate relationship between congressional ends and means. The propriety requirement should not be understood to provide textual support for free-standing principles of federalism, such as state sovereign immunity or the prohibition against commandeering of state officials. Thus, the article concludes that the Court's reliance on the propriety limitation in *Printz v. United States* and *Alden v. Maine* was misplaced. These decisions must be justified, if at all, on the structural and historical arguments employed by the Court. At the same time, in two recent commerce-power decisions, *United States v. Lopez* and *United States v. Morrison*, the Court failed to invoke the Necessary and Proper Clause where the propriety limitation was exactly apposite, and supported the Court's analysis. Constitutional doctrine will benefit from this historical account of the Necessary and Proper*

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Clause, as it highlights the modern implications of Chief Justice Marshall's understanding of the judicially enforceable limitations on congressional power.

Whatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress.

—James Madison, 1791**

The Supreme Court has surprised constitutional scholars in recent terms with a renewed emphasis on defending the states against incursions by Congress.¹ Three lines of cases reflect the revived interest in federalism that animates a majority of the current Court. First, the Court has rejected the government's invocation of the Commerce Clause as authority for federal legislation addressing noncommercial activities traditionally regulated by state governments.² Second, the Court has invalidated congressional attempts to "commandeer" state officials by compelling state legislators to enact desired legislation³ or requiring state executives to implement a federal regulatory scheme.⁴ Third, the Court has broadly defined state sovereign immunity, shielding states against many claims asserted on the basis of purported congressional authorizations.⁵

This article evaluates these recent federalism rulings in light of the controversy over implied congressional powers that commenced prior to ratification of the Constitution. All three lines of decisions implicate the Necessary and Proper Clause, the concluding provision in Article I, section 8's enumeration of congressional powers.⁶ The text of the Constitu-

** 2 ANNALS OF CONG. 1898 (1791). Gales and Seaton published two versions of Volume 2 of the Debates and Proceedings in the Congress of the United States (cited here as Annals of Congress), each with different pagination. This article will cite to the version that includes the above quote from Madison at page 1898 of Volume 2.

1. See, e.g., Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2181 (1998) ("The constitutional law of federalism-based constraints on the federal government has risen phoenix-like from the ashes of the post-New Deal enthusiasm for the exercise of national power.").

2. *Morrison v. United States*, 529 U.S. 598 (2000); *Lopez v. United States*, 514 U.S. 549 (1995). Federalism issues also predominate in a partially overlapping line of cases restricting congressional power to regulate states pursuant to Section 5 of the Fourteenth Amendment. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Morrison*, 529 U.S. at 618–27; *City of Boerne v. Flores*, 521 U.S. 507 (1997). This article relates primarily to the Article I powers of Congress and addresses only briefly the Fourteenth Amendment case law. See *infra* note 299 and accompanying text.

3. See *New York v. United States*, 505 U.S. 144 (1992).

4. *Printz v. United States*, 521 U.S. 898 (1997).

5. See *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

6. The Necessary and Proper Clause affords Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18. This article seeks to contribute to a growing body of recent literature concerning the Necessary and Proper Clause. See, e.g., JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT* (1999); Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745 (1997); David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL'Y 107 (1998);

tion does not expressly grant any of the legislative powers at issue in these cases: the power to regulate local gun possession or gender-motivated violence, the power to commandeer state legislators or executives, or the power to abrogate state sovereign immunity.⁷ As a result, under classical constitutional reasoning, Congress could exercise the authority advanced in each case only if it represented an implied power “necessary and proper” to carry into execution another power vested in the federal government.⁸ The Court’s rejection of the asserted congressional powers in these cases therefore can be understood as a construction of the Necessary and Proper Clause, a construction made explicit in the commandeering and sovereign immunity contexts,⁹ but never articulated in the commerce power cases.¹⁰ The “necessary and proper” standard, in other words, provides a potential textual anchor for the Court’s implied limitations on the implied powers of Congress.¹¹

Considering the recent federalism rulings through the lens of the Necessary and Proper Clause helps to place the decisions in the broader

Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996); Eugene Gressman, *RFRA: A Comedy of Necessary and Proper Errors*, 21 CARDOZO L. REV. 507 (1999); Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

7. See generally U.S. CONST. art. I, § 8.

8. The traditional approach to assessing claims of congressional power has been to first ask whether the text of the Constitution expressly grants the power in question. If not, the analysis then proceeds to consideration of whether the asserted congressional power constitutes an implied power satisfying the requirements of the Necessary and Proper Clause. See, e.g., *United States v. Harris*, 106 U.S. 629, 636 (1882) (“Mr. Justice Story, in his Commentaries on the Constitution, says: ‘Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be whether it is *properly* an incident to an express power and *necessary* to its execution. If it be, it may be exercised by Congress. If not, Congress cannot exercise it.’”) (emphasis added) (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1243 (1833)); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819) (“Among the enumerated powers, we do not find that of establishing a bank or creating a corporation.”); *id.* at 406–24 (concluding that Congress possessed implied power to incorporate a bank under the Necessary and Proper Clause); *Alden*, 527 U.S. at 739 (“The Federal Government . . . ‘can claim no powers which are not granted to it by the [C]onstitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.’”) (quoting *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816)); *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 379 (1805) (“Under what clause of the constitution is such a power given to congress? Is it under the general power to make all laws necessary and proper for carrying into execution the particular powers specified? If so, where is the necessity, or where is the propriety, of such a provision[,] and to the exercise of what other power, is it necessary?”); 29 ANNALS OF CONG. 1132 (1818) (recognizing in the Committee Report on internal improvements legislation that any power asserted by Congress must either be expressly given or necessary and proper to execution of an express power); St. George Tucker, Appendix 1 [hereinafter Tucker’s Appendix] to 1 WILLIAM BLACKSTONE, COMMENTARIES 288 (St. George Tucker ed., 1803) [hereinafter BLACKSTONE’S COMMENTARIES].

9. See *Alden*, 527 U.S. at 732–39; *Printz*, 521 U.S. at 923–24.

10. See *infra* notes 253–99 and accompanying text.

11. See Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 826–30 (1999) (suggesting the need for a textual basis for the Court’s federalism decisions). Professor Rappaport seeks to ground the Court’s federalism principles in the historical understanding of the term “State,” which is used throughout the constitutional text. See *id.* at 821, 831–38.

context of American constitutional history. In light of that history, this article contends that the Supreme Court's approach to the Necessary and Proper Clause in these cases has been precisely backwards. The Court neglected to mention the "necessary and proper" standard in contexts where it would support the Court's analysis, and instead relied upon it in contexts where it offered no assistance.

In the commerce-power decisions, *Lopez* and *Morrison*, the Court failed to invoke the Necessary and Proper Clause.¹² This article will suggest that the omission was material. The best explanation for those decisions derives from the historical understanding of the restraints imposed by the Necessary and Proper Clause on implied congressional powers. On the other hand, when the Court did rely upon the "necessary and proper" standard, in *Printz* and *Alden*, it erroneously concluded that laws commandeering state officials or abrogating state sovereign immunity are not "proper" as that term is used in Article I, section 8.¹³ Careful analysis suggests that the propriety limitation should instead be understood to regulate the relationship between congressional means and constitutional ends, rather than as a repository for implied principles of federalism. The commandeering and sovereign immunity cases may be defensible on structural grounds, but the construction of the Necessary and Proper Clause offered by the Court provides a dubious basis for the decisions.

It should come as no surprise that the Necessary and Proper Clause lies at the center of debate over federalism. As a corollary to the Tenth Amendment, any expansion of federal authority diminishes the reserved powers of the states.¹⁴ Thus, the Court has often conceived its task in federalism cases as one of discerning "the constitutional line between federal and state power."¹⁵ Because the Necessary and Proper Clause delineates the outer boundary of congressional authority, interpretation of that provision also permits identification of reserved state powers.

Section I of this article highlights early discussions of the Necessary and Proper Clause, leading up to *McCulloch v. Maryland*¹⁶ and John Marshall's pseudonymous defense of that decision in his *Friend to the Union* and *Friend of the Constitution* essays.¹⁷ Two of the Constitution's

12. *Morrison v. United States*, 529 U.S. 598 (2000); *Lopez v. United States*, 514 U.S. 549 (1995).

13. *Alden*, 527 U.S. at 730–31; *Printz*, 521 U.S. at 923–25.

14. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." U.S. CONST. amend. X. The amendment conceptualizes sovereign powers as something like a pie, so that carving out a larger slice for the federal government leaves less for division between the states and the people.

15. *New York v. United States*, 505 U.S. 144, 155 (1992).

16. 17 U.S. (4 Wheat.) 316 (1819).

17. John Marshall, *A Friend to the Union Nos. 1–2* (1819) [hereinafter *A Friend to the Union*], in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 78–105 (Gerald Gunther ed., 1969) [hereinafter JOHN MARSHALL'S DEFENSE]; John Marshall, *A Friend of the Constitution Nos. 1–9* (1819) [hereinafter *A Friend of the Constitution*], in JOHN MARSHALL'S DEFENSE, *supra*, at 155–214.

Framers played a leading role in this early debate over the meaning of the Necessary and Proper Clause. James Madison argued for a strict construction of the provision, while Alexander Hamilton advocated a broader recognition of implied congressional powers.¹⁸ The *McCulloch* opinion largely reiterated Hamilton's 1791 Secretary of the Treasury opinion defending the constitutionality of a congressionally chartered bank.¹⁹ But while Hamilton won the initial skirmish over the scope of implied congressional powers, the Hamiltonian position included important limitations that help to explain and illuminate the Court's modern federalism rulings.

Section II of the article addresses the Supreme Court's recent restrictions on congressional regulation of local conduct affecting interstate commerce. The power to regulate conduct that affects commerce does not appear in the text of the Commerce Clause, but instead constitutes an implied power within the scope of the Necessary and Proper Clause. The Supreme Court in *Lopez* and *Morrison* confined Congress in most circumstances to regulation of *economic* or *commercial* activities that substantially affect interstate commerce.²⁰ One can explain this limitation as a particular application of Hamilton's principle that an implied congressional power must bear an "obvious relation" to an end encompassed within one of the enumerated grants of power.²¹ Using the language of *McCulloch*, regulation of local, noneconomic conduct is not a means "appropriate," "plainly adapted to" or "really calculated to effect" the end of controlling interstate commercial activity.²²

These restrictions on the means-end relationship provide the Hamiltonian antidote to a particular concern articulated by Madison. In both congressional debate and private correspondence, Madison expressed the fear that Congress would accomplish an unlimited expansion of federal authority through regulation of activities remote from its enumerated powers.²³ Chief Justice Marshall viewed *McCulloch*'s restrictions on the means-end relationship as the mechanism for resolving this remoteness problem.²⁴ While the Court in *Lopez* and *Morrison* shared Madi-

18. Cf. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 96–103 (14th ed. 2001). Professors Sullivan and Gunther characterize the debate as one between Thomas Jefferson and Alexander Hamilton. I focus on James Madison as the advocate for the strict constructionist view, in part because Madison's speech opposing Hamilton's bank bill preceded Jefferson's opinion on the issue. See *infra* notes 67–109 and accompanying text.

19. Opinion of Alexander Hamilton on the Constitutionality of a National Bank (Feb. 23, 1791) [hereinafter Hamilton Opinion], reprinted in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 95–112 (M. St. Clair Clarke & D.A. Hall eds., Augustus M. Kelley 1967) (1832) [hereinafter BANK HISTORY].

20. United States v. Morrison, 529 U.S. 598, 617–18 (2000); United States v. Lopez, 514 U.S. 549, 567 (1995).

21. BANK HISTORY, *supra* note 19, at 99.

22. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421, 423 (1819).

23. See H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651, 658–59 (1995); *infra* notes 78–79 and accompanying text.

24. See *infra* notes 186–218 and accompanying text.

son's concern about regulation of activities remote from the enumerated powers of Congress, the Court neglected to mention the strong connection between its commercial activity principle and these means-end limitations from *McCulloch*.²⁵

Section III considers the Supreme Court's anticommandeering and sovereign immunity decisions. In *Printz v. United States* and *Alden v. Maine*, the Court rejected the dissenting Justices' invocation of the Necessary and Proper Clause, holding that it is not "proper" for Congress to commandeer state officials or to abrogate state sovereign immunity.²⁶ Some historical support exists for reading the term "proper" to require congressional respect for sovereign interests of the states.²⁷ Nevertheless, in light of the historical materials, the propriety standard is better read to regulate the relationship between a particular legislative measure and the congressional power on which it rests. This article argues that *McCulloch* in fact interpreted the propriety requirement in this fashion, and that its most important restrictions on the means-end relationship derive from the term "proper," rather than the term "necessary." The propriety limitation therefore provides an insufficient basis for the Supreme Court's anticommandeering and sovereign immunity rules. Those rules must stand or fall on the validity of the structural reasoning employed by the Court, and can draw no textual support from the Necessary and Proper Clause.

I. MADISON, HAMILTON, AND THE NECESSARY AND PROPER CLAUSE

One can conceptualize the early debate over interpretation of the Necessary and Proper Clause as an extended dialogue initiated by two Framers, James Madison, and Alexander Hamilton. At its core, the debate arose from the tension between two fundamental goals of the constitutional scheme, goals to which both Madison and Hamilton subscribed. On the one hand, proponents of the Constitution sought to afford the federal government adequate powers to achieve its delegated ends.²⁸ Many perceived the Articles of Confederation government as too frail to protect the shared interests of the people of the United States.²⁹ At the same time, the Framers sought to confine the jurisdiction of the federal government in order to preserve state autonomy and individual liberty.

25. *Morrison*, 529 U.S. at 610–19; *Lopez*, 514 U.S. at 559–68.

26. *Alden v. Maine*, 527 U.S. 706, 733 (1999); *Printz v. United States*, 521 U.S. 898, 923–24 (1997).

27. See generally Lawson & Granger, *supra* note 6, at 298–308. But see *infra* notes 363–439 and accompanying text.

28. THE FEDERALIST NO. 16, at 102–03, 123, (Alexander Hamilton), NO. 37, at 233–34 (James Madison) (Jacob E. Cooke ed., 1961).

29. See, e.g., THE FEDERALIST NOS. 15, 23 (Alexander Hamilton).

While the federal government was given important powers, those powers were to be enumerated and limited.³⁰

These twin aims of establishing a more powerful national government and confining its powers to preserve state and individual autonomy³¹ created a dilemma in interpreting the Necessary and Proper Clause. That clause provides that Congress shall have power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”³²

The Necessary and Proper Clause plainly affirmed that Congress possesses some powers not spelled out in the text of the Constitution. At the same time, the language employed failed to clarify the precise scope of those implied powers. Construing the clause too narrowly presented the risk that the government would experience the same feebleness that led the Framers to abandon the Articles of Confederation.³³ But construing the clause too broadly raised the danger that the federal government would supplant state governments or stifle individual freedom.

As between the Scylla of ineffectual federal power and the Charybdis of excessive federal power, Madison steered toward Scylla. Favoring preservation of the role of the state governments, he labored to ensure a strict interpretation of the Necessary and Proper Clause that would keep the federal government within defined boundaries. Hamilton, on the other hand, navigated toward Charybdis. Recalling the ineffectiveness of the confederation government, he advocated a liberal interpretation of the Necessary and Proper Clause that would permit flexibility in responding to the needs of the Union.

This section of the article offers an overview of the dialogue begun by Madison and Hamilton, culminating with the Supreme Court’s Hamiltonian decision in *McCulloch v. Maryland* and Chief Justice Marshall’s

30. See U.S. CONST. art. I, § 8; *id.* amend. X; THE FEDERALIST NO. 14, at 86 (James Madison), NO. 84, at 579–80 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

31. THE FEDERALIST NO. 37, at 233–37 (James Madison) (Jacob E. Cooke ed., 1961); see also H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 851–52 (1999) (“[F]ederalism is not simply about protecting the states from national encroachment. It is also about empowering the national government to act where appropriate. After all, American federalism was invented as a means of creating a more effective (and necessarily more powerful) national government than existed under the Articles of Confederation.”).

32. U.S. CONST. art. I, § 8, cl. 18.

33. A primary flaw in the Articles of Confederation lay in its rejection of any notion of implied congressional powers. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406–07 (1819); THE FEDERALIST NO. 44, at 303–04 (James Madison) (Jacob E. Cooke ed., 1961). Article II of the Articles provided: “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.” ARTS. OF CONFED., art. II. A rule requiring all governmental powers, no matter how minor or obvious, to be expressly stated at the outset places an impossible weight on the foresight and patience of those framing the plan of government. The Tenth Amendment incorporates a principle of reserved powers, comparable to Article II, but does not limit Congress to only those powers “expressly delegated.” See U.S. CONST. amend. X.

subsequent defense of the decision in pseudonymous newspaper essays. Sections II and III then consider the Court's recent federalism decisions in light of the themes sounded in this early debate.

A. *Madison and Hamilton in the Campaign for Ratification*

Though they would later part ways over interpretation of the Necessary and Proper Clause, Madison and Hamilton began their public discussion of the provision as joint authors of essays supporting ratification of the Constitution. In the *Federalist*, under the common pen name "Publius," they labored together to overcome objections raised by the Constitution's opponents.³⁴ Their divisions over the Necessary and Proper Clause did not surface during ratification because the discussions of the clause took place at a high level of generality. Neither of them addressed concrete applications of the provision, except for the purpose of dismissing hypothetical legislative usurpations that were extreme and improbable given the assumptions of the day.³⁵

The Anti-Federalists found in the ambiguity of the "Sweeping Clause," as they called it,³⁶ fertile ground for criticizing the proposed plan of government.³⁷ George Mason's widely circulated critique of the Constitution objected to this power in the following terms:

Under their own Construction of the general Clause at the End of the enumerated Powers, the Congress may grant Monopolies in Trade & Commerce, constitute new Crimes, inflict unusual & severe Punishments, and extend their Power as far as they shall think proper; so that the State Legislatures have no Security for the Powers now presumed to remain to them; or the People for their Rights.³⁸

Other Anti-Federalists echoed Mason's concern that the Necessary and Proper Clause would permit intrusion on the reserved powers of the states.³⁹ Some even contended that the Sweeping Clause would permit

34. THE FEDERALIST NO. 33 (Alexander Hamilton), NO. 44 (James Madison).

35. See THE FEDERALIST NO. 33, at 206-07 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see also *infra* notes 47-48 and accompanying text.

36. See LYNCH, *supra* note 6, at 4, 24; Lawson & Granger, *supra* note 6, at 270-71, n.10.

37. Letters from the Federal Farmer, reprinted in 2 THE COMPLETE ANTI-FEDERALIST § 2.8.29, at 237 (Herbert J. Storing ed., 1981) [hereinafter COMPLETE ANTI-FEDERALIST] (noting the impossibility of knowing "the extent and number of the laws which may be deemed necessary and proper").

38. 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 350 (1983) [hereinafter DOCUMENTARY HISTORY OF THE RATIFICATION]; 14 *id.* at 151. Mason had made the same critique during the Constitutional Convention. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 640 (Max Farrand ed., 1937) (complaining that under this provision, "the State legislatures have no security for the powers now presumed to remain to them, or the people for their rights"); see also 4 *id.* at 56 (complaining of "indefinite powers" granted to the national government). Eldridge Gerry also objected to the Necessary and Proper Clause at the Constitutional Convention, arguing that this provision, along with other features of the Constitution, would render the rights of citizens insecure. 13 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra*, at 199.

39. Essays of An Old Whig, reprinted in 3 COMPLETE ANTI-FEDERALIST, *supra* note 37, § 3.3.12, at 24 ("Under such a clause as this can any thing be said to be reserved and kept back from Con-

Congress to abolish state governments entirely or undermine their operations.⁴⁰ For instance, various opponents of the Constitution claimed that Congress could pass a law preventing the state governments from collecting taxes, on the ground that such a prohibition was necessary and proper to effectuate federal tax collection.⁴¹

Hamilton responded to the Anti-Federalist fears in Federalist No. 33, one in a series of papers dealing with federal taxation. He complained that the Necessary and Proper Clause, coupled with the Supremacy Clause, had been held up to the people “in all the exaggerated colours of misrepresentation, as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated.”⁴² The primary thrust of Hamilton’s response was to characterize the Necessary and Proper Clause as “perfectly harmless,” because it merely stated a proposition that would otherwise be derived “by necessary and unavoidable implication” from the particular grants of congressional power.⁴³

What is a power, but the ability or faculty of doing a thing? What is the ability to do a thing but the power of employing the *means* necessary to its execution? What is a LEGISLATIVE power but a power of making LAWS? What are the *means* to execute a LEGISLATIVE power but LAWS? . . . What are the proper means of executing such a power but *necessary* and *proper* laws?⁴⁴

By way of example, Hamilton argued that the power to lay and collect taxes must include authority “to pass all laws *necessary* and *proper*

gress?”); Letters of Centinel No. V, *reprinted in 2 COMPLETE ANTI-FEDERALIST*, *supra* note 37, § 2.7.97, at 168 (recognizing that, under this power, Congress “may stamp with the sanction of the constitution every possible law”); *see* LYNCH, *supra* note 6, at 31–32.

40. Essays of Brutus, *reprinted in 2 COMPLETE ANTI-FEDERALIST*, *supra* note 37, § 2.9.8, at 367 (fearing that the clause “may . . . be exercised in a such manner as entirely to abolish the state legislatures”); *id.* § 2.9.9, at 367 (“[T]hey may so exercise this power as entirely to annihilate all the state governments, and reduce this country to one single government.”); *see also* Letter from William Russell to William Fleming (Jan. 25, 1788), *reprinted in 15 DOCUMENTARY HISTORY OF THE RATIFICATION*, *supra* note 38, at 468 (“It seems to me, if Congress, have a right to make all laws that may be necessary & proper, that no inferiour Legislature, can be more than a Mitaphysical nothing.”); 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 338 (Williams, New York) (Jonathon Elliot ed., 2d ed. 1836) [hereinafter DEBATES IN THE STATE CONVENTIONS] (noting that the clause “would tend to annihilate the state governments”).

41. Essays of Brutus, *reprinted in 2 COMPLETE ANTI-FEDERALIST*, *supra* note 37, § 2.9.8, at 367 (asking whether Congress could repeal a state tax law “because it may prevent the collection of a tax which they may think proper and necessary to lay”); A Farmer, *reprinted in 17 DOCUMENTARY HISTORY OF THE RATIFICATION*, *supra* note 38, at 142 (characterizing the clause as giving “the power of repelling or forbidding the execution of any tax law whatever that may interfere with or impede the exercise of the general taxing power”); *see also* Letters of Centinel No. V, *reprinted in 2 COMPLETE ANTI-FEDERALIST*, *supra* note 37, § 2.7.97, at 169 (“[B]y virtue of this clause, they may controul and abrogate any and every of the laws of the state governments, on the allegation that they interfere with the execution of any of their powers.”); 1 DEBATES IN THE STATE CONVENTIONS, *supra* note 40, at 339 (surmising that Congress could “abolish state taxes” to ensure federal priority in tax collection).

42. THE FEDERALIST NO. 33, at 204 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

43. *Id.* at 204–05.

44. *Id.*

for the execution of that power.”⁴⁵ The Convention included the final clause of Article I, section 8 only out of an abundance of caution, to protect against “cavilling refinements” by those seeking to avoid legitimate exercises of federal power.⁴⁶ In short, Hamilton’s response to the Anti-Federalists was that the Necessary and Proper Clause conferred no power beyond what was implicit in a fair reading of the other enumerated powers.

Hamilton also rejected two specific hypothetical statutes on the ground that they would fail the constitutional requirement of “propriety,” drawn from the term “proper” in the Necessary and Proper Clause:

The *propriety* of a law in a constitutional light, must always be determined by the nature of the powers upon which it is founded. Suppose by some forced constructions of its authority (which indeed cannot easily be imagined) the Federal Legislature should attempt to vary the law of descent in any State; would it not be evident that in making such an attempt it had exceeded its jurisdiction and infringed upon that of the State? Suppose again that upon the pretence of an interference with its revenues, it should undertake to abrogate a land tax imposed by the authority of a State, would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to this species of tax which its constitution plainly supposes to exist in the State governments?⁴⁷

Because the Constitution would not authorize such hypothetical legislation, it would therefore lack the force of law. Under the Supremacy Clause, acts of Congress “which are *not pursuant* to its constitutional powers but which are invasions of the residuary authorities of the [states]” are “acts of usurpation” that “deserve to be treated as such.”⁴⁸

At least two aspects of Hamilton’s analysis are worthy of note. First, he assumed that, given “the nature of the powers” identified as support for a particular law, it would sometimes be “evident” that Congress had exceeded its constitutional jurisdiction. Second, the inference of *ultra vires* activity would arise when Congress had invaded an arena widely understood to belong to the state governments, such as the power to regulate descent of property or to tax land.

Madison’s turn at defending the Necessary and Proper Clause came in Federalist No. 44, when he engaged in a systematic consideration and

45. *Id.* at 205.

46. *Id.* Indeed, Hamilton turned the Anti-Federalist critique on its head, claiming that the clause was necessary to protect the federal government against the states. The clause left nothing to construction to guard against “the danger which most threatens our political welfare, . . . that the State Governments will finally sap the foundations of the Union.” *Id.* at 205–06.

47. *Id.* at 206 (emphasis added). It is clear that Hamilton is using the word “propriety” advisedly to refer to the term “proper” in the Necessary and Proper Clause. The paragraph in which this passage appears begins with the question, “[W]ho is to judge the *necessity* and *propriety* of the laws to be passed for executing the powers of the Union?” *Id.*

48. *Id.* at 207. Hamilton specifically applied this principle to the hypothetical law preventing state tax collection. *Id.* at 208.

rejection of four alternative paths the Convention might have followed with respect to implied congressional powers. The first option would have restricted Congress to those powers expressly delegated, as under the Articles of Confederation.⁴⁹ This option would either “disarm the government of all real authority” or else invite a latitudinous interpretation of the term “expressly.”⁵⁰ The second alternative, an enumeration of all federal powers, would have required “a complete digest of laws on every subject,” including laws that might be required by future circumstances.⁵¹ The third possibility, an attempted enumeration of all *exceptions* to the powers of Congress, would have been futile and underinclusive.⁵² The fourth option, omission of the Necessary and Proper Clause and complete silence on the issue of implied powers, would have made no difference in constitutional interpretation because “the particular powers, requisite as means of executing the general powers, would have resulted to the government, by unavoidable implication.”⁵³ On this last point, Madison’s discussion echoed Hamilton’s claim in Federalist No. 33 that the Necessary and Proper Clause was, in effect, redundant.⁵⁴

Madison then turned to the question of how Congress could be prevented from assuming unwarranted powers through misconstruction of the Necessary and Proper Clause.⁵⁵ He noted that the success of such a scheme required the cooperation of the judiciary and the executive, “which are to expound and give effect to the legislative acts.”⁵⁶ If these initial lines of defense proved ineffective, Madison’s ultimate remedy against congressional usurpation lay in the power of popular election. In exercising an electoral check, the people would receive aid from state legislatures, which would be zealous to protect their own rights and

49. THE FEDERALIST NO. 44, at 303 (James Madison) (Jacob E. Cooke ed., 1961).

50. *Id.*

51. *Id.* at 304; see also 2 ANNALS OF CONG. 1912 (1791) (statement of Rep. Sedgwick) (“The great ends to be obtained as means to effectuate the ultimate end—the public good and general welfare—are capable, under general terms, of constitutional specification; but the subordinate means are so numerous, and capable of such infinite variation, as to render an enumeration impracticable, and must therefore be left to construction and necessary implication.”).

52. THE FEDERALIST NO. 44, at 304 (James Madison) (Jacob E. Cooke ed., 1961).

53. *Id.* at 304–05.

54. See *supra* note 43 and accompanying text.

55. THE FEDERALIST NO. 44, at 305 (James Madison) (Jacob E. Cooke ed., 1961).

56. *Id.* Presumably Madison was here referring, at least in part, to judicial review and “executive review” as mechanisms to prevent implementation of unconstitutional legislation. The theory of executive review holds that, just as the courts may ignore an unconstitutional statute in resolving cases and controversies, the President may ignore an unconstitutional statute in executing the laws. See Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 919–20 (1989–1990); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1306 (1996); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 244–45, 257–62 (1994); J. Randy Beck, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 16 CONST. COMMENT. 419, 421–22 (1999) (book review).

would “sound the alarm” when Congress exceeded its delegated jurisdiction.⁵⁷

Comparison of Federalist Nos. 33 and 44 highlights several broad points of agreement between Hamilton and Madison with respect to interpretation of the Necessary and Proper Clause. Both viewed the provision, if correctly interpreted, as adding nothing to the enumerated powers.⁵⁸ The Convention inserted the clause to guard against a nitpicking casuistry in constitutional interpretation that would sap the federal government of its legitimate authority. The clause merely confirmed the existence of lesser powers, not expressly detailed in the Constitution, which would serve as the means of carrying the enumerated powers into effect. At the same time, Madison and Hamilton also agreed that the federal government possesses only limited powers delegated by the Constitution.⁵⁹ Because both understood congressional powers to be limited, they both believed Congress could exceed the legitimate scope of its constitutional authority through an overly broad reading of the Necessary and

57. THE FEDERALIST NO. 44, at 305 (James Madison) (Jacob E. Cooke ed., 1961). We are accustomed to thinking of judicial review as the primary defense against unconstitutional acts of Congress. It should be recalled, however, that in the case of the infamous Sedition Act, the courts upheld the statute against constitutional challenge, relying on the Necessary and Proper Clause. *See, e.g.*, *Case of Fries*, 9 F. Cas. 826, 836–39 (C.C.D. Pa. 1799) (No. 5126) (jury charge of Justice Iredell). The statute was eventually undermined by the other means Madison mentioned. After the statute was challenged by certain state legislatures, the voters removed the Federalists from power in 1800. Gregg Costa, Note, *John Marshall, the Sedition Act, and Free Speech in the Early Republic*, 77 TEX. L. REV. 1011, 1029 (1999) (discussing the Kentucky and Virginia Resolutions). Newly elected President Jefferson then refused to enforce the statute and granted pardons to those already convicted. Beck, *supra* note 56, at 430.

58. *See supra* notes 43, 53–54 and accompanying text. This proposition was commonly accepted in subsequent discussions of the Necessary and Proper Clause. 1 DEBATES IN THE STATE CONVENTIONS, *supra* note 40, at 206 (Randolph, Virginia) (“This formidable clause does not in the least increase the powers of Congress.”); *id.* at 468 (Wilson, Pennsylvania) (“[E]ven the concluding clause, with which so much fault has been found, gives no more or other powers; nor does it, in any degree, go beyond the particular enumeration It is saying no more than that the powers we have already particularly given, shall be effectually carried into execution.”); 1 LIFE AND CORRESPONDENCE OF JAMES IREDELL 393 (Griffith J. McRee ed., 1949) (“Though these words do not perhaps convey more real authority than would have been conveyed by fair implication, arising from the special powers of legislation before expressed, yet in an instrument of this high importance it was certainly wise and safe to leave as little room as possible for any doubt in its construction.”); 2 ANNALS OF CONG. 1901 (1791) (James Madison) (“The explanations in the State Conventions all turned . . . on the principle that the terms necessary and proper gave no additional powers to those enumerated.”); *id.* at 1909 (statement of Rep. Ames) (“He did not pretend that [the Sweeping Clause] gives any new powers; but it establishes the doctrine of implied powers.”); Tucker’s Appendix, *supra* note 8, at 287 (“It neither enlarges any power specifically granted, nor is it a grant of new powers to congress, but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those otherwise granted, are included in the grant.”); 22 ANNALS OF CONG. 141 (1811) (statement of Sen. Crawford) (“If these words had been omitted in the clause giving authority to pass laws to carry into execution the powers vested by the Constitution in the National Government, still Congress would have been bound to pass laws which were necessary and proper, and not such as were unnecessary and improper.”).

59. *See supra* notes 48, 55–57 and accompanying text.

Proper Clause.⁶⁰ In so doing, Congress would generally usurp authority that rightfully belonged to the states or the people.⁶¹

B. *Madison Versus Hamilton in the Bank Bill Debate*

The seeming harmony between Hamilton and Madison with respect to the Necessary and Proper Clause broke down when Hamilton, as Secretary of the Treasury, proposed that Congress incorporate the Bank of the United States.⁶² Madison contested the constitutionality of the bank in a speech on the floor of the House.⁶³ After the bill passed both houses, Secretary of State Thomas Jefferson and Attorney General Edmund Randolph authored opinions agreeing with Madison that the bill was unconstitutional.⁶⁴ Alexander Hamilton responded in an opinion that defended the constitutionality of the bank.⁶⁵ President Washington ultimately rejected the views of his fellow Virginians and signed the legislation.⁶⁶

I. *Madison's Speech Against the Bank*

Madison's constitutional challenge to the bank bill began with the observation that no express provision of the Constitution authorized the legislation; the bill did not, for instance, lay any tax or borrow any money.⁶⁷ Nor did he believe the Necessary and Proper Clause would justify incorporation of a bank.⁶⁸ Madison argued that one must construe the Necessary and Proper Clause in a manner consistent with preratification assurances that the federal government would possess only limited

60. See *supra* notes 47–48, 55 and accompanying text.

61. See *supra* notes 47–48, 57 and accompanying text.

62. Alexander Hamilton, Report to the House of Representatives (Dec. 13, 1790), reprinted in *BANK HISTORY*, *supra* note 19, at 15–35. The issue of congressional authority to incorporate a bank predated the Constitution. Even though the Articles of Confederation contained no express power of incorporation, the Confederation Congress felt it necessary to incorporate the Bank of North America to address fiscal concerns relating to the Revolutionary War. See An Ordinance to Incorporate the Subscribers to the Bank of North America (Dec. 31, 1781), reprinted in *BANK HISTORY*, *supra* note 19, at 12, 13. Recognizing that it was acting without constitutional warrant, Congress essentially recommended that the state legislatures ratify their act by passage of appropriate legislation. *Id.* at 13–14; LYNCH, *supra* note 6, at 87; 22 ANNALS OF CONG. 620–22 (1811). The bank eventually accepted a charter of incorporation from the State of Pennsylvania. 22 ANNALS OF CONG. 622 (1811); Proceedings in Congress on its Original Institution, *BANK HISTORY*, *supra* note 19, at 9.

63. 2 ANNALS OF CONG. 1894 (1791).

64. Opinion of Thomas Jefferson, Secretary of State (Feb. 15, 1791), reprinted in *BANK HISTORY*, *supra* note 19, at 91 [hereinafter Jefferson Opinion]; Opinion of Edmund Randolph, Attorney General of the United States (Feb. 12, 1791), reprinted in *BANK HISTORY*, *supra* note 19, at 86 [hereinafter Randolph Opinion]; LYNCH, *supra* note 6, at 79 (noting that Jefferson and Randolph “followed Madison’s position and declared the bill unconstitutional”).

65. Hamilton Opinion, *supra* note 19, at 95.

66. LYNCH, *supra* note 6, at 90; 22 ANNALS OF CONG. 643 (1811) (Rep. Porter) (pointing out that Washington signed the bank bill “with more doubt and hesitation, than almost any other act of his Administration”).

67. 2 ANNALS OF CONG. 1896 (1791).

68. *Id.* at 1898.

powers.⁶⁹ “Whatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress.”⁷⁰ The preamble of the bank legislation broadly stated that a bank was “conceived . . . [to] be very conducive to the successful conducting of the national finances; . . . [to] tend to give facility to the obtaining of loans, for the use of the government, in sudden emergencies; and [to] be productive of considerable advantages to trade and industry in general.”⁷¹ Finding such “diffuse and ductile terms” inconsistent with the constitutional standard of “necessary and proper” legislation,⁷² Madison argued that reasoning like this could destroy “[t]he essential characteristic of the Government, as composed of limited and enumerated powers.”⁷³

Two aspects of the argument supporting the bank particularly troubled Madison. First, he objected to enlisting the Necessary and Proper Clause in support of measures that would merely *facilitate* the exercise of an enumerated power, rather than directly carrying the power into execution.⁷⁴ This concern related to the *objects* appropriately comprehended within a particular grant of power. Does the power to borrow money merely give Congress the authority to take out loans, or does it include a broader power to “give facility to the obtaining of loans” by creating a potential lending institution? Madison denied that the borrowing power included the latter authority.⁷⁵ He suggested that the same reasoning applied to the taxing power would permit regulation of “agriculture, manufactures, and commerce.”⁷⁶ After all, if the power to borrow allows Con-

69. *Id.* at 1898–1902.

70. *Id.* at 1898.

71. Act of Feb. 25, 1791, ch. 10, 1 Stat. 191.

72. 2 ANNALS OF CONG. 1898 (1791). Madison denied that the bank was “necessary,” because the same ends could be achieved by other means:

[T]he proposed Bank could not even be called necessary to the Government; at most it could be but convenient. Its uses to the Government could be supplied by keeping the taxes a little in advance; by loans from individuals; by the other Banks, over which the Government would have equal command; nay greater, as it might grant or refuse to these the privilege (a free and irrevocable gift to the proposed Bank) of using their notes in the Federal revenue.

Id. at 1901.

73. *Id.* at 1898.

74. *Id.*

75. *Id.* at 1897–98. Attorney General Edmund Randolph echoed this concern in his opinion challenging the constitutionality of the bank:

If the laying and collecting of taxes brings with it every thing which, in the opinion of Congress, may facilitate the payment of taxes; if to borrow money sets political speculation loose, to conceive what may create an ability to lend; if to regulate commerce is to range in the boundless mazes of projects for the apparently best scheme to invite from abroad, or to diffuse at home, the precious metals; if to dispose of, or to regulate, property of the United States, is to incorporate a bank, that stock may be subscribed to it by them, it may, without exaggeration, be affirmed, that a similar construction on every specified federal power, will stretch the arm of Congress into the whole circle of State legislation.

Randolph Opinion, *supra* note 64, at 89; see also 22 ANNALS OF CONG. 634–38, 646 (1811) (statement of Rep. Porter) (offering similar argument).

76. 2 ANNALS OF CONG. 1898 (1791).

gress to “create the ability to lend,” then the power to tax would permit Congress to “create the ability to pay.”⁷⁷

Second, Madison protested the construction of an extended chain of means and ends to achieve an object thus brought within the scope of congressional authority:

Mark the reasoning on which the validity of the bill depends! To borrow money is made the end, and the accumulation of capitals implied as the means. The accumulation of capitals is then the end, and a Bank implied as the means. The Bank is then the end, and a charter of incorporation, a monopoly, capital punishments, &c., implied as the means.

If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.⁷⁸

Rather than reading the Necessary and Proper Clause to permit employment of means “remote” from the enumerated powers, Madison believed Congress should use only “direct and incidental means” to achieve a constitutional end.⁷⁹

By broadly construing the objects encompassed within a particular grant of delegated power and by permitting Congress to employ means remote from those objects, Madison thought bank supporters were ignoring rules of construction implicit in the debate over constitutional ratification. Proponents of the Constitution had rejected a Bill of Rights as unnecessary, because Congress possessed no power “to abridge the freedom of the press, or the rights of conscience, &c.”⁸⁰ This explanation presupposed that the powers given to Congress “were not to be extended by remote implications.”⁸¹ Correspondingly, the “explanatory amendments” proposed for the Constitution implicitly supported a rule of strict construction.⁸² The Bill of Rights, in Madison’s view, did not carve out exceptions to the powers of Congress, but rather made explicit certain areas that congressional power would not reach if one properly construed the enumerated powers. The latitude of construction approved by bank supporters was inconsistent with the narrower construction assumed in the provisions of the Bill of Rights.⁸³ Madison also saw no way to reconcile the argument in favor of the bank with the repeated state-

77. *Id.*

78. *Id.* at 1899.

79. *Id.* at 1898. Phrased differently, Congress could use “means necessary to the end, and incidental to the nature of the specified powers.” *Id.*

80. *Id.* at 1901.

81. *Id.*

82. *See id.*

83. *Id.* In particular, Madison viewed the Ninth Amendment “as guarding against a latitude of interpretation.” *Id.* He referred to it as the “Eleventh” amendment, because it had been eleventh in the list of amendments proposed to the states. Barnett, *supra* note 6, at 753–54.

ments in state ratifying conventions “that the terms necessary and proper gave no additional powers to those enumerated.”⁸⁴

In short, Madison accused bank supporters of engaging in a bait-and-switch operation with respect to constitutional construction. “[A]doption was brought about by one set of arguments,” but “it is now administered under the influence of another set.”⁸⁵ The “sting” of this reproach was made keener because it applied “to so many individuals concerned in both the adoption and administration.”⁸⁶ It seems clear that Madison directed this reproach at Hamilton, among others. Madison argued, for instance, that the reasoning offered in support of the bank legislation would permit Congress to abrogate state tax authority.⁸⁷ He thus implied that Hamilton now advocated principles of constitutional construction irreconcilable with his assurances in Federalist No. 33, in which he illustrated the innocuous nature of the Necessary and Proper Clause by denying the validity of federal legislation abrogating a state tax.⁸⁸

2. *Hamilton’s Opinion in Favor of the Bank*

Hamilton’s opinion supporting the constitutionality of the bank did not respond directly to Madison’s speech on the bank bill, but instead focused on the written opinions of his fellow Cabinet officers, Jefferson and Randolph.⁸⁹ Hamilton continued to espouse the positions taken in Federalist No. 33, that the federal government possessed only those powers delegated by the Constitution and that the Necessary and Proper Clause did not give any new or independent power.⁹⁰ At the same time, he did not believe that the enumerated powers of Congress should be given a narrow construction. Congress possessed only those powers delegated, “but how much is delegated in each case, is a question of fact, to be made out by fair reasoning and construction . . . taking as guides, the general principles and general ends of government.”⁹¹ Neither Jefferson nor Randolph denied that certain implied powers accompanied those powers expressly conferred by the Constitution.⁹² Limiting Congress to the letter of its express powers, Hamilton argued, “would at once arrest the motion of Government.”⁹³ A principle of strict construction

84. 2 ANNALS OF CONG. 1901 (1791).

85. *Id.*

86. *Id.* at 1901–02.

87. *Id.* at 1898–99. Madison argued: “The States have, it is allowed on all hands, a concurrent right to lay and collect taxes The reasons for the bill cannot be admitted, because they would invalidate that right.” *Id.* As Madison saw it, a “uniform and exclusive imposition of taxes”—i.e., a law abrogating state tax authority—would be at least as helpful to federal tax collection efforts as the proposed bank. *Id.* at 1899.

88. *See supra* note 47 and accompanying text.

89. Hamilton Opinion, *supra* note 19, at 95.

90. *Id.* at 96, 99.

91. *Id.* at 96.

92. *Id.*

93. *Id.* at 99.

would be “fatal to the just and indispensable authority of the United States.”⁹⁴

Hamilton’s argument in favor of the bank began with the proposition that the United States possesses the powers of a sovereign in relation to those objects entrusted to its care.⁹⁵ As a general rule, sovereign power includes “a right to employ all the means requisite, and fairly applicable, to the attainment of the *ends* of such power, and which are not precluded by restrictions and exceptions specified in the constitution, or not immoral, or not contrary to the essential ends of political society.”⁹⁶ Creation of a corporation is a means available to a sovereign, so the United States possesses the power of incorporation “in relation to the objects” entrusted to the government.⁹⁷ “The only question must be, in this, as in every other case, whether the mean to be employed, or, in this instance, the corporation to be erected, has a natural relation to any of the acknowledged objects or lawful ends of the Government?”⁹⁸

Having argued in favor of the bank without explicit reliance on the Necessary and Proper Clause, Hamilton turned to a refutation of Jefferson’s restrictive reading of that provision. Hamilton took exception to Jefferson’s definition of “necessary” means as “those without which the grant of the power would be nugatory.”⁹⁹ “It is essential to the being of the National Government,” Hamilton wrote, “that so erroneous a conception of the meaning of the word necessary should be exploded.”¹⁰⁰ According to the grammatical and the popular sense of the term, “necessary often means no more than needful, requisite, incidental, useful, or conducive to.”¹⁰¹ Jefferson unjustifiably treated the term “as if the word absolutely, or indispensably, had been prefixed to it.”¹⁰² The degree to which a particular means was necessary was a matter of opinion, and could not be the test of the legal right to use that means. “The relation between the *measure* and the *end*; between the *nature* of the *mean* employed toward the execution of a power, and the *object* of that power; must be the criterion of constitutionality; not the more or less of necessity or utility.”¹⁰³

In Hamilton’s view, the test of constitutionality depended on the relationship between the proposed congressional means and a

94. *Id.* at 95.

95. *Id.*

96. *Id.*

97. *Id.* at 96 (emphasis omitted).

98. *Id.* at 97. Thus, although Congress could not create a corporation to superintend “the police of the city of Philadelphia,” it could create a corporation “in relation to the collection of the taxes, or to the trade with foreign countries, or to the trade between the States, or with the Indian tribes,” all of which are objects within the regulatory power of Congress. *Id.*

99. *Id.*; see also Jefferson Opinion, *supra* note 64, at 93.

100. Hamilton Opinion, *supra* note 19, at 97 (emphasis omitted).

101. *Id.* (emphasis omitted).

102. *Id.* at 98 (emphasis omitted).

103. *Id.*

constitutionally delegated end:¹⁰⁴ “If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution, it may safely be deemed to come within the compass of the national authority.”¹⁰⁵ This focus on the “obviousness” of the relationship between congressional means and constitutional ends squarely comported with Federalist No. 33, in which Hamilton asserted that usurpations by Congress would sometimes be “evident” in light of the nature of the enumerated power in question.¹⁰⁶

Hamilton’s opinion also followed Federalist No. 33 in calling for attention to the effect of legislation on state prerogatives, though the opinion explained the relevance of this inquiry in somewhat different terms. In Federalist No. 33, Hamilton suggested that federal intrusion into the domain of the states related to the “propriety” of legislation.¹⁰⁷ In his Treasury opinion, Hamilton argued that legislation abridging no preexisting state or individual right should enjoy a strong presumption of constitutionality, and “slighter relations to any declared object of the constitution, may be permitted to turn the scale.”¹⁰⁸ In other words, intrusion upon state or individual rights would not, by itself, invalidate the legislation, but would serve to ratchet up the level of scrutiny applied, by requiring a closer fit between means and ends.

Close consideration of the arguments of Madison and Hamilton suggests that they only partially disagreed over construction of the Necessary and Proper Clause. Hamilton took a more relaxed approach than Madison to the identification of constitutional *ends* encompassed within an enumerated power. On the other hand, they agreed that the Necessary and Proper Clause imposed a requirement of immediacy or proximity in the connection between means and ends. For Madison, Congress could only employ means with a “direct” or non-“remote” connection to its enumerated powers.¹⁰⁹ For Hamilton, the means-end connection must be “obvious.” Hamilton’s formulation parallels that of Madison, because the relation between a particular legislative measure and a constitutionally authorized end will become less and less “obvious” as the chain of means employed by Congress grows progressively longer. They agreed, therefore, that the Necessary and Proper Clause places a limit on congressional regulation of matters far removed from its delegated areas of concern.

104. *Id.* at 99.

105. *Id.*

106. *See supra* note 47 and accompanying text.

107. *See id.*

108. Hamilton Opinion, *supra* note 19, at 99–100.

109. *See supra* notes 78–79 and accompanying text.

C. *McCulloch v. Maryland: Hamilton Redux with Allusions to Madison*

The Supreme Court finally addressed the constitutionality of a congressionally chartered bank in *McCulloch v. Maryland*, in the course of striking down a state tax directed at the Second Bank of the United States.¹¹⁰ The *McCulloch* opinion incorporated elements from the positions of both Madison and Hamilton, though its analysis was decidedly more Hamiltonian on issues where the two diverged. The bank at issue in *McCulloch* was not the same bank that had led to the division of opinion between Madison and Hamilton.¹¹¹ Indeed, the bank in *McCulloch* came into existence through legislation signed by Madison as President.¹¹² This does not mean Madison had converted to a Hamiltonian mode of constitutional construction.¹¹³ Rather, he became convinced that governmental actors and the public had acquiesced in the congressional assertion of power to incorporate a bank, and that such acquiescence provided a constitutional basis for bank legislation.¹¹⁴

In upholding the bank statute, the Supreme Court began with this acquiescence theory promoted by Madison. The Court noted that congressional power to incorporate a bank “can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it.”¹¹⁵ A bank had been incorporated by the first Congress under the new Constitution, after full debate of the constitutional issue.¹¹⁶ It was signed into law after further constitutional debate within the Cabinet.¹¹⁷ While that legislation was permitted to expire, the absence of the bank had exposed the government to economic “embar-

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

111. Congress refused to renew the charter of the first Bank of the United States in 1811. 22 ANNALS OF CONG. 346–47, 646 (1811) (listing the congressional votes rejecting legislation to renew the charter of the bank).

112. LYNCH, *supra* note 6, at 222 (“Madison signed the bill chartering the Second Bank of the United States despite his own earlier argument against the constitutionality of the Bank under its first charter.”).

113. Madison continued to employ strict construction, for instance, in insisting that Congress lacked authority to undertake a program of internal improvements—roads and canals—absent a constitutional amendment. Gerald Gunther, *Introduction to JOHN MARSHALL’S DEFENSE*, *supra* note 17, at 1, 6.

114. When Madison vetoed legislation to incorporate a bank in 1815, he waived the question of constitutionality “as being precluded, in my judgment, by repeated recognitions, under varied circumstances, of the validity of such an institution, in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation.” James Madison, Veto Message (Jan. 30, 1815), *reprinted in BANK HISTORY*, *supra* note 19, at 594; *see also* Letter from James Madison to Charles J. Ingersoll (June 25, 1831), *reprinted in BANK HISTORY*, *supra* note 19, at 778–80; Letter from James Madison to Reynolds Chapman (Jan. 6, 1831), *reprinted in 9 WRITINGS OF JAMES MADISON* 429, 434 (Gaillard Hunt ed., 1910). Madison approved legislation incorporating the second federal bank the following year. *History of the House of Representatives* (Apr. 5, 1816), *reprinted in BANK HISTORY*, *supra* note 19, at 713.

115. *McCulloch*, 17 U.S. (4 Wheat.) at 401.

116. *Id.* at 401–02.

117. *Id.* at 402.

rassments.”¹¹⁸ These practical difficulties “convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law.”¹¹⁹ In these circumstances, the Court thought it difficult to characterize the bill as “a bold and plain usurpation, to which the constitution gave no countenance.”¹²⁰

Madison might have been satisfied had the Court ended its analysis of the bank’s constitutional status at that point, but the Court moved on to the merits of the issue of congressional power raised by the case.¹²¹ In upholding the establishment of the bank, Chief Justice Marshall tracked the substance, and sometimes even the phrasing, of Hamilton’s 1791 Treasury opinion. In many respects, *McCulloch* appears to be a judicial repackaging of the argument first made by Hamilton.¹²²

Marshall opened with the “universally admitted” proposition that the federal government possessed only enumerated powers.¹²³ But much as Hamilton had distinguished this proposition from the question of “how much” power had been delegated,¹²⁴ Marshall likewise identified “the extent of the powers actually granted” as a question yet to be decided.¹²⁵ And just as Hamilton had affirmed the existence of both express and implied powers, Marshall noted that nothing in the Constitution precluded the exercise of “incidental or implied powers” by Congress.¹²⁶

Hamilton had made his initial argument for the constitutionality of the bank without invoking the Necessary and Proper Clause.¹²⁷ His argument rested on the premise that the United States was “sovereign” with respect to particular objects, which implied a choice of means to effectuate those objects.¹²⁸ Marshall, likewise, first argued for the constitu-

118. *Id.*; LYNCH, *supra* note 6, at 87, 219–20 (pointing out that, in the absence of a national bank, the United States defaulted on its debt during the War of 1812).

119. *McCulloch*, 17 U.S. (4 Wheat.) at 402; *see also id.* at 422–23 (“[S]tatesmen of the first class, whose previous opinions against [the bank] had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation.”).

120. *Id.* at 402.

121. *Id.* at 402–05. Before beginning its analysis of the proper construction of the Constitution, the Court first detoured to reject the argument by Maryland’s counsel that the Constitution had been ratified by the states. The Court believed instead that the Constitution was ratified by the people. *Id.* at 403–05.

122. Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 198 (1996) (noting that Marshall’s test of implied constitutional power “practically cop[ied] Hamilton’s earlier argument to President Washington”). Marshall was familiar with and admired Hamilton’s opinion. Shortly after *McCulloch*, he described Hamilton’s opinion as a “masterly argument.” *A Friend of the Constitution No. 3*, *supra* note 17, at 176.

123. *McCulloch*, 17 U.S. (4 Wheat.) at 405.

124. *See supra* note 91 and accompanying text.

125. *McCulloch*, 17 U.S. (4 Wheat.) at 405.

126. *Id.* at 406.

127. *See supra* notes 95–98 and accompanying text.

128. *See supra* notes 95–96 and accompanying text.

tionality of the bank on the basis of “general reasoning”¹²⁹ and similarly characterized the Union as “supreme within its sphere of action.”¹³⁰ He too argued that the Framers presumptively afforded Congress the ability to select the most appropriate means to accomplish its designated ends.¹³¹

The Chief Justice drew upon Madison’s thought in discussing the nature of the Constitution. He noted that the document specifies only the “important objects” of federal authority, and does not particularize governmental powers with “the prolixity of a legal code.”¹³² Madison had offered a similar vision of the Constitution in Federalist No. 44, rejecting the desirability of “a complete digest of laws on every subject to which the Constitution relates.”¹³³ But if Marshall’s overall conception of the nature of the Constitution drew from Madison, he followed Hamilton in deriving “the minor ingredients which compose those [important] objects” of federal power.¹³⁴ Like Hamilton, Marshall emphasized the federal government’s need for ample means to accomplish its delegated objects. The Constitution gave many great and important powers to the Union, and, “[t]he power being given, it is in the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.”¹³⁵ While the power of incorporation is a sovereign power,¹³⁶ Marshall agreed with Hamilton that it could be implied as incidental to other powers or used as a means for their execution.¹³⁷ He rejected the view that incorporation was “a great substantive and independent power,” a phrase that nearly replicated the words of Hamilton’s Treasury opinion.¹³⁸

129. *McCulloch*, 17 U.S. (4 Wheat.) at 411 (“But the constitution of the United States has not left the right of congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning.”).

130. Compare *supra* note 95 and accompanying text, with *McCulloch*, 17 U.S. (4 Wheat.) at 405. See also *McCulloch*, 17 U.S. (4 Wheat.) at 410 (recognizing that the government of the Union and those of the states “are each sovereign, with respect to the objects committed to it”).

131. *Id.* at 408. Marshall went on to state:

It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. This could not be done, by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end.

Id. at 415.

132. *Id.* at 407.

133. THE FEDERALIST NO. 44, at 304 (James Madison) (Jacob E. Cooke ed., 1961).

134. *McCulloch*, 17 U.S. (4 Wheat.) at 407.

135. *Id.* at 408.

136. *Id.* at 409–10.

137. *Id.* at 411.

138. *Id.* Compare *id.*, with Hamilton Opinion, *supra* note 19, at 97 (criticizing those who viewed incorporation “as some great independent substantive thing”). Marshall also tracked Hamilton’s opinion in arguing that creation of a corporation is never an end in itself, but rather the means to accomplish some other object. Compare *McCulloch*, 17 U.S. (4 Wheat.) at 411, with Hamilton Opinion, *supra* note 19, at 101 (arguing that incorporation is not “a political engine, and of peculiar magnitude and moment,” but rather a “quality, capacity, or mean to an end”).

When Marshall turned to the Necessary and Proper Clause, it was primarily for the purpose of refuting the narrow construction of the term “necessary” offered by the State of Maryland, much as Hamilton had sought to “explode” Jefferson’s definition of the word.¹³⁹ Maryland, following Jefferson’s lead, argued that the term “necessary” limited Congress to the enactment of laws that “are indispensable, and without which the power would be nugatory.”¹⁴⁰ Marshall found this reading of the term implausible, because it would deny Congress a choice of means to execute its constitutional powers.¹⁴¹ Drawing from common usage and “approved authors,” Marshall offered several synonyms for “necessary,” including “needful,” “requisite,” “useful” and “conducive to,”¹⁴² all of which appear in Hamilton’s list.¹⁴³ Marshall distinguished the stricter phrase “*absolutely* necessary,” which appears in Article I, section 10,¹⁴⁴ much as Hamilton had accused Jefferson of trying to smuggle the word “absolutely” into the Necessary and Proper Clause.¹⁴⁵

Marshall did make one argument against a narrow construction of “necessary” that did not derive from Hamilton’s opinion. Marshall argued that because of its conjunction with the term “proper,” the word “necessary” should be read to give Congress a choice of means in executing its constitutional powers:

If the word “necessary” was used in that strict and rigorous sense for which the counsel for the state of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible affect of which is, to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation, not strained and compressed within the narrow limits for which gentlemen contend.¹⁴⁶

139. *McCulloch*, 17 U.S. (4 Wheat.) at 411–14.

140. *Id.* at 413.

141. *Id.* at 415, 419. Indeed, if a particular end could be achieved by more than one means, it can be argued that none of those means is “indispensable,” because one of the other means could be used instead. *A Friend to the Union No. 2*, *supra* note 17, at 94–95 (“In almost every conceivable case, there is more than one mode of accomplishing the end. Which, or is either, indispensable to that end? . . . Of no one of these means can it be truly said, that, ‘without it, the end *could not* be attained.’”); 22 ANNALS OF CONG. 661 (1811) (Rep. Key) (“If more means than one exist to carry a power into effect, neither can be said to be indispensably necessary, because either may be adopted to the exclusion of the other; and this mode of reasoning pushed far proves, that, where more means than one exist to execute power, the power is a dead letter.”); 30 ANNALS OF CONG. 886 (1817) (Rep. Sheffey) (“If such is really the fact, then this Government is without any power whatever. As in the physical and moral, so in the political world, there is scarcely an end which may not be attained by different means. If the objects confided to you can be effected only by such means as are absolutely necessary, how will you effect any?”).

142. *McCulloch*, 17 U.S. (4 Wheat.) at 413, 418. Other synonyms for “necessary” in the opinion include “essential to” and “calculated to produce the end.” *Id.* at 413–14.

143. Hamilton Opinion, *supra* note 19, at 97 (“[N]ecessary’ often means no more than *needful, requisite, incidental, useful, or conducive to.*”).

144. *McCulloch*, 17 U.S. (4 Wheat.) at 414–15.

145. See Hamilton Opinion, *supra* note 19, at 98.

146. *McCulloch*, 17 U.S. (4 Wheat.) at 418–19.

Because laws adopted under this clause must be both “necessary” and “proper,” the word “proper” would serve little or no purpose unless the term “necessary” was read to permit a choice of means.¹⁴⁷ Marshall thus indicated that the terms “necessary” and “proper” operate as independent limitations on the exercise of congressional power under the Necessary and Proper Clause.

Even Marshall’s ultimate articulation of the constitutional test under the Necessary and Proper Clause appears to owe much to Hamilton: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”¹⁴⁸ This standard seems little more than a fleshed-out version of the more compact test offered in the Hamilton opinion.¹⁴⁹ Both begin with identification of an end within the scope of the powers delegated by the Constitution. Where Hamilton required means bearing “an obvious relation” to that legitimate end, Marshall required means “appropriate” and “plainly adapted” to the end. Hamilton’s test, phrased in terms of the “obviousness” of the means-end relationship, corresponds to Marshall’s test, phrased in terms of the “plainness” of that relationship. Moreover, both tests eschew means prohibited by the Constitution, though Marshall’s formulation may be somewhat more restrictive of federal power in suggesting that a particular means could be prohibited by the Constitution’s “spirit,” as well as its “letter.”

D. *McCulloch’s Limitations on Congressional Power*

The *McCulloch* opinion seemed a clear victory for Hamiltonian principles of constitutional construction on those points where Madison and Hamilton disagreed. Madison and his political allies certainly viewed the opinion in this light. The *McCulloch* decision was criticized in two sets of essays published by the *Richmond Enquirer*, one under the pen name “Amphictyon” and the other using the pseudonym “Hamp-

147. Essentially the same argument had been made during the 1811 congressional debate over whether to extend the charter of the first Bank of the United States. See 22 ANNALS OF CONG. 295–96 (1811) (Sen. Taylor) (“But the rigid *necessity* which our opponents wish to enforce on us, this metaphysical necessity, must, from its very nature, be immutable; it must be unique, and could not exist in a greater or less degree; and, therefore, the word joined to it in the Constitution (*proper*) could have no meaning at all. The laws, to be passed, must be necessary, [that] is the only one way given under heaven by which you are to effect the end desired; in other words, the law must be imposed by Fate. It is perfect nonsense to say that there is a latitude left with us to judge whether such a law is proper or improper.”).

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

149. See Hamilton Opinion, *supra* note 19, at 99 (“If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution, it may safely be deemed to come within the compass of the national authority.”).

den.”¹⁵⁰ Amphictyon complained of “the liberal and latitudinous construction” given to the term “necessary” by “the Chief Justice, and before him by Mr. Secretary Hamilton.”¹⁵¹ Judge Spencer Roane, author of the *Hampden* essays, sought to associate himself with Madison’s “celebrated speech against the first bank law,” repeating its criticism of the preamble to the bill, which he attributed to Hamilton.¹⁵²

Madison himself, in a letter to Roane, objected to the principles of constitutional construction adopted in the Supreme Court’s opinion.¹⁵³ His criticism returned to themes articulated in his congressional speech against the bank bill:

[W]hat is of most importance is the high sanction given to a latitude in expounding the Constitution which seems to me to break down the landmarks intended by a specification of the Powers of Congress, and to substitute for a definite connection between means and ends, a Legislative discretion as to the former to which no practical limit can be assigned. In the great system of Political Economy having for its general object the national welfare, everything is related immediately or remotely to every other thing; and consequently a Power over any one thing, if not limited by some obvious and precise affinity, may amount to a Power over every other. Ends & means may shift their character at the will & according to the ingenuity of the Legislative Body.¹⁵⁴

Twenty-eight years after his speech to Congress, Madison expressed renewed fear that a Hamiltonian mode of constitutional interpretation would undermine the federal government’s character as a government of limited and enumerated powers.¹⁵⁵ The mechanisms for expanding federal power were essentially the same ones identified in his speech to the House: (1) legislative manipulation of the ends permitted by the Constitution, and (2) use of means remote from any legitimate constitutional end.¹⁵⁶

But *McCulloch* did more to accommodate Madison’s concerns than he acknowledged in his partisan letter to Roane. Chief Justice Marshall

150. Gunther, *supra* note 113, at 1.

151. *Amphictyon No. 1*, reprinted in JOHN MARSHALL’S DEFENSE, *supra* note 17, at 53; see also *id.* at 72.

152. *Hampden No. 3*, reprinted in JOHN MARSHALL’S DEFENSE, *supra* note 17, at 133; see *supra* notes 71–73 and accompanying text.

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

154. *Id.* at 448. Madison also reiterated the concern that the rule of construction adopted in *McCulloch* was inconsistent with the assumptions of those who ratified the Constitution. *Id.* at 450–51.

155. See Barnett, *supra* note 6, at 760–61 (“Although as president Madison had actually signed into law the bill establishing the national bank that Marshall upheld as constitutional, Madison took immediate exception to Marshall’s opinion in *McCulloch*, renewing the argument he had made as a congressman nearly thirty years before.”).

156. If the implied powers of Congress are defined in terms of implied means to accomplish constitutional ends, it makes sense that one could expand the implied powers by multiplying either the ends or the means subject to congressional control.

rejected the Madisonian critique of his *McCulloch* opinion, reflected in the essays of *Amphictyon* and *Hampden*.¹⁵⁷ Under the pen name, “A Friend to the Union,” he responded to *Amphictyon*, and under the pseudonym, “A Friend of the Constitution,” he responded to Roane’s *Hampden* essays.¹⁵⁸ Marshall’s essays sought to highlight features of the *McCulloch* opinion that established enforceable boundaries for the powers of Congress.¹⁵⁹ In particular, *McCulloch*’s restrictions on the means-end relationship parallel those advocated by Madison in his speech to the House of Representatives.¹⁶⁰ It is to these limitations on congressional power that we now turn.

1. *Confining the Ends of Congressional Action*

McCulloch and other early sources read the Necessary and Proper Clause as acknowledging congressional power to employ necessary and proper means for the accomplishment of certain legitimate constitutional ends.¹⁶¹ Such a means-end analysis requires discernment of the permissible legislative ends encompassed within an enumerated power.¹⁶² Madison believed that bank supporters had unjustifiably expanded the enumerated powers of Congress to embrace ends not supported by the express language of the Constitution. Strictly construed, the Article I, section 8 power “[t]o borrow money on the credit of the United States” would only authorize Congress to “borrow”—i.e., take out a loan.¹⁶³ But bank supporters read this grant of power more broadly, as permitting Congress to *facilitate* borrowing by incorporating a lending institution.¹⁶⁴ Under this view, the express power to borrow was supplemented by an incidental power to create conditions under which borrowing could take place safely and efficiently.

157. The *Amphictyon* essays had expressed similar concerns about use of means that only “remotely have a tendency” to produce a delegated end and that are chiefly designed to attain “some other end.” *Amphictyon No. 2*, reprinted in JOHN MARSHALL’S DEFENSE, *supra* note 17, at 71.

158. Gunther, *supra* note 113, at 1.

159. Professor Gunther writes:

The major charge by Roane and Brockenbrough was that *McCulloch*’s principles endorsed a virtually unlimited central authority, that the Court had set forth no viable limits on national power. And the thrust of Marshall’s response was to deny the charge of consolidation, to insist, with more emphasis than in *McCulloch* itself, that those principles did not give Congress carte blanche, that they did preserve a true federal system in which the central government was limited in its powers—and that the limits were capable of judicial enforcement.

Id. at 18.

160. See *supra* note 79 and accompanying text.

161. See *supra* notes 139–49 and accompanying text.

162. The Constitution speaks in terms of “powers,” not “ends.” See U.S. CONST. art. I, § 8. The task of translation is complicated by the fact that constitutional powers are not viewed as ends in themselves, but rather as means to accomplish the higher ends stated in the Preamble: “to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity.” U.S. CONST. pmb1.

163. U.S. CONST. art. I, § 8, cl. 2.

164. See *supra* notes 74–77 and accompanying text.

On this issue, Marshall simply disagreed with Madison's position. He contended that the express powers of Congress *do* carry with them certain additional powers, not encompassed within the constitutional language, which are necessary to achieve the purposes underlying the delegated authority. Consider, for instance, Marshall's illustration drawn from the enumerated power "[t]o establish Post Offices and post Roads."¹⁶⁵ The Framers granted this power so that mail could move safely and expeditiously from state to state. However, that purpose would fail if no one carried the mail or if someone stole the mail en route. Thus, Marshall understood the express power to "establish" post offices and roads as encompassing two additional objects—providing for carriers to transport mail and specifying punishments for mail theft.¹⁶⁶ Congress could establish post offices and roads without also providing for carriage of mail or punishing mail theft,¹⁶⁷ but Marshall deemed the latter two powers "essential to the beneficial exercise" of the former.¹⁶⁸

McCulloch likewise offered the illustration of the power to punish "stealing or falsifying a record or process of a court of the United States, or . . . perjury in such Court."¹⁶⁹ Marshall expanded on this argument in his second *Friend to the Union* essay.¹⁷⁰ The Constitution expressly authorizes Congress to "ordain and establish" inferior courts.¹⁷¹ Experience under the Articles of Confederation showed that one may "establish" a court while possessing no power to punish falsification of court records.¹⁷² Nevertheless, "such a law is 'needful,' 'requisite,' 'essential,' 'conducive to,' the due administration of justice."¹⁷³ Thus, under the Constitution, Congress had interpreted the express power to establish courts as carrying with it an additional power to punish falsification of court records, an end not encompassed within any language of the Constitution.¹⁷⁴ As with the example of the postal powers, it would be difficult to achieve the purpose of this express power without implying a power outside the language of the constitutional grant.

165. U.S. CONST. art. I, § 8, cl. 7.

166. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 417 (1819).

167. *Id.*

168. *Id.*

169. *Id.* This argument had been made by Representative Boudinot in the congressional debate over the constitutionality of the bank bill. 2 ANNALS OF CONG. 25 (1791) (Rep. Boudinot) ("[U]nder the power of establishing courts, we have implied the power of punishing the stealing and falsifying the records, and ascertained the punishment of perjury, bribery, and extortion.").

170. *A Friend to the Union No. 2*, *supra* note 17, at 99.

171. U.S. CONST. art. III, § 1; *see also id.* art I, § 8, cl. 9 (granting the power "[t]o constitute Tribunals inferior to the supreme Court").

172. *A Friend to the Union No. 2*, *supra* note 17, at 99.

173. *Id.*

174. Marshall does not mention the congressional power to "constitute" tribunals inferior to the Supreme Court. U.S. CONST. art. I, § 8, cl. 9. "Constitute" is arguably a broader term than "establish" and might be interpreted to permit legislation concerning falsification of records in the lower federal courts. On the other hand, neither Article I nor Article III gives Congress an express power to punish falsification of records in the Supreme Court.

While Marshall affirmed the existence of certain incidental powers essential to the “beneficial exercise” of the express powers, he agreed with Madison that Congress may not simply pursue any object it desires.¹⁷⁵ In construing the scope of a grant of power, constitutional or otherwise, “no strained construction, either to include or exclude the incident, is admissible; but . . . the natural construction is the true one.”¹⁷⁶ Some claims of implied congressional power can reasonably be viewed as incidental to an express power, and others cannot.¹⁷⁷

McCulloch had warned that the Court would strike down a law that was not “really calculated to” effect one of the objects delegated to Congress:

[S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.¹⁷⁸

This inquiry into whether Congress has used its enumerated powers as a “pretext” for pursuit of illegitimate ends should not be confused with an investigation of the subjective motives of the legislators.¹⁷⁹ Rather, the “pretext” inquiry involves an objective consideration of the nature of the means-end relationship alleged to undergird a statute—whether the

175. In the *Friend of the Constitution* essays, Marshall drew a distinction between “means” to execute an express power and powers that are “incidental” to an express power. He explained that a law designating post offices and roads would simply be the means chosen by Congress to execute the express power. *A Friend of the Constitution No. 3*, *supra* note 17, at 172. “But the right to punish those who rob the mail is an incidental power, and the question whether it is fairly deducible from the grant is open for argument.” *Id.* Similarly, an act

constituting [tribunals inferior to the supreme court], defining their jurisdiction, regulating their proceedings, &c. is not an incident to the power, but the means of executing it But a law to punish those who falsify a record, or who commit perjury or subornation of perjury, is an execution of an incidental power; and the question whether that incident is fairly deduced from the principal, is open to argument.

Id. at 173. Although this is a useful distinction, it is not clear that Marshall maintained the distinction throughout the *McCulloch* opinion. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 418 (1819) (describing the power of punishment as “incidental to” constitutional powers and as “a means” for carrying powers into execution).

176. *A Friend of the Constitution No. 3*, *supra* note 17, at 168.

177. Marshall accepted Hampden’s common-law definition of an “incident” as “a thing appertaining to, or following another, as being more worthy or principal,” and he noted Johnson’s definition of the term as “means falling in beside the main design.” *Id.* at 171. With respect to an incidental power, “we are always to enquire whether ‘it appertains to or follows the principal’; for the power itself may be questioned.” *Id.* at 173.

178. *McCulloch*, 17 U.S. (4 Wheat.) at 423.

179. *But see* SULLIVAN & GUNTHER, *supra* note 18, at 105 (apparently suggesting that the “pretext” passage contemplated a second inquiry into congressional purposes). Marshall had previously expressed skepticism about judicial inquiry into legislative motives. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130–31 (1810).

means are “really calculated to effect any of the objects intrusted to the government.”¹⁸⁰ It is to this means-end relationship that we now turn.

2. *Foreclosing Remote and Distant Means*

Madison feared that, in addition to the Federalists’ multiplication of legitimate constitutional *ends*, Congress would expand its authority indefinitely through employment of regulatory *means* far afield from its enumerated powers.¹⁸¹ A means-end relationship constitutes a species of causal relationship. One employs a means in hopes of bringing about, or causing, a desired end. But as Madison knew, and as we know even better today, all of our activities take place within the intersection of complicated systems of cause and effect in which virtually everything contributes in some fashion to the causation of virtually everything else.

As Madison wrote in his letter to Roane, “everything is related immediately or remotely to every other thing; and consequently a Power over any one thing, if not limited by some obvious and precise affinity, may amount to a Power over every other.”¹⁸² This concern was not peculiar to Madison, but was instead a theme sounded repeatedly in early discussions of the Necessary and Proper Clause.¹⁸³ It was widely understood that one could not maintain limits on congressional power if Congress could regulate activities remote from legitimate constitutional ends.¹⁸⁴

180. *McCulloch*, 17 U.S. (4 Wheat.) at 423. This pretext inquiry had been suggested by the Attorney General in oral argument. *Id.* at 358–59. As explained by the Attorney General, the pretext issue would be resolved through an examination of the means-end relationship:

Nor does the rule of interpretation we contend for, sanction any usurpation, on the part of the national government; because, if the argument be, that the implied powers of the constitution may be assumed and exercised, for purposes not really connected with the powers specifically granted, under color of some imaginary relationship between them . . . the danger of the abuse will be checked by the judicial department, which, by comparing the means with the proposed end, will decide, whether the connection is real, or assumed as the pretext for the usurpation of powers not belonging to the government[.]

Id. To similar effect, Pinkney had argued that in determining whether congressional action was “a mere evasive pretext, under which the national legislature travels out of the prescribed bounds of its authority, and encroaches upon state sovereignty, or the rights of the people . . . [the judiciary] must inquire, whether the means assumed have a connection, in the nature and fitness of things, with the end to be accomplished.” *Id.* at 387.

181. See *supra* notes 78–79 and accompanying text.

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

183. On this ground, for instance, Thomas Jefferson objected to a proposal for a copper mining company chartered by Congress:

Congress are authorized to defend the nation. Ships are necessary for defence; copper is necessary for ships; mines necessary for copper; a company necessary to work mines; and who can doubt this reasoning who has ever played at “This is the House that Jack built?” Under such a process of filiation of necessities the sweeping clause makes clean work.

Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800), reprinted in 10 THE WRITINGS OF THOMAS JEFFERSON 163, 165 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903).

184. 22 ANNALS OF CONG. 277–78 (1811) (Sen. Pope) (“For instance, I should consider it a violation of the Constitution, if Congress, under the power ‘to make rules for the government of the land and naval forces,’ should pass a law regulating military testamentary devises; because the incident is too remote, it is too great a stretch of power, the constitutionality or unconstitutionality being regulated by the relation of the means to the object to be effected.”); *id.* at 636 (Rep. Porter) (“It is not less

This may explain Amphictyon and Hampden's concerns about *McCulloch*'s broad definition of "necessary" and its insistence that the degree of necessity represented an issue for Congress, rather than the courts. If a law is "necessary" whenever it is "convenient," "useful" or "conducive to" the achievement of a constitutional end, and if courts cannot review the degree of that necessity, then Congress seemingly possesses unlimited power, subject only to specific constitutional prohibitions.¹⁸⁵

Marshall recognized this problem and rejected any interpretation of *McCulloch* that would give Congress authority to regulate activities remote from its enumerated powers. In his second *Friend to the Union* essay, he castigated Amphictyon for attributing to the Court so broad an understanding of the term "necessary":

[Amphictyon] occasionally substitutes words not used by the court, and employs others, neither in the connexion, nor in the sense, in which they are employed by the court, so as to ascribe to the opinion sentiments which it does not merely not contain, but which it excludes. The court does not say that the word "necessary" means whatever may be "convenient" or "useful." And when it uses "conducive to," that word is associated with others plainly showing that *no remote, no distant conduciveness to the object, is in the mind of the court.*¹⁸⁶

Amphictyon can be forgiven for misreading *McCulloch* (if in fact it was a misreading) to equate the constitutional term "necessary" with "convenient" or "useful." The *McCulloch* opinion does say that the word "necessary" "frequently imports no more than that one thing is *convenient*, or *useful*, or essential to another,"¹⁸⁷ and it later echoes this definition in describing the bank as "a *convenient*, a *useful*, and essential instrument" in conducting fiscal operations.¹⁸⁸ But even if we think Marshall's rhetoric unduly harsh, it is significant that the author of *McCulloch* believed the opinion should be read to prohibit congressional means "remote" or "distant" from the enumerated powers of Congress.

absurd than it is dangerous, first to assume some great, distinct and independent power, unknown to the Constitution, and violating the rights of the States; and, then, to attempt to justify it, by a reference to some remote, indirect, collateral tendency which the exercise of it may have towards facilitating the execution of some known and acknowledged power."); 30 ANNALS OF CONG. 897 (1817) (Rep. Barbour) ("Upon the subject of incidental powers, as growing out of what was generally called the residuary clause in the Constitution, he would remark, that to justify the exercise of a power not granted, as an incident to one which was granted, it was not enough to show that, by indirect and remote consequences, it might conduce to the execution of the granted power; such a construction would break down all the barriers of the Constitution; it must be shown that it had an immediate, direct, and obvious relation to the power granted."); LYNCH, *supra* note 6, at 197-98 (relating John Nicholas's critique of the Sedition Act on the ground that it removed limitations on federal power by regulating conduct far removed from the enumerated powers and noting that the same reasoning would permit federal control of education).

185. *Amphictyon No. 2*, *supra* note 151, at 75-76; *Hampden No. 3*, *supra* note 152, at 134, 138.

186. *A Friend to the Union No. 2*, *supra* note 17, at 100 (emphasis added).

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

188. *Id.* at 422.

How exactly does *McCulloch* regulate the means-end relationship to constrain congressional reliance on remote or distant means? We can begin by excluding two solutions to the remoteness problem that are inconsistent with *McCulloch*. First, the Court rejected Maryland's construction of the term "necessary" to require means "indispensable" to the accomplishment of a constitutional end.¹⁸⁹ The Court found this solution inadmissible because it would deny Congress a choice of means, and thereby undercut the flexibility and discretion necessary to successful operation of the federal government.¹⁹⁰

Second, and relatedly, the Court's opinion suggests that Congress is not limited to the "ordinary means" of implementing a power.¹⁹¹ Opponents of the bank conceded that "the powers given to the government imply the ordinary means of execution," but they "denied that the government has its choice of means."¹⁹² In affirming the discretion of Congress to choose its means, the Court implicitly rejected a rule that would tether Congress to those means ordinarily employed by governments in the eighteenth century. The Court emphasized that the Constitution was "intended to endure for ages to come, and . . . to be adapted to the various *crises* of human affairs."¹⁹³ Consequently, it was unwilling to assume that the Framers deprived Congress of "the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."¹⁹⁴

Congress, then, cannot be confined to indispensable means, or even to ordinary means of carrying its powers into execution. But *McCulloch* nevertheless recognized limitations on the means Congress might employ.¹⁹⁵ Specifically, the opinion restricted Congress to "means which are appropriate, which are plainly adapted to" a legitimate constitutional end.¹⁹⁶ Moreover, a measure must be "really calculated to effect" an object entrusted to the government, and Congress may not use its constitutional powers as a pretext for accomplishing ends that have not been so entrusted.¹⁹⁷ Elsewhere in the opinion, Marshall echoed a limitation found in Madison's bank speech, approving "any means which tend[] *directly* to the execution of the constitutional powers of the government."¹⁹⁸

189. *Id.* at 415–19.

190. *Id.*

191. *See id.* at 409.

192. *See id.*

193. *Id.* at 415. In oral argument, Daniel Webster had contended that Congress may employ newly developed means for carrying its powers into execution. *Id.* at 324. "Steam-frigates, for example, were not in the minds of those who framed the constitution, as among the means of naval warfare; but no one doubts the power of congress to use them, as means to an authorized end." *Id.*

194. *Id.* at 415–16.

195. *Id.* at 421; *see* Engdahl, *supra* note 6, at 115 n.53.

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

197. *Id.* at 423.

198. *Id.* at 419 (emphasis added); *see supra* note 79 and accompanying text.

Marshall further elaborated the constitutional restrictions on the means-end relationship in his *Friend to the Union* and *Friend of the Constitution* essays.¹⁹⁹ The term “appropriate” from *McCulloch* he defined as “‘peculiar,’ ‘consigned to some particular use or person,’ — ‘belonging peculiarly.’”²⁰⁰ He perceived no essential difference between the *McCulloch* test and that proposed by Amphictyon, which would limit Congress to “means which directly and necessarily tend to produce the desired effect.”²⁰¹ Marshall went on to suggest that Congress had constitutional discretion to adopt a measure “if the means have a plain relation to the end—if they be direct, natural and appropriate.”²⁰²

From this effusion of adjectives, we can draw at least three limiting principles that tend to foreclose congressional resort to means remote or distant from the enumerated powers. First, Marshall indicated that the means employed must bear a “direct” relationship to the end in view.²⁰³ A means that “directly” produces an end includes the connotation of

199. See *A Friend to the Union*, *supra* note 17; *A Friend of the Constitution*, *supra* note 17.

200. *A Friend to the Union No. 2*, *supra* note 17, at 101. Applied to the constitutional power to raise armies, he read the opinion to permit “‘all means which are peculiar’ to raising armies, which are ‘consigned to that particular use,’ which ‘belong peculiarly’ to it, all means which are ‘plainly adapted’ to the end.” *Id.* at 101–02.

It is not entirely clear how a bank is “peculiar” to any of the enumerated powers. One criticism offered by bank opponents was that supporters of the bank listed several enumerated powers that would supposedly be carried into execution through the legislation. See, e.g., *Hampden No. 3*, *supra* note 152, at 133 (“So far from the bank of the United States being *peculiar* to any of the given powers, its friends have not yet agreed upon the particular power to which it is to be attached!”); 22 ANNALS OF CONG. 634 (1811) (arguing that identification of several constitutional sources of the power to incorporate the bank “is, in itself, conclusive evidence, that it has no very direct relation to any of them”). But perhaps Marshall was not saying that an implied power must relate exclusively to a single enumerated power, but rather, was simply rejecting the proposition that Congress could exercise implied powers on the ground of their utility to carry federal powers into execution *in general*, without regard to any specific powers. Such an argument had been used to uphold the Sedition Act:

It is, however, alleged, that the necessity and propriety of passing collateral laws for the support of others, are confined to cases where the powers are delegated, and do not extend to cases which have a reference to general danger only. The words [of the Necessary and Proper Clause] are general If, therefore, there be anything necessary and proper for carrying into execution any or all of those powers, I presume that may be constitutionally enacted.

Case of Fries, 9 Fed. Cas. 826, 838 (C.C.D. Pa. 1799) (No. 5126) (Iredell, J.). The sedition law was constitutional, in other words, because it was a necessary and proper means to execute the powers of Congress generally, and Congress did not need to show a connection to any particular enumerated power. See also 18 ANNALS OF CONG. 133 (1807) (Rep. Clopton) (proposing constitutional amendment to prevent Sweeping Clause from being construed, as in the case of the Sedition Act, to confer implied powers not connected to any particular enumerated power).

It may be that Marshall conceived of the “peculiarity” requirement as forbidding such a construction of the Necessary and Proper Clause. Madison had previously rejected such a mode of construing the Necessary and Proper Clause in debate over the bank legislation, arguing that an implied power must be necessary and proper to an enumerated power, not necessary and proper to the union generally. 2 ANNALS OF CONG. 1900 (1791) (Rep. Madison) (“This constituted the peculiar nature of the Government; no power . . . not enumerated could be inferred from the general nature of Government.”); see LYNCH, *supra* note 6, at 81.

201. *A Friend to the Union No. 2*, *supra* note 17, at 102 (“Means which are ‘appropriate,’ which are ‘plainly adapted’ to the end, must ‘directly and necessarily tend to produce’ it.”).

202. *A Friend of the Constitution No. 3*, *supra* note 17, at 173.

203. *McCulloch*, 17 U.S. (4 Wheat.) at 409; *A Friend of the Constitution No. 3*, *supra* note 17, at 173.

producing its effect without numerous intermediate or intervening causes.²⁰⁴ Of course, a directness limitation can be difficult to enforce, because “direct,” like “necessary,” is a term of degree.²⁰⁵ *McCulloch* itself rejected a requirement that Congress employ the “most direct” means to a given end.²⁰⁶ But even a requirement of a *relatively* direct means-end relationship tends to prevent Congress from employing remote means that, by definition, operate through a lengthy chain of cause and effect relationships.

Second, *McCulloch* imposed a sort of “good faith” requirement for the selection of congressional means.²⁰⁷ The legislature must utilize means “really calculated to” effect an end entrusted to its care, and may not use its constitutional powers as a “pretext” for achieving other ends.²⁰⁸ As suggested above, this does not imply a search for *subjective* good faith on the part of large numbers of legislators.²⁰⁹ Rather, Marshall seemed to envision an *objective* inquiry into whether the means employed have a *real* tendency to produce an end within the scope of congressional power.²¹⁰ As elaborated in the essays, the inquiry includes a focus on whether the measure is a “natural” means to the end, or whether it “belongs peculiarly” to that end.²¹¹

In examining this question of legislative good faith, perhaps the question one should ask is this: Could a legislator who honestly wanted to achieve a legitimate end within the scope of the enumerated powers *really expect* this measure to accomplish the result?²¹² Such an inquiry

204. See, e.g., 1 SAMUEL JOHNSON, *DICTIONARY OF THE ENGLISH LANGUAGE* [unpaginated] (1755) (defining “directly” to mean, *inter alia*, “[I]mmediately; . . . without any long train of consequence”); see also *Carter v. Carter Coal Co.*, 298 U.S. 238, 307–08 (1936) (“The word ‘direct’ implies that the activity or condition invoked or blamed shall operate proximately—not immediately, remotely or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition.”).

205. See *infra* notes 282–87 and accompanying text.

206. 17 U.S. (4 Wheat.) at 413.

207. *Id.* at 423.

208. *Id.*

209. See *supra* note 179 and accompanying text.

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

211. *A Friend to the Union No. 2*, *supra* note 17, at 101. Recall that Hamilton had advocated a similar test of constitutionality in the course of his bank opinion, insisting that a means employed by Congress must bear “a natural relation” to one of the government’s lawful ends. See *supra* note 98 and accompanying text. Elsewhere in the opinion, he argued that the test of constitutionality should focus on the relation between the “nature of the mean employed toward the execution of a power and the object of that power.” See *supra* note 103 and accompanying text. Additional support for such an analysis can be found in congressional debates over the Necessary and Proper Clause. See 22 *ANNALS OF CONG.* 212 (1811) (Rep. Clay) (“In all cases where incidental powers are acted upon, the principal and incidental ought to be congenial with each other, and partake of a common nature. The incidental power ought to be strictly subordinate and limited to the end proposed to be attained by the specified power. In other words, under the name of accomplishing one object which is specified, the power implied ought not to be made to embrace other objects, which are not specified in the Constitution.”).

212. In an earlier opinion interpreting the Necessary and Proper Clause, Marshall indicated that Congress “must be empowered to use any means which are *in fact conducive* to the exercise of a power granted by the constitution.” *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805) (emphasis added); see Engdahl, *supra* note 6, at 118 n.65.

would tend in most circumstances to prevent Congress from employing means remote from its enumerated powers. The longer the chain of cause and effect between the means and the professed end, the less plausible is the claim that the measure will really perform the function asserted.²¹³

Third, *McCulloch* required the means employed to be “plainly adapted” to the constitutional end.²¹⁴ The means must bear “a plain relation” to an end Congress may legitimately pursue.²¹⁵ This plainness requirement corresponds to Hamilton’s bank opinion, which required an “obvious relation” between means and ends, and to Federalist No. 33, which asserted that congressional usurpations would be “evident,” at least in certain cases.²¹⁶ A plainness limitation means that the relationship between a measure passed by Congress and a legitimate constitutional end must be readily discernible. A permissible means-end relationship should not require sophisticated explanation. Such a plainness requirement tends to foreclose congressional employment of remote means.²¹⁷ The longer the causal chain between a statute and a constitutional end, the more explaining one must do, making it less likely that the means-end relationship will be plain or obvious.

These three related requirements—directness, good faith, and plainness of the means-end relationship—leave Congress with ample flexibility to accomplish the Framers’ goals. The limitations do not deprive Congress of its choice of means to accomplish its delegated responsibilities. At the same time, they vindicate Marshall’s position that, properly understood, *McCulloch* confines and limits the powers of Congress. They explain his assertion that “no remote, no distant conduciveness to the object, [was] in the mind of the court.”²¹⁸ These three principles all require proximity between legislative means and constitutional ends, though they attack the remoteness problem from slightly different angles. The next section considers Marshall’s discussion of two hypo-

213. In *Burroughs v. United States*, 290 U.S. 534, 547–48 (1934), the Supreme Court wrote that “[i]f it can be seen that the means adopted are really calculated to attain the end, . . . the closeness of the relationship between the means adopted, and the end to be attained, are matters for Congressional determination alone.” But even conceding this principle, it has no application here, where the precise question under consideration is whether the means adopted really are calculated to attain the end in view.

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

215. *A Friend of the Constitution No. 3*, *supra* note 17, at 173.

216. See *supra* notes 47–48 and accompanying text. Madison likewise believed that implied powers could be exercised only if they bore an “evident” relationship to an enumerated power. 2 ANNALS OF CONG. 1899 (1791) (Madison) (rejecting exercise of any power “which is not *evidently* and necessarily involved in an express power”) (emphasis added); see also 22 ANNALS OF CONG. 211 (1811) (Rep. Clay) (“[T]he implication must be necessary, and *obviously* flow from the enumerated power with which it is allied.”) (emphasis added).

217. One member of Congress, for instance, sought to resolve the remoteness problem by reading the Necessary and Proper Clause to require “an immediate, direct, and *obvious* relation to the powers granted.” 30 ANNALS OF CONG. 897 (1817) (Rep. Yates) (emphasis added).

218. *A Friend to the Union No. 2*, *supra* note 17, at 100.

thetical federal statutes, which illustrate the application of *McCulloch's* means-end restrictions.

3. *Applying Marshall's Principles*

Using the same hypothetical examples offered in Federalist No. 33, Marshall's essays identified two statutes he deemed to exceed congressional power under the Necessary and Proper Clause.²¹⁹ Just like Madison in his speech to Congress,²²⁰ Amphictyon claimed that the Court's construction of the Necessary and Proper Clause would permit Congress to prohibit state taxation of land in order to assist collection of a federal land tax.²²¹ Marshall denied that such a law would be constitutional:

Now I deny that a law prohibiting the state legislatures from imposing a land tax would be an "appropriate" means, or any means whatever, to be employed in collecting the tax of the United States. It is not an instrument to be so employed. It is not a means "plainly adapted," or "conducive to" the end. The passage of such an act would be an attempt on the part of Congress, "under the pretext of executing its powers, to pass laws for the accomplishment of objects not intrusted to the federal government."²²²

Marshall's argument rests on the premise that the Constitution did not confer on Congress the end or power of suppressing state taxation as incidental to any of the enumerated powers. While preventing state tax collection might be said to *facilitate* the exercise of the federal taxing power by preserving the resources of taxpayers, Marshall rejected the view that the Framers intended to include suppression of state taxation as an end within the scope of Article I, section 8.²²³

The problem with the hypothetical statute can thus be described in terms of either the means employed or the end pursued. If we consider the legitimate congressional end of collecting federal taxes, the law is not a means appropriate, plainly adapted, or conducive to that end. It does not operate directly, plainly, or in good faith to collect a dime for the federal treasury. Alternatively, Marshall's rejection of the statute can be explained on the ground that collection of federal taxes is a "pretext," and the real end of the statute—suppression of state taxation—is an end that the Constitution has not entrusted to the government.

219. Compare THE FEDERALIST NO. 33, at 204 (Alexander Hamilton) (Jacob E. Cooke ed., 1961), with *A Friend to the Union No. 2*, *supra* note 17, at 100, and *A Friend of the Constitution No. 3*, *supra* note 17, at 173.

220. See *supra* notes 87–88 and accompanying text.

221. *Amphictyon No. 2*, *supra* note 151, at 66–67 ("[Such a law] would be extremely *convenient* and a very *appropriate* measure, and very *conducive to* their purpose of collecting the [federal] tax speedily and promptly.").

222. *A Friend to the Union No. 2*, *supra* note 17, at 100 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421, 423 (1819)).

223. See *supra* notes 175–77 and accompanying text.

Marshall also followed Hamilton in rejecting a hypothetical federal statute controlling inheritance:

Congress certainly may not, under the pretext of collecting taxes, or of guaranteeing to each state a republican form of government, alter the law of descents; but if the means have a plain relation to the end—if they be direct, natural and appropriate, who, but the people at the elections, shall, under the pretext of their being unnecessary, control the legislative will, and direct its understanding?²²⁴

Again, one can analyze the statute in terms of either an unconstitutional end or unconstitutional means. Marshall suggests that the statute would not have a “plain relation” to or be a “direct, natural and appropriate” means of accomplishing the legitimate congressional ends of collecting taxes and guaranteeing each state a republican form of government. Thus, recitation of these goals would be a “pretext” for the real congressional end of regulating inheritance, which is not an end delegated to Congress by the Constitution.

Marshall’s hypothetical examples confirm that *McCulloch*’s means-end restrictions and its “pretext” limitation represent opposite sides of the same coin. If Congress does not employ means appropriate and plainly adapted to the pursuit of a legitimate constitutional end—if the measure does not constitute a plain, direct, and good faith effort to accomplish an end within the scope of the enumerated powers—then it follows that Congress is pursuing an end not entrusted to its care. The next section of the article explores the extent to which *McCulloch*’s limitations on the means-end relationship assist in explaining the Supreme Court’s decisions in *Lopez* and *Morrison*.

II. *LOPEZ*, *MORRISON*, AND THE NECESSARY AND PROPER CLAUSE

The Supreme Court sent shock waves through the legal community in 1995 when it held, for the first time in nearly 60 years, that Congress had exceeded its constitutional authority under the power to “regulate Commerce . . . among the several states.”²²⁵ The Court in *United States v. Lopez* struck down the Gun-Free School Zones Act of 1990, which made

224. *A Friend of the Constitution No. 3*, *supra* note 17, at 173. Like Madison, Marshall points to popular elections as the ultimate check against an overly broad construction of the Necessary and Proper Clause. *Id.*; *see supra* note 57 and accompanying text.

225. U.S. CONST. art. I, § 8, cl. 3; *see* Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793, 793 (1996) (“In 1995, the Supreme Court alarmed its observers by shaking off the cobwebs of sixty years of inaction and invalidating a federal statute as a violation of the Commerce Clause.”). Nearly six decades before *Lopez*, the Court invalidated the Bituminous Coal Conservation Act of 1935 as exceeding the power of Congress under the Commerce Clause. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). The following year, however, the Court upheld the National Labor Relations Act of 1935 against a similar Commerce Clause challenge in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). From *NLRB* to *Lopez*, the Court routinely upheld statutes predicated on the commerce power. *See United States v. Lopez*, 514 U.S. 549, 555–57 (1995); *id.* at 606–07 (Souter, J., dissenting); 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-4, at 811–16 (3d ed. 2000).

it a federal crime to possess a firearm within a specified distance of any school.²²⁶ The Court reconfirmed its intention to rein in the commerce power five years later, in *United States v. Morrison*, which relied on *Lopez* to invalidate Congress's creation of a federal damages action for any crime of violence motivated by gender.²²⁷ It is clear that a slim five-to-four majority of the Supreme Court was seeking to identify and enforce doctrinal limits on the scope of the commerce power, a goal the Court seemingly had abandoned in the years before *Lopez*.²²⁸

The early discussions of the Necessary and Proper Clause and the Supreme Court's decision in *McCulloch* provide a useful lens through which to consider the decisions in *Lopez* and *Morrison*. Both decisions fall within a line of cases dealing with congressional authority to regulate activity that substantially affects interstate commerce.²²⁹ Subsection A shows that the Supreme Court has defended this "substantial effects" theory as an application of the Necessary and Proper Clause.²³⁰ In order to accomplish the goals of the commerce power, Congress has been permitted to regulate certain intrastate conduct that bears an integral relationship to the regulation of interstate commerce.

Subsection B argues that, although the majority opinions in *Lopez* and *Morrison* do not refer to the Necessary and Proper Clause, they respond to the Madisonian fear that Congress would invoke that provision to assume unlimited control over matters remote from its enumerated powers. Therefore, the Court could have explained the decisions as applications of *McCulloch*'s restrictions on permissible means-end relationships. *Lopez* and *Morrison* can be understood as holding that Congress had regulated conduct so remote from interstate commerce that the means employed were not appropriate, plainly adapted or really calculated to effectuate any end legitimately within the scope of the Commerce Clause. Instead, Congress had used the commerce power as a pretext for pursuing ends the Constitution has not entrusted to the federal government.²³¹

A. *The "Substantial Effects" Cases and the Necessary and Proper Clause*

In keeping with *McCulloch*, Congress has long understood the Commerce Clause to imply incidental powers not strictly encompassed

226. 514 U.S. at 551–52.

227. 529 U.S. 598, 598 (2000).

228. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-7, at 313 (2d ed. 1988) (observing, pre-*Lopez*, that "[t]he doctrinal rules courts currently employ to determine whether federal legislation is affirmatively authorized under the commerce clause do not themselves effectively limit the power of Congress.").

229. *Lopez*, 514 U.S. at 558–59; *Morrison*, 529 U.S. at 609.

230. See *infra* notes 232–52 and accompanying text; Engdahl, *supra* note 6, at 108; Gardbaum, *supra* note 6, at 807–11.

231. See *infra* notes 253–99 and accompanying text.

within the language of the constitutional grant.²³² In *Gibbons v. Ogden*, Marshall parsed the express terms of the Commerce Clause, construing it to confer power “to prescribe the rule by which commerce is to be governed.”²³³ However, the first Congress under the new Constitution understood the Commerce Clause to authorize something more: the acquisition, construction, and maintenance of lighthouses, beacons, buoys, and public piers.²³⁴ Constructing a lighthouse no doubt assists in accomplishing the Commerce Clause goal of fostering trade.²³⁵ But building the lighthouse is not itself an act of regulation and does not prescribe a rule by which commerce is governed.²³⁶

The courts have likewise construed the commerce power to permit the pursuit of incidental ends in connection with the regulation of activities substantially affecting commerce.²³⁷ It would be difficult for Congress to exercise beneficial control over the interstate economy if forces beyond its reach could significantly influence interstate commercial activity. Thus, in order to effectuate the purposes of the Commerce Clause, Congress has been permitted to regulate not just interstate commerce it-

232. Based upon the construction of the Commerce Clause underlying early federal legislation, one member of Congress construed the word “‘regulate’ . . . to imply an entire control over the subject in all its relations.” 30 ANNALS OF CONG. 889 (1817) (Rep. Sheffey). The variety of measures passed in reliance on the commerce power gave “a practical construction of the word ‘regulate,’ and furnishe[d] . . . a complete answer to the idea often repeated on this floor, that we can employ only such means as directly tend to execute the delegated powers; that we dare not, without usurpation, depart one step out of a direct line in moving toward our object.” *Id.* at 890.

233. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).

234. See Act of Aug. 7, 1789, ch. 9, 1 Stat. 53 (providing for the establishment of lighthouses, beacons, buoys, and public piers); Act of July 22, 1790, ch. 32, 1 Stat. 137 (amending the act for the establishment and support of lighthouses, beacons, buoys, and public piers); Act of Aug. 10, 1790, ch. 41, 1 Stat. 184 (authorizing the Secretary of the Treasury to finish the Lighthouse on Portland Head in the District of Maine); 2 ANNALS OF CONG. 1904 (1791) (Rep. Ames) (“We may regulate trade; therefore we have taxed ships, erected light-houses, made laws to govern seamen, &c., because we say that they are the incidents to that power.”); Hamilton Opinion, *supra* note 19, at 98; 22 ANNALS OF CONG. 139 (1811) (Sen. Crawford) (“Under the power to regulate commerce, Congress exercises the right of building and supporting light-houses.”); 30 ANNALS OF CONG. 889 (1817) (Rep. Sheffey). *But see* 22 ANNALS OF CONG. 184 (1811) (Sen. Giles) (arguing that lighthouses are justified under the Article I, section 8 power to purchase land “for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings”).

235. See 22 ANNALS OF CONG. 140 (1811) (Sen. Crawford) (“[T]he erection of light-houses tends to facilitate and promote the security and prosperity of commerce.”); *id.* at 738 (Rep. Sheffey) (arguing that the power to regulate commerce includes the power to promote it); *Lopez*, 514 U.S. at 558 (acknowledging congressional power to “protect the instrumentalities of interstate commerce, or persons or things in interstate commerce”).

236. See 22 ANNALS OF CONG. 140 (1811) (Sen. Crawford) (“A law to erect light-houses is no more a law to regulate commerce, than a law creating a bank is a law to collect taxes, imposts, and duties.”); *id.* at 769 (Rep. Garland) (“Erecting lighthouses is not ‘regulating commerce,’ properly and strictly speaking . . .”). Stated differently, to protect against threats to commerce, Congress often must regulate something other than commerce itself. A behavior or condition that threatens commerce may not itself be a commercial activity.

237. *Lopez* acknowledged the legitimacy of this category of commerce power regulation, at least when properly confined. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

self, but also intrastate activities substantially related to interstate commerce.²³⁸

The Commerce Clause does not expressly confer this power over activities affecting commerce. Rather, the courts have recognized this authority as an incidental power encompassed within the Necessary and Proper Clause. A unanimous Supreme Court acknowledged the dependence of the affecting-commerce rationale on the Necessary and Proper Clause in *United States v. Darby*,²³⁹ which cited *McCulloch* in holding that congressional power “extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them *appropriate means to the attainment of a legitimate end*, the exercise of the granted power of Congress to regulate interstate commerce.”²⁴⁰

The *Darby* case primarily concerned two provisions of the Fair Labor Standards Act. In one provision, Congress prohibited interstate shipment of goods manufactured in violation of certain minimum wage and maximum hour standards.²⁴¹ The Court deemed this provision a straightforward regulation of interstate commerce, consistent with Marshall’s definition in *Gibbons v. Ogden*.²⁴² The second provision at issue directly regulated the wages and hours of persons employed in manufacturing goods for interstate commerce.²⁴³ The Court acknowledged that manufacturing is an activity distinct from interstate commerce itself.²⁴⁴ Thus, the validity of this intrastate wage-and-hour regulation turned on whether the prohibited conduct was “so related to [interstate] commerce and so affect[ed] it as to be within the reach of the power of Congress to regulate it.”²⁴⁵ The Court upheld the statute, reasoning that “[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states.”²⁴⁶ Drawing directly from *McCulloch*’s

238. See, e.g., *United States v. Darby*, 312 U.S. 100, 119 (1941) (holding that commerce power permits regulation of intrastate activities when appropriate for “the *effective execution*” of power to regulate interstate commerce) (emphasis added). “Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government.” *Id.* at 121.

239. 312 U.S. 100 (1941).

240. *Id.* at 118 (emphasis added); see also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) (quoting this passage from *Darby* in the course of sustaining Civil Rights Act public accommodation provisions).

241. Fair Labor Standards Act of 1938 § 15(a)(1), 29 U.S.C. § 215(a)(1) (2000).

242. *Darby*, 312 U.S. at 113 (“While manufacturing is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce.”). The fact that the motive of the regulation was to control local wages and hours was deemed irrelevant, given that Congress had employed a regulation of interstate commerce in pursuit of that purpose. *Id.* at 113–15.

243. Fair Labor Standards Act of 1938 § 15(a)(2).

244. *Darby*, 312 U.S. at 113.

245. *Id.* at 117.

246. *Id.* at 118.

treatment of the Necessary and Proper Clause, the Court noted that the Tenth Amendment would not prevent Congress from using “*all means* for the exercise of a granted power *which are appropriate and plainly adapted to the permitted end.*”²⁴⁷

The Court again highlighted the relationship between the affecting-commerce rationale and the Necessary and Proper Clause the following year in *United States v. Wrightwood Dairy Co.*²⁴⁸ The government in that case sought to apply milk price regulations to milk shipped within a state, which competed with milk sold in interstate commerce.²⁴⁹ The Court again cited *McCulloch* and referenced that decision’s test for congressional power under the Necessary and Proper Clause.²⁵⁰ The *Wrightwood Dairy* Court concluded that the power of Congress “extends to such control over intrastate transactions . . . as is *necessary and appropriate* to make the regulation of the interstate commerce effective.”²⁵¹

Because the “affecting commerce” cases derive from the Necessary and Proper Clause, a statute purporting to regulate on this theory must comply with the constitutional standards of *McCulloch*.²⁵² The next section will argue that the *McCulloch* standards, as elucidated by Marshall in his *Friend to the Union* and *Friend of the Constitution* essays, explain the Court’s decisions in *Lopez* and *Morrison*.

B. *The Means-End Relationship in Lopez and Morrison*

The Supreme Court has recognized a wide variety of ways in which local activities may affect interstate commerce and justify federal regulation.²⁵³ In some instances, the posited effect on commerce has been rela-

247. *Id.* at 124 (emphasis added) (citing *McCulloch*, 17 U.S. (4 Wheat.) at 405–06). The Court also upheld as “an appropriate means to the legitimate end” a provision requiring employers to maintain records concerning covered employees. *Id.* at 125.

248. 315 U.S. 110 (1942).

249. *Id.* at 117–18.

250. *Id.* at 119 (“The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them *appropriate means to the attainment of a legitimate end*, the effective execution of the granted power to regulate interstate commerce.” (emphasis added)). In *Wickard v. Filburn*, 317 U.S. 111 (1942), the government defended a regulation of local wheat production “as a ‘necessary and proper’ implementation of the power of Congress over interstate commerce.” *Id.* at 119. In upholding the regulation, the *Wickard* Court quoted this passage from *Wrightwood Dairy*. *Id.* at 124; *see also id.* at 121 (assuming that questions of affirmative commerce power turn on what is “‘necessary and proper’ to the exercise by Congress of its granted power”).

251. *Wrightwood Dairy*, 315 U.S. at 121 (emphasis added). More recently, the connection between the “affecting commerce” cases and the Necessary and Proper Clause has been recognized by Justice O’Connor in her dissent in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 584–85 (1985) (O’Connor, J., dissenting); *see also* *United States v. Lopez*, 514 U.S. 549, 587–89 (1995) (Thomas, J., concurring) (arguing that the Commerce Clause itself does not permit regulation of matters that substantially affect commerce, and that reading the Necessary and Proper Clause this broadly would make various enumerated powers redundant).

252. *See Darby*, 312 U.S. at 118 (citing *McCulloch*, 17 U.S. (4 Wheat.) at 421).

253. Intrastate sales may compete with sales of goods traveling interstate. *Wrightwood Dairy*, 315 U.S. at 117–19. Home production of commodities for personal use may reduce the demand for com-

tively immediate, as when competition from local sales impacts the prices charged for goods sold interstate.²⁵⁴ In other situations, demonstration of the required effect on commerce involves construction of a chain of cause and effect with multiple links. For instance, in *NLRB v. Jones & Laughlin Steel Corp.*, the defendant had interfered with union organizing efforts and discriminated against union members.²⁵⁵ Such activities created a risk of “industrial strife.”²⁵⁶ Industrial strife could result in interruption of manufacturing activities.²⁵⁷ A manufacturing interruption could “throttle” interstate commerce by reducing the amount of steel available for transport.²⁵⁸ Thus, the Court permitted Congress to regulate employer conduct toward union members as a means to promote industrial harmony, which was a means to prevent strikes, which was a means to avoid a constriction of interstate commercial activity.

Because Congress may point to a multilink chain of causal relationships to demonstrate an effect on interstate commerce, the affecting commerce rationale implicates Madison’s remoteness concern.²⁵⁹ As explained above, Madison feared that, absent some close affinity between congressional means and constitutional ends, “implications, . . . remote and . . . multiplied,” could be linked together to reach “every object of legislation, every object within the whole compass of political economy.”²⁶⁰ Marshall likewise shared Madison’s apprehension that Congress might overreach through regulation of activities remote from its enumerated powers.²⁶¹

This same remoteness concern drove the Court’s decision in *Lopez*. In defending the Gun-Free School Zones Act, the Government offered two analyses to show the effect of school gun possession on interstate commerce.²⁶² The first argument was that gun possession leads to

modities from other states. *Wickard v. Filburn*, 317 U.S. 111, 127–29 (1942). Discrimination may discourage travel and inhibit spending at institutions utilizing interstate goods. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 252–53 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 299–301 (1964). Local pollution may create economic losses and damage natural resources in ways that adversely affect interstate commerce. *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 277–80 (1981). The Court has also upheld legislation on grounds that underpaying and overworking one’s employees constitute “unfair methods of competition” in the interstate marketplace, *Darby*, 312 U.S. at 122–23, and that loan sharking provides revenue to organized crime, exacts money from borrowers, coerces property crimes, and causes “racketeers” to assume control of legitimate businesses. *Perez v. United States*, 402 U.S. 146, 155–56 (1971). The reach of the doctrine has been augmented further under the aggregation principle, which permits individual acts with no appreciable affect on commerce to be regulated if they fall within a class of activities that in the aggregate affects commerce in a substantial way. See *Perez*, 402 U.S. at 153–54; *Wickard*, 317 U.S. at 127–29.

254. *Wrightwood Dairy*, 315 U.S. at 117–18.

255. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 22 (1937).

256. See *id.* at 41.

257. *Id.*

258. *Id.* at 42.

259. See *supra* notes 78, 181–82 and accompanying text.

260. 2 ANNALS OF CONG. 1899 (1791); see *supra* note 78 and accompanying text.

261. See *supra* note 186 and accompanying text.

262. *United States v. Lopez*, 514 U.S. 549, 563–64 (1995).

crime.²⁶³ Articulated in terms of a means-end relationship, Congress purported to regulate gun possession near schools as a means of reducing crime, which was a means of avoiding economic losses, which was a means of preventing the spread of those losses to society through insurance, which was a means of preventing such effects on interstate commerce as the reduction of purchases across state lines.²⁶⁴ Alternatively, the regulation was a means of reducing crime, which was a means of improving the reputation of the area around each school, which was a means of encouraging travel to those areas, which was a means of fostering interstate commerce.²⁶⁵ The Court rejected these crime-reduction justifications for the statute because, as the government admitted, such a theory would permit Congress to regulate “not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.”²⁶⁶

The Court could likewise find no practical limit to the government’s second theory, which was that gun possession disrupts education, and “[a] handicapped educational process, in turn, will result in a less productive citizenry.”²⁶⁷ Here, the government identified regulation of gun possession as a means of preventing disturbances to the educational process, which was a means of producing better educated students, which was a means of graduating more skilled workers, which was a means of promoting interstate commerce.²⁶⁸ Under this theory, however, “Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example.”²⁶⁹ The Court believed that permitting regulation on the rationales offered by the government would effectively grant the federal government a general police power in derogation of the reserved powers of the states.²⁷⁰

263. *Id.*

264. *See id.*

265. *See id.*

266. *Id.* at 564.

267. *Id.*

268. *See id.* Remoteness is difficult to quantify because “distance” is a metaphor when applied to causal relationships. The distance between means and ends can be made to appear longer or shorter depending on the level of generality at which cause and effect relations are described. On one reading of Justice Breyer’s *Lopez* dissent, it could be concluded that the chain of causation connecting school gun possession with interstate commerce involves only two links: (1) violence affects the quality of education, and (2) the quality of education affects interstate commerce. *See id.* at 618 (Breyer, J., dissenting) (“Could Congress rationally have found that ‘violent crime in school zones,’ through its effect on the ‘quality of education,’ significantly (or substantially) affects ‘interstate’ or ‘foreign commerce?’”). But the same chain could be stretched to dozens of links—perhaps even hundreds—by describing with particularity the ways that gun possession might lead to violence, the specific impacts that violence might have on the educational process, the potential effects of these educational shortcomings on individual students, and the precise manner in which undereducated workers could impact interstate commerce.

269. *Id.* at 564.

270. The Court seemed particularly concerned that the regulation invaded a field traditionally regulated by the states:

Preventing resort to means remote from legitimate constitutional ends was likewise the concern of the Court in *Morrison*. In enacting the Violence Against Women Act, Congress had reasoned that gender-motivated violence affects interstate commerce “by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by increasing medical and other costs, and decreasing the supply of and demand for interstate products.”²⁷¹ As in *Lopez*, the Court concluded that permitting such an analysis would overthrow the enumeration of powers and “completely obliterate the Constitution’s distinction between national and local authority.”²⁷² The Court characterized the posited effect on commerce as “attenuated.”²⁷³ The reasoning employed by Congress could just as well permit federal legislation concerning “family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.”²⁷⁴

To resolve the remoteness problem in *Lopez* and *Morrison*, the Court limited Congress to the regulation of economic or commercial activities that substantially affect interstate commerce.²⁷⁵ Because local gun possession and gender-motivated violence are not economic in nature, the Court deemed these activities beyond the scope of the federal commerce power.²⁷⁶ The Court could have explained this economic conduct limitation as an interpretation of the Necessary and Proper Clause designed to prevent Congress from employing means remote from its power to regulate interstate commerce. The majority opinions in *Lopez* and *Morrison* did not reference the Necessary and Proper Clause, but the

Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Id. The Court premised its decision on the “first principle” that “[t]he Constitution creates a Federal Government of enumerated powers.” *Id.* at 552. The statute could only be sustained on theories that the Court deemed inconsistent with the character of the government as one of limited powers. *Id.* at 564.

271. *Morrison v. United States*, 529 U.S. 598, 615 (2000) (quoting H.R. CONF. REP. NO. 103-711, at 385).

272. *Id.*

273. *Id.* (“The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States’ police power) to every attenuated effect upon interstate commerce. If accepted, petitioners’ reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.”). The Court in *Morrison* used the same word to describe the chain of causal relations offered to support the statute in *Lopez*. *See id.*

274. *Id.* at 615–16.

275. *Lopez*, 514 U.S. at 559–60, 567; *Morrison*, 529 U.S. at 609, 612.

276. *Lopez*, 514 U.S. at 567; *Morrison*, 529 U.S. at 612.

Government's brief in *Lopez*²⁷⁷ and the dissenting Justices in *Morrison*²⁷⁸ cited the provision as a source of the regulatory power asserted by Congress. Given that the affecting-commerce cases rest on the Necessary and Proper Clause,²⁷⁹ the Court's *Lopez* and *Morrison* decisions necessarily articulate an implied limitation on the implied congressional power recognized by that provision.

When one thinks of *Lopez* and *Morrison* as interpretations of the Necessary and Proper Clause designed to address a remoteness problem, the natural question becomes how these decisions relate to the Court's analysis in *McCulloch*. Chief Justice Marshall understood his *McCulloch* opinion to resolve the remoteness issue that faced the *Lopez* and *Morrison* Courts.²⁸⁰ As we observed above, *McCulloch* suggests at least three limitations on permissible means-end relationships, each of which tends to require a relatively close proximity between a legislative measure and the enumerated powers of Congress: (1) the means must bear a "direct" relationship to a legitimate end entrusted to Congress; (2) the means must be "really calculated to" produce that end; and (3) the relationship between the means and the end must be "plain."²⁸¹ How do *Lopez* and *Morrison* square with these principles from *McCulloch*?

The Supreme Court has previously rejected the first of these three *McCulloch* limitations as a restriction on congressional regulation under the Commerce Clause. In the late nineteenth and early twentieth centuries, the Supreme Court employed a "direct relationship" test to evaluate regulatory action taken on an affecting-commerce rationale,²⁸² holding that Congress could regulate activity that directly affected commerce, but lacked power if the relationship was deemed indirect.²⁸³ A primary purpose of this direct relationship requirement was to prevent Congress from regulating activities remote from interstate commerce.²⁸⁴ However,

277. Brief for the United States at 2, 12–13 n.4, *Lopez* (No. 93-1260), reprinted in 242 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT (Philip B. Kurland & Gerhard Casper eds., 1996).

278. 529 U.S. at 640 (Souter, J., dissenting); *id.* at 657 (Breyer, J., dissenting).

279. See *supra* notes 232–52 and accompanying text.

280. See *supra* notes 186, 195–218 and accompanying text.

281. See *supra* notes 203–17 and accompanying text.

282. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 4.5, at 165 (6th ed. 2000).

283. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34–41 (1937) (holding that labor practices of steel production company directly affected commerce); *Carter v. Carter Coal Co.*, 298 U.S. 238, 307–10 (1936) (holding that labor practices in coal production only indirectly affected commerce); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548–51 (1935) (holding that labor practices in intrastate slaughterhouses only indirectly affected commerce); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 240–41 (1899) (holding that combination among pipe manufacturers directly affected commerce); *United States v. E.C. Knight Co.*, 156 U.S. 1, 16–17 (1895) (holding that alleged monopoly in manufacture of refined sugar did not directly affect commerce).

284. For instance, in a well-known concurrence in the *Schechter Poultry* case, Justice Cardozo pointed to this function of the doctrine:

There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours "is an elastic medium which transmits all tremors throughout its territory; the only question is of their size." Per

the test proved difficult to apply in a principled fashion. The Court struck down wage-and-hour regulations in the coal industry, finding only an indirect effect on commerce,²⁸⁵ but it sustained similar regulations in the steel industry the following year, ostensibly on the ground that here the effect on commerce was direct.²⁸⁶ Not long thereafter, the Court abandoned the distinction between direct and indirect effects, holding in *Wickard v. Filburn* that “questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as ‘production’ and ‘indirect’ and foreclose consideration of the actual affects of the activity in question upon interstate commerce.”²⁸⁷

However, while the Supreme Court in *Lopez* and *Morrison* could not invoke *McCulloch*’s direct relationship requirement without overruling or qualifying the intervening decision in *Wickard*, it could have explained its holdings in terms of *McCulloch*’s good faith and plainness limitations. The good faith principle requires Congress to employ means “really calculated to” effect some end within the legitimate scope of its enumerated constitutional powers.²⁸⁸ The Court has broadly construed the Commerce Clause to afford Congress plenary authority to control and promote interstate commerce.²⁸⁹ But a legislator truly interested in the control or promotion of interstate commerce would be unlikely to regulate school-zone gun possession or gender-motivated violence as means to that end. Precisely because these activities bear only remotely on the interstate market, it is implausible that Congress regulated them *because of* their effect on commerce.²⁹⁰ The more plausible inference is that Congress used its commerce power in these statutes as a “pretext” to

Learned Hand, J., in the court below. The law is not indifferent to questions of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. . . . There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system.

295 U.S. at 554 (Cardozo, J., concurring). This passage was quoted by the *Lopez* majority. See *United States v. Lopez*, 514 U.S. 549, 567 (1995); see also *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453, 466–67 (1938) (“[D]irect’ has been contrasted with ‘indirect,’ and what is ‘remote’ or ‘distant’ with what is ‘close and substantial.’”).

285. *Carter*, 298 U.S. at 307–10.

286. *Jones & Laughlin Steel*, 301 U.S. at 34–41.

287. *Wickard v. Filburn*, 317 U.S. 111, 120 (1942).

288. See *supra* notes 207–13 and accompanying text.

289. See, e.g., *Lopez*, 514 U.S. at 553 (“[The commerce power] is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.” (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 196)); *id.* at 574 (Kennedy, J., concurring) (“Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.”).

290. Although Congress must exhibit a good-faith intention to regulate or promote commerce, this does not mean Congress must be motivated by economic concerns. Congress may use its commerce power for the purpose of achieving noneconomic social goals. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 257 (1964); *United States v. Darby*, 312 U.S. 100, 114–15 (1941). But its pursuit of such ends must be accomplished through bona fide measures designed to control or promote interstate commercial activity.

accomplish ends more closely related to the statutory restrictions.²⁹¹ Congress sought to eliminate gun possession near schools and reduce gender-motivated violence purely as ends in themselves, and not as means to control the interstate economy.²⁹² While these are important and worthwhile ends, they are not ends that have been entrusted to Congress under a fair reading of its enumerated powers.²⁹³

The *Lopez* and *Morrison* statutes also fail the *McCulloch* plainness limitation.²⁹⁴ The regulation of school-ground gun possession and gender-motivated violence does not bear a plain or obvious relation to the protection or control of interstate commercial activity. While one can sketch such a connection through a lengthy chain of cause and effect relationships, the connection is so remote and attenuated that one cannot say these statutes are “plainly adapted” to the achievement of any end delegated to Congress by the Commerce Clause.

Lopez and *Morrison* do not speak in terms of congressional good faith or the plainness of the means-end relationship. Instead, the decisions offer the rule of thumb that Congress may only regulate local activities that are economic or commercial in nature.²⁹⁵ Nevertheless, this *Lopez/Morrison* rule appears to implement, in a rough (but judicially manageable) fashion, the good faith and plainness principles from *McCulloch*. Given the close relationship between intrastate and interstate economic activity, a statute regulating local economic conduct will usually be calculated to accomplish an end legitimately encompassed within the plenary congressional authority over interstate commerce.²⁹⁶ Likewise, the causal relationship linking economic means with economic ends will generally be plain or obvious. Thus, limiting Congress to the regulation of local *economic* activity ensures that such regulations will, in most circumstances, be plainly adapted and really calculated to achieve some legitimate end connected with the interstate economy.

The *Lopez/Morrison* economic-conduct rule differs from the good faith and plainness limitations in the important respect that the former provides a more formalistic standard than either of the latter. To this extent, the *Lopez/Morrison* rule revives the long-running debate over the virtue of formalism in Commerce Clause doctrine.²⁹⁷ While the Court in

291. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

292. *See supra* notes 262–74 and accompanying text.

293. *See* U.S. CONST. art. I, § 8.

294. *See supra* notes 214–17 and accompanying text.

295. *United States v. Lopez*, 514 U.S. 549, 559–60, 567 (1995); *Morrison*, 529 U.S. at 611, 618.

296. *See Lopez*, 514 U.S. at 560 (“Where economic activity substantially affects interstate commerce legislation regulating that activity will be sustained.”).

297. *See* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089 (2000). At the same time that the Supreme Court rejected a direct relationship test for evaluating Commerce Clause regulations, it also abandoned a set of formalistic rules that denied congressional power to regulate conduct categorized as “production,” “agriculture,” “manufacturing,” or the like, all of which were deemed to be precommercial activities. *Wickard v. Filburn*, 317 U.S. 111, 120 (1942); *cf. Lopez*, 514 U.S. at 586–87 (Thomas, J., concurring) (arguing that the Framers of the Constitution distinguished “commerce” from “agriculture” and “manufacturing”). The debate over

Lopez indicated that “the question of congressional power under the Commerce Clause ‘is necessarily one of degree,’”²⁹⁸ the rule it adopted will generate relatively predictable results in many cases. Thus, the Court sought to address the degree question under the Commerce Clause on a more categorical basis, rather than through open-ended, case-by-case consideration.

In neglecting to mention *McCulloch* or the Necessary and Proper Clause, the Supreme Court in *Lopez* and *Morrison* overlooked an opportunity to articulate what seems perhaps the strongest rationale for its limitations on means-end relationships under the commerce power.²⁹⁹ *Lopez* and *Morrison* addressed a long-recognized problem in Necessary and Proper Clause interpretation, preventing Congress from regulating local activities remote from its enumerated powers. While the rule applied by the Court was not based explicitly on *McCulloch*, it seems fairly defensible as a more formalistic proxy for the good faith and plainness limitations articulated long ago by Chief Justice Marshall.

III. THE “PROPRIETY” LIMITATION ON IMPLIED CONGRESSIONAL POWERS

The preceding section argued that the Court’s recent commerce power decisions can best be understood as implementing the *McCulloch* requirements that Congress choose means “appropriate,” “plainly adapted,” and “really calculated” to accomplish an end within the scope of the enumerated powers. The Supreme Court has offered a different construction of the Necessary and Proper Clause in support of two other lines of federalism cases. In *Printz*, one of the anticommandeering cases, and *Alden*, one of the sovereign-immunity cases, the Court rejected claims of implied congressional power on the ground that the asserted powers were not “proper” means of carrying enumerated powers into

formalism under the Commerce Clause is part of a broader discussion of formalism in all areas of the law. See generally Symposium, *Formalism Revisited*, 66 U. CHI. L. REV. 527 (1999).

298. *Lopez*, 514 U.S. at 566 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

299. Judicial scrutiny of the means-end relationship has also been the central element in the Supreme Court’s recent case law defining the scope of congressional power under Section 5 of the Fourteenth Amendment. First, the Court has restricted the *ends* to which the Section 5 power may be directed. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 518–19. Congress may prevent or remedy conduct that the Court views as violating the Fourteenth Amendment, but may not broaden the substantive scope of Fourteenth Amendment protection. See *id.* at 519–20. Second, the Court has required “a congruence and proportionality between the injury to be prevented or remedied and the *means* adopted to that *end*.” *Id.* at 520 (emphasis added). This standard appears related to the “pre-text” review called for in *McCulloch*. See *supra* notes 178–80 and accompanying text. The “congruence and proportionality” inquiry tests whether Congress is really seeking to prevent or remedy unconstitutional conduct or is instead attempting to accomplish some other end that the Court views as outside the scope of the Fourteenth Amendment. Because the Commerce Clause and Fourteenth Amendment cases represent the most consequential elements of the Supreme Court’s recent federalism case law, it would not be going too far to say that the judicial policing of means-end relationships constitutes the heart of the ongoing federalism revival.

execution.³⁰⁰ Part A discusses the anticommandeering and sovereign immunity cases, including the Court's treatment of the Necessary and Proper Clause. Part B evaluates the Court's construction of the propriety limitation in *Printz* and *Alden*. Historical analysis and a close reading of *McCulloch* suggest that one should view the propriety requirement as regulating the fit between congressional means and constitutional ends, rather than as a textual hook for principles of federalism, separation of powers, or individual liberty.

A. *Commandeering and Abrogation of Sovereign Immunity as "Improper" Legislative Means*

The Supreme Court's recent commandeering cases concern the extent to which Congress may give orders to officials of the state governments. In *New York v. United States*, this issue arose in the context of congressional directions to state legislators.³⁰¹ In the Low-Level Radioactive Waste Policy Amendments Act of 1985, Congress sought to enlist state legislatures in the effort to provide adequate facilities for disposal of low-level radioactive waste.³⁰² The Court approved provisions of the act using carrots and sticks to "encourage" legislative action by the states.³⁰³ At the same time, the Court invalidated a provision of the statute that "crossed the line distinguishing encouragement from coercion."³⁰⁴ The Court applied the principle that "Congress may not simply 'commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"³⁰⁵

The Court extended this anticommandeering principle to state executive officials in *Printz v. United States*.³⁰⁶ The 1993 Brady Handgun Violence Prevention Act employed a system of background checks to enforce federal legislation prohibiting handgun sales to various categories of persons, such as convicted felons and drug users.³⁰⁷ Pending creation of a national database, the Brady Act required certain local law enforcement officers to perform the required background checks.³⁰⁸ The

300. *Printz v. United States*, 521 U.S. 898, 923–24 (1997); *Alden v. Maine*, 527 U.S. 706, 732–33 (1999).

301. 505 U.S. 144 (1992).

302. *Id.* at 151–54.

303. *Id.* at 171–74. The Court approved provisions permitting complying states to impose charges on waste coming from noncomplying states. *Id.* at 171. It also held that Congress could require compliance with statutory requirements as a condition for receipt of federal funds. *Id.* at 171–73. Further, Congress could offer states a choice between regulating pursuant to federal standards and having their laws preempted by federal law. *Id.* at 173–74.

304. *Id.* at 175. Under this "take title" provision, a state that did not adopt legislation satisfying federal standards by a specified deadline was required to assume ownership of low-level radioactive waste generated within the state. *Id.* at 153–54, 175–76.

305. *Id.* at 161 (alteration in original) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)).

306. 521 U.S. 898 (1997).

307. *Id.* at 902–03.

308. *Id.*

Court applied the *New York* anticommandeering principle to invalidate this provision, holding that “[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”³⁰⁹

The Court mentioned the Necessary and Proper Clause in *New York*, but not as a source for the anticommandeering principle.³¹⁰ The majority defended the anticommandeering rule on the basis of historical evidence, structural inference, and the language of various precedents.³¹¹ *Printz* likewise premised its extension of the anticommandeering principle on considerations of history, structure, and precedent.³¹² *Printz* differed from *New York*, however, in that it also identified the Necessary and Proper Clause as a source for the anticommandeering principle, though only in response to the dissent’s invocation of that provision³¹³ as the basis for a congressional commandeering power:

What destroys the dissent’s Necessary and Proper Clause argument . . . is not the Tenth Amendment, but the Necessary and Proper Clause itself. When a “La[w] . . . for carrying into Execution” the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, it is not a “La[w] . . . proper for carrying into Execution the Commerce Clause,” and is thus, in the words of The

309. *Id.* at 935.

310. 505 U.S. at 158–59.

311. *Id.* at 161–66. This article does not offer a defense of the anticommandeering principle. It is worth noting, however, that the debates over the constitutionality of a federally chartered bank provide support for the Supreme Court’s holding in *New York*. Bank opponents argued that a bank was not necessary because the federal government could use state banks instead. See Arthur E. Wilmarth, Jr., *Too Big to Fail, Too Few to Serve? The Potential Risks of Nationwide Banks*, 77 IOWA L. REV. 957, 971 & n.48 (1992). One response by bank supporters was that this would make the federal government dependent on the state legislatures, because it could not control decisions regarding the continued existence of those banks. 22 ANNALS OF CONG. 142 (1811) (Sen. Crawford) (“[W]e have no power to compel them to perform the act, for which we have made ourselves their dependents.”); *id.* (“There are State banks in almost every State in the Union, but their existence is wholly independent of the Government, and their dissolution is equally so.”); *id.* at 639–40 (Rep. Porter) (apparently conceding the bank proponents’ argument that “we have no control” over state legislatures, but disputing their position on other grounds); see also 31 ANNALS OF CONG. 1172 (1818) (Rep. Clay) (noting that if Congress designates a local road as a post road, and it falls into disrepair, “[t]he local authority cannot be acted upon by the General Government to compel its reparation”). Additional evidence for the anticommandeering rule derives from Chief Justice Marshall’s *Friend of the Constitution* essays, where he indicates that the government of the United States “acts only on individuals,” even though other states and governments are recognized. *A Friend of the Constitution No. 6*, *supra* note 17, at 193–94; see also *A Friend of the Constitution No. 7*, *supra* note 17, at 199 (“[The Constitution] has established legislative, executive, and judicial departments, all of which act directly on the people, not through the medium of the state governments.”); *A Friend of the Constitution No. 8*, *supra* note 17, at 202 (“[T]he measures of our national government are carried into execution by itself, without requiring the agency of the states.”).

312. 521 U.S. at 904–32.

313. *Id.* at 923–24. The majority teased the dissent for relying on the Necessary and Proper Clause, calling it “the last, best hope of those who defend ultra vires congressional action.” *Id.* at 923.

Federalist, “merely [an] ac[t] of usurpation” which “deserve[s] to be treated as such.”³¹⁴

Printz thus treated commandeering of state officials as a means violating the *propriety* requirement of the Necessary and Proper Clause.³¹⁵ In support of its reading of the term “proper” to incorporate federalism-based restraints on the implied powers of Congress, the Court cited a law review article on the propriety requirement by Gary Lawson and Patricia Granger.³¹⁶

The Necessary and Proper Clause received only passing attention in *New York* and *Printz* because the Court chose to focus on the scope of state sovereignty, rather than the reach of the enumerated powers. However, the Court described these inquiries as “mirror images of each other.”³¹⁷ The ultimate conclusion should not change, in other words, whether one frames the issue in terms of the scope of the express and implied powers of Congress or the scope of state immunity from federal power. The Court chose to approach *New York* and *Printz* from the latter perspective.³¹⁸

If the Court had begun by analyzing the reach of the enumerated powers of Congress, the importance of the Necessary and Proper Clause to the *New York* and *Printz* decisions might have been more apparent.³¹⁹ The Constitution does not contain an express congressional power to commandeer state legislators or executive officials. If we acknowledge the legitimacy of the ends pursued by Congress, as the Court did in *New*

314. *Id.* at 923–24 (quoting THE FEDERALIST NO. 33).

315. Even before the *Printz* decision, Professor Regan had argued that the propriety requirement of the Necessary and Proper Clause provided the most appropriate textual ground for *New York*'s anticommandeering principle:

It would be much more sensible . . . to assign this idea to the Necessary and Proper Clause rather than the Tenth Amendment. Roughly speaking, the Tenth Amendment addresses, truisitically, the question of what kinds of things Congress may regulate. The Necessary and Proper Clause addresses the question of what means Congress may use to achieve its regulatory ends. Nobody doubted in *New York v. United States* that Congress could regulate radioactive waste The only issue was about the means Congress had chosen. The Necessary and Proper Clause suggests, by implication, that some means are improper. If we think the means Congress used in this case were improper, this seems the natural clause to appeal to.

Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 593 (1995).

316. *Printz v. United States*, 521 U.S. 898, 924 (1997) (citing Gary Lawson & Patricia B. Granger, *The ‘Proper’ Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297–326, 330–33 (1993)).

317. *New York*, 505 U.S. at 155–56 (characterizing questions of the reach of delegated congressional powers and questions of “state sovereignty reserved by the Tenth Amendment” as “mirror images of each other”).

318. See *Printz*, 521 U.S. at 905 (beginning with issue of whether state executives can be “pressed into federal service,” rather than with enumerated powers of Congress); *New York*, 505 U.S. at 159–60 (framing issue in terms of Tenth Amendment).

319. The *Printz* Court suggested that the dissent’s Necessary and Proper Clause argument had been tacitly resolved in *New York*, when the Court discussed the appropriate scope of congressional power: “[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.” *Printz*, 521 U.S. at 924 (quoting *New York*, 505 U.S. at 166).

York and *Printz*,³²⁰ the next step in the inquiry becomes whether commandeering of state officials constitutes a means permitted by the Necessary and Proper Clause.³²¹

The *Printz* Court opened a new chapter in Necessary and Proper Clause jurisprudence with its conclusion that commandeering of state officials is not a “proper” means of executing an enumerated power.³²² We will consider below whether the history of the Necessary and Proper Clause and the Court’s reading of the provision in *McCulloch* support such a form of propriety review.³²³ It seems reasonably clear, however, that the statutes at issue in *New York* and *Printz* do not suffer from the defects of those addressed in *Lopez* and *Morrison*.³²⁴ Requiring state legislators to provide for storage space seems like a means plainly adapted and really calculated to effectuate the end of promoting interstate shipment of radioactive waste.³²⁵ Likewise, requiring state law enforcement officials to conduct background checks is a means plainly adapted and really conducive to the end of regulating who may participate in the interstate handgun market.³²⁶ In these contexts, commandeering of state officials is not a means remote from legitimate constitutional ends and does not rest upon a long chain of intermediate causal relationships. Rather than pointing to a defect in the means-end relationship, the *Printz* Court condemned the commandeering power on the ground that it interferes with constitutionally protected sovereign interests of the states.

The Supreme Court subsequently relied upon *Printz*’s reading of the term “proper” in *Alden v. Maine*.³²⁷ The Court concluded in *Alden* that states enjoy a constitutionally protected immunity from suit that is not limited by the express terms of the Eleventh Amendment, and thus applies in state court.³²⁸ Congress lacks the power under Article I to ab-

320. In *New York*, it was conceded that Congress could regulate the “interstate market in waste disposal,” *New York*, 505 U.S. at 160, suggesting that pursuit of additional storage space was a legitimate end within the scope of the Constitution. In *Printz*, Justice Thomas denied that the Commerce Clause would permit regulation of “wholly intrastate, point-of-sale transactions,” *Printz*, 521 U.S. at 937 (Thomas, J., concurring), but no other Justice joined him in questioning the legitimacy of the congressional end of requiring background checks for handgun purchasers.

321. See *supra* note 8.

322. *Printz*, 521 U.S. at 923–24. In fairness to the Court, I should emphasize that it presumably would have reached the same conclusion on structural grounds, even if it could not appeal to the propriety requirement of the Necessary and Proper Clause. Nevertheless, because the Court did invoke the text of the Necessary and Proper Clause in support of its ruling, it is appropriate to consider the merits and implications of its construction.

323. See *infra* notes 339–439 and accompanying text.

324. See *supra* notes 262–94 and accompanying text.

325. See *supra* notes 207–17 and accompanying text.

326. See *id.*

327. 527 U.S. 706 (1999).

328. *Id.* at 726–28, 754–55. In *Alden*, Congress had attempted to abrogate a state’s sovereign immunity in its own courts by authorizing a state-court suit to enforce the overtime provisions of the Fair Labor Standards Act. *Id.* at 711–12 (citing 29 U.S.C. §§ 216(b), 203(x)).

rogate this sovereign immunity of the states,³²⁹ though it may abrogate sovereign immunity when exercising powers granted by the Fourteenth Amendment.³³⁰ *Alden* was an extension of the Court's decision in *Seminole Tribe of Florida v. Florida*, which had rejected an attempt to abrogate state sovereign immunity in federal court.³³¹

The operative question in *Alden* concerned the scope of congressional power to abrogate state sovereign immunity.³³² As in *New York* and *Printz*, the Court did not question the legitimacy of Congress's regulation of overtime wages pursuant to the commerce power.³³³ Because the Constitution contains no express power to subject the states to litigation by individuals, *Alden* raised the issue of whether Congress possessed an implied power to authorize such suits by virtue of the Necessary and Proper Clause.³³⁴ If authorizing a money-damages suit against a private employer qualifies as a means plainly adapted and really calculated to accomplish an end within the scope of the Commerce Clause, it seems undeniable that authorizing such suits against public employers would also satisfy these restrictions on the means-end relationship. Nevertheless, the *Alden* Court held that the Necessary and Proper Clause does not give Congress "the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers."³³⁵ In support of this conclusion, it quoted the above language from *Printz*, indicating that laws violating state sovereignty are not "proper" means for carrying enumerated powers into execution.³³⁶

Assuming the Court was correct that the express language of the Necessary and Proper Clause protects state sovereign immunity, it might have made more of this conclusion than it did in *Alden*. One persistent criticism of the Court's sovereign immunity jurisprudence has been its repeated departures from the language of the Eleventh Amendment.³³⁷ This area of constitutional law has been characterized by an apparent

329. *Id.* at 712. In a sense, *Alden* can be conceived of as a further, limited extension of the anti-commandeering principle. *See id.* at 749 ("A power to press a State's own courts into federal service to coerce the other branches of the State . . . is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will . . ."). In *Printz* and *New York*, the Court found that state legislators and executives cannot be pressed into federal service. *Printz v. United States*, 521 U.S. 898, 925–33 (1997); *New York v. United States*, 505 U.S. 144, 175–76 (1992). *Alden* concluded that state judges could not be forced to hear federal claims against the state, though they may be required to enforce federal law against other defendants. *See Printz*, 521 U.S. at 928–29 (noting that the Supremacy Clause requires state courts to apply federal law).

330. *Alden*, 527 U.S. at 756.

331. 517 U.S. 44 (1996).

332. *Alden*, 527 U.S. at 730.

333. *See id.* at 755–57 (recognizing that valid federal laws remain binding on the states notwithstanding sovereign immunity).

334. *See supra* note 8.

335. *Alden*, 527 U.S. at 732.

336. *Id.* (quoting *Printz*, 521 U.S. at 923–24).

337. *See, e.g., Ernest A. Young, Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1602 (2000).

tension between originalist and textualist modes of constitutional interpretation. The Court in *Alden* seemed to recognize this tension and to side with the originalists over the textualists: “To rest on the words of the [Eleventh] Amendment alone would be to engage in the type of ahistorical literalism we have rejected in interpreting the scope of the States’ sovereign immunity since the discredited decision in *Chisholm*.”³³⁸ But if the Court has correctly construed the word “proper,” the tension between originalism and textualism disappears, because the Necessary and Proper Clause then offers a *textual* basis for enforcing the Court’s *originalist* understanding of state sovereign immunity. The next section will consider evidence for and against the Court’s reading of the term “proper” to protect implied principles of state sovereignty.

B. *Three Readings of the Term “Proper”*

The Supreme Court in *Printz* and *Alden* understood the word “proper” in the Necessary and Proper Clause to place implied state sovereignty limitations on the implied powers of Congress. Is this a plausible reading of the term? Does good evidence exist that the Framers intended the term “proper” in the Necessary and Proper Clause to incorporate identifiable states’ rights?³³⁹

The Supreme Court did not offer an historical argument for its mode of reading the Necessary and Proper Clause. Instead, the Court cited a law review article by Gary Lawson and Patricia Granger that contains such a defense.³⁴⁰ The Lawson and Granger article actually presents an even broader argument than the Supreme Court seemed to embrace, because it suggests that the term “proper” prevents enactment of legislation that violates various principles of federalism, individual liberty, and separation of powers.³⁴¹ In other words, the propriety limitation of the Necessary and Proper Clause protects individuals, states, and other branches of the federal government against forms of congressional overreaching that the Framers would view as improper.³⁴²

Early discussions of the Necessary and Proper Clause reveal at least three different approaches to the term “proper” among members of the framing generation. The first approach was to read the term as redun-

338. *Alden*, 527 U.S. at 730.

339. My goal is not to establish whether the Supreme Court was correct in its particular holdings regarding the commandeering power and state sovereign immunity, but rather to consider the more general question of whether the term “proper” in the Necessary and Proper Clause should be understood as protecting state sovereignty interests. It could be that the Supreme Court was correct to construe the term “proper” as protecting fundamental rights of the states, but was incorrect in finding the anticommandeering and sovereign immunity principles encompassed within its protection. Conversely, it could be that the term “proper” was not meant to protect identifiable states’ rights, but that those interests are nevertheless protected by implications from the constitutional structure.

340. See *Printz v. United States*, 521 U.S. 898, 924 (1997) (citing Lawson & Granger, *supra* note 6, at 298–326, 330–32).

341. Lawson & Granger, *supra* note 6, at 297.

342. See *id.*

dant, adding nothing of substance beyond what was already conveyed by the term “necessary.” This reading of the term “proper” was rejected in *McCulloch*, though it was held by persons (including Attorney General Edmund Randolph) whose opinions merit consideration.³⁴³ From their perspective, the words “and proper” imposed *no* additional limitation on congressional power.

If, contrary to the Randolph view, the term “proper” limits implied congressional power in a manner distinct from the necessity requirement, the task of discerning the nature of the propriety limitation remains. Broadly speaking, there are at least two different ways that the word “proper” might serve to limit implied congressional powers, each of which finds support in the framing generation. On one view, the propriety limitation refers to the nature of the “fit” between congressional means and a legitimate constitutional end. Although the necessity requirement already regulates the relation of the means to the end, the term “proper,” on this understanding, places a complementary restriction on the sort of means-end relationship that will satisfy constitutional standards. A law enacted under the Necessary and Proper Clause must represent a means both “necessary” to carry an enumerated power into execution and “proper” for doing so in light of the nature of the end pursued. We might call this an *internal* limitation on congressional power, because it limits the general reach of Congress in devising means for the attainment of constitutional ends.³⁴⁴

A third approach to the term “proper” in the framing generation viewed the standard as a source of *external* limits on the implied powers of Congress. On this view, the analysis does not focus on the relationship between the congressional means and the constitutional end, but rather on the identification of particular interests that deserve protection against congressional control. Such a limitation is external in the sense that it limits congressional power even if Congress can demonstrate an appropriate means-end fit, i.e., it is a limitation external to the means-end relationship.³⁴⁵

These second and third approaches to the propriety limitation correspond to the two strategies pursued more generally by the Framers for limiting congressional power. On the one hand, the Framers confined Congress to the exercise of delegated powers, and reserved all other powers to the states or to the people.³⁴⁶ This was an internal limitation that arose from the definition of congressional power and limited the reach of the legislative body as a general matter. On the other hand, the Framers adopted a Bill of Rights that identified particular interests pro-

343. See *infra* notes 351–54 and accompanying text.

344. See *infra* notes 391–409 and accompanying text.

345. See *infra* notes 363–90 and accompanying text.

346. See U.S. CONST. art. I, § 8 & amend. X.

tected against congressional control.³⁴⁷ These constitutional amendments place external limitations on Congress, because they do not arise from the definition of congressional power.³⁴⁸

The *McCulloch* limitations on the means-end relationship, requiring congressional means to be appropriate, plainly adapted, and really calculated to accomplish a constitutional end, are internal limits on the implied powers of Congress.³⁴⁹ The Supreme Court's opinions in *Printz* and *Alden*, however, interpret the term "proper" as imposing external limits on implied congressional powers.³⁵⁰ The laws invalidated in those cases were deemed improper, not because of any defect in the fit between the means employed and the end pursued, but because Congress had invaded sovereign interests of the states that the Court deemed entitled to constitutional protection. The analysis will now turn to an examination of the evidence that supports each of these three approaches to the term "proper."

I. "Necessary" and "Proper" as Synonyms

The *Printz/Alden* reading of the Necessary and Proper Clause rests on the view that the Framers intended the terms "necessary" and "proper" to convey distinct limitations on implied congressional powers. The argument breaks down if the Framers simply indulged in the lawyerly habit of iteration, stringing together multiple terms that cover the same ground, as in the phrase "give, devise and bequeath."³⁵¹ Attorney General Randolph took this view of the Necessary and Proper Clause in his opinion against the bank bill. He noted that "[t]he phrase 'and proper,' if it has any meaning, does not enlarge the powers of Congress, but rather restricts them."³⁵² Nevertheless, he cautioned bank opponents against reliance on this phrase, suggesting that they should consider these words "as among the surplusage which as often proceeds from inattention as caution."³⁵³ Daniel Webster offered a similar con-

347. See *id.* amends. I–VIII.

348. With an internal limitation, Congress cannot reach the forbidden fruit because its arm is too short. With an external limitation, Congress cannot pick the forbidden fruit because it is surrounded by an invisible force field.

349. See *supra* notes 203–17 and accompanying text.

350. See *supra* notes 334–36 and accompanying text.

351. See *Moskal v. United States*, 498 U.S. 103, 120 (1990) (Scalia, J., dissenting) (offering other common examples of iteration by attorneys); JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 611 (5th ed. 2002) (quoting DAVID MELLINKOFF, DICTIONARY OF AMERICAN LEGAL USAGE 129 (1992)).

352. Randolph Opinion, *supra* note 64, at 89.

353. *Id.* Evidence from the Constitutional Convention suggests that inclusion of the words "and proper" was not the result of inattention. An early proposal in the Committee of Detail would have given Congress "a right to make all Laws *necessary* to carry the foregoing Powers into Execu—." 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 38, at 144 (emphasis added). A later proposal expanded the language to its current phrasing, suggesting that inclusion of the words "and proper" was a deliberate act. See *id.* at 168. One member of the Convention prepared a motion to delete the words "and proper," restoring the earlier phrasing, but the motion was never offered. See LYNCH, *supra* note 6, at 19–20.

struction in the *McCulloch* oral argument, contending that “[t]hese words, ‘necessary and proper,’ in such an instrument, are probably to be considered as synonymous.”³⁵⁴

Evidence for the view that “proper” adds nothing to “necessary” might be found in a clause of the Constitution that Lawson and Granger discuss in a different context. In Article II, section 3, the Constitution authorizes the President to recommend to Congress “such Measures as he shall judge necessary and expedient.”³⁵⁵ Lawson and Granger point to this provision as evidence that the term “necessary” should not be read to mean “indispensable.”³⁵⁶ Such a reading of “necessary” in Article II, section 3 would render the term “expedient” superfluous, because the latter “suggests only a minimal requirement of usefulness.”³⁵⁷ But even if we read “necessary” with the less restrictive meaning approved by *McCulloch*, it is still difficult to see the term “expedient” as contributing any additional limitation on measures the President might propose. Under what conditions could the President view a measure as “necessary,” but not consider it “expedient” in the sense of satisfying “a minimal requirement of usefulness?” If we suspect that “iteration is . . . afoot” in the “Necessary and Expedient Clause,” perhaps we should not be surprised to find iteration in the Necessary and Proper Clause as well.³⁵⁸

Nevertheless, Chief Justice Marshall’s opinion in *McCulloch* rests in part on the proposition that the terms “necessary” and “proper” place distinct limitations on the implied powers of Congress. In rejecting a constrictive definition of the term “necessary,” Marshall pointed to the conjunction of these terms in the Necessary and Proper Clause as evidence that there must be multiple “necessary” means for achieving any particular constitutional end.³⁵⁹ Otherwise, adding the propriety limitation would be “an extraordinary departure from the usual course of the human mind.”³⁶⁰ His argument assumes that the word “proper” serves the function of excluding some means that meet the constitutional standard of necessity.³⁶¹ Marshall’s reading of necessity and propriety as distinct limitations finds substantial support in the historical record, a point demonstrated by Lawson and Granger in their article.³⁶²

354. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 324 (1819).

355. U.S. CONST. art. II, § 3.

356. Lawson & Granger, *supra* note 6, at 288.

357. *Id.*

358. *Moskal v. United States*, 498 U.S. 103, 120 (1990) (Scalia, J., dissenting).

359. *See McCulloch*, 17 U.S. (4 Wheat.) at 413–16.

360. *Id.* at 418–19 (“If the word ‘necessary’ was used in that strict and rigorous sense for which the counsel for the state of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is, to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation, not strained and compressed within the narrow limits for which gentlemen contend.”).

361. *See id.*

362. Lawson and Granger cite several statements made during the eighteenth and early nineteenth centuries by persons who believed the term “proper” performed a function in the Necessary

2. *Propriety as an External Limitation on the Implied Powers of Congress*

The Supreme Court's recent case law interprets the term "proper" in the Necessary and Proper Clause to impose external state sovereignty limitations on the implied powers of Congress—an anticommandeering rule in *Printz* and a sovereign immunity principle in *Alden*. The article by Lawson and Granger, cited in *Printz*, more fully develops the theory that the propriety requirement protects state prerogatives.³⁶³ The authors argue that the propriety limitation should be read in a "jurisdictional" sense so that "a 'proper' law is one that is *within the peculiar jurisdiction or responsibility of the relevant governmental actor*."³⁶⁴ They derive this understanding from Samuel Johnson's definition of "proper" as "[p]eculiar; not belonging to more; not common,"³⁶⁵ and from evidence concerning historical usage of the term "proper."³⁶⁶ As they explain their thesis:

Congress's choice of means to execute federal powers would be constrained in at least three ways: first, an executory law [i.e., a law carrying an enumerated power into execution] would have to conform to the "proper" allocation of authority within the federal government; second, such a law would have to be within the "proper" scope of the federal government's limited jurisdiction with respect to the retained prerogatives of the states; and third, the law would have to be within the "proper" scope of the federal government's limited jurisdiction with respect to the people's retained rights. In other words, under a jurisdictional construction of the Sweeping Clause, executory laws must be consistent with principles of separation of powers, principles of federalism, and individual rights.³⁶⁷

Imposing such external limits, they believe, would confine implied powers under the Necessary and Proper Clause to those that "distinctively and peculiarly belong to the national government as a whole and to the

and Proper Clause distinct from that performed by the term "necessary." Lawson & Granger, *supra* note 6, at 289–90 & n.95.

363. *Id.* at 330–33. Lawson and Granger, however, do not address whether the term "proper" should be read to include an anticommandeering rule or a sovereign immunity principle. *See id.*

364. *Id.* at 291. Use of the term "jurisdictional" is not particularly helpful in distinguishing Lawson and Granger's interpretation of the Necessary and Proper Clause from others that might be offered. Every interpretation of the Necessary and Proper Clause must be "jurisdictional" in the sense of establishing the permissible scope of congressional action. An interpretation that places internal limits on congressional power would be no less jurisdictional than one that places external limits such as those advocated by Lawson and Granger.

365. *Id.* (quoting 2 SAMUEL JOHNSON, *DICTIONARY OF THE ENGLISH LANGUAGE* [unpaginated] (1785)).

366. *Id.* at 291–97.

367. *Id.* at 297. Perhaps a fourth category of propriety limitation could be added to those identified by Lawson and Granger, one derived from principles of international law. It is theoretically possible that, based on the views of the framing generation, one could identify and enforce principles of "proper" congressional action toward foreign nations or Indian tribes.

particular national institution whose powers are carried into execution.”³⁶⁸

Lawson and Granger cite several statements from the framing generation that they view as supporting their jurisdictional reading of the term “proper” in the Necessary and Proper Clause.³⁶⁹ For instance, Representative Ames seemingly construed the clause in this fashion when he argued in favor of the bank bill:

Congress may do what is necessary to the end for which the Constitution was adopted, provided it is not repugnant to the natural rights of man, or to those which they have expressly reserved to themselves, or to the powers which are assigned to the States That construction may be maintained to be a safe one which promotes the good of the society, and the ends for which the Government was adopted, without impairing the rights of any man, or the powers of any State.³⁷⁰

As Lawson and Granger point out, Ames argues that legislation under the Necessary and Proper Clause must not only be “necessary,” but also must not impair “the rights of any man, or the powers of any State,” which may be his rephrasing of the propriety limitation.³⁷¹

One could also read Hamilton’s discussion of the propriety requirement in Federalist No. 33 to support Lawson and Granger’s thesis.³⁷² Hamilton concluded that hypothetical federal laws overriding a state tax on land or regulating descent of property would not satisfy the requirement of propriety.³⁷³ One explanation for Hamilton’s conclusion could be that he believed it “improper,” in a constitutional sense, for Congress to interfere with certain sovereign state prerogatives. On this understanding, the propriety requirement carves out particular interests of the states, such as their interest in regulating certain topics or their interest in raising revenue, and protects those sovereign interests against incompatible federal legislation.³⁷⁴

368. *Id.* Other scholars have drawn upon Lawson and Granger’s analysis, relying on the term “proper” as a source of federalism or separation of powers restraints. See Gardbaum, *supra* note 6, at 813 n.64 (characterizing the term “proper” as placing procedural limitations on Congress when exercising power of preemption or regulating local activity that affects commerce); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1567 & n.94 (2000) (arguing that legislation limiting the grounds for a presidential veto would not be “proper” under the Necessary and Proper Clause).

369. See Lawson & Granger, *supra* note 6, at 298–308.

370. 2 ANNALS OF CONGRESS 1906 (1791); see Lawson & Granger, *supra* note 6, at 300. Lawson and Granger cite to a different version of volume 2 of the Annals of Congress. See *supra* note **.

371. 2 ANNALS OF CONGRESS 1906 (1791). He goes on to argue in favor of incorporating the Bank of the United States on the ground that it did not interfere with state or individual rights. See *id.* at 1906–07.

372. See Lawson & Granger, *supra* note 6, at 298–308.

373. See *supra* note 47 and accompanying text.

374. I will argue below that there is a better reading of Hamilton’s position that would not support Lawson and Granger’s thesis. See *infra* notes 400–02 and accompanying text.

A handful of other early discussions of the Necessary and Proper Clause also arguably treat the term “proper” as imposing external limitations on implied congressional powers.³⁷⁵ Thus, Lawson and Granger cite a letter by *An Impartial Citizen*, published during the debates over ratification, that invoked the propriety requirement to counter George Mason’s attack on the Necessary and Proper Clause.³⁷⁶ The author argued that laws “granting commercial monopolies, inflicting unusual punishments, creating new crimes, or commanding any unconstitutional act . . . would be manifestly not proper.”³⁷⁷ Similarly, shortly before *McCulloch*, a member of Congress argued that a congressional power to construct roads, in addition to being unnecessary, “is not ‘proper,’ because it must conflict with the authority of the States to construct their own roads.”³⁷⁸

At the same time, it must be said that the historical evidence for treating the propriety requirement as an external limitation on congressional power seems relatively thin. Significantly, such a reading of the Necessary and Proper Clause was not offered in the context one would most expect. One of the most politically powerful arguments against the proposed Constitution was the omission of a Bill of Rights.³⁷⁹ Assuming Lawson and Granger are correct, the Necessary and Proper Clause effectively incorporates many of the same protections as a Bill of Rights when it authorizes only legislation that is “proper.” If readers of the proposed Constitution shared Lawson and Granger’s view of the term “proper,” one would expect calls for a Bill of Rights to be met with the claim that the document already incorporated such protections. Instead, proponents of the Constitution made the less reassuring argument that Congress had been given no power to undermine cherished individual free-

375. See generally Lawson & Granger, *supra* note 6, at 298–308.

376. *An Impartial Citizen V.*, PETERSBURG VA. GAZETTE, Feb. 28, 1788 [hereinafter *An Impartial Citizen*], reprinted in 8 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 38, at 431; Lawson & Granger, *supra* note 6, at 299.

377. *An Impartial Citizen*, *supra* note 376, at 431.

378. 31 ANNALS OF CONG. 1141 (1818) (Rep. Smyth). Lawson and Granger also cite other early statements as support for their thesis. Representative Niles, for instance, objected to a construction of the terms “necessary” and “proper” that would permit legislation allowing mail carriers to also carry paying passengers. Lawson & Granger, *supra* note 6, at 300 (quoting 3 ANNALS OF CONG 309–10 (1792)). However, although Niles apparently thought such legislation “improper” in a constitutional sense, and believed it would interfere with rights of the states, he did not explicitly offer a construction of the term “proper” as an external limitation on implied congressional powers. *Id.* at 300–01. Counsel for the defendant in error in *United States v. Bryan and Woodcock*, 13 U.S. (9 Cranch) 374, 376–79 (1815), argued that retrospective civil legislation is not “proper,” thus arguably reading the term to incorporate protection of individual rights. See Lawson & Granger, *supra* note 6, at 303–04. Andrew Jackson’s message explaining his veto of bank legislation also supports reading the propriety limitation to include external limits on implied congressional powers. See *id.* at 306–08; *infra* notes 384–90 and accompanying text. Two other sources cited by Lawson and Granger, in my view, actually support an internal-limitation reading of the propriety requirement and will be discussed in the sections that follow. See *infra* notes 403–04 and accompanying text (discussing the commentary of St. George Tucker); see also *infra* notes 410–39 and accompanying text (discussing the *McCulloch* opinion); Lawson & Granger, *supra* note 6, at 301–06.

379. See *Letter from the Federal Farmer to the Republican No. IV*, reprinted in 2 COMPLETE ANTI-FEDERALIST, *supra* note 37, § 2.8.49, at 247; § 2.8.196, at 324; § 2.8.197, at 325.

doms, such as freedom of speech.³⁸⁰ Given the prominence of the omission of a Bill of Rights in the debate over the proposed Constitution, it is telling that so little evidence exists for the proposition that the Necessary and Proper Clause incorporates principles of federalism and individual liberty.

There are also several conceptual and practical difficulties that could arise from treating the propriety requirement as a guardian of extrinsic interests, such as unenumerated individual rights or principles of federalism. First, the Necessary and Proper Clause limits only the legislative powers of the federal government, rather than those of the states. Thus, even if the term “proper” could serve as a basis for enforcing certain principles of individual liberty against Congress, those rights would not bind the states absent some additional theory.³⁸¹ Second, the propriety limitation of the Necessary and Proper Clause does not apply to express powers of Congress. Thus, legislation that directly exercised an enumerated power without invoking the Necessary and Proper Clause would not be restricted by principles found to reside in the term “proper.” An odd dichotomy could arise in which persons and states would possess greater rights when Congress acted pursuant to the Necessary and Proper Clause than when it directly exercised its enumerated powers.³⁸² Third, the Necessary and Proper Clause does not directly restrain the Executive or the Judiciary (though it may affect legislation concerning those branches). Thus, principles of individual liberty or federalism discovered in the Necessary and Proper Clause would not logically apply to actions taken by the President or the federal courts.

380. See, e.g., THE FEDERALIST NO. 84, at 579–80 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 38, at 454–55 (James Wilson) (“[I]t is very true, sir, that this Constitution says nothing with regard to [liberty of the press], nor was it necessary, because it will be found that there is given to the general government no power whatsoever concerning it; and no law in pursuance of the Constitution can possibly be enacted to destroy that liberty.”). It was further argued that a Bill of Rights would be dangerous in suggesting that the Congress had been delegated more power than it in fact possessed. THE FEDERALIST NO. 84, at 579–80 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

381. This limitation is not necessarily insurmountable. Perhaps there is a theory that would permit incorporation of selected propriety limitations against the states in a manner similar to incorporation of the Bill of Rights.

382. Lawson and Granger argue that the propriety requirement provided constitutional protection for freedom of the press prior to adoption of the First Amendment. See Lawson & Granger, *supra* note 6, at 324. They concede that the propriety standard would not bar “[a] bare prohibition stating that ‘it shall be unlawful to ship, in interstate commerce, printed material that criticizes Congress.’” *Id.* To circumvent this difficulty, they argue that the propriety requirement would prevent any attempt to enforce the prohibition on shipments, because enforcement would require invocation of the Necessary and Proper Clause. *Id.* But what about a copyright statute protecting only works of authorship that did not criticize Congress? Because federal copyright protection requires affirmative action by Congress, a discriminatory failure to protect certain works based on content would seem to evade any protection offered by the propriety standard of the Necessary and Proper Clause. This particular hypothetical is academic today, given the adoption of the First Amendment, but it illustrates the patchwork protection that might arise from ascribing substantive content to the propriety requirement of the Necessary and Proper Clause when similar protection would not apply to a statute directly implementing an enumerated power.

A final difficulty arising from the sort of propriety review envisioned by Lawson and Granger is that it may raise the “countermajoritarian difficulty” in an extreme form.³⁸³ Absent a neutral and principled methodology for defining the content of the term “proper,” the word constitutes an empty glass into which one may pour whatever social, economic or political theory one desires. A source cited by Lawson and Granger illustrates this danger: Andrew Jackson’s message explaining his veto of a bill to extend the charter of the second Bank of the United States.³⁸⁴ Even granting the authority of *McCulloch*, Jackson found at least six different ways that the bill violated the propriety limitation of the Necessary and Proper Clause: (1) extending the exclusivity of the bank’s federal charter was improper because it would limit the discretion of future congresses;³⁸⁵ (2) the same provision was also improper because it would undermine the congressional power to make laws for the District of Columbia “in all cases whatsoever;”³⁸⁶ (3) authorizing real estate purchases by a bank with foreign members was improper because it disregarded state laws precluding foreign ownership of land and was “vitally subversive of the rights of the States;”³⁸⁷ (4) allowing a bank partially owned by the United States to purchase land was improper, because it circumvented perceived constitutional restrictions on federal land purchases;³⁸⁸ (5) authorizing the bank to determine the location of its branches was improper, because this should be decided by the government,³⁸⁹ and (6) the legislation was improper because it failed to subject the bank to state taxation, an essential reserved power of the states.³⁹⁰

Even if Jackson made some arguable points, the veto message as a whole reflects a casual invocation of the propriety limitation. The word “improper” provided a convenient constitutional label that Jackson could attach to any provision he disliked on policy grounds. Jackson’s veto message illustrates the danger of an undisciplined approach to the propriety limitation and suggests the need for caution should the Court continue down the interpretive path taken in *Printz* and *Alden*.

383. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–23 (2d ed. 1986).

384. Andrew Jackson, Veto Message (July 10, 1832), reprinted in 2 *COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS* 576 (James D. Richardson ed., 1896).

385. *Id.* at 583–84.

386. *Id.* The bank legislation contained a provision permitting establishment of banks in the District of Columbia, but limiting the total permissible capitalization of those banks. *Id.* at 583.

387. *Id.* at 585.

388. *Id.* As Jackson read the Constitution, the United States could only purchase land with the consent of the state where it was located and could only make such purchases “for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.” U.S. CONST. art. I, § 8, cl. 17.

389. Jackson, *supra* note 384, at 585–86. He argued that the government best knows where branches would serve the public functions that made the bank “necessary” under the Necessary and Proper Clause. *Id.*

390. *Id.* at 586–88.

3. *Propriety as an Internal Limitation on the Means-End Relationship*

Lawson and Granger conceive of the propriety limitation as an external restraint on the implied powers of Congress, designed to implement principles of federalism, separation of powers, and individual liberty.³⁹¹ The Supreme Court accepted a portion of this thesis in *Printz* and *Alden*, reading the term “proper” to incorporate particular federalism-based restraints on congressional enactments.³⁹² Though some historical evidence supports Lawson and Granger’s approach, the stronger evidence points toward treatment of the propriety limitation as an internal restraint, intended to ensure a “proper” fit between a measure adopted by Congress and the constitutional end the measure purports to pursue. The propriety of a law does not depend on whether it interferes with unenumerated rights of states, individuals or other federal actors, but rather on whether Congress has selected a *proper* means *in light of the nature of the constitutional power invoked*.

The internal restraint construction flows more naturally from the text of the Necessary and Proper Clause. Laws enacted under this provision must be necessary and proper “*for carrying into Execution*” the powers of the federal government.³⁹³ This language favors treatment of “proper” as a means-end regulator. The constitutional rule is that the law (the means) must be proper for executing a particular power (the end). The Lawson and Granger approach asks whether a legislative measure is *proper to* a government actor in the sense of being within that actor’s proper jurisdiction. But the clause itself focuses on whether legislation is *proper for* the purpose of carrying a given power into execution. The text thus appears to address the relationship between the legislation and the legislative end in view, rather than, say, the relationship between Congress and the states. This inference is strengthened by the fact that the companion term “necessary” is understood to regulate the means-end relationship.³⁹⁴

Turning to the historical evidence, we find numerous early expositions of the Necessary and Proper Clause that treat the propriety requirement as an internal restraint on the means-end relationship.³⁹⁵ For instance, in his speech to the House on the bank legislation, Madison un-

391. Lawson & Granger, *supra* note 6, at 297.

392. *Alden v. Maine*, 527 U.S. 706, 732 (1999); *Printz v. United States*, 521 U.S. 898, 923–24 (1997).

393. U.S. CONST. art. I, § 8, cl. 18.

394. If the term “proper” had the jurisdictional meaning attributed to it by Lawson and Granger, the clause might instead have been phrased in terms of power to adopt laws “necessary for carrying into execution the foregoing powers, or any other power vested in the Government of the United States, or a Department or Officer thereof, and within the proper jurisdiction of Congress or the Department or Officer to whom the legislation relates.”

395. This section contains expositions of the Necessary and Proper Clause prior to the decision in *McCulloch* that treat propriety as an internal means-end restraint. Additional evidence post-dating the *McCulloch* decision appears in the next section of the text.

derstood the Necessary and Proper Clause to limit Congress “to means necessary to the end, and *incident to the nature of the specified powers*.”³⁹⁶ He condemned the exercise of any power by Congress “which is not *evidently and necessarily involved in an express power*.”³⁹⁷ In these formulations, Madison uses the phrases “incident to the nature of the specified power” and “evidently . . . involved in an express power” in place of the term “proper” in the Necessary and Proper Clause.³⁹⁸ Each formulation purports to limit the legislature to selection of means that are somehow consistent with the nature of the power from which the constitutional end derives. Neither formulation makes any reference to protection of state or individual rights.³⁹⁹

As discussed above, Hamilton’s Federalist No. 33 invoked the propriety limitation in rejecting hypothetical federal legislation displacing state rules for descent of property or abrogating state authority to collect real estate taxes.⁴⁰⁰ At first blush, this might be read to support Lawson and Granger’s understanding of the propriety requirement as protecting certain sovereign interests of the states. But the language of Federalist No. 33 seems instead to support the means-end understanding of “proper” advocated here. Hamilton indicated that “[t]he *propriety* of a law in a constitutional light, *must always be determined by the nature of the powers upon which it is founded*.”⁴⁰¹ He quite clearly described the focus of the propriety inquiry as the nature of the power implemented by particular legislation, rather than extrinsic matters such as state and individual rights.⁴⁰²

396. 2 ANNALS OF CONG. 1898 (1791) (Madison) (emphasis added).

397. *Id.* at 1899 (emphasis added).

398. *Id.* at 1898–99.

399. Indeed, Madison specifically denied that one should consider “[i]nterference with the power of the States” in determining the reach of congressional power under the Necessary and Proper Clause: “Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States.” *Id.* at 1897.

400. See *supra* notes 47–48 and accompanying text.

401. THE FEDERALIST NO. 33, at 206 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added).

402. Hamilton’s bank opinion did suggest consideration of state and individual rights as part of the constitutional analysis, but not in the manner suggested by Lawson and Granger. He proposed testing the constitutionality of implied congressional powers by asking whether a measure passed by Congress bore an “obvious relation” to an end “clearly comprehended within any of the specified powers,” Hamilton Opinion, *supra* note 19, at 99, i.e., a test of the means-end relationship. See also *id.* at 98 (“The relation between the *measure* and the *end*; between the *nature* of the *mean* employed towards the execution of a power, and the *object* of that power; must be the criterion of constitutionality; not the more or less of necessity or utility.”). The constitutional analysis could be “materially assist[ed],” he said, by considering whether a law “abridge[d] a preexisting right of any State, or of any individual.” *Id.* at 99. However, this inquiry would merely determine the strictness with which one would scrutinize the means-end relationship. In the absence of any impact on state or individual rights, there would be a “strong presumption” of constitutionality, and “slighter relations to any declared object of the constitution may be permitted to turn the scale.” *Id.* at 99–100. Thus, external considerations of state and individual rights were relevant, but only in varying the intensity with which the internal restraints on the means-end relationship would be applied.

Lawson and Granger also cite St. George Tucker in support of their reading of the propriety requirement.⁴⁰³ Again, however, his comments seem to offer more support for an internal restraint construction than for the Lawson and Granger view. Tucker indicated that if a power is not expressly given to Congress, the power can only be exercised if “it is *properly* an incident to an express power, and *necessary* to its execution.”⁴⁰⁴ He thus conceived of the propriety limitation as concerned with the relationship between the implied power asserted by Congress (the means) and the express power relied upon for support (the end).

Likewise, statements made during the 1811 congressional debate over rechartering the bank point to construction of the propriety requirement as an internal means-end restraint. Representative Barry argued that to be “proper,” an incidental power “must be appropriate, and confined to the end in view.”⁴⁰⁵ Representative Clay seemed to read the term “proper” as requiring that an implied power “obviously flow” from an enumerated power.⁴⁰⁶ Such formulations interpret the term “proper” as a standard governing the relationship between congressional means and constitutional ends. Extrinsic considerations relating to federalism or individual rights play no role.⁴⁰⁷

Even in the oral argument in *McCulloch*, the propriety requirement was described in terms of an internal means-end restraint. One of the attorneys for Maryland argued that a congressional means “must be, not merely convenient—fit—adapted—proper, to the accomplishment of the end in view; it must likewise be necessary for the accomplishment of that end.”⁴⁰⁸ Thus, both the text of the Necessary and Proper Clause and the strongest explanatory evidence in the period preceding *McCulloch* favor

403. Lawson & Granger, *supra* note 6, at 301–03.

404. Tucker’s Appendix, *supra* note 8, at 288 (emphasis added).

405. 22 ANNALS OF CONG. 696 (1811) (Rep. Barry).

406. 22 ANNALS OF CONG. 211 (1811) (Rep. Clay) (“It is said that there are cases in which it must act on implied powers. This is not controverted, but the implication must be necessary, and obviously flow from the enumerated power with which it is allied.”).

407. One representative appeared to understand the term “proper” both to regulate the means-end relationship *and* to require conformity to external constitutional standards. 22 ANNALS OF CONG. 296 (1811) (“The signification of the word *proper* I take to contain the description of the measure or law to which it is applied, in the following respects: whether the law is in conformity to the letter, the spirit, and the meaning of the Constitution; whether it will produce the good end desired in the most ready, easy, and convenient mode, that we are acquainted with.”).

408. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 367 (1819) (oral argument of Jones). Interestingly, Jones viewed necessity as the stricter of the two requirements. *Id.* The oral argument of the Attorney General on behalf of the bank also points to a means-end analysis:

The court, in inquiring whether congress had made a selection of constitutional means, is to compare the law in question with the powers it is intended to carry into execution; not in order to ascertain whether other or better means might have been selected, for that is the legislative province, but to see whether those which have been chosen have a natural connection with any specific power; whether they are adapted to give it effect; whether they are appropriate means to an end.

Id. at 357. Notice that the Attorney General used the word “appropriate” in a means-end context. It will be argued below that “appropriate” is a synonym for “proper.” See *infra* notes 413–18 and accompanying text.

reading the propriety requirement to impose an internal restraint. While various phrases were used to articulate the propriety limitation, they commonly required a natural fit between the means chosen and the end pursued.⁴⁰⁹ The next section will argue that *McCulloch* itself implicitly adopted such an understanding of the propriety requirement.

4. *The Propriety Requirement in McCulloch*

Chief Justice Marshall did not explicitly define the term “proper” in *McCulloch*. Though he indicated that “necessary” and “proper” create distinct requirements, he nowhere explained the latter restriction. Lawson and Granger suggest therefore that *McCulloch* is not “a definitive discussion of the Sweeping Clause,” but “at best only a starting point.”⁴¹⁰ On this view, one may look to *McCulloch* for the meaning of the term “necessary,” but must look elsewhere for the meaning of “proper.”

Marshall himself, on the other hand, believed that *McCulloch* had addressed both the necessity and propriety requirements. For instance, in the *Friend of the Constitution* essays, he conceded that “the court may be mistaken in the ‘propriety and necessity’ of” the bank.⁴¹¹ The concession only makes sense on the assumption that *McCulloch* resolved both the issues of propriety and necessity. Or consider once again the test offered by Marshall for evaluating assertions of congressional power: “Let the end be legitimate, let it be within the scope of the constitution, and *all means* which are appropriate, which are plainly adapted to the end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”⁴¹² According to this passage, “all means” meeting the stated requirements “are constitutional.” The Court could employ this phrasing only if it was setting forth a comprehensive constitutional standard. Marshall could not have written this language if he believed there was an additional propriety requirement not covered in this formulation.

How then does the *McCulloch* opinion address the propriety limitation? Notice that Marshall’s test requires Congress to employ “means which are *appropriate*” to a legitimate end. Lawson and Granger recognize that the framing generation sometimes used the term “proper” to mean “appropriate.”⁴¹³ The evidence suggests that Marshall used “appropriate” here, and perhaps other language in the opinion as well, to

409. James Monroe, Veto Message (May 4, 1822), *reprinted in* 2 COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 173 (James D. Richardson ed., 1896) (noting that congressional power must be executed “by laws necessary and proper for the purpose—that is, well adapted to the end”).

410. Lawson & Granger, *supra* note 6, at 288–89.

411. *A Friend of the Constitution* No. 5, *supra* note 17, at 190.

412. *See McCulloch*, 17 U.S. (4 Wheat.) at 421 (emphasis added).

413. *See* Lawson & Granger, *supra* note 6, at 292 & n.107.

express his understanding of the propriety requirement.⁴¹⁴ Elsewhere in *McCulloch*, Marshall argued that Congress needs the power to adopt any means “which might be *appropriate*, and which were *conducive to* the end.”⁴¹⁵ Because “conducive to” is one of Marshall’s definitions for “necessary,”⁴¹⁶ “appropriate” in this sentence correlates with “proper” in the Necessary and Proper Clause. The phrase “appropriate, and . . . conducive to” is another way of saying “proper and necessary.”⁴¹⁷

This section argues, then, that Marshall’s test of the constitutionality of legislation already incorporates the propriety limitation when it requires Congress to choose means “appropriate” to a constitutional end. If this is true, then *McCulloch* reads the term “proper” in the Necessary and Proper Clause to impose an internal limitation on the means-end relationship. The propriety of legislation derives from its relation to a legitimate constitutional end, and extrinsic considerations of federalism, separation of powers, or individual liberty play no part in the evaluation.⁴¹⁸

The commentaries of Justice Joseph Story, a member of the *McCulloch* Court, provide powerful evidence for this reading of the opinion. Story’s discussion of the Necessary and Proper Clause largely reiterated the reasoning and conclusions of *McCulloch*.⁴¹⁹ He defined “proper” in the course of arguing that the word “necessary” should be given a broad construction: “[I]f the intention was to use the word ‘necessary’ in its more liberal sense, then there is a peculiar fitness in the other word [i.e., ‘proper’]. It has a sense at once admonitory, and directory. It requires, that the means should be, *bona fide*, appropriate to the end.”⁴²⁰ Story’s discussion confirms that *McCulloch*’s requirement of a means “appropriate” to the end corresponds to the term “proper” in the Necessary and Proper Clause.⁴²¹

414. “Appropriate” and “proper” are synonymous terms. See 1 OXFORD ENGLISH DICTIONARY 586 (2d ed. 1989) (including “proper” among definitions for “appropriate”).

415. *McCulloch*, 17 U.S. (4 Wheat.) at 415 (emphasis added).

416. *Id.* at 418.

417. Consider likewise the following passage from the opinion: “But were [the bank’s] *necessity* less apparent, none can deny its being an *appropriate* measure; and if it is, the degree of its *necessity*, as has been very justly observed, is to be discussed in another place.” *Id.* at 423 (emphasis added). This phrasing treats “necessary” and “appropriate” as separate standards. A measure may be appropriate, even if its necessity is not apparent.

418. Such considerations may impact the constitutionality of a measure passed by Congress. *McCulloch* indicates, after all, that a measure must “consist with the letter and spirit of the constitution.” See *McCulloch*, 17 U.S. (4 Wheat.) at 421. My point is simply that such considerations do not relate to the *propriety* of the measure under the Necessary and Proper Clause.

419. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 600–618 (Carolina Academic Press 1987) (1833).

420. *Id.* § 613.

421. Subsequent decisions of the Supreme Court also appear to understand *McCulloch*’s requirement of “appropriate” means as a reference to the propriety limitation of the Necessary and Proper Clause. For instance, the Court has indicated that the power of Congress “extends to such control over intrastate transactions . . . as is *necessary and appropriate* to make the regulation of the interstate commerce effective.” *United States v. Wrightwood Dairy*, 315 U.S. 110, 121 (1942) (emphasis added); see also *Houston, E. & W. Texas Ry. Co. v. United States*, 234 U.S. 342, 353 (1914) (Congress

Lawson and Granger define “proper” to mean “peculiar.”⁴²² Consistent with their external restraint interpretation of the propriety limitation, they ask whether a measure is “within the peculiar jurisdiction or responsibility of the relevant governmental actor.”⁴²³ Interestingly, Judge Roane in his *Hampden* essays also used “peculiar” as a synonym for “proper.”⁴²⁴ Unlike Lawson and Granger, however, Roane read the propriety requirement as an internal means-end limitation, arguing that an implied power “must be one which is . . . proper, that is peculiar to [a constitutional] end,”⁴²⁵ or “‘peculiar’ to the execution of a given power.”⁴²⁶ In responding to Roane’s essays, Marshall likewise argued that congressional means should be “peculiar” to a particular constitutional end.⁴²⁷ Marshall attributed this peculiarity requirement to the term “appropriate” in the *McCulloch* opinion.⁴²⁸ The fact that Marshall defined “appropriate” the same way Roane defined “proper” provides additional evidence that the requirement of appropriate means constituted Marshall’s rendering of the propriety limitation. Moreover, the definition given by Marshall confirms that *McCulloch* interpreted the propriety limitation as an internal restraint on the means-end relationship.

Assuming *McCulloch* used the term “appropriate” as a stand-in for “proper” in the Necessary and Proper Clause, we should next consider what *McCulloch* contemplates when it insists on means “appropriate” to a constitutional end. What is the content of the propriety limitation, and how does it relate to the standard of necessity? Most students of *McCulloch* concur that the opinion defines “necessary” to impose only a relatively minimal requirement of a means-end or “telic” relationship.⁴²⁹ To meet the constitutional standard of necessity, a measure passed by Congress must merely be conducive to the achievement of some constitutional end.⁴³⁰ It would seem to follow, then, that any internal restraint on implied congressional powers in *McCulloch*, beyond the bare require-

may “foster and protect interstate commerce,” and “take all measures *necessary or appropriate* to that end”) (emphasis added).

422. Lawson & Granger, *supra* note 6, at 291.

423. *Id.*

424. *Hampden No. 3, supra* note 152, at 133.

425. *Id.* at 131.

426. *Id.* at 133. Another formulation by Roane also points to the propriety requirement as an internal, means-end requirement. *Id.* at 122–23 (“[T]he only enquiry is whether the power is properly an *incident* to an express power and *necessary* to its execution.”). *Amphictyon*’s version of the propriety requirement similarly regulates the means-end relationship. *Amphictyon No. 2, supra* note 151, at 66 (speculating that if the term “necessary” were omitted, “Congress might have made all laws which might be ‘proper,’ that is *suitable*, or *fit*, for carrying into execution the other powers”).

427. *A Friend to the Union No. 2, supra* note 17, at 101–02.

428. *Id.*

429. *See, e.g.,* ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 172 (1997) (“*Necessary* here means useful or desirable, not indispensable or essential.”); DAVID E. ENGBAHL, CONSTITUTIONAL FEDERALISM IN A NUTSHELL 20–21 (2d ed. 1987); STORY, *supra* note 419, § 608, at 437 (“To employ the means, necessary to an end, is generally understood, as employing any means calculated to produce the end . . .”).

430. *See* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 418 (1819).

ment of a means-end relationship, must derive from the propriety limitation.

McCulloch views necessity as an issue primarily for the legislature. If proponents of a measure make some minimal showing that it will tend toward achieving a legitimate constitutional end, they have satisfied the judicially enforceable component of the necessity requirement, and the degree of necessity becomes a question committed to the discretion of Congress. However, *McCulloch* also imposes other internal restraints on implied congressional powers, requiring the relationship between congressional means and constitutional ends to be direct, plain, and bona fide.⁴³¹ From what language does Marshall derive these requirements, if not from the word “proper”? They certainly are not required by any definition Marshall offers for the term “necessary.” To be “necessary,” then, a measure must merely be “adapted to” or “conducive to” the end, and the content of the necessity limitation is otherwise committed to the discretion of Congress. But to be “proper,” the measure must be “appropriate,” “plainly adapted to,” and “really calculated to” achieve the end, requirements which are subject to judicial review.

Reading these latter limitations from *McCulloch* as components of the propriety inquiry accords with other expositions of the propriety standard from the same time period. Recall that Justice Story explicitly connected the propriety limitation with a requirement of good faith, defining a “proper” means as one “*bona fide*, appropriate to the end.”⁴³² Additional support for this understanding of the propriety limitation derives from the 1811 speech of Representative Barry on the issue of re-chartering the bank:

The incidental power to be exercised must not only be necessary, but proper; that is, it must be appropriate, and confined to the end in view. If it goes beyond it; if it involves the exercise of a power that tends to create a distinct and substantive thing, which, in its important operations, is entirely distinct from, and independent of the power to the execution of which it was designed as a mean, it would most certainly be improper. Such an exercise of power would, in truth, be usurpation, and the end proposed becomes a mere pretence for the unwarrantable assumption of power.⁴³³

Representative Barry not only used the term “appropriate” as a surrogate for “proper,” but he also viewed the propriety standard as requiring something akin to the “pretext” review promised by *McCulloch*.⁴³⁴

431. See *supra* notes 203–17 and accompanying text.

432. See *supra* note 420 and accompanying text.

433. 22 ANNALS OF CONG. 696 (1811) (Rep. Barry).

434. See *McCulloch*, 17 U.S. (4 Wheat.) at 423. We know that Marshall had read the congressional debates concerning the initial incorporation of the bank. *A Friend of the Constitution* No. 3, *supra* note 17, at 175. It is not implausible, then, that he would also be familiar with the congressional debates on reincorporation of the bank.

Early discussions of the propriety requirement also anticipated *McCulloch*'s plainness limitation. As noted above, Madison believed Congress could invoke only those implied powers “*evidently* and necessarily involved in an express power.”⁴³⁵ Likewise, Representative Clay appeared to read the propriety limitation as incorporating a plainness component, arguing that an implied power must “*obviously* flow” from an enumerated power.⁴³⁶

If this analysis is correct, then *Lopez* and *Morrison* would appear to rest on a conclusion that regulation of school-zone gun possession and gender-motivated violence is not a “proper” means of carrying the commerce power into execution.⁴³⁷ On the other hand, the construction of the Necessary and Proper Clause offered in *Printz* and *Alden* would be inconsistent with *McCulloch*. These modern cases read the term “proper” to place external federalism-based restraints on the means chosen by Congress, while *McCulloch* construed the same word as an internal restraint on the means-end relationship.

This does not necessarily mean that *Printz* and *Alden* were wrongly decided, or even that the holdings of those cases are inconsistent with *McCulloch*. It may be that the federalism principles applied in *Printz* and *Alden* can be derived from the constitutional structure and enforced against Congress without any explicit textual basis. *McCulloch* itself recognized that there are structural principles implicit in the Constitution when it precluded Maryland from taxing a federally chartered bank.⁴³⁸ The Court acknowledged that actions by Congress might also violate the “spirit” of the Constitution.⁴³⁹ However, to the extent that *Printz* and *Alden* seek to ground their decision in the propriety requirement of the Necessary and Proper Clause, this analysis suggests that the decisions are inconsistent with *McCulloch* and with the sounder construction of the provision from a historical standpoint.

IV. CONCLUSION

Chief Justice Marshall predicted in *McCulloch* that “the question respecting the extent of the powers actually granted [to the federal government] will probably continue to arise, so long as our system shall exist.”⁴⁴⁰ Over 180 years of subsequent constitutional history attests to the accuracy of his prediction. We can expect that question to continue aris-

435. 2 ANNALS OF CONG. 1899 (1791) (Rep. Madison).

436. 22 ANNALS OF CONG. 211 (1811) (Rep. Clay) (“It is said that there are cases in which it must act on implied powers. This is not controverted, but the implication must be necessary, and obviously flow from the enumerated power with which it is allied.”).

437. See *supra* notes 262–74, 288–94 and accompanying text.

438. *McCulloch*, 17 U.S. (4 Wheat.) at 425–36.

439. *Id.* at 421.

440. *Id.* at 405.

ing precisely because “it is a *constitution* we are expounding.”⁴⁴¹ The Framers inscribed in the document only the “important objects” of our system of government and left “the minor ingredients which compose those objects [to] be deduced from the nature of the objects themselves.”⁴⁴² Marshall’s generation debated whether those “minor ingredients” included a congressional power to incorporate a bank or to build roads and canals. The current generation debates whether the power to regulate guns near schools or gender-motivated violence, or to enlist state officials in federal regulatory efforts or subject states to litigation by individuals, can be deduced from the “great outlines” of the Constitution.⁴⁴³ So the issues change from year to year. But in a deeper sense, the underlying themes of the discussion remain the same, because the discussion is bounded by the commitments the members of the framing generation made to one another for the benefit of their posterity.

441. *Id.* at 407.

442. *Id.*

443. *Id.*

