THE "PROPER" SCOPE OF FEDERAL POWER: A JURISDICTIONAL INTERPRETATION OF THE SWEEPING CLAUSE

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> 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.[1]

INTRODUCTION

The year is 1790—shortly after ratification of the Federal Constitution. Imagine that the newly formed U.S. Congress, pursuant to its constitutionally enumerated power to "establish Post Offices and post Roads,"[2] authorizes construction of a post road between Baltimore and Philadelphia.[3] Suppose further that the

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

2. *Id.* cl. 7.

3. We are assuming, as would virtually everyone today, that the power to "establish . . . post Roads" authorizes the *construction* of new roads as well as the *designation* of existing roads as routes for the carriage of mail. The Founders did not universally accept this view. *See* Letter from Thomas Jefferson to James Madison (Mar. 6, 1796), *in* 3 THE FOUNDERS' CONSTITUTION 28 (Philip B. Kurland & Ralph Lerner eds., 1987) (suggesting that the postal power encompasses only the power to "*select* from those [roads] already made, those on which there shall be a post"). Indeed, government officials were still vigorously debating this question into the nineteenth century. *Compare* James Monroe, Views of the President of the United States on the Subject of Internal Improvements (1822), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE

most convenient route runs straight through, for example, Mrs. Barrington's cow pasture. Mrs. Barrington values her cows' serenity and strongly urges the government to build its road around her pasture. Congress nonetheless enacts a statute instructing the President and his subordinates to build the road across Mrs. Barrington's land. The enabling statute does not authorize compensation for Mrs. Barrington for the loss of her property, nor does she receive compensation through a private bill or any other legislatively authorized source.[4] Is the statute constitutional?

Today, it is tempting to answer "no" on the simple ground that the Fifth Amendment flatly prohibits the national government from taking "private property . . . for public use, without just

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PRESIDENTS, 1787–1897, at 142, 156–59 (James D. Richardson ed., 1896) (doubting Congress's power to construct post roads); 30 ANNALS OF CONG. 897 (1817) (reporting that Representative Barbour "had always considered that nothing else was intended by [the postal power], than an authority to designate and fix the mail routes"); *and* 31 ANNALS OF CONG. 1141 (1818) (statement of Representative Smyth denying that Congress has power to construct post roads) *with id.* at 1130 (statement of Representative Smith that "the power to establish post roads is not merely that of pointing them out, but of opening and making them efficient"). At least one U.S. Supreme Court Justice doubted Congress's power to build roads as late as 1845. *See* Searight v. Stokes, 44 U.S. (3 How.) 151, 181 (1845) (Daniel, J., dissenting) ("I believe that the authority vested in Congress by the Constitution to establish post-roads, confers no right to open new roads."). Nonetheless, in 1833, Joseph Story confidently (if erroneously) declared that "[n]obody doubts, that the words 'establish post-roads,' may . . . be construed so, as to include the power to lay out and coustruct roads," JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1144 (1833), and the Kentucky Court of Appeals strongly endorsed Story's construction of the postal power in dictum five years later. *See* Dickey v. Maysville, Washington, Paris & Lexington Turnpike Rd. Co., 37 Ky. (7 Dana) 113, 125–28, 134–35 (1838); *cf.* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, at 275 n.298 (1985) (claiming that the majority in *Searight v. Stokes* approved in dictum a congressional power to construct post roads). The text of the Constitution supports advocates of congressional power to construct new roads. The constitutional provisions granting Congress power to "*establish* an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies," U.S. CONST. art. I, § 8, cl. 4 (emphasis added), and referring to "such inferior Courts as the Congress may from time to time ordain and *establish*," *Id.* art. III, § 1 (emphasis added), surely contemplate that Congress will *create* such rules, laws, and courts, respectively; there is no reason to suppose that the word "establish" has a different meaning in the Postal Clause. For an extensive discussion of the debates over the power to construct post roads, see Lindsay Rogers, *The Postal Power of Congress: A Study in Constitutional Expansion, in* 34 JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE 61 (1916).

4. Mrs. Barrington could be compensated for her land only if Congress appropriated funds for that purpose; the President or the courts conld not unilaterally decide to compensate her. *See* U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

compensation."[5] The Fifth Amendment, however, was not ratified, and thus had no legal effect, until December 15, 1791. The question for Mrs. Barrington under these circumstances in 1790 is whether, *before ratification of the Bill of Rights*, Congress could constitutionally take property without providing just compensation. Similar questions would arise if Congress in 1790 authorized the issuance of general warrants to search Mrs. Barrington's farm, imposed a prior restraint on her criticism of the government's actions, or violated other widely acknowledged individual rights or principles of governmental structure that the constitutional text does not expressly protect.

Modern constitutional scholars would likely address Mrs. Barrington's problem in one of two ways. Some scholars, including some textualists, might conclude that because the unamended Constitution contained no express limitation on Congress with respect to the taking of property, no such limitation existed in 1790. In contrast, other scholars might insist that such a limitation was part of the natural law background against which the Constitution was enacted and that an uncompensated taking of Mrs. Barrington's land therefore would have violated the "unwritten constitution."[6] Mrs. Barrington would seem to be faced with a choice between fidelity to constitutional text and a contented herd.

There is, however, another possibility that resolves Mrs. Barrington's dilemma. Neither of the views described above identifies the constitutional *source*, if any, of Congress's power to condemn land and thus never asks whether that source contains

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5. *Id.* amend. V.

6. *See* Thomas C. Grey, *The Original Understanding and the Unwritten Constitution, in* TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION 145 (Neil L. York ed., 1988); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987). *But cf.* Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C. L. REV. 421 (1991) (questioning whether the relevant historical sources sustain Grey's and Sherry's conclusions about the role of unwritten law in judicial decisions). Conceivably, such natural law scholars also could maintain that protection against uncompensated takings was not sufficiently fundamental in 1789 to be part of the unwritten constitution. *See* William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985) (arguing that the inclusion of just compensation requirements in the Bill of Rights and contemporaneous state constitutions was a product of then-recent liberal ideology). This escape hatch can be closed by adding to our example, as discussed above, the issuance of a general warrant to search Mrs. Barrington's farm or the imposition of a prior restraint on her speech.

internal, textual limits on the condemnation power. Perhaps the unamended constitutional text does indeed contain a just compensation requirement, but in a subtler form than textualists have thus far recognized.

The power of eminent domain is not among Congress's explicitly enumerated powers. Nor did the Fifth Amendment's Takings Clause confer this power in 1791; the clause does not confer any governmental power, but rather limits an assumed, preexisting power of eminent domain.[7] If the eminent domain power exists at all in the national government,[8] it stems—both in 1790 and today—from the constitutional grant of power to Congress "[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."[9]

Although the Framers, adopting the terminology of the anti-federalists, called this provision the "Sweeping Clause,"[10] it is not,

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7. The U.S. Supreme Court has recognized that the eminent domain power does not derive from the Fifth Amendment. *See* United States v. Jones, 109 U.S. 513, 518 (1883) ("The provision . . . for just compensation for the property taken, is merely a limitation upon the use of the [eminent domain] power. It is no part of the power itself . . . .").

8. As with the power to construct post roads, *see* U.S. CONST. art. I, § 8, cl. 7, not all persons in 1790 would have conceded that Congress could exercise a power of condemnation. *See* Monroe, *supra* note 3, at 156 (declaring that "very few would concur in the opinion that such a power exists"); 31 ANNALS OF CONG. 1209 (1818) (statement by Representative Austin questioning whether the national government can "against the will of the individual, or by his consent, carve out any mode under the Constitution, by jury or otherwise, so as to ascertain the value of the soil, and acquire title? He did not think they could . . . ."). The Supreme Court did not recognize such a power until 1876. *See* Kohl v. United States, 91 U.S. 367, 371–74 (1876) (dictum).

9. U.S. CONST. art. I, § 8, cl. 18; *see* CURRIE, *supra* note 3, at 435 n.43 (identifying the Sweeping Clause as the source of the eminent domain power); David E. Engdahl, *State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283, 338 n.238 (1976) (same); *see also* United States v. Gettysburg Elec. Ry., 160 U.S. 668, 679 (1896) (stating that Congress can authorize condemnation of property "whenever it is necessary or appropriate to use the land in the execution of any of the powers granted to it by the Constitution"). Some nineteenth-century decisions declared that the power of eminent domain was inherent in all governments and did not have to be traced to any specific constitutional source. *See, e.g., Jones*, 109 U.S. at 518; Boom Co. v. Patterson, 98 U.S. 403, 406 (1878). However, these decisions are plainly inconsistent with the principle of defined and limited federal powers that underlies the Constitution.

10. *See, e.g.*, THE FEDERALIST No. 33, at 203 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (referring to "the sweeping clause, as it has been affectedly called"). We use the founding era's label rather than the modern designation of the provision as the "Necessary and Proper Clause." *Cf.* William W. Van Alstyne, *The Role of Congress*

nor did the Framers think it to be, a grant of general legislative power. The clause's language limits its authorizing scope to laws that are "necessary and proper" and that "carry[] into Execution" powers vested in the national government. The hypothetical statute seizing a right of way through Mrs. Barrington's farm without compensation does indeed "carry[] into Execution" a constitutionally vested power—the postal power—but the question remains whether it is a "necessary and proper" means to execute that power.

Today, that question may seem trivial. Ever since Chief Justice John Marshall's famous opinion in *McCulloch v. Maryland*,[11] which construed the Sweeping Clause to require only a minimal "fit" between legislatively chosen means and a valid governmental end,[12] the clause has not been widely viewed as a significant substantive limitation on congressional authority.[13] Chief Justice Marshall's discussion, however, focused almost exclusively on the word "necessary," whereas the clause requires executory laws[14] to be both necessary *and proper*. We submit that the word "proper" serves a critical, although previously largely unacknowledged, constitutional purpose by requiring executory laws to be *peculiarly within Congress's domain or jurisdiction*—that is, by requiring that such laws not usurp or expand the constitutional powers of any federal institutions or infringe on the retained rights of the states or of individuals.[15] The Sweeping Clause, so construed, serves as

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in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause, 40 LAW & CONTEMP. PROBS., Spring 1976, at 102 (using both labels in roughly equal measures).

The Supremacy Clause, U.S. CONST. art. VI, cl. 2, was also occasionally described by anti-federalists as the "sweeping clause," *see Centinel II*, PHILADELPHIA FREEMAN'S J., Oct. 24, 1787, *reprinted in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 457, 460 (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter 13 DOCUMENTARY HISTORY]; *Extract of a Letter from Queen Anne's County*, PHILADELPHIA FREEMAN'S J., Nov. 21, 1787, *reprinted in* 14 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 163, 163 (John P. Kaminski & Gaspare J. Saladino eds., 1983) [hereinafter 14 DOCUMENTARY HISTORY], but this usage never became standard.

11. 17 U.S. (4 Wheat.) 316 (1819).

12. *See infra* notes 77–89 and accompanying text.

13. *See* Stephen L. Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. PA. L. REV. 1341, 1378 (1983) ("Since the time of *McCulloch v. Maryland*, it has been clear that the [Sweeping] Clause presents no formidable barriers to legislative activity.") (footnote omitted).

14. We use "executory laws" to mean laws enacted pursuant to the Sweeping Clause.

15. Several scholars have hinted at such an interpretation of the word "proper,"

a textual guardian of principles of separation of powers, principles of federalism, and unenumerated individual rights.[16]

In Part I, we present an overview of the principal textual and structural features of the Sweeping Clause. In Part II, we explore the Sweeping Clause's meaning in four steps. First, we demonstrate that the word "necessary" in the Sweeping Clause refers to a telic[17] relationship, or fit, between executory laws and valid government ends. We take no firm position on how close the relationship between those means and ends must be, although we acknowledge the force of Chief Justice Marshall's argument in *McCulloch* that "necessary" in this context does not mean "indispensable." Second, we show that legal actors during the founding era understood the words "necessary" and "proper" to have distinct meanings in many contexts, which counsels strongly against treating the words as synonymous in the Sweeping Clause. Third, we show that one of the many ordinary meanings of the word "proper" during the founding era was "peculiar to" or "belonging to." In the context of the Sweeping Clause, this meaning of "proper" would require executory laws to be laws that are peculiarly within the jurisdiction or competence of Congress—that is, to be laws that do not tread on the retained rights of individuals or states, or the prerogatives of federal executive or judicial departments.[18] Finally, we marshall evidence for the proposition that the word "proper" in the Sweeping Clause not only *can* but *does* bear

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although none has developed the point. *See* CURRIE, *supra* note 3, at 326–27 (noting prior attempts to construe the word "proper" as having substantive meaning); David E. Engdahl, *Sense and Nonsense about State Immunity*, 2 CONST. COMMENTARY 93, 100, 111, 115 (1985) (insisting that "proper" executory laws must conform to constitutional principles of federalism); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1398 (1987) (stating that it would not be "proper" for Congress to regulate all local activity as a means for implementing its commerce power); Grey, *supra* note 6, at 163–64 (suggesting that "laws passed by Congress must be both instrumentally useful in pursuing one of Congress's delegated powers (necessary) and consistent with traditionally recognized principles of individual right (proper)").

16. As our hypothetical example involving Mrs. Barrington illustrates, prior to 1791, *all* individual rights held by persons against the federal goverument, beyond the short list in Article I, Section 9, were unenumerated.

17. We borrow the term "telic" from David Engdahl to describe the means-ends relationship required by the Sweeping Clause. *See* DAVID E. ENGDAHL, CONSTITUTIONAL FEDERALISM IN A NUTSHELL 20 (2d ed. 1987).

18. In accordance with the dominant usage of the founding era, we describe the national legislature, executive, and judiciary as "departments" rather than "branches." *See* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1156 n.6 (1992).

this jurisdictional meaning of "peculiar to" or "belonging to." The evidence includes statements by eighteenth- and nineteenth-century legal actors evincing this understanding of the Sweeping Clause, comparisons with the language and structure of other provisions in the Constitution and with related provisions in contemporaneous state constitutions, and inferences from the Framers' design for a limited national government. This evidence demonstrates that a jurisdictional construction of the Sweeping Clause is the best understanding of the clause in the overall context of the Constitution.

Part III describes some of the important implications of our construction of the Sweeping Clause for constitutional history and constitutional law. First, this jurisdictional interpretation of the Sweeping Clause harmonizes the seemingly conflicting modern views on the meaning of the Ninth Amendment. Some scholars maintain that the Ninth Amendment was designed solely to prevent an inference that Congress possessed all legislative powers that the first eight amendments did not specifically deny it.[19] Other scholars insist that the Ninth Amendment also protects unenumerated individual rights that are enforceable against the national government even when the government is exercising powers that the Constitution clearly grants to it.[20] Our construction of the Sweeping Clause demonstrates that both sides are partially correct. The Ninth Amendment potentially does refer to unenumerated substantive rights, but the Sweeping Clause's requirement that laws be "proper" means that Congress never had the delegated power to violate those rights in the first instance. Those unenumerated rights, as well as the rights enumerated in the first eight amendments, therefore were legally protectible even before the Bill of Rights was ratified. Second, our construction of the Sweeping Clause illuminates the Constitution's methods for safeguarding federalism. The principal safeguard, of course, is the scheme of enumerated national powers, under which the federal government is granted only limited subject matter jurisdiction. Our analysis demonstrates that the Sweeping Clause is an important part of this scheme: a "proper" executory law must be peculiarly and distinctively within the province of the national government and therefore must respect the national government's jurisdictional

19. *See infra* notes 242–44 and accompanying text.
20. *See infra* notes 245–49 and accompanying text.

boundaries. In this sense, the Sweeping Clause was the precursor of the Tenth Amendment's declaration 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."[21] Third, our interpretation of the Sweeping Clause provides a textual foundation for principles of separation of powers that have long been understood to animate and supplement the specific constitutional provisions allocating authority among federal institutions. All laws "carrying into Execution" the powers of any national department or officer must keep all departments and officers within their "proper" jurisdiction.

Part IV comments on the reliability of some of the documentary sources that we employ. Part V briefly summarizes our conclusions.

The Sweeping Clause, when properly understood as a jurisdictional limitation on the scope of federal power, is a vital part of the constitutional design. That understanding has largely been lost in modern times. We hope to reclaim it here.

I. THE SWEEPING CLAUSE IN CONSTITUTIONAL CONTEXT

The Sweeping 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 [enumerated in Article I], and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[22] Three textual and structural features of this clause provide important background for understanding its meaning.

A. *The Sweeping Clause Is Not a Self-Contained Power*

First, and most obviously, the Sweeping Clause is not a self-contained grant of power. It authorizes Congress only to pass laws that "carry[] into Execution" powers the Constitution elsewhere vests in one or more institutions of the federal government.[23] An

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21. U.S. CONST. amend. X. The Sweeping Clause, of course, does delegate power to the United States, but the requirement that executory laws be "proper" prevents the national government from using the Sweeping Clause to regulate indirectly subjects over which it does not have direct jurisdiction. *See infra* notes 257–60 and accompanying text.

22. U.S. CONST. art. I, § 8, cl. 18.

23. By its terms, the Sweeping Clause gives Congress power to pass laws both "vertically" to implement its own enumerated powers and "horizontally" to implement the con-

exercise of the Sweeping Clause power must always be tied to the exercise of some other identifiable constitutional power of the national government.[24]

B. *"Necessary" and "Proper" Are Distinct Requirements*

Second, and more significantly for our purposes, the Sweeping Clause specifies that any laws enacted under its authority must be *both* necessary *and* proper—in the conjunctive.[25] It is linguistically possible, of course, that this conjunction merely adds emphasis and that the words "necessary" and "proper" are essentially synonymous. Indeed, at the time of the Framing, the clause sometimes was misquoted (usually by opponents of the proposed Constitution) to omit altogether the requirement that laws be "proper,"[26]

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stitutionally vested powers of federal executive and judicial officers. For an illuminating analysis of the horizontal aspects of the Sweeping Clause, see Van Alstyne, *supra* note 10.

24. The Framers understood this feature of the Sweeping Clause well. *See, e.g.*, 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 468 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES] (statement of James Wilson at the Pennsylvania convention that the words necessary and proper "are limited and defined by the following, 'for carrying into execution the foregoing powers' "); 3 *id.* at 441 (statement of Edmund Pendleton at the Virginia convention that "the plain language of the [sweeping] clause is, to give them power to pass laws in order to give effect to the delegated powers"); *id.* at 455 (reporting a statement of James Madison at the Virginia convention that "[w]ith respect to the supposed operation of what was denominated the Sweeping Clause, . . . it only extended to the enumerated powers. Should Congress attempt to extend it to any power not enumerated, it would not be warranted by the clause."); 4 *id.* at 141 (statement of Archibald Maclaine at the North Carolina convention that the Sweeping Clause "specifies that they shall make laws to carry into execution *all the powers vested* by this Constitution; consequently, they can make no laws to execute any other power"); 1 ANNALS OF CONG. 277 (Joseph Gales ed., 1789) (statement of Elbridge Gerry that the Sweeping Clause "gives no legislative authority to Congress to carry into effect any power not expressly vested by the constitution").

Nonetheless, members of the Federalist Party often ignored this stricture on the Sweeping Clause during the 1798 debates on the Alien and Sedition Acts. *See* JAMES M. SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 135 (1956). This episode prompted Representative John Clopton to propose a constitutional amendment that would have explicitly required the Sweeping Clause to

> be construed so as to comprehend only such laws as shall have a natural connexion with and immediate relation to the powers enumerated in the said section, or to such other powers as are expressly vested by this Constitution in the Government of the United States, or in any department or officer thereof.

16 ANNALS OF CONG. 148 (1806).

25. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 367 (1819) (argument of Mr. Jones, counsel for the state of Maryland) ("It is not 'necessary *or* proper,' but 'necessary *and* proper.' The means used must have both these qualities.").

26. *See* 2 ELLIOT'S DEBATES, *supra* note 24, at 334 (statement of John Smith at the

and members of the Federalist Party pointedly avoided mention of the word "proper" when discussing the Sweeping Clause during debates on the Alien and Sedition Acts.[27] Nonetheless, as a textual matter, the Sweeping Clause seems to set forth distinct requirements of necessity and propriety; anyone who claims that the word "proper" is redundant bears a heavy burden.[28]

C. *Congress Does Not Have Unfettered Discretion to Determine What Is "Necessary" and "Proper"*

Third, and most significantly, the clause does not explicitly designate Congress as the sole judge of the necessity and propriety of executory laws. The Sweeping Clause gives Congress power "[t]o make all Laws which *shall be* necessary and proper" for carrying federal powers into execution. This mandatory language clearly implies that such laws must *in fact* be necessary and proper and not merely *thought by Congress* to be necessary and proper. The clause sets forth an objective standard by which the necessity and propriety of laws can and must be determined, and it gives no indication that Congress is the only entity authorized to make that determination. In modern jargon, the Sweeping Clause does not exhibit "a textually demonstrable constitutional commitment of the issue to . . . [the legislative] department."[29]

There is evidence that this feature of the Sweeping Clause is not accidental. Other constitutional provisions that employ the adjectives "necessary" or "proper," or the related adjectives "expedient" or "needful," sometimes do and sometimes do not confer final authority on the relevant political actors to judge the necessity, propriety, expediency, or needfulness of the conduct prescribed. The absence of overt discretion-granting language in the Sweeping Clause is therefore significant.[30]

New York convention); 3 *id.* at 56, 436 (statement of Patrick Henry at the Virginia convention); *id.* at 217 (statement of James Monroe at the Virginia convention); 3 ANNALS OF CONG. 304 (1791–93) (unattributed comments); *cf.* 1 *id.* at 280 (Joseph Gales ed., 1789) (statement of Representative Lawrence that Congress has power "to make all laws necessary *or* proper to carry the declarations of the constitution into effect") (emphasis added).

27. SMITH, *supra* note 24, at 73 n.23 ("[O]nly one of the Federalists made any reference to the word 'proper' from the necessary and proper clause. They seemed to assume that anything was proper which they deemed necessary.").

28. As we later demonstrate, that burden cannot be met. *See infra* Section II(B).

29. Baker v. Carr, 369 U.S. 186, 217 (1962).

30. By referring to the Sweeping Clause as nondiscretionary, we obviously do not

There are five power-granting provisions in the Constitution that include the phrases "shall think," "they think," "shall judge," or "shall deem" before the relevant grants of power and thus expressly bestow discretion on the pertinent actors to determine the necessity, propriety, or expediency of prescribed action.[31] Three of these provisions use the word "proper." For example, Article II, Section 3 states that if Congress cannot agree on a time of adjournment, "[the President] may adjourn [Congress] to such Time *as he shall think proper.*"[32] This provision grants sole discretion to the President to determine when it is "proper" for Congress to reconvene, subject only to constraints found elsewhere in the Constitution.[33] Even if one assumes that certain times of reconvening could objectively be proper or improper, propriety is not the measure of constitutionality: if the President *thinks* a time is "proper," but some objective standard would render it improper, the clause nonetheless validates the President's action, merely by virtue of the President's belief.[34]

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mean that the choice of executory laws is a ministerial task. Congress clearly can choose from among a wide range of necessary and proper laws in implementing any of the national government's enumerated powers. We mean only that congressional judgments of necessity and propriety are fully subject to both judicial and executive review for constitutionality.

31. If there is any appropriate role for a political question doctrine, it may be in connection with these provisions that overtly make the President, the Congress, or the states, respectively, the judges of their own actions. *But cf.* MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER 111–36 (1991) (doubting the legitimacy of the political question doctrine but not directly addressing the discretionary clauses discussed herein).

32. U.S. CONST. art. II, § 3 (emphasis added).

33. For example, the Constitution mandates that "Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day." *Id.* art. I, § 4, cl. 2, *amended by id.* amend. XX, § 2 (fixing date as "noon on the 3d day of January"). Thus, the President cannot adjourn Congress indefinitely.

34. One could say that presidential decisions under this clause present political questions because the time of reconvening is textually committed to the President's discretion. This conclusion, however, may be too hasty. One might argue instead that the President's action is unconstitutional if the President does not truly think his action is proper. Such a claim seems justiciable in principle, although the problems of proof may be insurmountable. It is highly improbable that the President would ever declare that he thought his action was improper when he took it, and the fact that the President selected a certain time would be prima facie proof that he thought it was proper. Nonetheless, one conceivably could infer from objective circumstances (such as the extraordinary inconvenience of a chosen time) that the President could not really have thought that his action was proper.

Similarly, the Constitution granted the then-existing states the power, until 1808, to import "such Persons *as any of [them] shall think proper* to admit,"[35] and the Appointments Clause of Article II allows Congress to "vest the Appointment of such inferior Officers, *as they think proper*, in the President . . . , the Courts of Law, or in the Heads of Departments."[36] Just as the Article II, Section 3 "shall think proper" phrase gives decisional responsibility to the President, these provisions grant untrammelled discretion to the states and to Congress, respectively.[37] In addition, Article II, Section 3 states that the President "shall . . . recommend to [Congress's] Consideration such Measures *as he shall judge necessary and expedient.*"[38] Finally, Article V authorizes Congress to propose constitutional amendments "whenever two thirds of both Houses *shall deem it necessary.*"[39] These provisions expressly make a political actor's judgment, rather than objective necessity, propriety, or expediency, the test of constitutionality.

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35. U.S. CONST. art. I, § 9, cl. 1 (emphasis added).

36. *Id.* art. II, § 2, cl. 2 (emphasis added). If Congress does not exercise this power, the default mode of appointment for inferior officers—as is always the only constitutional mode of appointment for principal officers—is nomination by the President and confirmation by the Senate. *See id.* We contend only that Congress has untrammelled discretion to choose whether and when to avoid this more formal mode of appointment for inferior officers by vesting their appointment, without Senate confirmation, in the President, the courts, or department heads. We take no position on whether Congress also has untrammelled discretion to permit any of the designated recipients of the appointment power to appoint any inferior officer outside their own respective departments. *See* Morrison v. Olson, 487 U.S. 654, 675–76 (1988) (permitting Congress to vest the appointment of a special prosecutor in the courts of law but suggesting that interdepartmental appointments might be improper "if there [were] some 'incongruity' between the functions normally performed by the courts and the performance of their duty to appoint") (citing *Ex parte* Siebold, 100 U.S. 371, 398 (1880)).

37. One could argue that it is a justiciable question under these clauses whether the states or Congress, respectively, truly think that their actions are proper. The identities of the actors involved in these provisions, however, make it even more unlikely than in the case of the President under the Recommendation Clause, *see supra* note 34, that one could ever prove the absence of the relevant states of mind, and such proof may even be impossible. Unlike the President—an individual whose thoughts and intentions may arguably be determinable to some extent—the states and Congress are entities comprised of many individuals whose joint decision to act does not leave room for much debate about intent in a literal sense.

38. U.S. CONST. art. II, § 3 (emphasis added). This may, at last, be an instance of a decision that is unreviewable in principle. The fact that the President puts forward a recommendation is definitive proof that he judges the recommendation to be necessary and expedient for *some* purpose.

39. *Id.* art. V (emphasis added).

In contrast, other constitutional provisions that use adjectives similar to those found in the Sweeping Clause do not expressly confer discretion on the actor in whom power is vested. For example, states are forbidden from laying imposts or duties without the consent of Congress, "except what *may be absolutely necessary* for executing [their] inspection Laws."[40] Under this clause, the states are not the ultimate arbiters of absolute necessity: their impost laws must *in fact* be absolutely necessary in order to be valid without congressional consent. Nor is Congress the ultimate arbiter: if the states' laws are, indeed, absolutely necessary for inspection purposes, the Constitution validates them regardless of whether Congress thinks them absolutely necessary.

An objective, if undemanding, standard also constrains Congress's enumerated powers to erect buildings on federal enclaves and to govern territories. Under the relevant clauses, Congress has the power, respectively, "[t]o exercise exclusive Legislation in all Cases whatsoever" over federal enclaves purchased from states "for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other *needful* Buildings"[41] and to "make all *needful* Rules and Regulations respecting the Territory or other Property belonging to the United States."[42] "Needful" is an objective requirement in each clause, although the standard of needfulness is considerably less stringent than the standard of absolute necessity that governs the Imposts Clause. Congress has general, rather than limited, legislative power over enclaves and territories[43] and accordingly must have considerable latitude in its decisions concerning such domains. Thus, Congress surely has broad power to decide which buildings and territorial rules and regulations are needful—not because these clauses expressly confer unreviewable discretion on Congress but because "needful" in the context of these grants of general legislative power is not an especially confining term.[44]

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40. *Id.* art. I, § 10, cl. 2 (emphasis added).

41. *Id.* art. I, § 8, cl. 17 (emphasis added). The clause also empowers Congress to legislate for the District of Columbia.

42. *Id.* art. IV, § 3, cl. 2 (emphasis added).

43. *See infra* notes 183–86 and accompanying text.

44. Two other constitutional provisions use the adjective "necessary" and treat it as a nondiscretionary condition that must be satisfied, but neither usage of the term qualifies a grant of power to any legal actor. *See* U.S. CONST. art. I, § 7, cl. 3 (setting forth the presidential presentment requirement for "[e]very Order, Resolution, or Vote to which

As with these latter provisions, the Sweeping Clause does not explicitly confer discretion on Congress to determine which laws are necessary and proper. The clause contains no language stating that Congress may enact laws that it "shall believe" or "shall think" necessary and proper. On the contrary, Congress is given 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."[45]

Furthermore, the mandatory language of the Sweeping Clause contrasts starkly with an analogous legislative power grant in the Georgia State Constitution of 1789, which declared that "[t]he general assembly shall have power to make all laws and ordinances which *they shall deem* necessary and proper for the good of the State, *which shall not be repugnant to this constitution.*"[46] This constitution was contemporaneous with and, in fact, modelled after the U.S. Constitution.[47] The principal difference, of course, is that the government of Georgia is a general government, possessing all legislative powers not specifically restricted by its constitution, whereas the national government is limited to its constitutionally enumerated powers. One would not expect the legislative power-*granting* provisions of a general government to contain internal limits but would expect limitations to stem from a bill of rights or other prohibitory clauses. By the same token, one *would* expect the legislative power-granting provisions of a limited government to place constraints on the exercise of power; to do otherwise might defeat the very purpose of constituting a limited government.[48] Georgia's decision to add the discretionary phrase "they

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the Concurrence of the Senate and House of Representatives may be necessary"); *id.* art. II, § 1, cl. 3 (specifying that when presidential elections are thrown into the House of Representatives, "a Majority of all the States shall be necessary to a Choice [of a President]"). We therefore do not discuss these provisions further in this Article.

45. *Id.* art. I, § 8, cl. 18 (emphasis added).

46. GA. CONST. of 1789, art. I, § 16 (emphasis added). *See infra* subsection II(D)(3).

47. *See* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 455 (William F. Swindler ed., 1973) [hereinafter SOURCES].

48. Madison recognized this principle in his Report on the Virginia Resolutions opposing the Alien and Sedition Acts:

> 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 it be not, Congress cannot exercise it.

shall deem" before "necessary and proper" reflects this qualitative difference between general and limited governments and further reinforces a nondiscretionary, limiting construction of the Sweeping Clause.

There was widespread recognition during and shortly after the ratification debates on the Constitution that the Sweeping Clause placed cognizable limits on Congress's discretion to determine the necessity and propriety of executory laws. For example, in *The Federalist*, James Madison clearly suggested that both the President and the judiciary would have the power to review legislative determinations of necessity and propriety:

> If it be asked what is to be the consequence, in case the Congress shall misconstrue this part of the Constitution and exercise powers not warranted by its true meaning, I answer the same as if they should misconstrue or enlarge any other power vested in them . . . . In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; and in the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers.[49]

Likewise, during the debates at the Virginia ratifying convention, George Nicholas emphasized the availability of judicial review to confine the exercise of Congress's powers under the Sweeping Clause: "[W]ho is to determine the extent of such powers? I say, the same power which, in all well-regulated communities, determines the extent of legislative powers. If they exceed these powers, the judiciary will declare it void, or else the people will have

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> It must be recollected by many, and could be shown to the satisfaction of all, that the construction here put on the terms "necessary and proper" is precisely the construction which prevailed during the discussions and ratifications of the Constitution. It may be added, and cannot too often be repeated, that it is a construction absolutely necessary to maintain their consistency with the peculiar character of the government, as possessed of particular and definite powers only, not of the geueral and indefinite powers vested in ordinary governments . . . . And it must be wholly immaterial whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution limited powers.

4 ELLIOT'S DEBATES, *supra* note 24, at 567–68.

49. THE FEDERALIST No. 44, at 285–86 (James Madison) (Clinton Rossiter ed., 1961).

a right to declare it void."[50] Nicholas's colleague at the Virginia convention, Governor Edmund Randolph, agreed that the "much dreaded" Sweeping Clause was not a limitless grant of power to Congress and argued that any use of that clause by Congress to expand its constitutionally granted powers would constitute an "absolute usurpation."[51]

Members of the House of Representatives on both sides of the 1791 debate over the first Bank of the United States also accepted a limited, and limiting, construction of the Sweeping Clause. Representative Stone, an opponent of the Bank, declared that the Sweeping Clause was "meant to reduce legislation to some rule. In fine, it confined the Legislature to those means that were necessary and proper."[52] Representative Smith, a Bank proponent whom Stone earlier had accused of adopting an excessively latitudinarian view of the Sweeping Clause,[53] corrected that misconception of his views and agreed with Stone that Congress was not the final judge of its powers under the Sweeping Clause. Smith maintained that Congress in the first instance had to judge the necessity and propriety of any proposed executory law but that "it was still within the province of the Judiciary to annul the law, if it should be by them deemed not to result by fair construction from the powers vested by the Constitution."[54]

Others from the founding era, however, contended that Congress had sole and unfettered discretion to judge the necessity and propriety of laws enacted pursuant to the Sweeping Clause. James Monroe's comments at the Virginia convention exemplified this view:

> There is a general power given to [the national government] to make all laws that will enable them to carry their powers into effect. There are no limits pointed out. They are not restrained or controlled from making any law, however oppressive in its

50. 3 ELLIOT'S DEBATES, *supra* note 24, at 443.

51. *Id.* at 206.

52. 2 ANNALS OF CONG. 1986 (1791).

53. *See id.* at 1983 ("[A] gentleman from South Carolina (Mr. Smith) had remarked that all our laws proceeded upon the principle of expediency—that we were the judges of that expediency—as soon as we gave it as our opinion that a thing was expedient, it became constitutional.").

54. *Id.* at 1988.

> operation, which *they may think necessary* to carry their powers into effect.[55]

John Williams of New York and John Tyler and Patrick Henry of Virginia shared Monroe's concerns,[56] as did many other anti-federalists.[57] Perhaps the clearest such construction of the Sweeping Clause was set forth in a pamphlet authored by "An Old Whig," who read the clause as a grant of power

> to make all such laws which *the Congress shall think necessary and proper*,—for who shall judge for the legislature what is necessary and proper?—Who shall set themselves above the sovereign?—What inferior legislature shall set itself above the supreme legislature? To me it appears that no other power on earth can dictate to them or controul them, unless by force . . . .[58]

This controversy continued into the second decade of the nineteenth century, although the advocates of limited congressional

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55. 3 ELLIOT'S DEBATES, *supra* note 24, at 218 (emphasis added).

56. 2 *id.* at 330 (statement of John Williams that the Sweeping Clause authorizes Congress to "pass any law which they may think proper"); 3 *id.* at 455 (statement of John Tyler that if Congress wanted to establish a monarchy, the Sweeping Clause would enable it "to call in foreign assistance, and raise troops, and do whatever they think proper to carry this proposition into effect"); *id.* at 436 (rhetorical question of Patrick Henry: "If [members of Congress] think any law necessary for their personal safety, after perpetrating the most tyrannical and oppressive deeds, cannot they make it by this Sweeping Clause?").

57. *See Cumberland County Petition to the Pennsylvania Convention*, Dec. 5, 1787, *reprinted in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 309, 310 (Merrill Jensen ed., 1976) [hereinafter 2 DOCUMENTARY HISTORY] (predicting that members of Congress "are to be the judges of what laws shall be necessary and proper"); *Centinel V*, PHILADELPHIA INDEPENDENT GAZETTEER, Dec. 4, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 10, at 343, 345 ("Whatever law congress may deem necessary and proper for carrying into execution any of the powers vested in them, may be enacted . . . ."); *Brutus V*, N.Y. J., Dec. 13, 1787, *reprinted in id.*, at 422, 423 ("[i]t is obvious, that the legislature alone must judge what laws are proper and necessary"); *Centinel VIII*, PHILADELPHIA INDEPENDENT GAZETTEER, Jan. 2, 1788, *reprinted in* 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 231, 232 (John P. Kaminski & Gaspare J. Saladino eds., 1984) [hereinafter 15 DOCUMENTARY HISTORY] (arguing that the members of Congress "are to be the sole judges of the propriety of such laws").

58. *An Old Whig*, No. 2 (1787), *reprinted in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 3, at 239. James Iredell came very close to endorsing this position in his charge to the grand jury in the prosecution of Jonathan Fries. *See* Case of Fries, 9 F. Cas. 826, 838 (C.C.D. Pa. 1799) (No. 5126) (stating that judgments of necessity and propriety under the Sweeping Clause "are considerations of policy, not questions of law, and upon which the legislature is bound to decide according to its real opinion of the necessity and propriety of any act particularly in contemplation").

discretion firmly gained the upper hand. During the 1811 debate on the renewal of the charter of the first Bank of the United States, numerous representatives assumed that Congress's judgments of necessity and propriety could be objectively correct or incorrect;[59] only Representative Sheffey argued, to the contrary, that Congress was the sole judge of the scope of the powers granted by the Sweeping Clause.[60] Moreover, a counsel arguing to the U.S. Supreme Court in 1815 shared this understanding that the Sweeping Clause establishes objective requirements of necessity and propriety.[61]

Although the proponents of unlimited congressional discretion to construe the Sweeping Clause generally did not offer arguments in support of this construction, there are several reasons why they might have described Congress's powers so broadly. First, at least prior to the decision in *Marbury v. Madison*[62] in 1803, concerns about the scope of congressional discretion under the Sweeping Clause may have reflected generalized doubts about the availability of judicial (or presidential)[63] review of legislation; if Congress is the final authority on *all* questions regarding its constitutional powers, it is of course the final judge of its powers under the Sweeping Clause. Second, some of the claims made during the ratification debates may have been political poses; the argument that the proposed Constitution would in practice create an unlimited national government was one of the anti-federalists' strongest

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59. *See, e.g.*, 22 ANNALS OF CONG. 295–96 (1811) (statement of Senator Taylor); *id.* at 634–35 (statement of Representative Porter); *id.* at 695–96 (statement of Representative Barry); *id.* at 797–98 (statement of Representative Stanley).

60. *See id.* at 735 ("To whom is confided the right to judge what shall be 'necessary and proper?' I presume it will be admitted that this right is exclusively inherent in Congress.").

61. This counsel maintained:

> [I]t is declared that Congress shall have power "*to make all laws,*" not that they, in their good pleasure, with a discretion that acknowledges neither guide nor restraint, not to make any, and every sort of law they may chuse, in furtherance of any special power, but only those "*which shall be* NECESSARY *and* PROPER . . . ."

United States v. Bryan & Woodcock, 13 U.S. (9 Cranch) 374, 376 (1815).

62. 5 U.S. (1 Cranch) 137 (1803).

63. For an overview of the 200-year-long debate over the President's power to review legislation for constitutionality, see WHO SPEAKS FOR THE CONSTITUTION?: THE DEBATE OVER INTERPRETIVE AUTHORITY (The Federalist Society, Occasional Paper No. 3, 1992).

weapons.[64] Third, such people may simply have made honest mistakes when interpreting the clause.

Whatever considerations may have spawned the claim that the Sweeping Clause gives Congress unlimited and unreviewable power, that claim was assuredly mistaken. The language and structure of the Sweeping Clause, especially in view of the Constitution's selective use of express discretion-granting language in other clauses,[65] establish that the Sweeping Clause places some limit on Congress's authority to enact executory laws. The question is not *whether* the Sweeping Clause contains internal limits on Congress's executory power but to what *extent* those limits reach—a question that can only be answered by close scrutiny of the clause's language and role in the constitutional design.[66]

II. THE MEANING OF THE SWEEPING CLAUSE

Historically, discussion of the Sweeping Clause has been dominated by discussion of the meaning of the word "necessary," no doubt because of Chief Justice Marshall's focus on that word in *McCulloch v. Maryland*.[67] The word "proper" has generally been treated as a constitutional nullity or, at best, as a redundancy.[68] There are, however, strong textual and structural arguments that suggest that "proper," as used in the Sweeping Clause, is a term distinct from, and supplementary to, "necessary" and that it functions as an integral part of the constitutional design for a limited national government. We develop these arguments in four discrete steps: first, we establish that the word "necessary" refers to a telic

64. *See* John P. Kaminski, *The Constitution Without a Bill of Rights*, *in* THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERALISM 16, 29 (Patrick T. Conley & John P. Kaminski eds., 1992) ("[Anti-federalists] pointed to the general welfare clause and the necessary and proper clause to show that Congress possessed unlimited authority under the Constitution.").

65. *See supra* notes 31–39 and accompanying text.

66. The Sweeping Clause's drafting history is of no help because "the accounts of the 1787 Constitutional Convention are silent on the meaning of the necessary and proper power." BERNARD H. SIEGAN, THE SUPREME COURT'S CONSTITUTION: AN INQUIRY INTO JUDICIAL REVIEW AND ITS IMPACT ON SOCIETY 1 (1987). *See* David E. Engdahl, *What's in a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457, 484 n.134 (1991) (summarizing the clause's sparse drafting history).

67. 17 U.S. (4 Wheat.) 316 (1819).

68. *See* Carter, *supra* note 13, at 1378 ("The word 'proper' has been read to mean 'appropriate,' which adds little to 'necessary,' except for a strong implication that legislation is appropriate only when it does not conflict with another constitutional provision.").

relationship between governmental means and ends; second, we show that the word "proper," as used in the Sweeping Clause, has a meaning distinct from "necessary;" third, we show that a jurisdictional meaning of "proper" was in ordinary usage during the framing era; and fourth, we argue that this jurisdictional meaning is the best interpretation of the word "proper" in the context of the Sweeping Clause.

A. *The Meaning of "Necessary"*

The 1755 and 1785 editions of Samuel Johnson's *Dictionary of the English Language* both define "necessary" as: "1. Needful; *indispensably requisite.* 2. Not free; fatal; impelled by fate. 3. Conclusive; decisive by inevitable consequence."[69] In *McCulloch v. Maryland*,[70] the most famous, although not the first, U.S. Supreme Court case to construe the Sweeping Clause,[71] counsel for the state of Maryland invoked the definition of "necessary" as "indispensably requisite"[72] in arguing that the Sweeping Clause strongly restricts Congress's discretion to choose the means by which it executes the national government's enumerated powers.[73] Counsels for McCulloch, on the other hand, argued that "necessary" merely means "suitable," "most useful,"[74] "fairly adapted,"[75] or "ha[ving] a natural and obvious connection"[76] to the relevant executory laws' ends.

Chief Justice Marshall, writing for a unanimous Court, agreed with McCulloch's position. He stated that "necessary" in this context does not connote "absolute physical necessity," but rather

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69. 2 SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (1785) [hereinafter JOHNSON (1785)] (emphasis added); 2 SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (1755) [hereinafter JOHNSON (1755)] (emphasis added). These editions of Johnson's *Dictionary* are not paginated.

70. 17 U.S. (4 Wheat.) 316 (1819).

71. In United States v. Fisher, 6 U.S. (2 Cranch) 358 (1805), the Court, per Chief Justice Marshall, upheld the constitutionality of a statute under the Sweeping Clause that gave debts due to the United States priority in the settlement of insolvent estates. *See id.* at 396–97.

72. *McCulloch*, 17 U.S. (4 Wheat.) at 367 (argument of Mr. Jones) ("The word 'necessary,' is said to be a synonyme of 'needful.' But both these words are defined 'indispensably requisite;' and most certainly this is the sense in which the word 'necessary' is used in the constitution.").

73. *Id.* at 366–67.

74. *Id.* at 324–25 (argument of Mr. Webster for the plaintiff in error).

75. *Id.* at 356–57 (argument of Attorney General for the plaintiff in error).

76. *Id.* at 386–88 (argument of Mr. Pinckney for the plaintiff in error).

means "convenient, or useful, or essential to another."[77] As support for this construction, Chief Justice Marshall compared the Sweeping Clause to Article I, Section 10, Clause 2,[78] which provides that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be *absolutely* necessary for executing it's [sic] inspection Laws."[79] He concluded that the presence of the word "absolutely" in this clause, and its absence in the Sweeping Clause, indicated that the term "necessary," standing alone, has a less restrictive meaning than that urged by counsel for Maryland.[80] He also argued that the "strict and rigorous sense [of 'necessary']" would render the use of the word "proper" in the Sweeping Clause extraneous.[81] Finally, he pointed to the Sweeping Clause's placement among the grants of power to Congress in Article I, Section 8, rather than among the limitations on congressional power enumerated in Article I, Section 9.[82] This placement was relevant, he argued, because in the absence of the Sweeping Clause, the natural inference concerning Congress's executory powers would be that "any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, [would be] in themselves constitutional."[83] As the Sweeping Clause "purport[s] to enlarge, not to diminish the powers vested in the government,"[84] Chief Justice Marshall concluded that Congress must have at least as much discretion in its choice of means as would exist in the clause's absence.[85]

As Chief Justice Marshall construed it, the word "necessary" describes the extent to which legislatively chosen means are "adapted to the end" and "tend[] directly to the execution of the constitutional powers of the government."[86] Necessity, on this un-

77. *Id.* at 413.
78. *Id.* at 414.
79. U.S. CONST. art. I, § 10, cl. 2 (emphasis added).
80. *McCulloch*, 17 U.S. (4 Wheat.) at 414–15.
81. *See id.* at 418–19.
82. *Id.* at 419–20.
83. *Id.* at 419. This claim is dubious. In the absence of the Sweeping Clause, executory laws that satisfied Chief Justice Marshall's criteria but that violated accepted principles of individual rights or governmental structure would surely be unconstitutional. Congress cannot plausibly claim an *implied* power to infringe on the prerogatives of the people, the states, or other federal departments.
84. *Id.* at 420.
85. *Id.*
86. *Id.* at 419; *see also id.* at 423 (stating that a law is necessary if it is "really cal-

derstanding, refers to the telic relationship, or fit, between legislative means and ends—that is, the extent to which the means efficaciously promote the ends.

To the best of our knowledge, no one, including the opponents of the Bank in *McCulloch*, has ever doubted that the word "necessary" refers to some kind of fit between means and ends. The only dispute over the term has concerned how tight the means-ends fit must be to comply with the requirements of the Sweeping Clause. Although we take no firm position on this dispute, we acknowledge the force of Chief Justice Marshall's claim that something less than strict indispensability is sufficient. He was correct in saying that the use of the phrase "absolutely necessary" in Article I, Section 10, Clause 2 strongly suggests that "necessary," by itself, does not connote indispensability. In addition, the Recommendation Clause of Article II, Section 3 provides powerful support for Chief Justice Marshall's position, although he did not make use of it. The clause instructs the President to recommend to Congress "such Measures as he shall judge necessary and expedient."[87] If "necessary" means "indispensable," it is hard to understand why it would be conjoined with a term like "expedient," which suggests only a minimal requirement of usefulness.[88]

The fitness requirement imposed by the word "necessary," however, only exhausts the meaning of the Sweeping Clause if the word "proper" also describes merely a telic relationship between means and ends. Chief Justice Marshall's opinion in *McCulloch* did not directly address the meaning of the word "proper," perhaps because the Bank's opponents questioned only the Bank's necessity and not its propriety.[89] Thus, although *McCulloch* is often

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culated to effect any of the objects entrusted to the government").

87. U.S. CONST. art. II, § 3.

88. The meaning of the word "necessary" is not inevitably the same in every clause of the Constitution. The Second Amendment, for example, which states that "[a] well regulated Militia, being *necessary* to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed," *Id.* amend. II (emphasis added), may well use the word "necessary" in a more restrictive sense than do the constitutional provisions described above. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1172 (1991). One needs, however, very strong reasons to attribute different meanings to instances of the same word in the same document.

89. *See McCulloch*, 17 U.S. (4 Wheat.) at 331–33 (argument of Mr. Hopkinson); *id.* at 367–68 (argument of Mr. Jones). This tactic was not surprising. The Bank's challengers had to deal with the facts that Congress had once before approved the Bank after a heated constitutional debate and that the Bank had existed from 1791 to 1811. They no doubt feared that this precedent would weigh heavily in favor of the Bank's constitution-

treated as a definitive discussion of the Sweeping Clause, it is at best only a starting point. A complete discussion also must consider the meaning of the word "proper" and, in particular, the possibility that the word has a distinct and powerful meaning that goes well beyond a requirement of a telic relationship between means and ends.

B. *"Necessary" As Distinct From "Proper"*

Daniel Webster, arguing on behalf of McCulloch and the Bank, suggested that "[t]hese words, 'necessary and proper,' in such an instrument, are probably to be considered as synonimous."[90] Webster's conflation of "necessary" and "proper," however, plainly did not conform to ordinary usage in the eighteenth and nineteenth centuries, either in general legal discourse or in specific discussions of the Sweeping Clause.

During and shortly after the founding era, the words "necessary" and "proper" were commonly used as distinct terms with different meanings, often with "proper" being the more restrictive term. For example, James Wilson argued at the Pennsylvania ratifying convention that a bill of rights would be "not only unnecessary, but improper,"[91] while Samuel Spencer at the North Carolina ratifying convention insisted that "[i]t might not be so necessary to have a bill of rights . . . ; but at any event, it would be proper to have one."[92] Wilson and Spencer both clearly treated "necessary" and "proper" as distinct terms—as did many other persons during and shortly after the ratification debates.[93]

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ality—and, indeed, Chief Justice Marshall's first argument in support of the Bank invoked this precedent. *See id.* at 401–02. The best argument for the Bank's challengers was thus to claim that although the first Bank might have been "necessary" for the collection of revenue in 1791, the different financial circumstances in 1816 rendered the second Bank "unnecessary" for these purposes. *See id.* at 331 (argument of Mr. Hopkinson) ("The argument might have been perfectly good, to show the necessity of a bank for the operations of the revenue, in 1791, and entirely fail now, when so many facilities for money transactions abound, which were wanting then."). On the other hand, if the Bank was not "proper" in 1816, it could not have been "proper" in 1791.

90. *Id.* at 324.

91. 2 ELLIOT'S DEBATES, *supra* note 24, at 453.

92. 4 *id.* at 138.

93. *See, e.g., id.* at 149 (statement of James Iredell at the North Carolina convention that "[i]f we had formed a general legislature, with undefined powers, a bill of rights would not ouly have been proper, but necessary"); 1 ANNALS OF CONG. 500 (Joseph Gales ed., 1789) (statement of James Madison during the debate on the presidential removal power that some persons considered it "improper, or at least unnecessary, to

Likewise, a distinction between "necessary" and "proper" pervaded discussions of the Sweeping Clause in the founding era. For example, Edmund Randolph's opinion on the constitutionality of the first Bank of the United States stated that "no power is to be assumed under the general [sweeping] clause, but such as is not only necessary, but proper, or perhaps expedient also."[94] Representative Barry was even clearer on this point in opposing the second Bank, insisting that "[t]he word 'proper' is, in my mind, an important and operative word in this [sweeping] clause of the Constitution. The incidental power to be exercised must not only be necessary, but proper."[95]

These comments are consistent with the venerable legal maxim of document construction that presumes that every word of a statute or constitution is used for a particular purpose.[96] Chief Justice Marshall's emphasis in *McCulloch* on the difference between the phrase "absolutely necessary" in the Imposts Clause and the word "necessary" in the Sweeping Clause[97] illustrates the

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come to any decision on this subject"); *id.* at 442 (statement of Representative Jackson that if the addition of a bill of rights "is not dangerous or improper, it is at least unnecessary").

94. Opinion of Edmund Randolph (Feb. 12, 1791), *reprinted in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 86, 89 (M. St. Clair Clarke & D.A. Hall eds., 1832) [hereinafter HISTORY OF THE BANK].

95. 22 ANNALS OF CONG. 696 (1811); *see also* 28 *id.* 986 (1814) (statement of Representative Clopton that the word "necessary" in the Sweeping Clause is "qualified and restricted in its meaning by the addition of the term 'proper'"). Other participants in the debates over the Bank distinguished "necessary" from "proper," although using "necessary" as the more restrictive term. *See* Opinion of Alexander Hamilton, on the Constitutionality of the National Bank (Feb. 23, 1791), *reprinted in* HISTORY OF THE BANK, *supra* note 94, at 95, 106 ("To designate or appoint the money or thing in which taxes are to be paid, is not only a proper, but a necessary *exercise* of the power of collecting them."); Spencer Roane, *Roane's "Hampden" Essays*, *in* JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 131 (Gerald Gunther ed., 1969) [hereinafter MARSHALL'S DEFENSE] (writing that a valid law under the Sweeping Clause "must be one which is not only proper, that is peculiar to that end, but also necessary"). As these quotations demonstrate, the words "necessary" and "proper" both can bear different meanings in different contexts. What is significant for our purposes, however, is that the terms were regarded as distinct in so many of these contexts during the founding era.

96. *See, e.g.*, 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (5th ed. 1992) (describing and citing numerous authorities for the rule in the context of statutory interpretation); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1434 (1992) (objecting to the staudard interpretation of the Fourteenth Amendment's Equal Protection Clause as a general equality provision on the ground that "the word protection is not doing much work in the standard reading of the text").

97. *See supra* notes 78–80 and accompanying text.

maxim's power for the founding generations. There is thus good reason to think that the word "proper" adds meaning to the Sweeping Clause rather than merely emphasis to the word "necessary."

C. *The Meaning of "Proper"*

The word "proper" has several meanings that have been part of common English usage since at least the mid-eighteenth century. Samuel Johnson's dictionary, in both its 1755 and 1785 editions, offered nine different definitions of the word "proper." The first and fifth of these definitions are especially pertinent to our discussion: "1. Peculiar; not belonging to more; not common" and "5. Fit; accommodated; adapted; suitable; qualified."[98] The fifth definition closely parallels the now-accepted construction of "necessary" in the Sweeping Clause, which seems to have been accepted by default as the construction of "proper" ever since the Court's decision in *McCulloch*.[99] The first definition, however, was widely in use around the time of the Framing in contexts involving the allocation of governmental powers. This usage suggests that a "proper" law is one that is *within the peculiar jurisdiction or responsibility of the relevant governmental actor.*

The word "proper" (or a variation thereon)[100] was used in this jurisdictional sense in four state constitutions that were available as models in the decade preceding the drafting of the Federal Constitution. The first substantive provision of the Virginia Constitution of 1776 declared that "[t]he legislative, executive, and judi-

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98. 2 JOHNSON (1785), *supra* note 69; 2 JOHNSON (1755), *supra* note 69. The other definitions seem less applicable in the context of the Sweeping Clause: "2. Noting an individual. 3. One's own. It is joined with any of the possessives: as, *my* proper, *their* proper. 4. Natural; original . . . . 6. Exact; accurate; just. 7. Not figurative. 8. It seems in *Shakespeare* to signify, mere; pure. 9. Elegant; pretty." 2 JOHNSON (1785), *supra* note 69; 2 JOHNSON (1755), *supra* note 69. The third definition may be an aspect of the first; both emphasize that X is "proper" in relation to Y if X distinctively or peculiarly belongs to Y.

99. We know of no court decision that expressly turns on the meaning of the word "proper" in the Sweeping Clause. A recent lower court decision, however, suggests in passing that a law is not "proper" if it violates express constitutional prohibitions. *See* Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n., 673 F.2d 425, 455 (D.C. Cir. 1982), *aff'd sub nom.* Process Gas Consumers Group v. Consumer Energy Council of Am., 463 U.S. 1216 (1983).

100. Words like "improper," "properly," and "propriety" are often used in contexts that shed obvious light on the meaning of the root word "proper."

ciary department, shall be separate and distinct, so that neither exercise the powers *properly* belonging to the other."[101] The Georgia Constitution of 1777 contained an identical separation of powers provision,[102] as did the Vermont Constitution of 1786.[103] In addition, the Connecticut Constitutional Ordinance of 1776 stated

> that all the free Inhabitants of this or any other of the United States of *America*, and Foreigners in Amity with this State, shall enjoy the same justice and Law within this State, which is general for the State, in all Cases *proper* for the Cognizance of the Civil Authority and Court of Judicature within the same, and that without Partiality or Delay.[104]

The Vermont Constitution of 1786 similarly declared that "[c]ourts of justice shall be maintained in every county in this State, and also in new counties when formed; which courts shall be open for the trial of all causes *proper* for their cognizance."[105] Each of these provisions used the word "proper" to mark out the jurisdiction of one or more legal actors. The Virginia, Georgia, and Vermont constitutions employed the term explicitly to differentiate the peculiar functions of the respective governmental departments.[106] The Connecticut and Vermont constitutions used the word "proper" to refer to the sphere of activity of relevant judicial authorities—that is, to refer to their jurisdiction.

This was not, of course, the only way in which the word "proper" was used in the state constitutions of that era. For example, it was sometimes used more generally to mean "suitable" or "appropriate."[107] Our point here is only that the jurisdictional

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101. VA. CONST. of 1776, ¶ 3 (emphasis added).

102. GA. CONST. of 1777, art. I. In fact, the Virginia Constitution of 1776 actually referred to the legislative, executive, and judiciary "department," in the singular. We suspect that this was a clerical error in the transcription of the original constitution. The 1830 constitution contains the same provision, which, as in the Georgia document, uses the word "departments" (with no comma following). VA. CONST. of 1830, art. II.

103. VT. CONST. of 1786, ch. II, § VI.

104. CONN. CONST. ORDINANCE of 1776, ¶ 3, *reprinted in* 2 SOURCES, *supra* note 47, at 143 (second emphasis added).

105. VT. CONST. of 1786, ch. II, § IV (emphasis added).

106. *See also* KY. CONST. of 1792, art. I, ¶ 2 ("No person, or collection of persons, being of one of these departments, shall exercise any power *properly* belonging to either of the others, except in the instances hereinafter expressly permitted.") (emphasis added).

107. *See, e.g.*, DEL. DECLARATION OF RIGHTS AND FUNDAMENTAL RULES of 1776, art. 18, *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY

meaning of "proper" was one common way in which the word was understood in the era just preceding the drafting of the Federal Constitution.

This jurisdictional usage of "proper" (or related offshoots of the word) was also prevalent in ordinary legal discourse during and following the drafting of the Federal Constitution. As do the separation of powers provisions of the Virginia, Georgia, and Vermont constitutions, some of these uses described the jurisdictional boundaries of the three departments of the national government. For instance, the Constitutional Convention of 1787 attempted to define the powers of the presidency by providing that the executive be entrusted

> "with power to carry into effect. the national laws. to appoint to offices in cases not otherwise provided for, and to execute such other powers ['not Legislative nor Judiciary in their nature.'] as may from time to time be delegated by the national Legislature". The words ['not legislative nor judiciary in their nature'] were added to the proposed amendment in consequence of a suggestion by Genl Pinkney that *improper powers* might [otherwise] be delegated . . . .[108]

Madison's notes on the Constitutional Convention further report that Mr. Read argued that "[t]he Legislature was an *improper* body for appointments."[109] Similarly, at the Pennsylvania ratifying convention, James Wilson responded to an anti-federalist contention that, in Wilson's words, "*improper* powers are . . . blended in the Senate."[110] In each of these instances, the word "improper" is clearly used to describe a departure from sound jurisdictional principles of separation of powers.[111]

HISTORY 278 (1971) ("[A] well regulated militia is the proper, natural and safe defense of a free government."); DEL. CONST. of 1776, art. 12 (prescribing a mode of appointment for justices of the peace "if the legislature shall think proper to increase the number"); MD. DECLARATION OF RIGHTS, art. XXV ("[A] well regulated militia is the proper and natural defence of a free government."); N.Y. CONST. of 1777, art. III (permitting the council of revision to veto bills that "appear improper to the said council").

108. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 67 (Max Farrand ed., 1937) (emphasis added) (punctuation and alterations in original) (footnote omitted).

109. 1 1787: DRAFTING THE U.S. CONSTITUTION 899 (Wilbourn E. Benton ed., 1986) [hereinafter DRAFTING].

110. 2 ELLIOT'S DEBATES, *supra* note 24, at 505.

111. *See also* 3 ANNALS OF CONG. 704 (1792) (statement of Representative Baldwin that "it is as *improper* for the Legislative to attend to the execution of a law, as it is for the Executive to meddle in the business of legislation") (emphasis added); *id.* at 718

This meaning of "proper" also was often employed during the 1791 congressional debates on the post office bill. The original bill specifically designated the routes by which mail was to be carried.[112] Representative Sedgwick moved to amend the bill to authorize the carriage of mail "*by such route as the President of the United States shall, from time to time, cause to be established.*"[113] Several representatives objected to this amendment on the ground that it would unconstitutionally delegate legislative power to the President. Two of them expressly framed this argument in terms of the "propriety" of the proposed action. Representative Livermore "did not think they could *with propriety* delegate that power, which they were themselves appointed to exercise."[114] Representative Page even more forcefully declared:

> If the motion before the committee succeeds, I shall make one which will save a deal of time and money, by making a short session of it; for if this House can, *with propriety*, leave the business of the post office to the President, it may leave to him any other business of legislation; and I may move to adjourn and leave all the objects of legislation to his sole consideration and direction.[115]

Furthermore, Representative Sedgwick, responding to another delegation's challenge to a different portion of his amendment,[116] noted that Congress had previously authorized the appointment of

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(statement of Representative Ames that "the Legislative and Executive branches of Government are to be kept distinct, and this . . . [instruction to the Secretary of the Treasury to report a plan for redemption of the public debt] will produce an *improper* blending of them") (emphasis added); *id.* at 1320 (letter to Congress from Justice Iredell and Judge Sitgreaves questioning whether certain administrative or quasi-administrative functions vested in the federal courts were "*properly* of a Judicial nature") (emphasis added).

112. The final legislation did so as well. Act of Feb. 20, 1792, ch. 7, § 1, 1 Stat. 232.

113. 3 ANNALS OF CONG. 229 (1791) (quoting Representative Sedgwick).

114. *Id.* (emphasis added); *see also id.* at 422 (report of comments by Representative Smith that because the President has no constitutional command over the militia until they are called into actual service, "he cannot, with any propriety, be invested with th[e] power [to arrange the state militias into units]") (emphasis added).

115. *Id.* at 233 (emphasis added).

116. The *Annals* do not give the text of this portion of Representative Sedgwick's amendment, but one can infer from the debate that it authorized the appointment of deputy postmasters without specifying the number and precise duties of such officers. A provision to this effect ultimately became § 3 of the enacted statute: "[T]here shall be one Postmaster General, who shall have authority to appoint an assistant, and deputy postmasters, at all places where such shall be found necessary." Act of Feb. 20, 1792, ch. 7, § 3, 1 Stat. 232, 234.

revenue officers but had "*very properly* left with the Executive"[117] the determination of the number of such officers.

Other statements from the post office debate involving use of the word "peculiar" indirectly reinforce this jurisdictional construction of "proper." Representative Vining concluded, on the basis of President Washington's invitation to Congress to take up the subject of the post office, that the President "had no other conception of the matter than that it was the *peculiar* privilege of the Legislature."[118] Representative Sedgwick, commenting generally on the difficulty of drawing "a boundary line between the business of Legislative and Executive," suggested "that as a general rule, the establishment of principles was the *peculiar* province of the former, and the execution of them, that of the latter."[119] Both of these representatives, therefore, used the word "peculiar" in the same way that other participants (including Sedgwick) in the same debate used the word "proper," namely, to describe the appropriate jurisdiction of the legislative and executive departments.

Representative Findley echoed this usage of "peculiar" and directly equated it with "proper" the next year in a debate over a proposed resolution "[t]hat the Secretary of the Treasury be directed to report to this House his opinion of the best mode for raising the additional supplies requisite for the ensuing year."[120] He argued that the demand for a secretarial report was an unconstitutional delegation of legislative power[121] because "[t]he House of Representatives are *peculiarly* intrusted with the authority of digesting fiscal arrangements and principles . . . . I consider [this] . . . method of originating money bills highly *improper* in itself . . . ."[122]

These usages of "peculiar" are significant because they underscore the dictionary definition of "proper" that is most relevant to

117. 3 ANNALS OF CONG. 239 (1791) (emphasis added).
118. *Id.* at 235 (emphasis added).
119. *Id.* at 239–40 (emphasis added).
120. *Id.* at 437 (1792).
121. In fact, such a report would merely be advisory, and its filing with the House could in no way constitute an exercise of legislative authority. *See id.* at 716–18 (statement of Representative Ames regarding a different, but similar, report by the Secretary of the Treasury).
122. *Id.* at 447 (emphasis added).

our thesis: "*Peculiar*; not belonging to more; not common."[123] Such usages strongly suggest that "proper" and "peculiar" were at the time of the Framing regarded as synonymous in certain legal contexts involving the distribution of governmental powers.

Justice Paterson's 1798 opinion in *Calder v. Bull*[124] reflected the same jurisdictional understanding of "proper." *Calder* involved a Connecticut statute that set aside a testamentary decree and ordered a new hearing. The Court unanimously upheld the act's constitutionality. "True it is," Justice Paterson wrote, "that the awarding of new trials falls *properly* within the province of the judiciary; but if the Legislature of *Connecticut* have been in the uninterrupted exercise of this authority, . . . we must . . . respect their decisions as flowing from a competent jurisdiction, or constitutional organ."[125] Under this interpretation, a "proper" allocation of governmental powers is one that conforms to generally accepted jurisdictional lines.[126]

Other speakers used "proper" to denote the appropriate division of authority between state governments and the new national government. During the Constitutional Convention, Madison offered a list of powers that he described as "*proper* to be added to those of the General Legislature."[127] Shortly thereafter, in New York's ratification debates, Alexander Hamilton described "commerce, manufactures, population, production, and common resources of a state" as "the *proper* objects of federal legislation."[128] Later in the same convention, in discussing how the Framers chose to allocate powers to the federal government, Hamilton also declared:

> The question, then, of the division of powers between the general and state governments, is a question of convenience: it becomes a prudential inquiry, what powers are *proper* to be reserved to the latter; and this immediately involves another inqui-

123. 2 JOHNSON (1785), *supra* note 69 (emphasis added).

124. 3 U.S. (3 Dall.) 386 (1798).

125. *Id.* at 395 (opinion of Paterson, J.) (first emphasis added).

126. "Proper" still held this meaning for the Court 30 years later. *See* United States v. Tingey, 30 U.S. (5 Pet.) 115, 128 (1831) ("[T]he United States being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the *proper* department to which those powers are confided, enter into contracts . . . .") (emphasis added).

127. 1 DRAFTING, *supra* note 109, at 904 (emphasis added).

128. 2 ELLIOT'S DEBATES, *supra* note 24, at 265–66 (emphasis added).

> ry into the *proper* objects of the two governments. This is the criterion by which we shall determine the just distribution of powers.[129]

Even more pointedly, Roger Sherman urged that "[i]f the federal government keeps within its *proper jurisdiction*, it will be the interest of the state legislatures to support it, and they will be a powerful and effectual check to its interfering with their jurisdictions."[130]

Thus, the word "proper" was often used during the founding era to describe the powers of a governmental entity as peculiarly within the province or jurisdiction of that entity.

D. *The Jurisdictional Meaning of the Sweeping Clause*

The Sweeping Clause requires valid executory laws to be "proper." If the word "proper" in that clause has a jurisdictional meaning, then the authority conferred by executory laws must distinctively and peculiarly belong to the national government as a whole and to the particular national institution whose powers are carried into execution. In view of the limited character of the national government under the Constitution, Congress's choice of means to execute federal powers would be constrained in at least three ways: first, an executory law 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.[131]

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129. *Id.* at 350 (emphasis omitted and added).

130. Roger Sherman, *A Citizen of New Haven*, CONN. COURANT, Jan. 7, 1788, *reprinted in* 3 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 525 (Merrill Jensen ed., 1978) [hereinafter 3 DOCUMENTARY HISTORY] (emphasis added).

131. This distinction among separation of powers, federalism, and individual rights, although often analytically useful, should not be overemphasized. Separation of powers and federalism are vehicles for securing individual rights, and many of what we today regard as individual rights have foundations in, and important implications for, considerations of constitutional structure. *See generally* Amar, *supra* note 88 (describing the continuity between the original Constitution and the Bill of Rights). Moreover, persons in the found-

Such a jurisdictional construction of the Sweeping Clause is supported by evidence from four distinct sources: statements by eighteenth- and nineteenth-century legal actors; the language and structure of other provisions of the Federal Constitution; the language and structure of the power-granting provisions of contemporaneous state constitutions; and inferences from the Framers' design of the national government. Each source independently contributes to an understanding of the jurisdictional nature of the Sweeping Clause.

1. *The Founders' Understanding of the Sweeping Clause.* Many legal actors, spanning the half-century from the Founding to the 1830s, interpreted the Sweeping Clause in precisely the jurisdictional fashion that we suggest. At a minimum, their statements—which we present in chronological sequence to emphasize the consistency of this interpretation over time—show that such a construction of the Sweeping Clause was a linguistically acceptable, and accepted, interpretation of the clause during the founding era. At a maximum, the statements directly demonstrate that our proposed construction of the Sweeping Clause is the best representation of the clause's original public meaning.

In a response to George Mason's well-publicized objections to the proposed Constitution during the Virginia ratification debate, "An Impartial Citizen" clearly set forth the idea that a "proper" law under the Sweeping Clause must respect limitations that are not expressly enumerated in the constitutional text:

> It is also objected by Mr. Mason, that under their own construction of the general clause, at the end of the enumerated powers, the Congress may grant monopolies in trade, constitute new crimes, inflict unusual punishments, and in short, do whatever they please . . . . I insist that Mr. Mason's construction on this clause is absolutely puerile, and by no means warranted by the

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ing era who discussed jurisdictional limits on the national government did not always sharply distinguish among these categories. Accordingly, we do not mean to suggest that all issues regarding the jurisdiction of the national government can be assigned uniquely to one of these analytical categories. Moreover, although we later discuss some constitutional implications of our construction of the Sweeping Clause, *see infra* Part III, we do not discuss in detail how to determine the precise content of the national government's jurisdiction—for example, whether it is defined solely by reference to express constitutional provisions or in part by background principles that underlie the Constitution. We mean only to establish that whatever those jurisdictional limits may be, the Sweeping Clause is a textual vehicle for their enforcement.

> words, which are chosen with peculiar *propriety* . . . . In this case, the *laws* which Congress can make, for carrying into execution the conceded powers, must not only be *necessary*, but *proper*—So that if those powers cannot be executed without the aid of a *law*, granting commercial monopolies, inflicting unusual punishments, creating new crimes, or commanding any unconstitutional act; yet, as such a *law* would be manifestly *not proper*, it would not be warranted by this clause, without absolutely departing from the usual acceptation of words.[132]

This passage distinguishes between the words "necessary" and "proper" in the Sweeping Clause and construes the latter as a powerful limitation on Congress's executory authority. Moreover, it observes that this construction of the word "proper" reflects "the usual acceptation of words"[133] as understood by the public.

In *The Federalist*, Alexander Hamilton similarly argued that the word "proper" in the Sweeping Clause embodies principles of federalism. In answer to his own question—"Who is to judge of the *necessity* and *propriety* of the laws to be passed for executing the powers of the Union?"—he responded:

> 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 pretense 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?[134]

A jurisdictional view of the Sweeping Clause was also endorsed by Representative Ames during the debates on the first Bank of the United States. Speaking after the ratification of the

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132. *An Impartial Citizen V*, PETERSBURG VA. GAZETTE, Feb. 28, 1788, *reprinted in* 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 428, 431 (John P. Kaminski & Gaspare J. Saladino eds., 1988) (emphasis added).

133. *Id.*

134. THE FEDERALIST No. 33, at 203–04 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Federal Constitution but nearly a year before the ratification of the Bill of Rights, Ames declared that

> 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. This rule of interpretation seems to be a safe, and not a very uncertain one, independently of the Constitution itself. By that instrument certain powers are specially delegated, together with all powers necessary or proper to carry them into execution. 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.[135]

This passage is a virtual declaration that a "necessary" law that impairs "the rights of any man, or the powers of any State"[136] is beyond Congress's power under the Sweeping Clause because it is not "proper."

Representative Niles similarly commented in the debate over the postal bill in 1791:

> But, sir, the question is simply, whether Congress have a right to authorize the carrier of the mail to carry passengers on hire, through those States where an exclusive right of carrying passengers for hire has been granted by the State Government, and still exists. You are empowered by the Constitution to establish post offices and post roads, and to do whatever may be *necessary* and *proper* to carry that power into effect. Now, sir, is it necessary, in order to the transportation of your mail, that you should erect stage-coaches for the purpose of transporting passengers? What has your mail to do with passengers transported for hire? Why, sir, nothing more than this—by granting to the carrier of your mail a right to carry passengers for hire, the carriage of the mail may be a little less expensive. Does this consideration render it *necessary* and *proper* for you to violate the laws of the States? If not, you will, by so doing, violate their rights, and overleap the bounds of your own. This matter *may* occasion a legal adjudication, in order to which the Judiciary must determine, whether you have a *constitutional right* to establish this regulation, and this will depend on the question whether it be

135. 2 ANNALS OF CONG. 1956 (1791).
136. *Id.*

> *necessary* and *proper*. A curious *discretionary law* question! Such a one as I presume never entered the thought of the States when they adopted the Constitution. But, sir, if the trifling pecuniary saving proposed by this regulation, entitles it to the character of a *necessary* one, or, in the sense of the Constitution, a *proper* one, and so a constitutional one, what may not Congress do under the idea of *propriety*? It may be *proper*, for the sake of a more advantageous contract for carrying the mail, to authorize the carrier to erect ferry-boats, for the transportation both of the mail and of passengers—or to grant the right of driving herds of cattle over toll bridges and turnpike roads, toll free, in violation both of legal and prescriptive rights—to erect post houses under peculiar regulations, and with exclusive right. What, sir, may not be construed as *proper* to be done by Congress? Under this idea, the whole powers vested in Congress by the Constitution will be found in the magic word *proper*; and the States might have spared, as nugatory, all their deliberations on the Constitution, and have constituted a Congress, with general authority to legislate on every subject, and in any manner it might think *proper*. What rights, then, remain to the States? None, sir, but the *empty* denomination of Republican Governments.[137]

St. George Tucker expressed a similar view of the Sweeping Clause, although somewhat obliquely, in 1803 in his appendix to Blackstone's *Commentaries*.[138] According to Tucker, under the Sweeping Clause, Congress may exercise a power not expressly enumerated in the Constitution if "it is *properly* an incident to an express power, and necessary to it's [sic] execution."[139] Tucker insisted that this provision would "operate as a powerful and immediate check upon the proceedings of the federal legislature"[140] by providing standards that both legislators and judges could use

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137. 3 *id.* at 309–10 (1792); *see also id.* at 304–05 (similar comments by an unidentified representative). *But see id.* at 305 (comments by another unidentified representative contesting the comments of the former).

138. 1 St. George Tucker, *Appendix to* 1 WILLIAM BLACKSTONE, COMMENTARIES (St. George Tucker ed., Philadelphia, Birch & Small 1803).

139. *Id.* at 288 (emphasis added).

140. *Id.* Tucker went on to state that

> this construction of the words "*necessary and proper*," is not only consonant with that which prevailed during the discussions and ratifications of the constitution, but is absolutely necessary to maintain their consistency with the peculiar character of the government, as possessed of particular and defined powers, only; not of the general and indefinite powers vested in ordinary governments.

Id.

to assess the constitutionality of executory laws. His discussion of the role of judicial review is particularly important. Tucker began by restating, almost verbatim, Madison's argument that a limited, and limiting, construction of the Sweeping Clause is necessary for judicial review.[141] He then gave a specific example:

> If, for example, congress were to pass a law prohibiting any person from bearing arms, as a means of preventing insurrections, the judicial courts, under the construction of the words necessary and proper, here contended for, would be able to pronounce decidedly upon the constitutionality of these means. But if congress may use any means, which they choose to adopt, the provision in the constitution which secures to the people the right of bearing arms, is a mere nullity; and any man imprisoned for bearing arms under such an act, might be without relief; because in that case, no court could have any power to pronounce on the necessity or propriety of the means adopted by congress to carry any specified power into complete effect.[142]

Tucker illustrated his interpretation of the Sweeping Clause by positing an executory law that would potentially violate the Second Amendment,[143] but, significantly, he framed the constitutional case against the law in terms of the Sweeping Clause rather than in terms of the Amendment. In Tucker's view, an executory law that infringed on the right to keep and bear arms would not be "necessary and proper" within the meaning of the Sweeping Clause. Perhaps he meant only that such a law would not be *essential* to the end of suppressing insurrections and thus would not satisfy a strict definition of necessity similar to that later advanced by opponents of the Bank of the United States in *McCulloch v.*

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141. He said:

> If it be understood that the powers implied in the specified powers, have an immediate and appropriate relation to them, as means, necessary and proper for carrying them into execution, questions on the constitutionality of laws passed for this purpose, will be of a nature sufficiently precise and determinate, for judicial cognizance and control. If on the one hand congress are not limited in the choice of the means, by any such appropriate relation of them to the specified powers, but may use all such as they may deem capable of answering the end, without regard to the necessity, or propriety of them, all questions relating to means of this sort must be questions of mere policy, and expediency, and from which the judicial interposition and control are completely excluded.

Id. at 288–89; *cf.* 4 ELLIOT'S DEBATES, *supra* note 24, at 568 (setting forth Madison's almost identical original argument).

142. Tucker, *supra* note 138, at 289.

143. U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

Maryland.[144] It is at least as plausible, however, to read the passage as saying that laws that violate individual rights are not "proper," regardless of whether they are "necessary."

An *explicit* interpretation of "proper" as a vehicle for securing rights was put forward in 1815 in an argument to the U.S. Supreme Court in *United States v. Bryan & Woodcock*.[145] A 1797 statute provided that debts owed to the United States by bankrupt debtors should be given priority over the claims of all other creditors.[146] A revenue officer died one month before enactment of this statute, in debt to the United States. The debtor's garnishees challenged the United States' attempt to invoke its statutory priority retroactively. The Supreme Court held that the statute, by its terms, did not apply to the case.[147] Accordingly, the Court did not reach the constitutional argument of counsel for the debtor's garnishees that even if the statute applied to the debtor, such retroactive operation of a civil law[148] would be unconstitutional. Counsel's unaddressed argument was expressly couched in terms of the Sweeping Clause. He correctly traced the source of Congress's power to enact the challenged law to the Sweeping Clause.[149] After noting that laws under the clause must be both necessary and proper, he argued:

> To pass [a retrospective law] . . . would not be "*proper*," because it would be to travel a path of error, which the people have

144. *See supra* notes 72–73 and accompanying text.

145. 13 U.S. (9 Cranch) 374, 377 (1815).

146. The statute stated in part

> [t]hat where any revenue officer, or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied . . . .

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

147. The statute applied to any persons "hereinafter becoming indebted" to the United States. *Bryan & Woodcock*, 13 U.S. (9 Cranch) at 387. Although the debtor died before the statute was enacted, the accounting that revealed his debt to the United States was completed after the statute took effect. The Court concluded that the debt was fixed at the time of death, not the time of settling accounts. *Id.*

148. The Court had already ruled that the Constitution's ban on ex post facto laws, U.S. CONST. art. I, § 9, cl. 3, applies only to retrospective criminal laws. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 390–92 (1798) (opinion of Chase, J.), *see also id.* at 395 (opinion of Paterson, J.); *id.* at 398 (opinion of Iredell, J.). *See generally* CURRIE, *supra* note 3, at 43–45 (discussing the arguments for and against such a limited conception of ex post facto laws).

149. *Bryan & Woodcock*, 13 U.S. (9 Cranch) at 375.

> positively forbidden their own state governments to use. It would not be "*proper*," because it would overturn instead of "*establishing justice*:" it would be to frustrate in place of promoting one of the first great objects of the people in forming this government.[150]

Although conceding that some retrospective civil laws might be constitutional,[151] counsel urged that the law in question was improper because

> [i]t cannot be "*necessary and proper*," nor will it "*establish justice*," to transfer to others the consequences of their own improvidence. Such, the Defendants in this case, contend would virtually be the effect of *retrospective* liens and priorities, in favor of the government, and at the expense of the citizen . . . . To set up *such* liens and priorities would not be "*proper*," because it would impair the obligation of contracts between citizen and citizen, by rendering unavailing the means of insuring their execution. It would not be "*proper*," because it would be lessening the security for private "*property*," if not taking away by undue "*process*" of law . . . . An act, then, producing any of these effects could not have been "*necessary and proper*;" and is not warranted by the constitution . . . .[152]

A similar jurisdictional construction of the Sweeping Clause found support four years later in an unlikely source: Chief Justice Marshall's opinion in *McCulloch v. Maryland*.[153] Chief Justice Marshall formulated his test for the constitutionality of executory laws in now-famous language: "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."[154] Elsewhere, he emphasized that Congress

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150. *Id.* at 377; *see also id.* at 376 (noting that the "talismanic" words "necessary and proper" placed important limitations on Congress prior to the ratification of the Bill of Rights).

151. *Id.* at 378.

152. *Id.* at 378–79.

153. 17 U.S. (4 Wheat.) 316 (1819).

154. *Id.* at 421. Professor Currie aptly describes this formulation as "remarkably careful and hard to improve upon in the light of a century and a half of experience." CURRIE, *supra* note 3, at 162. Chief Justice Marshall may have borrowed the formulation from Senator Taylor, a defender of the Bank of the United States, who expressly tied this language to the word "proper" in the Sweeping Clause during the 1811 debates on renewal of the Bank's charter:

could not, "under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government."[155]

One might argue, however, that these passages from *McCulloch* are merely a declaration that executory laws must be suitable "for carrying into Execution"[156] enumerated powers.[157] Under this interpretation, Chief Justice Marshall's assertion that Congress cannot pass laws that do not "consist with the letter and spirit of the constitution"[158] or "for the accomplishment of objects not entrusted to the government"[159] does not address the substance of the executory laws themselves but only insists that these laws directly relate to the execution of an enumerated power.[160]

This interpretation of Chief Justice Marshall's opinion in *McCulloch* is implausible, however, in light of his subsequent, pseudonymous defense of that opinion against editorial attacks published in Virginia newspapers. An 1819 essay by "Amphictyon"[161] harshly criticized Chief Justice Marshall's broad construction of Congress's powers under the Sweeping Clause.[162]

> 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.

22 ANNALS OF CONG. 296 (1811) (statement of Senator Taylor).

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

156. U.S. CONST. art. I, § 8, cl. 18.

157. *See generally supra* notes 23–24 and accompanying text.

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

159. *Id.* at 423.

160. Chief Justice Marshall acknowledged, of course, that executory laws cannot violate express constitutional provisions. *See id.* (stating that Congress cannot "adopt measures which are prohibited by the constitution").

161. Gerald Gunther surmises that Amphictyon was probably Judge William Brockenbrough. *See* MARSHALL'S DEFENSE, *supra* note 95, at 1.

162. *A Virginian's "Amphictyon" Essays, reprinted in id.* at 52. Amphictyon's criticisms dealt exclusively with Chief Justice Marshall's construction of the word "necessary." Amphictyon interpreted the word "proper" to require a telic relationship between means and ends much like that required by Chief Justice Marshall's interpretation of the word "necessary." Amphictyon wrote:

> Suppose the word necessary had been omitted. Then Congress might have made all laws which might be *proper*, that is *suitable*, or *fit*, for carrying into execution the other powers; in that case they would have had a wider field of discretion: they would then have only been obliged to enquire what were the suitable means to attain the desired end.

Specifically, Amphictyon suggested that Chief Justice Marshall's interpretation of the Sweeping Clause would sustain a federal statute prohibiting state governments from levying property taxes, on the ground that this prohibition would be conducive to the collection of federal taxes.[163] Chief Justice Marshall heatedly insisted:

> 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 government."[164]

If Chief Justice Marshall meant that such a law could not be an efficacious, and hence a "necessary," means of fostering federal tax collection, he was so clearly wrong that the claim would be disingenuous. Nor could he plausibly claim that such a law was not linked to the execution of an enumerated power; the federal government is expressly given the power to levy taxes.[165] If he were serious that such a law was not, and could not be, a constitutional exercise of the Sweeping clause power, he must have based that conclusion on something in the clause other than the word "necessary"—he must have meant that the law would not be "proper" because it would infringe on the protected rights of the states.

Finally, President Andrew Jackson explicitly adopted such a jurisdictional construction of the word "proper" in his message to Congress explaining his veto of the Bank of the United States'

Id. at 66. Amphictyon thus recognized that one term in the Sweeping Clause imposes telic limitations on Congress and another imposes jurisdictional limitations. He simply mismatched the clause's terms and limitations.

163. In Amphictyon's example,

> [Congress passes] a law to raise the sum of ten millions of dollars by a tax on land . . . . It would be extremely *convenient* and a very *appropriate* measure, and very *conducive to* their purpose of collecting this tax speedily and promptly, if the state governments could be prohibited during the same year from laying and collecting a land tax.

Id. at 66–67.

164. *Marshall's "A Friend to the Union" Essays*, *reprinted in id.* at 78, 100 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 423).

165. U.S. CONST. art. I, § 8, cl. 1.

reauthorization bill in 1832.[166] The bill would have authorized aliens to hold stock in the Bank and thus indirectly to have interests in the Bank's real property. Most of the states at that time had "laws disqualifying aliens from acquiring or holding lands within their limits,"[167] which Jackson claimed would be frustrated by the bank bill. He concluded that "[t]his privilege granted to aliens is not '*necessary*' to enable the bank to perform its public duties, nor in any sense '*proper*,' because it is vitally subversive of the rights of the States."[168] The word "proper," according to Jackson, serves as an important safeguard of principles of federalism.

Jackson also treated the requirement that executory laws be "proper" as a source of other jurisdictional limitations on Congress. The proposed bank bill, like its predecessor, promised that no other national bank would be established during the Bank of the United States' period of incorporation. Jackson doubted that Congress had power under the Sweeping Clause to bind its legislative successors in this way:

> It can not be "*necessary*" or "*proper*" for Congress to barter away or divest themselves of any of the powers vested in them by the Constitution to be exercised for the public good. It is not "*necessary*" to the efficiency of the bank, nor it is "*proper*" in relation to themselves and their successors. They may *properly* use the discretion vested in them, but they may not limit the discretion of their successors. This restriction on themselves and grant of a monopoly to the bank is therefore unconstitutional.[169]

He also doubted Congress's power to make the United States a stockholder in the Bank, which he thought would unduly extend the government's constitutional power to acquire land:

> The Government of the United States have [sic] no constitutional power to purchase lands within the States except [pursuant to article I, section 8, clause 17] "for the erection of forts, magazines, arsenals, dockyards, and other needful buildings," and even for those objects only "by the consent of the legislature of the

166. Andrew Jackson, *Veto Message*, *reprinted in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 3, at 263.

167. *Id.* at 264.

168. *Id.* at 265.

169. *Id.* at 264.

> State in which the same shall be." By making themselves stockholders in the bank and granting to the corporation the power to purchase lands for other purposes they assume a power not granted in the Constitution and grant to others what they do not themselves possess. It is not *necessary* to the receiving, safe-keeping, or transmission of the funds of the Government that the bank should possess this power, and it is not *proper* that Congress should thus enlarge the powers delegated to them in the Constitution.[170]

Nor, said Jackson, could Congress use the Bank and its ability to circulate notes as a means of exercising its power "[t]o coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures."[171] This is a power to be exercised by Congress: "It is neither necessary nor proper to transfer its legislative power to such a bank, and therefore unconstitutional."[172] Jackson thus saw the word "proper" as a wide-ranging prohibition on undue extensions of congressional power and on delegations of legislative authority. The Sweeping Clause, in his view, kept Congress within its constitutional jurisdiction.[173]

2. *Comparison with Other Constitutional Provisions.* An examination of the Sweeping Clause in relation to other constitutional clauses even more powerfully supports the proposition that the word "proper" is a substantive limitation on congressional power rather than merely a superfluous counterpart to the word "necessary."

For example, the Recommendation Clause of Article II, Section 3 commands the President to recommend to Congress "such Measures as he shall judge *necessary and expedient.*"[174] The use of the word "expedient" as a counterpart to "necessary" is striking in comparison to the pairing of "necessary" and "proper" in the

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170. *Id.* at 265. We take no position on whether President Jackson correctly understood the scope of the government's power to acquire land.

171. U.S. CONST. art. I, § 8, cl. 5.

172. 3 THE FOUNDERS' CONSTITUTION, *supra* note 3, at 265.

173. The Kentucky Court of Appeals made the same point six years later in Dickey v. Maysville, Washington, Paris & Lexington Turnpike Rd. Co., 37 Ky. (7 Dana) 113 (1838), stating in dictum that an executory law that will effectuate a constitutional end is permissible, "unless it be prohibited by the constitution, or be subversive of some fundamental principle, and, therefore, wonld not be '*proper*' as well as *necessary*." *Id.* at 132.

174. U.S. CONST. art. II, § 3 (emphasis added).

Sweeping Clause. As noted earlier,[175] Samuel Johnson's dictionary gave two definitions of "proper" that could naturally fit the term in the context of the Sweeping Clause: "1. Peculiar; not belonging to more; not common . . . ; 5. Fit; accommodated; adapted; suitable; qualified."[176] Johnson's dictionary further defines "expedient" as "proper; fit; convenient, suitable."[177] The latter three terms in this definition plainly overlap with, and are equivalent to, the terms in the fifth definition of "proper." All these terms convey the idea of a telic relationship: means are expedient if they will promote their appointed ends.[178]

It is significant that the Constitution uses "necessary and expedient" in one provision and "necessary and proper" in another. If the Framers' design was to have a term accompanying "necessary" in the Sweeping Clause that meant only "fit" or "suitable," they could have effectuated that design precisely and unambiguously by using "expedient" instead of "proper," as they did in Article II, Section 3. However, they did not.

In addition, although each use of "proper" in the Constitution other than in the Sweeping Clause carries this meaning of "fit" or "suitable," the different context in which the word "proper" appears in the Sweeping Clause warrants attributing to it a different meaning from the other usages. Specifically, before 1808, Congress could not bar the importation "of such Persons as any of the States now existing shall think proper to admit;"[179] Congress "may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments;"[180] and in case of disagreement between the House and Senate on a time of adjournment, the President "may adjourn them to such Time as he shall think proper."[181] In each of these provisions, however, the word "proper" stands alone, whereas in the Sweeping Clause, as in the structurally similar Recommendation Clause, it is conjoined with another adjective. Furthermore, these other provisions all overtly

175. *See supra* note 98 and accompanying text.
176. 2 JOHNSON (1785), *supra* note 69.
177. 1 JOHNSON (1785), *supra* note 69.
178. This, of course, is precisely the meaning of the word "necessary" in the Sweeping Clause. *See supra* notes 86–88 and accompanying text.
179. U.S. CONST. art. I, § 9, cl. 1.
180. *Id.* art. II, § 2, cl. 2.
181. *Id.* art. II, § 3.

confer discretionary power on a political actor to do what he or it "think[s]" proper.[182] In that context, it is natural to use "proper" to mean, in essence, "expedient." In contrast, the Sweeping Clause does not expressly give Congress untrammelled discretion, but rather defines and limits Congress's authority. It is therefore more natural to think that the Sweeping Clause uses "proper" in its jurisdictional sense.

Another instructive intraconstitutional comparison is between the Sweeping Clause and the Territories Clause, which gives Congress "Power to dispose of and make all *needful* Rules and Regulations respecting the Territory or other Property belonging to the United States."[183] "Needful," according to Samuel Johnson, was a synonym of "necessary."[184] It is therefore interesting that the Territories Clause requires that rules and regulations merely be "needful," rather than both "needful and proper." This wording was probably not accidental. Congress has general, rather than limited, legislative powers over the territories.[185] That is, when legislating for the territories, Congress is not confined to the subject areas enumerated elsewhere in the Constitution. By contrast, when Congress passes "necessary and proper" laws pursuant to the Sweeping Clause, its actions must "carry[] into Execution"[186] one or more of the national government's enumerated powers. It is noteworthy that Congress's *general* power over territories and property is described as the power to "make all *needful* Rules and Regulations,"[187] whereas in its role as part of a government of *limited* powers, Congress is granted only the power to make laws

182. *See supra* notes 31–39 and accompanying text.

183. U.S. CONST. art. IV, § 3, cl. 2 (emphasis added). The District Clause, *id.* art. I, § 8, cl. 17, is also substantively similar to the Sweeping Clause and Territories Clause. The District Clause, however, simply authorizes Congress "[t]o exercise exclusive Legislation in all Cases whatsoever," *id.*, over the seat of government and does not use any other adjectives to qualify that power, *see id.*

184. 2 JOHNSON (1785), *supra* note 69.

185. *See* National Bank v. County of Yankton, 101 U.S 129, 133 (1880) (Congress has "full and complete legislative authority over the people of the Territories and all the departments of the territorial governments."); Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 864 (1990). At least, Congress has such general power over territory that is not within the boundaries of a state. Whether Congress has equal power over federal land that is within a state's boundaries and was not purchased with the consent of the state's legislature is a complex question we do not address here. For an intriguing perspective on this problem, see Engdahl, *supra* note 9.

186. U.S. CONST. art. 1, § 8, cl. 18.

187. *Id.* art. IV, § 3, cl. 2 (emphasis added).

that are both "*necessary and proper.*"[188] The absence of the word "proper" from the Territories Clause highlights the word's role in the Sweeping Clause as a textual limitation on Congress's legislative powers.[189]

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188. *Id.* art. I, § 8, cl. 18 (emphasis added).

189. The enforcement provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments ("the Reconstruction Amendments") are also similar enough to the Sweeping Clause to warrant a brief comparison. Section 2 in both the Thirteenth and Fifteenth Amendments provides that "Congress shall have power to enforce this article by appropriate legislation." *Id.* amend. XIII, § 2; *id.* amend. XV, § 2. Section 5 of the Fourteenth Amendment gives to Congress "power to enforce, by appropriate legislation, the provisions of this article." *Id.* amend. XIV, § 5.

The rationale behind these provisions is obvious. The Sweeping Clause only empowers Congress to enact laws that "carry[] into Execution" powers vested in the national government. Inasmuch as the substantive provisions of the Reconstruction Amendments do not vest powers in the national government, but rather *prohibit* the exercise of state power, an explicit enforcement power was needed to enable Congress to legislate in the subject areas the Amendments covered. (The states, of course, have always had the authority to legislate on subjects covered by the Reconstruction Amendments. *See* Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 155 (1992)).

It is less obvious, however, why the drafters of the Reconstruction Amendments did not simply follow the language of the Sweeping Clause. The text of the Thirteenth Amendment, including the language in Section 2 concerning "appropriate legislation," originated in 1864 with the Senate Committee on the Judiciary. *See* CONG. GLOBE, 38th Cong., 1st Sess. 1313 (1864). Senator Charles Sumner proposed several amendments to the text that would have imported the Sweeping Clause's "necessary and proper" language into the Thirteenth Amendment, *see id.* at 1482–83, 1487–88, but these proposals did not excite much interest. By contrast, John Bingham's original draft of the Fourteenth Amendment directly tracked the language of the Sweeping Clause, *see* CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866), but the Joint Committee on Reconstruction's subsequent draft, which ultimately became the Fourteenth Amendment, instead substituted the phrase "appropriate legislation;" *see id.* at 2286 (statement of Representative Stevens). The available records do not reveal why, in 1864, these congressional committees, and in particular the Senate Committee on the Judiciary, chose the "appropriate legislation" language rather than the established "necessary and proper" language that Senator Sumner and Representative Bingham favored. There is evidence, however, that the term "appropriate" was taken from Chief Justice Marshall's opinion in *McCulloch*, in which he used the term "appropriate" to help define the scope of the Sweeping Clause. McCulloch v. Maryland 17 U.S. (4 Wheat.) 316, 421 (1819). In the 1866 debates on the Civil Rights Act, Representative Wilson copiously cited *McCulloch* as an authoritative exposition of the meaning of Section 2 of the Thirteenth Amendment. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866). In subsequent debates on civil rights legislation, Senator Thurman flatly said of Section 5 of the Fourteenth Amendment,

> What is meant by this term "appropriate legislation?" We know where the term comes from. We know it comes from an opinion of Chief Justice Marshall, and was applied by him simply to the old provision of the Constitution that Congress has power to make all laws necessary and proper for carrying into effect the foregoing powers.

3. *Contemporaneous State Constitutions.* This substantive difference between the Territories Clause and the Sweeping Clause is illuminated further by examination of the legislative power-granting provisions of the constitutions and charters of the original states at the time of the Framing. The Sweeping Clause has no clear antecedents in these documents; the phrase "necessary and proper" does not appear in an American governmental charter until the Constitution. That absence is not surprising. The state governments were all *general* governments whose powers did not depend on specific enumerations in a constitution. It would therefore be odd for a state constitution even to declare that its legislature could pass all necessary laws, much less all necessary and

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CONG. GLOBE, 41st Cong., 2d Sess. 602 (1870); *see also id.* at 3663 (statement of Senator Thurman similarly tracing the origin of Section 2 of the Fifteenth Amendment). Representatives Shellabarger and Willard also identified Section 5 of the Fourteenth Amendment with the Sweeping Clause, *see* CONG. GLOBE, 42d Cong., 1st Sess. app. 71 (1871) (statement of Representative Shellabarger); *id.* app. 189 (statement of Representative Willard), as did the Supreme Court in 1883 in The Civil Rights Cases, 109 U.S. 3, 13–14, 20 (1883). Moreover, "appropriate" is indeed a good substitute for the phrase "necessary and proper;" the word can plausibly function as a synonym both for "proper" in its jurisdictional sense and for "necessary" in its sense of fitness for a particular end. *See* Engdahl, *supra* note 15, at 115.

This history, of course, does not explain why the drafters of the Reconstruction Amendments used Chief Justice Marshall's gloss on the Sweeping Clause, rather than the clause's language itself. There is no indication, however, that the change in language was prompted by any widespread sense that the Sweeping Clause's terms were either too strict or too loose to serve the purposes of Reconstruction. Accordingly, the Reconstruction Amendments shed little, if any, light on the meaning of the Sweeping Clause.

proper laws.[190] Such a provision could be seen, however, as necessary for a government of limited and enumerated powers.

The Georgia Constitution of 1789, which was explicitly modelled after the then-recently ratified Federal Constitution,[191] contains a provision that declares that "[t]he general assembly shall have power to make all laws and ordinances which they shall deem necessary and proper for the good of the State, which shall not be repugnant to this constitution."[192] Significantly, the Georgia constitution places the phrase "which they shall deem" in front of the phrase "necessary and proper." Thus, the Georgia constitution expressly grants the legislature discretion to determine the necessity and propriety of the laws it makes—just as the Federal Constitution sometimes grants discretion to Congress, the President, or the states.[193] The addition of the discretionary language

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190. The only pre–1789 constitutions to contain such declarations were the Massachusetts Constitution of 1780 and the Georgia Constitution of 1777. The former provided that

> full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions . . . , so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth . . . .

MASS. CONST. of 1780, ch. I, § I, art. IV (using "general court" to describe the legislative body). Although this document seems to require all laws to be objectively wholesome and reasonable, the subsequent statement that the legislature is to "judge" whether laws promote the state's "good and welfare" grants the legislature discretion to determine what is "wholesome and reasonable," subject only to specific prohibitions in the state constitution. The 1777 Georgia constitution gave its legislature "power to make such laws and regulations as may be conducive to the good order and well-being of the State; provided such laws and regulations be not repugnant to the true intent and meaning of any rule or regulation contained in this constitution." GA. CONST. of 1777, art. VII, cl. 1. Again, althongh this provision, read alone, would appear to declare that laws must actually (or at least potentially) be conducive to the state's good order and well-being, the succeeding clause provides that "[t]he house of assembly shall also have power to repeal all laws and ordinances *they find* injurious to the people." *Id.* art. VII, cl. 2. The overall context thus suggests that, as with the Massachusetts constitution, there is no effective internal limitation on the general legislative power. Several state constitutions contained provisions permitting the legislature to control its own internal procedures, to expel members, and to exercise "all other powers necessary for the legislature of a free and independent State." DEL. CONST. of 1776, art. V; *see also* CONN. CONST. of 1818, art. III, § 8; PA. CONST. of 1776, § 9; PA. CONST. of 1790, art. I, § 13. However, these provisions dealt only with matters of internal governance, such as judging elections, issuing subpoenas, and keeping journals.

191. *See* 2 SOURCES, *supra* note 47, at 455.

192. GA. CONST. of 1789, art. I, § 16.

193. *See supra* notes 31–39 and accompanying text.

makes perfect sense if the phrase "necessary and proper" is understood as a significant limitation on legislative power. In the absence of the express grant of discretion, a requirement that state laws actually be "necessary and proper" might undermine the otherwise general authority of the state legislature, inasmuch as that requirement is distinctively suited to a government of limited, rather than general, powers.

The provision in the 1789 Georgia constitution that legislation not be "repugnant to this constitution"[194] reinforces this interpretation. In the absence of this clause, a constitutional grant to the legislature of power "to make all laws and ordinances which they shall deem necessary and proper for the good of the State"[195] would arguably make the legislature the final judge of the constitutionality of its measures. If the phrase "necessary and proper" includes a requirement that laws conform to (implicit and explicit) constitutional norms, such a bare grant of discretionary power would then validate all laws that the legislature *believed* to be constitutional. The measure of the law's constitutionality would be the legislature's belief, rather than the law's objective properties. Accordingly, an express stipulation that legislation must not violate the constitution might have been seen as required.[196]

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194. GA. CONST. of 1789, art. 1, § 16.

195. *Id.* (emphasis added).

196. The 1789 Georgia constitution was the only post-revolutionary era document that granted legislative powers in this form. Most constitutions, both before and after ratification of the Federal Constitution, either contained express general vesting clauses, *see* CONN. CONST. of 1818, art. III, § 1 ("The legislative power of this State shall be vested in two distinct houses or branches . . . ."); DEL. CONST. of 1792, art. II, § 1 ("The legislative power of this State shall be vested in a general assembly . . . ."); N.H. CONST. of 1784, pt. II, ¶ 2 ("The supreme legislative power within this state shall be vested in the senate and house of representatives . . . ."); N.J. CONST. of 1776, arts. I, V, VI (vesting governmental power in a governor, legislative council, and general assembly and granting the council and assembly power to pass bills into law); N.Y. CONST. of 1777, art. II ("[T]he supreme legislative power within this State shall be vested in . . . the assembly . . . [and] the senate of the State of New York . . . ."); N.C. CONST. of 1776, art. I ("[T]he legislative authority shall be vested in two distinct branches . . . ."); PA. CONST. of 1776, §§ 2, 9 ("The supreme legislative power shall be vested in a house of representatives," which shall have power to "prepare bills and enact them into laws."); S.C. CONST. of 1776, art. VII ("[T]he legislative authority [shall] be vested in the president and commander-in-chief, the general assembly and legislative council . . . ."); S.C. CONST. of 1778, art. II ("[T]he legislative authority [shall] be vested in a general assembly . . . ."), or simply created legislative bodies that possessed general legislative powers by implicatiou. *See* DEL. CONST. of 1776, art. II ("The Legislature shall be formed of two distinct branches . . . ."), GA. CONST. of 1777, art. II ("The legislature of this State shall be composed of the representatives of the people, as is hereinafter pointed

4. *The Framers' Design.* Some of the most intriguing evidence concerning the meaning of the Sweeping Clause is indirect. A jurisdictional interpretation of the Sweeping Clause harmonizes with the Framers' conception of limited government, accounts for the otherwise puzzling explanation offered by advocates of the Constitution for the absence of a bill of rights, and provides a role for the Bill of Rights, including the Ninth and Tenth Amendments, that is consistent with almost everything we know about the Constitution's design. In sum, our construction of the Sweeping Clause makes sense of—and is necessary to make sense of—the positions advanced by the Constitution's defenders during the crucial period of ratification.

Although some anti-federalists argned that the new national government was an uncontrollable leviathan with unlimited powers,[197] the federalists uniformly maintained that the national gov-

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out . . . ."); MD. CONST. of 1776, art. I ("[T]he Legislature [shall] consist of two distinct branches . . . ."); MASS. CONST. of 1780, ch. I, art. I ("The department of legislation shall be formed by two branches . . . ."); N.H. CONST. of 1776, ¶ 4 ("[T]his Congress [shall] assume the name, power and authority of a house of Representatives or Assembly for the *Colony of New-Hampshire* . . . ."); VA. CONST. of 1776, ¶ 2 ("The legislative shall be formed of two distinct branches, who, together, shall be a complete Legislature.").

The only other forms of power-granting provisions in that era were found in Connecticut's and Rhode Island's colonial charters. Until 1818, Connecticut was governed by its colonial charter of 1662, *see* CONN. CONST. ORDINANCE OF 1776 ¶ I ("[T]he ancient Form of Civil Government, contained in the Charter from CHARLES the Second, King of England, and adopted by the People of this State, shall be and remain the Civil Constitution of this State."), which authorized the legislative authority "to Make, Ordain, and Establish all manner of wholesome and reasonable Laws, Statutes, Ordinances, Directions, and Instructions, not Contrary to the Laws of this Realm of *England*." CONN. CHARTER of 1662. Until 1841, Rhode Island was governed under its colonial charter of 1663, which empowered the legislative authority

> to make, ordeyne, constitute or repeal, such lawes, statutes, orders and ordinances, fformes and ceremonies of government and magistracye as to them shall seeme meete for the good nad [sic] wellfare of the sayd Company, and ffor the government and ordering of the landes and hereditaments, hereinafter mentioned to be graunted, and of the people that doe, or att any tyme hereafter shall, inhabitt or bee within the same; soe as such lawes, ordinances and constitutiones, soe made, bee not contrary and repugnant unto, butt, as neare as may bee, agreeable to the lawes of this our realme of England, considering the nature and constitutione of the place and people there . . . .

R.I. CHARTER of 1663. We do not discuss the early Connecticut and Rhode Island documents because we are reluctant to draw conclusions for the interpretation of late eighteenth-century American constitutions from mid-seventeenth-century corporate charters based on English law.

197. *See, e.g.*, 2 ELLIOT'S DEBATES, *supra* note 24, at 398–99 (statement of Thomas

ernment could legitimately exercise only those powers granted to it, expressly or by fair implication, by the Constitution.[198] They especially emphasized the limited character of the national government in responding to criticisms of the Constitution for not including a comprehensive bill of rights.[199] They persistently argued that a bill of rights was unnecessary, and even dangerous, because the national government was not granted any powers that required limitation by a bill of rights.[200] Today, the best-known expression of this view is Hamilton's argument in *The Federalist*,[201] but the

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Tredwell that all rights not specifically reserved by the people are transferred to the national government); *A Republican I: To James Wilson, Esquire*, N.Y. J., Oct. 25, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 10, at 477, 478–79 (inferring from the prohibitions in Article I, Section 9 that Congress possesses general powers); Letter from Richard Henry Lee to Samuel Adams (Oct. 27, 1787), *in id.* at 484, 484–85 (same); *Cincinnatus I: To James Wilson, Esquire*, N.Y. J., Nov. 1, 1787, *reprinted in id.* at 529, 531 (arguing that because the Constitution, unlike the Articles of Confederation, contains no express declaration that all powers not expressly given to the national government are reserved, "[t]he presumption therefore is, that the framers of the proposed constitution, did not mean to subject it to the same exception"); *see also* 2 ELLIOT'S DEBATES, *supra* note 24, at 448 (statement of James Wilson responding to a claim that the Sweeping Clause "gives to Congress a power of legislating generally"); 3 *id.* at 464 (statement of Edmund Randolph attributing to Patrick Henry the view that "complete and unlimited legislation is vested in the Congress of the United States").

198. *See, e.g.*, 2 ELLIOT'S DEBATES, *supra* note 24, at 362 (statement of Alexander Hamilton that "the laws of Congress are restricted to a certain sphere, and when they depart from this sphere, they are no longer supreme or binding"); 3 *id.* at 110 (statement of Francis Corbin that "[l]iberty is secured, sir, by the limitation of [the national government's] powers, which are clearly and unequivocally defined"); *id.* at 186 (statement of Henry Lee that the Constitution "goes on the principle that all power is in the people, and that rulers have no powers but what are enumerated in that paper"); *id.* at 246 (statement of George Nicholas that "[i]t is a principle universally agreed upon, that all powers not given are retained").

199. The unamended Constitution does contain a bill of rights of sorts: the prohibitions in Article I, Section 9 place affirmative limitations on congressional power in the fashion of a bill of rights. *See* THE FEDERALIST No. 84, at 510–12 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The anti-federalists' complaint was that these prohibitions did not extend far enough because they did not protect such cherished rights as the rights to freedom of speech, freedom of conscience, and a civil jury. *See, e.g.*, 3 ELLIOT'S DEBATES, *supra* note 24, at 461 (statement of Patrick Henry that "[t]he restraints in this congressional bill of rights are so feeble and few, that it would have been infinitely better to have said nothing about it").

200. *See* Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1229–34 (1990). Of course, the Constitution's defenders then had to explain why the prohibitions in Article I, Section 9 were not unnecessary or dangerous. *See id.* at 1234–35. Edmund Randolph accepted the challenge, arguing at the Virginia ratifying convention that every prohibition in the unamended Constitution "is an exception, not from general powers, but from the particular powers therein vested." 3 ELLIOT'S DEBATES, *supra* note 24, at 464; *see also id.* at 464–66.

201. Hamilton argued:

ratification debates were filled with claims that the Constitution's design for a limited government adequately secured the rights of the states and the people.[202] The statement of Alexander Contee Hanson, writing as "Aristides," was particularly pointed, emphasizing the difference between a constitution with an unlimited sweeping clause that conferred general legislative power on the central government and the actual, limited document that the convention produced:

> Should the compact authorize the sovereign, or head to do all things *it may think necessary and proper*, then there is no limitation to its authority; and the liberty of each citizen in the union has no other security, than the sound policy, good faith, virtue, and perhaps proper interests, of the head.
>
> When the compact confers the aforesaid general power, making nevertheless some special reservations and exceptions, then is the citizen protected further, so far as these reservations and exceptions shall extend.
>
> But, when the compact ascertains and defines the power delegated to the federal head, then cannot this government, with-

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> I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only nnnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?

The FEDERALIST No. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

202. *See, e.g.*, Oliver Ellsworth, *The Letters of a Landholder, 1787–1788*, *in* 1 SCHWARTZ, *supra* note 107, at 460, 461 (declaring that bills of rights against the national government "are insignificant since . . . all the power government now has is a grant from the people. The constitution they establish with powers limited and defined, becomes now to the legislator and magistrate, what originally a bill of rights was to the people."); 2 ELLIOT'S DEBATES, *supra* note 24, at 436 (statement of James Wilson that "in a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent"); *id.* at 540 (statement of Thomas M'Kean that a bill of rights is unnecessary, "for the powers of Congress, . . . being therein enumerated and *positively* granted, can be no other than what this positive grant conveys"); 4 *id.* at 140 (statement of Archibald Maclaine that "[i]t would be very extraordinary to have a bill of rights, because the powers of Congress are expressly defined; and the very definition of them is as valid and efficacious a check as a bill of rights could be, without the dangerous implication of a bill of rights"); *id.* at 148 (statement of James Iredell: "Of what use, therefore, can a bill of rights be in this Constitution, where the people expressly declare how much power they do give, and consequently retain all they do not?"); *id.* at 259 (statement of Charles Pinkney that a bill of rights against the national government is unnecessary because "no powers could be executed, or assumed, but such as were expressly delegated").

> out manifest usurpation, exert any power not expressly, or by *necessary* implication, conferred by the compact.
>
> This doctrine is so obvious and plain, that I am amazed any good man should deplore the omission of a bill of rights.[203]

The federalists' argument that a bill of rights was unnecessary makes sense, of course, only if the national government's enumerated powers do not authorize that government to violate the people's or the states' rights and liberties. Accordingly, the federalists vigorously insisted that cherished rights were in no danger from the national government. A parade of them maintained, for example, that textual protection for speech and the press was unnecessary because, as Hugh Williamson put it, "examine the Plan [of the Constitution], and you will find that the liberty of the press and the laws of Mahomet are equally affected by it."[204] During the ratification debates, such major figures as James Wilson,[205] Edmund Randolph,[206] Charles Cotesworth Pinckney,[207] James Iredell,[208] Roger Sherman,[209] and Oliver Ellsworth[210]

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203. Alexander C. Hanson, *Remarks on the Proposed Plan of a Federal Government, in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 217, 241–42 (Paul L. Ford ed., 1888) [hereinafter PAMPHLETS] (first emphasis added).

204. Hugh Williamson, *Remarks on the New Plan of Government* (1788), *reprinted in* 1 SCHWARTZ, *supra* note 107, at 550, 551.

205. For example, Wilson stated:

> It is very true, sir, that this Constitution says nothing with regard to that subject [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.

2 ELLIOT'S DEBATES, *supra* note 24, at 449. In another forum, Wilson said:

> For instance, the liberty of the press, which has been a copious source of declamation and opposition, what control can proceed from the federal government to shackle or destroy that sacred palladium of national freedom? If indeed, a power similar to that which has been granted for the regulation of commerce, had been granted to regulate literary publications, it would have been as necessary to stipulate that the liberty of the press should be preserved inviolate, as that the impost should be general in its operation.

James Wilson, Speech at a Public Meeting in Philadelphia, (Oct. 6, 1787), *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 10, at 337, 340.

206. *See* 3 ELLIOT'S DEBATES, *supra* note 24, at 203 ("Go through these powers, examine every one, and tell me if the most exalted genius can prove that the liberty of the press is in danger."); *see also id.* at 469 ("But I ask, . . . Where is the page where [the freedom of the press] is restrained? If there had been any regulation about it, leaving it insecure, then there might have been reason for clamors. But this is not the case.").

207. *See* 4 *id.* at 315 ("The general government has no powers but what are expressly granted to it; it therefore has no power to take away the liberty of the press.").

208. James Iredell, *Observations on George Mason's Objections to the Federal Con-*

made similar representations with respect to national power over speech and the press. Indeed, in his *Report on the Virginia Resolutions*[211] opposing the Alien and Sedition Acts, James Madison recalled this federalist consensus and indicated that it specifically extended to the Sweeping Clause, which in no way authorized Congress to violate rights such as the freedom of the press:

> When the Constitution was under the discussions which preceded its ratification, it is well known that great apprehensions were expressed by many, lest the omission of some positive exception, from the powers delegated, of certain rights, and of the freedom of the press particularly, might expose them to danger of being drawn, by construction, within some of the powers vested in Congress; *more especially of the power to make all laws necessary and proper for carrying their other powers into execution.* In reply to this objection, it was invariably urged to be a fundamental and characteristic principle of the Constitution, that all powers not given by it were reserved; that no powers were given beyond those enumerated in the Constitution, and such as were fairly incident to them; *that the power over the rights in question, and particularly over the press, was neither among the enumerated powers, nor incident to any of them: and consequently that an exercise of any such power would be manifest usurpation.* It is painful to remark how much the arguments now employed in behalf of the Sedition Act, are at variance with the reasoning which then justified the Constitution, and invited its ratification.[212]

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stitution (1788), *in* PAMPHLETS, *supra* note 203, at 333, 361 ("If the Congress should exercise any other power over the press than [the power to secure "for limited Times to Authors . . . the exclusive Right to their respective Writings," U.S. CONST. art. I, § 8, cl. 8] . . . they will do it without any warrant from this constitution . . . .").

209. *See A Citizen of New Haven*, CONN. COURANT, Jan. 7, 1788, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 130, at 524, 525 ("The liberty of the press can be in no danger, because that is not put under the direction of the new government.").

210. According to Ellsworth:

> *There is no declaration of any kind to preserve the liberty of the press,* &c. Nor is liberty of conscience, or of matrimony, or of burial of the dead; it is enough that congress have no power to prohibit either, and can have no temptation. This objection is auswered in that the states have all the power originally, and congress have only what the states grant them.

See Landholder VI, CONN. COURANT, Dec. 10, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 10, at 398, 401.

211. 4 ELLIOT'S DEBATES, *supra* note 24, at 546.

212. *Id.* at 571–72 (emphasis added).

In addition, numerous federalists agreed with Madison's further claim that "[t]here is not a shadow of right in the general government to intermeddle with religion."[213] Wilson,[214] Randolph,[215] and Iredell,[216] among others,[217] all affirmed that the Constitution granted the national government no power over religion. Furthermore, Randolph (later joined by Madison) insisted that a textual prohibition on general warrants was unnecessary because the national government had no power to issue such warrants.[218] Hamilton maintained that Congress, under the original Constitution, could not abolish jury trials in civil cases,[219] and

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213. *Id.* at 330.

214. Wilson maintained:

> [W]e are told that there is no security for the rights of conscience. I ask the honorable gentleman, what part of this system puts it in the power of Congress to attack those rights? When there is no power to attack, it is idle to prepare the means of defence.

2 *id.* at 455.

215. *See* 3 *id.* at 469 ("No part of the Constitution, even if strictly construed, will justify a conclusion that the general government can take away or impair the freedom of religion."); *see also id.* at 204 ("[N]o power is given expressly to Congress over religion.").

216. Iredell declared:

> They certainly have no authority to interfere in the establishment of any religion whatsoever; and I am astonished that any gentleman should conceive they have. Is there any power given to Congress in matters of religion? . . . If any future Congress should pass an act concerning the religion of the country, it would be an act which they are not authorized to pass, by the Constitution . . . .

4 *id.* at 194.

217. *See id.* at 208 (statement of Richard D. Spaight) ("As to the subject of religion, . . . [n]o power is given to the general government to interfere with it at all. Any act of Congress on this subject would be a usurpation."); *A Freeman II*, PENN. GAZETTE, Jan. 30, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 57, at 508, 508 ("Every regulation relating to religion, or the property of religious bodies, must be made by the state governments, since no powers affecting those points are contained in the constitution."); *see also* 1 ANNALS OF CONG. 730 (Joseph Gales ed., 1789) ("Mr. Sherman thought the amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the Constitution to make religious establishments; he would, therefore, move to have it struck out.").

218. Randolph observed:

> The honorable gentleman says there is no restraint on the power of issuing general warrants. If I be tedious in asking where is that power, you will ascribe it to him who has put me to the necessity of asking. They have no such power given them: if they have, where is it?

3 ELLIOT'S DEBATES, *supra* note 24, at 60.

219. *See* THE FEDERALIST No. 29, at 183–84 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It would be absurd . . . to believe that a right to enact *laws necessary and proper* for the imposition and collection of taxes would involve that of . . . abolishing the trial by jury in cases relating to it.") (emphasis added).

"An Impartial Citizen" denied that the Constitution gave Congress power, *inter alia*, to provide for unusual punishments.[220] This general sentiment about the scope of national power under the unamended Constitution was aptly summarized by Theophilus Parson at the Massachusetts convention, who insisted that "no power was given to Congress to infringe on any one of the natural rights of the people by this Constitution; and, should they attempt it without constitutional authority, the act would be a nullity, and could not be enforced."[221]

The anti-federalists were not persuaded. Several of them argued that even if the federal government could be limited to its enumerated powers,[222] the Sweeping Clause itself granted Congress ample power to violate the people's liberty. Patrick Henry feared that encroachments on the rights of the press and of jury trial "will be justified by the last part of [Article I, Section 8], which gives them full power 'to make all laws which shall be necessary and proper to carry their power into execution.'"[223] A petition to the Pennsylvania ratifying convention similarly worried that the Sweeping Clause

> submits every right of the people of these states, both civil and sacred to the disposal of Congress, who may exercise their power to the expulsion of the jury—trial in civil causes—to the total suppression of the liberty of the press; and to the setting up and establishing of a cruel tyranny, if they should be so disposed, over all the dearest and most sacred rights of the citizens.[224]

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220. *See supra* text accompanying note 132.

221. 2 ELLIOT'S DEBATES, *supra* note 24, at 162.

222. Many anti-federalists did not accept the principle of enumerated powers, arguing that, in the American tradition, constitutions presumptively grant to governments all powers not expressly prohibited. For example, Thomas Tredwell stated at the New York convention that

> [t]he first and grand leading, or rather misleading, principle in this debate, and on which the advocates for this system of unrestricted powers must chiefly depend for its support, is that, in forming a constitution, whatever powers are not expressly granted or given the government, are reserved to the people, or that rulers cannot exercise any powers but those expressly given to them by the Constitution . . . . [W]e may reason with sufficient certainty on the subject, from the sense of all the public bodies in the United States, who had occasion to form new constitutions. They have uniformly acted upon a direct and contrary principle, not only in forming the state constitutions and the old Confederation, but also in forming this very Constitution . . . .

Id. at 398.

223. 3 *id.* at 149.

224. *Cumberland County Petition to the Pennsylvania Convention*, Dec. 5, 1787, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 57, at 309, 310.

Brutus, a pseudonymous anti-federalist, thought it "a question well worthy consideration"[225] whether Congress could use the Sweeping Clause to justify imposition of a military draft.[226] Consequently, in the First Congress, Madison observed that calls for a bill of rights had been prompted largely by such fears about the scope of the Sweeping Clause.[227]

In light of these arguments, the federalists' unswerving insistence that the federal government did not have the power to violate the rights of the states and the people must be taken to mean, as Madison's *Report on the Virginia Resolutions* maintained,[228] that the Sweeping Clause, at least as understood by those defenders of the Constitution, did not grant the government any power to affect those rights. The federalists could have meant that the word "proper" by itself performs a strong limiting function. Alternatively, in the era before Chief Justice Marshall in *McCulloch v. Maryland* construed the word "necessary" to confer very broad powers on the national government, they could have meant that the words "necessary and proper" jointly constrain the national government's ability to violate protected rights. Madison, for example, doubted that laws authorizing the issuance of general warrants could be either necessary or proper, although he believed that a bill of rights might serve as a useful guard against misconstruction of the Sweeping Clause:

> It has been said, that in the Federal Government [bills of rights] are unnecessary, because the powers are enumerated . . . . I admit that these arguments are not entirely without foundation; but they are not conclusive to the extent which has been sup-

225. *Brutus VIII*, N.Y. J., Jan. 10, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 57, at 335, 336.

226. *See id.*

227. The *Annals* report that

> Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the Constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the Constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion . . . .

1 ANNALS OF CONG. 730 (1789) (Joseph Gales, ed., 1789).

228. *See supra* text accompanying note 212.

> posed. It is true, the powers of the General Government are circumscribed, they are directed to particular objects; but even if Government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent . . . ; because in the Constitution of the United States, there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the Government of the United States, or in any department or officer thereof [sic]; this enables them to fulfil every purpose for which the Government was established. Now, may not laws be considered necessary and proper by Congress, (for it is for them to judge of the necessity and propriety to accomplish those special purposes which they may have in contemplation), *which laws in themselves are neither necessary nor proper* . . . ? I will state an instance, which I think in point, and proves that this might be the case. The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for this purpose . . . ?[229]

In either case, the federalists must have believed that the Sweeping Clause does jurisdictional work. Therefore, according to the federalists, an executory law abridging the freedom of speech, authorizing issuance of a general warrant, imposing a cruel or unusual punishment, or (so Mrs. Barrington would argue) authorizing a taking of private property without just compensation would fall outside the enumerated powers of Congress and, although rarely explicitly stated in terms of this language, would be improper.[230]

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229. 1 ANNALS OF CONG. 438 (1789) (Joseph Gales ed., 1789) (emphasis added). If "necessary" has the meaning ascribed to it in *McCulloch v. Maryland*, *see supra* notes 77–86 and accompanying text, Madison's conclusion that general warrants cannot be necessary is wrong. One can readily imagine circumstances in which general warrants would be highly efficacious means for effectuating the national government's various revenue-raising powers or the power to prohibit (after 1808) the importation of slaves and thus would be "necessary" as that word is used in the Sweeping Clause as construed in *McCulloch*. Similarly, it is easy to imagine circumstances in which restrictions on the press might be efficacious means for carrying into execution the national government's military powers. In those circumstances, the word "proper" must carry the burden of limiting the government's jurisdiction—as it clearly can.

230. *But cf.* Andrzej Rapaczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 CHI.-KENT L. REV. 177, 186–88 (1988) (suggesting that the Framers' view that the national government has no power to violate rights is plausible only if they viewed constitutional guarantees as political, rather

A jurisdictional construction of the Sweeping Clause amply protects the people's rights and liberties because virtually all federal laws are executory laws enacted pursuant to, and thus subject to the limitations of, the Sweeping Clause. The enumerations of power in the other seventeen clauses of Article I, Section 8 and elsewhere in the Constitution essentially provide the subject matter for the exercise of Congress's executory authority.[231] Suppose, for example, that Congress wants to forbid the interstate transportation of publications critical of Congress. A bare prohibition stating that "it shall be unlawful to ship, in interstate commerce, printed material that criticizes Congress" seems to qualify as a direct regulation of commerce requiring no constitutional authorization beyond the Commerce Clause.[232] Nevertheless, as soon as Congress tries to make the prohibition *effective* by prescribing penalties for violation of the prohibition or by authorizing executive enforcement of the law, it must employ the Sweeping Clause to "carry[] into Execution" that exercise of the commerce power, and any such implementing law must therefore be "necessary and proper." A law prescribing penalties for interstate transportation of political speech critical of Congress would plainly not be "proper" under a jurisdictional interpretation of that term. Nor would it be "proper" to enact laws authorizing the issuance of general warrants to enforce the prohibition; laws restricting the rights of defendants under the statute to indictment by grand jury, to counsel, or to trial by jury; or laws prescribing cruel and unusual punishments for violation of the prohibition. None of these laws would be within Congress's enumerated authority under the Sweeping Clause.[233]

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than legal, but not considering the possibility that the Sweeping Clause affords a traditional legal vehicle for protecting rights).

231. *See* ENGDAHL, *supra* note 17, at 10–11.

232. U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have Power . . . To regulate Commerce . . . among the several States . . . .").

233. This conclusion assumes, of course, that Congress is legislating for citizens in the states, rather than for citizens in the territories or the District of Columbia. The Territories Clause authorizes Congress to "make all needful Rules and Regulations respecting the Territory or other Property belongiug to the United States," *id.* art. IV, § 3, cl. 2, and the District Clause empowers Congress "[t]o exercise exclusive Legislation in all Cases whatsoever [over the District of Columbia]," *id.* art. I, § 8, cl. 17. These clauses are self-contained grants of general legislative power. Accordingly, Congress does not need the Sweeping Clause to legislate with respect to the territories or the District of Columbia, and the jurisdictional restrictions on Congress contained in the Sweeping Clause therefore do not apply to such legislation. Congressional legislation for the territories and the District of Columbia must conform to certain constitutional limitations of

History thus may have dealt too harshly with the Framers' decision to exclude a comprehensive bill of rights from the Constitution. The omission of a bill of rights is typically portrayed as a major blunder,[234] attributable either to the Framers' carelessness or to their lack of concern for the protection of rights.[235] According to the conventional story, once the anti-federalists exposed the Framers' error, the Framers made matters worse by contriving weak arguments to justify their mistake.[236] Perhaps the Framers were indeed fools and knaves who concocted a desperate defense of a flawed document.[237] If our interpretation of the Sweeping Clause is correct, however, the Framers' argument for the original Constitution was more powerful than some may have supposed.[238] The Framers were correct when they maintained that a bill of rights was unnecessary to protect the people's rights, as those rights were safeguarded by the requirement that executory laws be "proper."[239] The scheme of enumerated powers protected the people's rights by not granting Congress the power to violate

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form and substance, such as the presentment requirement, *id.* art. I, § 7, cl. 2–3, or the general prohibition on ex post facto laws, *id.* art. I, § 9, cl. 3, but if the *only* textual vehicle for a limitation on such form or substance is the Sweeping Clause, that limitation might not have effect in the territories.

In a previous article, Professor Lawson argued that congressional legislation for the territories is subject to general separation of powers constraints such as the nondelegation doctrine. *See* Lawson, *supra* note 185, at 900–02. If the Sweeping Clause is the only vehicle by which the nondelegation doctrine is given legal effect, this conclusion requires reconsideration.

234. *See* Leonard W. Levy, *The Original Constitution as a Bill of Rights*, 9 CONST. COMMENTARY 163, 170 (1992) (stating that with the addition of the Bill of Rights in 1791, "[t]he Framers had rectified their great blunder of omission").

235. *See* Kaminski, *supra* note 64, at 22.

236. One commentator argues:

> That supporters of the Constitution could ask, "What have we to do with a bill of rights" suggests that they had made a colossal error of judgment. They had omitted a bill of rights and then compounded their error by refusing to admit it. Their single-minded purpose of creating an effective government had exhausted their energies and good sense, and when they found themselves on the defensive, under an accusation that their handiwork threatened the liberties of the people, their frayed nerves led them into indefensible positions.

Levy, *supra* note 234, at 167.

237. The Framers' political judgment was clearly questionable; the omission of a bill of rights almost doomed the Constitution. *See* Kaminski, *supra* note 64, at 28–39 (describing the Constitution's ratification history).

238. *See* 3 BERNARD SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 528 (1980) (arguing that federalist writings on the Bill of Rights "illustrate the approach of Federalist writers to the weakest aspect of their case").

239. This conclusion is true at least with respect to the states. A bill of rights might have been necessary to safeguard individual rights in the territories. *See supra* note 233.

them. Thus, under a jurisdictional interpretation of the Sweeping Clause, and *only* under such an interpretation of the Sweeping Clause, the federalists' view that the Bill of Rights was unnecessary and superfluous makes perfect sense.

III. THE "PROPER" JURISDICTION OF CONGRESS

Our analysis of the Sweeping Clause has several important implications for constitutional history and constitutional law. A jurisdictional understanding of the Sweeping Clause illuminates the meanings of the Ninth and Tenth Amendments and clarifies the Constitution's methods for safeguarding federalism and the separation of powers.

A. *The Sweeping Clause and the Meaning of the Ninth Amendment*

A jurisdictional construction of the Sweeping Clause provides important insight into the meaning of the Ninth Amendment, which has been a persistent subject of modern academic controversy.[240] The Ninth Amendment states that "[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."[241] The traditional—and, until recently, near-universal—view of the Ninth Amendment was that it only prohibited an inference, drawn from the listing of specific rights in the first eight amendments, that the national government had been granted powers not enumerated in the Constitution. Thomas McAfee has recently restated and defended this position, noting that "on this reading the other rights retained by the people are defined residually from the powers granted to the national government."[242] In other words, according to this "residual rights"[243] thesis, the rights of the people and the powers of the national government are flip sides of the same

240. *See* McAffee, *supra* note 200, at 1215–23 (describing the contours of the modern debate). For excellent representative samples of current scholarship on the Ninth Amendment, see 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed., 1993); 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed., 1989) [hereinafter RIGHTS RETAINED].

241. U.S. CONST. amend. IX.

242. McAffee, *supra* note 200, at 1221.

243. *Id.*

coin: if the national government exceeds its delegated powers by regulating subjects beyond its original enumerated jurisdiction, it thereby violates the rights of the people, but if it genuinely exercises a delegated power, even if by exercising that power it affects certain interests of the people, it *by definition* does not infringe on the people's retained rights.[244]

On other hand, a score of modern scholars, exemplified by Randy Barnett,[245] maintain that the Ninth Amendment refers to rights that "are to be defined independently of, and may serve to limit the scope of, powers granted to the national government by the Constitution."[246] Instead of "looking exclusively to the dele-

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244. The best way to understand this interpretation of the Ninth Amendment is to study an example of its violation. A five-Justice majority in the Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871), did precisely what the traditional interpretation of the Ninth Amendment instructs decisionmakers not to do. Justice Strong's opinion for the Court affirmed Congress's power to issue paper money that is not immediately redeemable in precious metals, despite the opinion's recognition that such a power could not be derived from any of the enumerated powers. The Court's reasoning must be read to be disbelieved:

> And, that important powers were understood by the people who adopted the Constitution to have been created by it, powers not enumerated, and not included incidentally in any one of those enumerated, is shown by the amendments. The first ten of these were suggested in the conventions of the States, and proposed at the first session of the first Congress, before any complaint was made of a disposition to assume doubtful powers. The preamble to the resolution submitting them for adoption recited that the "conventions of a number of the States had, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and *restrictive* clauses should be added." This was the origin of the amendments, and they are significant. They tend plainly to show that, in the judgment of those who adopted the Constitution, there were powers created by it, neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted. Most of these amendments are denials of power which had not been expressly granted, and which cannot be said to have been necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.

Id. at 534–35. A clearer violation of the traditionally understood Ninth Amendment is hard to imagine. *See* CURRIE, *supra* note 3, at 328 nn.312–14.

245. *See* Randy E. Barnett, *Introduction: James Madison's Ninth Amendment*, *in* 1 RIGHTS RETAINED, *supra* note 240, at 1; Randy E. Barnett, *Foreword: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 615 (1991) [hereinafter Barnett, *Unenumerated Rights*]; Randy E. Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 CHI.-KENT L. REV. 37 (1988). Professor Barnett's conclusions are not necessarily endorsed by all, or even most, Ninth Amendment scholars who reject the traditional view, but for our purposes the differences among the non-traditional scholars are irrelevant.

246. McAffee, *supra* note 200, at 1222.

gation of powers to define as well as to protect the rights of the people,"[247] these nontraditional, or "affirmative rights,"[248] scholars "look[] to the rights retained by the people in . . . [their] effort[s] to interpret and define the delegated-powers provisions."[249] Under this view, a determination that Congress has genuinely exercised a delegated power does not end the inquiry. The affirmative rights scholars argue that just as Congress can exercise, for example, its Commerce Clause power in a manner that violates the First Amendment or other provisions of the Bill of Rights, so it can exercise any of its enumerated powers in a manner that implicates other rights "retained by the people" but not specified in the first eight amendments.

Our analysis of the Sweeping Clause demonstrates that both sides to this controversy are partially correct. The Ninth Amendment prohibits an inference that the enumeration of rights in the first eight amendments is the only basis on which an executory law can be found "improper" under the Sweeping Clause for violating individual rights. The principal function of the Ninth Amendment is thus to prevent misconstruction of the Sweeping Clause.[250]

The key to understanding this interpretation of the Ninth Amendment is to recognize that the Sweeping Clause is an enumerated power, no different in principle from Congress's other enumerated powers, and that limitations on Congress's authority under the Sweeping Clause are therefore denials of delegated power rather than affirmative constraints on an otherwise delegated power. If a law that violates the rights of citizens or the states is not "proper" within a jurisdictional meaning of the Sweeping Clause, it exceeds the delegated power of Congress to enact executory laws. The residual rights thesis is therefore correct: one can completely identify the rights retained by the people and the states by determining the scope of the national government's delegated powers. Nevertheless, Professor Barnett and other affirmative rights scholars are also correct inasmuch as the scope of Congress's delegated authority under the Sweeping Clause is constrained by the requirement that executory laws must be "prop-

247. Barnett, *Unenumerated Rights*, *supra* note 245, at 639.

248. *See* McAffee, *supra* note 200, at 1222.

249. Barnett, *Unenumerated Rights*, *supra* note 245, at 639 (footnote omitted).

250. It also serves the traditionally recognized function of preventing an inference of unenumerated federal powers from the enumeration of rights. *See supra* notes 242–44 and accompanying text.

er"—that is, must conform to traditional principles of individual rights, whatever they may be.[251] The Ninth Amendment ensures that any executory laws that would have been improper before ratification of the Bill of Rights remain improper after ratification. It serves as a warning against concluding that the enumeration of rights in the first eight amendments is necessarily an exhaustive list of the ways in which executory laws can be improper.[252]

This understanding of the Ninth Amendment fits perfectly with the Framers' understanding of the Constitution. The Framers, as we have seen, denied one of the central premises of the affirmative rights reading of the Ninth Amendment: that Congress could, before ratification of the Bill of Rights, exercise its enumerated powers in a manner that would violate the rights protected by the first eight amendments.[253] The Framers steadfastly insisted that Congress simply had no delegated power to violate such rights. Although the Framers did not always expressly indicate the textual basis for their claim, a jurisdictional reading of the Sweeping Clause provides the obvious vehicle—indeed, the only plausible vehicle—for their position. Once it is understood that the Sweeping Clause protects individual rights, the Ninth Amendment, like the first eight amendments, is shown to be essentially a declaration of principles already implicit in the design of the national government,[254] as the Framers insisted was true of the Bill of Rights. The Ninth Amendment does not add new constraints to Congress's

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251. *See infra* notes 254–56 and accompanying text.

252. Professor Barnett, drawing heavily on Madison's speech against the first Bank of the United States, argues that the Ninth Amendment establishes an interpretative presumption in favor of strict construction of all enumerated powers, including the Sweeping Clause. *See* Barnett, *Unenumerated Rights*, *supra* note 245, at 635–39. We do not disagree with this conclusion, which is supported by the Ninth Amendment, the Tenth Amendment, and indeed the entire structure and context of the Constitution. We suggest, however, that the Ninth Amendment uniquely generates a more specific interpretative rule: laws that were "improper" in 1789 because they violated individual rights remain improper after 1791, even if the rights in question are not among the rights specified in the first eight amendments.

253. *See supra* notes 198–221 and accompanying text.

254. It is possible that one or more of the rights enumerated in the Bill of Rights are not rights whose violation would have been "improper" before 1791. It is also possible that the contours of those rights were altered somewhat by their reduction to writing in the Bill of Rights. It is unlikely, for example, that the twenty dollar amount-in-controversy requirement of the Seventh Amendment corresponded precisely to a preexisting background principle that would have operated before 1791 through the Sweeping Clause. *See* U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .").

power, but it preserves those constraints that the Sweeping Clause had already built into the Constitution.[255]

The task of identifying those unenumerated rights, if any, that the Sweeping Clause and the Ninth Amendment jointly protect is beyond the scope of our inquiry. Proponents of different interpretative theories will obviously have different methods for defining such rights. For example, originalists will seek to identify those rights the violation of which the general public in 1789 would have thought "improper." Under originalist premises, this list can include rights the eighteenth-century public did not actually acknowledge but *would* have acknowledged if all relevant arguments and information had been brought to its attention—just as electronic surveillance can be a "search" within the original meaning of the Fourth Amendment[256] if the eighteenth-century public, knowing what we know today about technology, would have fitted such surveillance within its concept of a search.

B. *The Sweeping Clause and Constitutional Federalism*

The relationship between the Sweeping Clause and the Tenth Amendment is similar to the relationship between the Sweeping Clause and the Ninth Amendment: the Tenth Amendment makes explicit what is already contained in the Sweeping Clause. The Tenth Amendment declares 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."[257] This provision expressly confines the national government to its delegated sphere of jurisdiction. As we have demonstrated, however, that is one of the functions that the Sweeping Clause serves. An executory law that regulates subjects outside Congress's enumerated powers is not "proper" and therefore not constitutional. The Tenth Amendment, as with the rest of the Bill of Rights, is thus declaratory of principles already contained in the unamended Constitution via the Sweeping Clause.

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255. The Bill of Rights may also extend those rights to the territories. *See supra* note 233.

256. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

257. *Id.* amend. X.

It is difficult to prescribe a precise method for identifying the appropriate federalism constraints imposed on Congress by the Sweeping Clause.[258] The core principle, however, is that a "proper" executory law must respect the system of enumerated federal powers: executory laws may not regulate or prohibit activities that fall outside the subject areas specifically enumerated in the Constitution. Two considerations support this strict construction of the Sweeping Clause. First, the word "proper" limits the powers conferred on Congress. It would be very strange if a "proper" executory law—a law that is distinctively and peculiarly within the jurisdiction of the national government—could regulate subjects outside the careful, precise enumeration of regulable subjects found elsewhere in the Constitution. Second, the Sweeping Clause only authorizes laws "for carrying into Execution" powers vested by the Constitution in the national government.[259] To carry a law or power into execution in its most basic sense means to provide enforcement machinery, prescribe penalties, authorize the hiring of employees, appropriate funds, and so forth to effectuate that law or power. It does *not* mean to regulate unenumerated subject areas to make the exercise of enumerated powers more efficient.[260]

Of course, it will not always be clear whether an executory law "properly" provides for the execution of enumerated powers or "improperly" regulates a subject beyond Congress's jurisdiction. For example, the law at issue in *McCulloch v. Maryland*, which incorporated a national bank as a means to effectuate the enumerated power to borrow money,[261] presents a hard case. The power of incorporation seems more like a subject to be separately enumerated than a vehicle for carrying into execution another enumerated power, as are the powers to prescribe penalties, appropriate funds, or hire federal employees, although we admit that the distinction is difficult to verbalize. If, however, hard cases under

258. This difficulty is not unique to our analysis. *See* New York v. United States, 112 S. Ct. 2408, 2417 (1992) ("[T]he task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases.").

259. *See* U.S. CONST. art. I, § 8, cl. 18. For a discussion of this aspect of the Sweeping Clause, *see supra* notes 23–24 and accompanying text.

260. *See* Epstein, *supra* note 15, at 1397–98.

261. U.S. CONST. art. I, § 8, cl. 2 ("The Congress shall have Power . . . To borrow Money on the credit of the United States . . . .").

the Sweeping Clause abound, so do easy ones: a law regulating the production of wheat for home consumption is plainly not "proper for carrying into Execution" the federal commerce power.[262]

An even thornier problem is whether executory laws that regulate subjects within Congress's enumerated powers but that significantly impair the autonomy of state governments can be "improper" because such laws contravene constitutionally "proper" principles of federalism. For example, assuming that Congress has the power, under the Commerce Clause, to set minimum wages and maximum hours for private employment,[263] does it necessarily follow that Congress can extend those regulations to employees of state governments? The question has a checkered history in the U.S. Supreme Court,[264] and we do not purport to answer it here. Nevertheless, we do insist that the answer lies in the Sweeping Clause.[265] If the Constitution was enacted against a background understanding of sound principles of federalism, under a jurisdictional interpretation of the Sweeping Clause, "proper" executory laws must conform to those principles. Accordingly, even if the majority in *Garcia v. San Antonio Metropolitan Transit Authority*[266] was correct that the Supreme Court has "no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause,"[267] the Court might have a license—and a duty—to employ such concep-

262. *See* Wickard v. Filburn, 317 U.S. 111 (1942). We thus disagree to some extent with Professor Engdahl, who maintains that the Sweeping Clause enables Congress to regulate subjects outside the enumerated powers as long as the executory law bears a telic relationship to an enumerated power. *See* ENGDAHL, *supra* note 17, at 18–19. Professor Engdahl's thoughtful analysis gives a very generous construction to the phrase "for carrying into Execution" and a very limited scope to the word "proper." Indeed, under Professor Engdahl's construction of the Sweeping Clause, the only function of the word "proper" is to require an especially strong telic relationship between executory laws and legislative ends when, for example, traditional principles of federalism are at issue. The *jurisdictional* meaning of the word "proper" that we set forth requires more.

263. *See* United States v. Darby, 312 U.S. 100 (1941) (holding that Congress has such power).

264. *See* Maryland v. Wirtz, 392 U.S. 183 (1968) (holding the Fair Labor Standards Act (FLSA) applicable to employees of public schools and hospitals), *overruled by* National League of Cities v. Usery, 426 U.S. 833 (1976) (holding the FLSA inapplicable to state employees engaged in traditional governmental functions), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (holding the FLSA applicable to municipal mass-transit employees).

265. *See* Engdahl, *supra* note 15, at 93.

266. 469 U.S. 528 (1985).

267. *Id.* at 550.

tions of sovereignty when measuring congressional authority under the Sweeping Clause.

C. *The Sweeping Clause and the Proper Separation of Powers*

Our interpretation of the Sweeping Clause also contributes to an understanding of the constitutional scheme of separation of powers. Numerous provisions in the Constitution allocate authority to various institutions of the national government, but there is no general "separation of powers clause" similar to those that appeared in many state constitutions of the founding era.[268] Nonetheless, it has long been recognized that general principles of separation of powers infuse the Constitution and give content to its specific provisions.[269] The Sweeping Clause is the textual vehicle by which those principles find expression in the Constitution: a "proper" law for carrying into execution the powers of any department of the national government must confine that department to its peculiar jurisdiction.

It is beyond the scope of this Article to spell out the content of a "proper" separation of powers doctrine; we recognize that different constitutional theorists will have different conclusions on this issue. An originalist, for example, would ask whether a fully informed public in 1789 would have regarded a particular distribution of governmental power as an "improper" departure from sound separation of powers principles. Whatever the content of that doctrine may be, however, it is textually incorporated into the Constitution through the Sweeping Clause. The Sweeping Clause

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268. For example, the Massachusetts Constitution of 1780 provided:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

MASS. CONST. of 1780, art. XXX; *see also supra* notes 101–02 and accompanying text (discussing the separation of powers clauses of the Virginia and Georgia state constitutions).

269. *See* Morrison v. Olson, 487 U.S. 654, 704 (1988) (Scalia, J., dissenting) ("Our opinions are full of the recognition that it is the principle of separation of powers . . . which gives comprehensible content to the Appointments Clause, and determines the appropriate scope of the removal power.").

therefore does not give Congress untrammelled authority to structure the national government. Congress must create and empower some of the institutions of national governance (if these institutions are to exist), such as executive agencies and inferior courts, but in so doing it must respect both the specific allocations of power prescribed by the Constitution, such as the Appointments Clause,[270] and any unenumerated but "proper" principles of governmental structure, such as the principle against delegation of legislative power.

IV. THE ACCURACY OF THE HISTORICAL RECORD

Our analysis often discusses evidence of linguistic usage of the word "proper" drawn from documentary sources of the founding generation. Any scholar of early constitutional history must take account of the serious flaws in that era's documentary record. In particular, we quote extensively from Jonathan Elliot's compilation of the debates at the state ratifying conventions and from the early volumes of the *Annals of Congress*. According to James H. Hutson, who scrutinized the documentary record of the Constitution, both sources are of questionable accuracy. Mr. Hutson reports that the published accounts of the ratification debates were often incomplete and inaccurate and, in some cases, may have been doctored for partisan purposes.[271] He is even more critical of the early editions of the *Annals*, which purport to record the debates in the House of Representatives. (Reports of Senate debates were not made available until 1794.) These early *Annals* were based on the notes of Thomas Lloyd, whose reportorial skills in 1789 were "dulled by excessive drinking,"[272] and whose manuscript was "periodically interrupted by doodling, sketches of members, horses, and landscapes, and by poetry."[273] These problems are of special concern to an enterprise like ours that focuses heavily on specific word usages and draws inferences from surrounding verbal contexts.

Nonetheless, for three principal reasons, we do not think that these difficulties with the documentary record significantly affect

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270. U.S. CONST. art. II, § 2, cl. 2.

271. *See* James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 12–24 (1986).

272. *Id.* at 36.

273. *Id.*

our project. First, we place our heaviest reliance on textual and structural features of the Federal Constitution and contemporaneous state constitutions, rather than on direct statements from individual actors. Second, the patterns of usage to which we refer are remarkably consistent across all documents that we have surveyed, including many whose accuracy is not subject to challenge, such as constitutions, letters, and court records. We thus feel relatively confident in relying on otherwise questionable sources, inasmuch as more reliable documents reinforce our conclusions. Third, even if some of the passages we cite are imaginative reconstructions, they at least give some evidence of contemporaneous linguistic usage.

In sum, we use these documents much as did Madison (at least if the reporter can be believed) in opposing a latitudinarian construction of the Sweeping Clause during the 1791 debate on the Bank of the United States:

> The explanations in the State Conventions all turned on the same fundamental principle, and on the principle that the terms necessary and proper gave no additional powers to those enumerated. [Here he read sundry passages from the Debates of the Pennsylvania, Virginia, and North Carolina Conventions, showing the ground on which the Constitution had been vindicated by its principal advocates, against a dangerous latitude of its powers, charged on it by its opponents.] He did not undertake to vouch for the accuracy or authenticity of the publications which he quoted. He thought it probable that the sentiments delivered might, in many instances, have been mistaken, or imperfectly noted; but the complexion of the whole, with what he himself and many others must recollect, fully justified the use he had made of them.[274]

V. CONCLUSION

Our jurisdictional construction of the Sweeping Clause accounts for the available evidence better than does any alternative construction: a jurisdictional usage of "proper" was common in legal discourse during the founding era; this understanding of the Sweeping Clause fits well with other provisions of the Federal Constitution and contemporaneous state constitutions; and many

274. 2 ANNALS OF CONG. 1951 (1791) (alteration in original).

persons during the founding era (broadly understood to extend into the first portion of the nineteenth century) expressly held such a view of the Sweeping Clause. Moreover, the Constitution's proponents repeatedly insisted that they were creating a government with very specific qualities—most notably, limited powers that did not include the power to violate individual rights or structural principles of separation of powers or federalism—which would only exist if the federal government's executory authority were strictly constrained. Our jurisdictional interpretation of the Sweeping Clause realizes the Founders' vision of a limited national government without departing from the constitutional text—the Framers clearly thought that the Constitution of 1789 placed such jurisdictional limits on the scope of national power, and the Framers were right.