
BOOK REVIEW

THE NECESSARY AND PROPER CLAUSE AND ITS LEGAL ANTECEDENTS

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INTRODUCTION

The Necessary and Proper Clause assigns Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹ Chief Justice Marshall’s formulation of what “necessary and proper” means has become canonical: “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.”²

Chief Justice Marshall’s reasoning – upon which the Court now bases its very forgiving rational basis approach to federal legislation³ – relied on four

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¹ U.S. CONST. art. I, § 8, cl. 18.

² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

³ *See, e.g., United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (reading *McCulloch* to mean that “the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute” when “the statute constitutes a means that is rationally

related grounds. First, Chief Justice Marshall argued that the ordinary meaning of the clause did not call for necessity in the strict sense: “If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another.”⁴ Second, he engaged in what we would now call intratextualism – comparing the clause’s operative terms with the language of similar clauses that expressly insisted upon more absolute necessity.⁵ Third, he made a variety of functional arguments, the chief one of which was that a strict view of the Necessary and Proper Clause – one requiring genuine necessity as the predicate for federal legislation – would make it impossible to adopt even the most routine governmental measures (such as prescribing criminal punishments).⁶ Finally, Chief Justice Marshall wrote that since grants of power routinely imply grants of incidental powers needed to carry them out, reading the clause narrowly would transform it from a grant of power into a

related to the implementation of a constitutionally enumerated power”); *Sabri v. United States*, 541 U.S. 600, 605 (2004) (interpreting *McCulloch* to establish “means-ends rationality” review under the Necessary and Proper Clause).

⁴ *McCulloch*, 17 U.S. at 413. Marshall further explained,

To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense – in that sense which common usage justifies. The word “necessary” is of this description. It has not a fixed character, peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases.

Id. at 413-14.

⁵ *See id.* at 414-15 (“This comment on the word is well illustrated by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying ‘imposts, or duties on imports or exports, except what may be *absolutely* necessary for executing its inspection laws,’ with that which authorizes congress ‘to make all laws which shall be necessary and proper for carrying into execution’ the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word ‘necessary,’ by prefixing the word ‘absolutely.’”); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (proposing and defending an integrated approach to reading the constitutional text).

⁶ *See id.* at 417-18 (“The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution, and from our laws.”).

restriction on power – contrary to the plain intent indicated by its placement among the powers of Congress in Article I, Section 8.⁷

As lawyerly as John Marshall’s opinion in *McCulloch* is, the gist of *The Origins of the Necessary and Proper Clause* (“*Origins*”) – an impressive book recently published by Professors Gary Lawson, Geoffrey P. Miller, Robert G. Natelson, and Guy I. Seidman – is that it is not lawyerly enough.⁸ Why? Through research conducted independently of one another, the book’s four authors arrived at three sources of technical meaning that, they argue, interpreters have largely overlooked.⁹

Professor Natelson argues that the clause implicitly incorporates principles of agency law that include general requirements of reasonableness, as well as rather more detailed fiduciary obligations of impartiality, good faith, and due care.¹⁰ Professors Lawson and Seidman argue that the language of the clause nicely captures similar but not identical requirements of “reasonableness” derived from traditions of English administrative law.¹¹ Finally, though more tentative in his conclusions, Professor Miller reads the clause in light of analogous language found in eighteenth-century corporate charters, concluding that accompanying corporate practice suggests, inter alia, both the need for a “reasonably close connection” between means and ends and a scruple against discriminatory laws.¹²

The authors of this important book largely take care to avoid definitive conclusions about what use modern interpreters should make of their findings.¹³ The four authors view their job as being to recover lost understandings, and they leave it to others to figure out exactly what to do with them in contemporary constitutional law.¹⁴ This Essay offers tentative thoughts on how a modern interpreter might make use of those lost understandings. Like the four authors, I do not attempt here to provide a conclusive reading of the Necessary and Proper Clause. Rather, I wish to use

⁷ See *id.* at 419-20 (“1st. The clause is placed among the powers of Congress, not among the limitations on those powers. 2d. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted.”).

⁸ See generally GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (2010).

⁹ In recent years, a great many others have written about the original meaning of the clause as well. See, e.g., Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183 (2004); J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 587. My focus here is not on the meaning of the Necessary and Proper Clause per se, but rather on the methodological implications of the approach taken by *Origins*.

¹⁰ LAWSON ET AL. *supra* note 8, at 119.

¹¹ *Id.* at 141-43.

¹² *Id.* at 175.

¹³ *Id.* at 8.

¹⁴ *Id.* at 8-9.

their important studies to examine the broader question of how one makes sense of the nitty-gritty details of the private or public law backgrounds of important constitutional clauses. For example, if Professor Natelson is correct in asserting that the Necessary and Proper Clause picks up on incidental powers clauses in trust law, should we read the detailed principles of fiduciary duty into that constitutional clause? For me, several considerations frame this inquiry.

First, that question should not depend on whether the authors of *Origins* can show that a constitutionally sufficient proportion of constitutionmakers subjectively understood the language in the precise and intricate detail of eighteenth-century trust, administrative, or corporate law. Because constitutional lawmaking was spread over so many distinct multimember institutions, one could never make that sort of showing.¹⁵ So if we assume that lawmakers choose their words on the sensible assumption that interpreters will decode them according to established conventions prevailing at the time, it makes sense to read technical terms technically, whether or not ratifiers subjectively knew the full contents of a “term of art.”

Second, this context presents an issue slightly different from the term-of-art question. In particular, it invites consideration of what interpreters should do when lawmakers borrow a legal *construct* from another context. Though Professor Natelson comes closest,¹⁶ none of the four authors asserts that either “necessary,” “proper,” or “necessary and proper” was a term of art with an established meaning familiar to anyone schooled in the fine points of eighteenth century legalese.¹⁷ Rather, these words reflected a legal construct – the incidental powers clause¹⁸ – that was used, we are told, in various private law contexts. To borrow a word or phrase with established meaning should carry with it that meaning. Yet there is no reason to think that borrowing a construct from a substantive area of law should bring all obligations of that particular area of law to a new and very different one, especially when the same type of clause is common to multiple areas of law. The law of trusts or corporate charters deals with matters very different from those that pertain to a

¹⁵ See, e.g., John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1666 (2001) (arguing that the vast and decentralized character of the constitutionmaking process makes it difficult, if not impossible, for interpreters to determine how a constitutionally sufficient proportion of the ratifiers *actually* understood the Constitution’s particulars).

¹⁶ See *infra* text accompanying notes 32-33.

¹⁷ See John C. Harrison, *Enumerated Federal Power and the Necessary and Proper Clause*, 78 U. CHI. L. REV. 1101, 1117 (2011) (reviewing LAWSON ET AL., *supra* note 8) (observing that the authors did not consider “necessary and proper” a term of art).

¹⁸ Professor Natelson refers to the relevant constructs as “further-powers clauses.” LAWSON ET AL., *supra* note 8, at 72. Professor Miller refers to them as “scope clauses.” *Id.* at 150. Since both acknowledge that these clauses grant incidental powers within the law of agency, I will refer to them collectively as “incidental powers clauses” in order to simplify the exposition.

constitution designed for a complex nation of millions.¹⁹ Would a reasonable observer really think that borrowing a familiar legal construct used in trust law or corporate law would necessarily carry the substantive trust law or corporate law with it? At most, such an observer might attribute to the Necessary and Proper Clause whatever least common denominator incidental power clauses share across all such contexts.

Third, when authors purport to recover lost understandings, a modern interpreter must consider the implications of the fact that these understandings were putatively lost. This intricate book is a testament to the complexity of the question of what the Necessary and Proper Clause means. Surely one cannot read the book without concluding that reasonable people – including reasonable eighteenth-century Americans – could differ about how to read the phrase “necessary and proper.” Madison famously wrote, and the founders apparently widely believed, that the Constitution would come out unfinished and that its meaning would become settled only through the passage of time and the accretion of practical constructions by the branches charged with implementing it.²⁰ Because *Origins* presents hard judgment calls about how much, if any, of the highly complex background doctrine one should ascribe to the clause, I think it especially valuable to pay attention to the settled meaning on which our society came to rest. Had early Americans read the Necessary and Proper Clause to impose on Congress the detailed obligations of a trust administrator or a corporate board, that fact itself might have resolving significance.²¹ Yet the authors offer very little evidence that early Americans did so. And while it is beyond this Essay’s scope to reconstruct the history of the clause’s interpretation, it is worth noting that foundational cases such as *McCulloch* seem to have treated the clause as an incidental powers clause but made no mention of its picking up the detailed substantive constraints of fiduciary law, administrative law, or corporate law.²² After almost two centuries, the burden of persuasion on those who would displace *McCulloch* strikes me as quite high.

This Essay proceeds in four parts. First, it briefly reviews the main claims of the book. Second, it explains why we might care about the private law backdrop identified by the authors even if we do not have any proof that it influenced a constitutionally sufficient majority of the ratifiers. Third, it

¹⁹ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasizing the unique challenges of constitutional design).

²⁰ See *infra* text accompanying notes 142-147 (describing Madison’s position and the role of early governmental practice in resolving constitutional ambiguities).

²¹ In determining the implications of such a finding for constitutional adjudication, one would still have to grapple with questions of stare decisis. Compare, e.g., Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 748-67 (1988) (defending a strong vision of constitutional stare decisis), with Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 26-28 (1994) (arguing that stare decisis contradicts the supremacy of the constitutional text).

²² See *infra* text accompanying notes 156-161.

differentiates, for interpretative purposes, between adopting a term of art and merely borrowing an off-the-rack legal device from a particular legal context. Fourth, it suggests a way for thinking about the burden of persuasion when legal scholars uncover lost meanings, as our four authors have so ably done here.

I. THE HISTORICAL CLAIMS IN BRIEF

The historical essays that comprise *Origins* do something altogether too rare in American public law; they attempt to recover the lost meaning of technical language. Professors Natelson and Miller, moreover, join a growing body of scholarship recognizing that at least some of the conceptual apparatus of the Constitution reflects the influence of private law.²³ All of the contributions look deeply at pre-constitutional legal frameworks governing the incidental powers that agents must have in order to carry out the primary grants of power made to them.

The project of *Origins* has a deeply commonsensical aspect to it. Reading the Constitution, one is struck by how much it is a lawyer's document,²⁴ packed with legalese.²⁵ That being the case, the authors start from the astute premise that "[i]t would be truly extraordinary if the Necessary and Proper Clause emerged from a late-eighteenth-century Committee of Detail with no intellectual antecedents."²⁶ For something so important and so technical sounding, it seems surpassingly unlikely that the founders drew from thin air either the type of clause or the turn of phrase that appears therein. Accordingly, the authors sensibly set about to discover how eighteenth-century lawyers would have understood the technicalities of that clause.

Interestingly, they all find strong evidence, but find it in different places. Professor Natelson traces the clause to eighteenth-century fiduciary law. Professors Lawson and Seidman read the clause in light of eighteenth-century English administrative law. Finally, Professor Miller believes the clause may mimic corporate law. Each historical claim merits brief elaboration.

²³ See, e.g., Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 503 (2006) (tracing judicial review to the practice of reviewing corporate behavior for repugnancy); Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL'Y 107, 117 n.26 (2009) ("[P]rivate law linguistic and intellectual traditions are not widely known to those immersed in modern public and administrative law.").

²⁴ See, e.g., John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2025 (2011) (discussing the Constitution's reliance on technical legal terms).

²⁵ See, e.g., U.S. CONST. art. I, § 8, cl. 11 (giving Congress the powers "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"); *id.* § 10, cl. 1 (prohibiting states from adopting "any Bill of Attainder" or "ex post facto Law").

²⁶ LAWSON ET AL., *supra* note 8, at 3.

A. Agency Law

Professor Natelson's argument is the most elaborate and makes the most definitive claims about the clause's meaning. He argues that the clause embodies principles of eighteenth century fiduciary law. He begins by noting that "a wide spectrum of actors" – including "administrators of estates, attorneys (both public and private), bailiffs, executors, factors, servants, stewards, and trustees" – functioned under fiduciary obligations.²⁷ He adds that eighteenth-century trust law included a widely applicable principal-and-incidents doctrine, which provided that a principal grant of a power or interest implied certain incidental powers or interests, often of the sort one might think necessary to make the principal grants effective.²⁸ Although such incidental powers were understood to be implicit, many documents – including "powers of attorney . . . , trust instruments, conveyances, and contracts" – contained express clauses.²⁹ Their wording varied, but all bore some sort of family resemblance to "necessary and proper"³⁰ – and sometimes included that very phrase or one of its component parts.³¹

Natelson does not claim that the particular phrase "necessary and proper" itself had a distinctive meaning in all of this. "Necessary," he suggests, seems to convey the basic idea of granting incidental powers³² and may have been a term of art in the law of real estate conveyances.³³ "Proper," for him, does the heavy lifting. Although that term "seems not to have been defined in reported cases,"³⁴ Natelson deduces that, in this motley array of trust instruments, "proper" must have referred to compliance with "then-prevailing fiduciary norms," such as "proceeding in good faith, maintaining undivided loyalty to the principal, accounting to the principal, and proceeding with due care."³⁵

For several reasons, Natelson believes that the founders would have read the Necessary and Proper Clause in light of these criteria. First, most of the people who drafted and ratified the Constitution were either lawyers or people "who employed fiduciaries – managers, factors, and so forth – in their personal business enterprises."³⁶ Indeed, the Committee of Detail, which drafted the

²⁷ *Id.* at 56-57.

²⁸ *Id.* at 60-67.

²⁹ *Id.* at 70.

³⁰ Natelson thus elaborates, "Some documents relied only on a single standard, such as 'necessary,' 'needful,' 'proper,' and 'fit.' Others employed 'necessary and proper,' 'necessary or proper,' 'needful and necessary,' 'necessary or useful,' 'necessary and convenient,' 'necessary and expedient' – and so on." *Id.* at 70.

³¹ *Id.* at 70-77.

³² *Id.* at 76.

³³ *Id.* at 64.

³⁴ *Id.* at 78.

³⁵ *Id.* at 78-79.

³⁶ *Id.* at 56. He adds:

Members of the founding generation who were neither lawyers nor businessmen often

clause, “was particularly laden with legal talent.”³⁷ Accordingly, he thinks it likely that the committee used those terms to convey a grant of incidental powers, subject to the fiduciary obligations that go with their exercise in the trust context.³⁸ Second, when the Antifederalists attacked the clause on the ground that it would lead to consolidation, the Federalists replied, in part, through “nontechnical expositions of the incidental powers doctrine, as limited by agents’ fiduciary duties.”³⁹ Importantly, he does not suggest that any of the Federalists explicitly invoked the law of trusts or the private law of fiduciary duty to explain the limits implicit in the Necessary and Proper Clause. Rather, he suggests that the kind of limits identified by the Federalists were consistent with the kind of limits that a fiduciary would face under private law.⁴⁰ Third, Natelson argues that in the debate over the First Bank of the United States in 1791, parties on both sides framed their arguments in terms of the incidental powers doctrine.⁴¹

From this evidence, Natelson infers that the Necessary and Proper Clause should be construed like an incidental powers clause in a fiduciary instrument.⁴² On that view, a power is “necessary” if it is “a customary way of exercising the principal power,” if it is “indispensable” to exercising the principal power, or if its absence would “greatly impair” the exercise of the principal power.⁴³ The term “proper,” in turn, imports fiduciary obligations – requiring that an act of Congress “be within constitutional authority, reasonably impartial, adopted in good faith, and with due care – that is, with some reasonable factual basis.”⁴⁴

gained personal knowledge of the relevant standards by serving as fiduciaries themselves, particularly in family affairs. . . . There is reason to believe that people had significantly more exposure to . . . fiduciary service [as guardians, executors, administrators, and trustees] than is true today, both because the shorter life expectancy of the time left far more estates to administer per capita and because guardians and executors typically served in teams rather than singly.

Id. at 56.

³⁷ *Id.* at 85.

³⁸ *Id.* at 93.

³⁹ *Id.* at 97.

⁴⁰ For example, Natelson notes that a defender of the Constitution made clear that it would not be “proper” for Congress to create commercial monopolies or inflict unusual punishments. *Id.* at 109. Granting a monopoly, Natelson then explains, would violate the fiduciary “duty of impartiality” by favoring one group over others. *Id.* Prescribing an unusual punishment, by the same token, would “breach both the duty of impartiality and the duty of loyalty, for an agent must not oppress his principals.” *Id.* It is worth noting, however, that Professor Natelson, rather than the eighteenth-century Federalist, draws the connection between these limitations and private fiduciary law.

⁴¹ *Id.* at 114-19.

⁴² *See id.* at 119.

⁴³ *Id.*

⁴⁴ *Id.*

B. *English Administrative Law*

Professors Lawson and Seidman pursue a somewhat different approach, rooted in eighteenth-century English administrative law. While acknowledging that English statutes had not used the terms “necessary and proper” or either of its components in a routine or predictable way,⁴⁵ they argue that by the late eighteenth century, English administrative law had firmly embraced a doctrine of reasonableness that fits logically with the Necessary and Proper Clause.⁴⁶

Under English law, even a broad and facially unfettered delegation of discretionary power from Parliament to some implemental entity was subject to a background, and judicially enforceable, obligation of reasonableness.⁴⁷ This principle, they argue, has an elegant conceptual fit with the premise that the U.S. Constitution rests on a delegation of discretionary power from the people of the several states to the federal government.⁴⁸ Accordingly, they say, it makes sense to read the delegation effected by the Necessary and Proper Clause in light of the English principles of reasonableness that governed delegations of discretionary power.⁴⁹

Again, Lawson and Seidman do not assert that the “necessary and proper” language reflected an established term of art. Indeed, they acknowledge that “the [administrative law] principle of reasonableness was not at [the] time [of the founding] specifically articulated as a distinct doctrine” and that “there [was] no canonical source from which . . . [to] draw the contours of the principle as it stood in the founding era.”⁵⁰ Still, the text and purpose of the Necessary and Proper Clause plausibly captured principles of reasonableness implicit in the English cases – including fairness, impartiality, proportionality,

⁴⁵ *Id.* at 15.

⁴⁶ *Id.* at 121.

⁴⁷ *Id.* at 121-25. Lawson and Seidman trace this principle primarily to *Rooke’s Case*, (1598) 77 Eng. Rep. 209 (C.P.) 210; 5 Co. Rep. 99b, 100b, and *Keighley’s Case*, (1609) 77 Eng. Rep. 1136 (K.B.) 1138; 10 Co. Rep. 139a, 140b, both of which superimposed a reasonableness requirement on grants of authority to the Commissioners of Sewers. LAWSON ET AL., *supra* note 8, at 122-24. They say that by the mid-seventeenth century, the requirement that “statutory discretion . . . be exercised reasonably applied generally to all delegated power and was not confined to sewer commissioners.” *Id.* at 124.

⁴⁸ *Id.* at 135.

⁴⁹ Lawson and Seidman acknowledge that no similar clause appears in Articles II and III of the Constitution, both of which also reflect delegations of power. *Id.* at 129-32. They argue, however, that this makes sense because the reasonableness principle applied to such entities under English law, and a reasonable constitutionmaker would therefore assume that it applied of its own force to the executive and judiciary. *Id.* at 131-33. In contrast, because the King-in-Parliament was not subject to the same constraint under English law, Lawson and Seidman speculate that the founders may have felt it necessary to make the reasonableness requirement express as applied to Congress. *Id.* at 135.

⁵⁰ *Id.* at 137.

the efficaciousness of means to the specified ends, and a respect for background rights.⁵¹

Accordingly, by Lawson and Seidman's lights, the term "'necessary' describes the causal relationship required between the selected means and desired ends."⁵² And "'proper' is an excellent way to describe norms of impartiality and regard for rights" and "fiduciary duties more broadly"⁵³ – a conclusion said to be in harmony with previously discussed private law understandings of incidental power.⁵⁴ Building on earlier work by Professor Lawson and Patricia Granger, Lawson and Seidman add that "proper" seemed an appropriate way to express the constraint that the delegate act within the scope of its assigned powers – that is, to respect constitutional rights.⁵⁵

C. *Corporate Law*

The final contribution to *Origins* makes the most modest set of claims. Stating that "[t]he Constitution . . . [was] itself a corporate charter – a document creating a body corporate and defining its powers"⁵⁶ – Professor Miller ties the Necessary and Proper Clause to corporate law. In particular, he notes that terms such as "necessary," "proper," and "necessary and proper" appeared in countless corporate charters of the period.⁵⁷ His starting premise is that the Constitution is very much like a corporate charter; it "endows [the government] with a name, continuity of existence, succession of leadership, and the power to sue and be sued."⁵⁸ The Constitution also specifies the government's purposes and powers and effects delegations of power to agents, subject to limitations.⁵⁹ All of these features, Miller writes, were shared with eighteenth-century and early nineteenth-century corporate charters, many of which served public purposes.⁶⁰

⁵¹ *Id.* at 137-41.

⁵² *Id.* at 141.

⁵³ *Id.* at 142.

⁵⁴ *Id.* at 143.

⁵⁵ *Id.* at 142; see also Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297 (1993) ("[T]he 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.").

⁵⁶ LAWSON ET AL., *supra* note 8, at 145.

⁵⁷ *Id.*

⁵⁸ *Id.* at 147.

⁵⁹ *Id.*

⁶⁰ *Id.* Miller then examines a variety of corporate charters, including the Crown charters for the American colonies, the charters of the First and Second Banks of the United States, the Massachusetts Bay Company's charter, and every charter issued by Connecticut and Rhode Island in the period up to 1819. *Id.* at 149-50.

From this starting point, he finds it telling that the language used in many corporate charters has a similarity with that of the Necessary and Proper Clause. In particular, a great number of corporate charters that granted powers to its officers and directors used either some combination of “necessary and proper” or words in the same family of descriptors.⁶¹ Accordingly, given the ubiquity of such clauses, Miller thinks it plausible to draw interpretive guidance for the Necessary and Proper Clause from its corporate law counterparts.⁶² Indeed, because many of the founders were lawyers (including four of the five-member Committee of Detail), Miller finds it at least plausible that they drew their inspiration from familiar corporate charters.⁶³

What guidance do eighteenth-century corporate charters thus provide? In keeping with the tenor of the book as a whole, Professor Miller’s claims are measured. He takes care to emphasize that “there is no proof” that the Constitution’s drafters actually drew “necessary and proper” from corporate charters or, if they did, that they “intended that the constitutional words be interpreted in the same way.”⁶⁴ Similarly, he does not suggest that the phrase “necessary and proper” or its components constitute a settled term of art in corporate law. Rather, he notes that the relevant terms “were not defined in colonial or early federal charters,” that “[c]orporate practice was not uniform,” and that, despite some predictability in usage, “there [was] also plenty of variation” in wording among the charters.⁶⁵ Still, he thinks it possible to draw some conclusions from corporate charters’ patterns of usage.

For example, Professor Miller notes that the term “necessary” appeared in fundamental clauses, such as those conferring general rulemaking powers on corporate directors, commissioners, or trustees.⁶⁶ For less fundamental clauses (relating to matters such as the timing of dividends or the setting of salaries), he finds that more permissive language (such as “expedient,” “convenient,” or “fit”) was more common.⁶⁷ Thus, while none of the key phrases was defined

⁶¹ *Id.* at 150-54. He provides the Connecticut and North Carolina charters as examples, stating:

“Necessary” and “proper” are the most common, but “expedient,” “fit,” “convenient,” “at pleasure,” and “appertaining” are also observed. Less common are “beneficial,” “advisable,” “reasonable,” “meet,” “conducive to,” “for the benefit of,” and “in their discretion.” Doublets, like . . . “necessary and proper[]” are also attested: examples are “expedient and necessary,” “necessary and expedient,” “necessary or expedient,” “fit and expedient,” “proper and necessary,” “necessary and proper,” “necessary and convenient,” “fit and proper,” “suitable and necessary,” and “necessary or convenient.”

Id. at 152-54.

⁶² *Id.* at 175.

⁶³ *Id.* at 149.

⁶⁴ *Id.* at 146.

⁶⁵ *Id.* at 145.

⁶⁶ *Id.* at 165-67.

⁶⁷ *Id.* at 161-65.

by corporate law at the time,⁶⁸ Miller infers that the use of the more restrictive term “necessary” in more fundamental clauses suggests that the means chosen for exercising such power must be “reasonably closely adapted” to the ends of the charter.⁶⁹ Similarly, because the charters commonly used “proper” in clauses granting power over salaries, conditions of employment, or dividends – matters relating to the interests of corporate stakeholders – Miller surmises that the term “proper” signaled that managers must consider the effect of their actions on these stakeholders.⁷⁰ In other words, he reads it requiring nondiscrimination against individual stakeholders.

Applying these hypotheses to the Necessary and Proper Clause, Miller concludes that a law is “necessary” if there is “a reasonably close connection between constitutionally recognized legislative ends and the means chosen to accomplish [them].” He also finds that for a law to be “proper,” it “must not without adequate justification discriminate against or otherwise disproportionately affect the interests of individual citizens.”⁷¹

II. THE RELEVANCE OF BACKGROUND LEGAL TECHNICALITIES

Origins makes a large contribution to our understanding one of the key provisions of the U.S. Constitution. After reading this rich set of law stories, one cannot think of the Necessary and Proper Clause the same way. In particular, I had always counted myself among those who puzzled over the apparent obscurity of the clause. The text itself tells us nothing concrete about what “necessary and proper” means,⁷² and the usual secondary sources – the Philadelphia Convention and the ratification debates – add little if any detail to the spare language of the clause.⁷³ Yet it seems implausible that in designing a clause so important (and ultimately so controversial), the framers just pulled language out of thin air. *Origins* convincingly shows that this is not what happened. At least Professors Natelson and Miller, who tie the Necessary and

⁶⁸ *Id.* at 145, 175-76.

⁶⁹ *Id.* at 171.

⁷⁰ *Id.* at 171-74.

⁷¹ *Id.*

⁷² See, e.g., J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 587 (“[T]he language employed failed to clarify the precise scope of [the] implied powers [granted by the clause].”).

⁷³ See LAWSON ET AL., *supra* note 8, at 5 (claiming that the antecedents of the Necessary and Proper Clause are not readily found “in the sources to which constitutional scholars typically look for guidance: the Convention notes, the ratification debates, and early American constitutional history”); Mark A. Graber, *Unnecessary and Unintelligible*, 12 CONST. COMMENT. 167, 168 (1995) (“The records of the Constitutional Convention provide no help. The Committee on Detail gave no hint why it chose the language it did, and the Convention in turn apparently perceived these particular alterations to prior drafts as merely stylistic . . .”).

Proper Clause to prior texts, leave no doubt that the operative phrase belongs to an ascertainable family of private law incidental power clauses.

Equally interesting is that each of the three contributions contends that interpreters should read this important clause in light of a really quite intricate set of legal antecedents. Natelson patches together a picture of incidental powers and fiduciary obligation from diverse areas of law spanning the law of real property conveyances to powers of attorney to the law of trusts.⁷⁴ Lawson and Seidman infer a general principle of reasonableness from a close reading of a small number of English administrative law cases that, as the authors acknowledge, remained a work in progress at the time of the framing.⁷⁵ And Miller's contribution draws meaning from a lawyerly comparison of the way countless corporate charters differentially used language, including a nuanced comparison of what *types* of power-granting clauses used the terms "necessary" and "proper" (more important ones) and what types did not (less important ones).⁷⁶ The lawyer's craft of reconstructing meaning from disparate pieces of evidence is impressively on display in all of these contributions.

Admirably, moreover, none of the contributors pretends that a constitutionally sufficient majority of ratifiers subjectively meant to adopt any of the intricate legal frameworks that the four authors so painstakingly reconstructed. Lawson and Seidman nowhere claim that any of the founders affirmatively intended to adopt *Rooke's Case* or *Keighley's Case* as the benchmark for the Necessary and Proper Clause. And Miller highlights the absence of any evidence that the founders borrowed the law of corporate charters or intended the clause to be read in light of the intricacies of eighteenth-century corporate law.⁷⁷ Of the three contributions, Natelson's comes closest to stating that the founders subjectively meant to adopt an extant legal framework – fiduciary law.⁷⁸ But most of his evidence goes to the more general – and limited – proposition that they understood the Necessary and Proper Clause to be an incidental powers clause,⁷⁹ and not to the more

⁷⁴ LAWSON ET AL., *supra* note 8, at 60-67 (discussing the eighteenth-century fiduciary powers doctrine).

⁷⁵ *Id.* at 121-25, 136-41 (discussing the principle of reasonableness as it applied to delegated powers in early the early eighteenth century); *see also id.* at 136 ("While the [administrative law] principle of reasonableness was well established by the eighteenth century, it had neither a name nor a precise definition at the time.").

⁷⁶ *Id.* at 154-74 (discussing evidence from corporate charters).

⁷⁷ *Id.* at 146 ("[T]here is no proof that the Necessary and Proper Clause was in fact taken from corporate charters. Even if the framers of the Constitution *did* borrow from corporate charters, they may not have intended that the constitutional words be interpreted in the same way . . .").

⁷⁸ *See id.* at 87-111.

⁷⁹ For further discussion of the implications of that point, see *infra* text accompanying notes 125-129.

particular claim that they also wished to subject Congress to the detailed fiduciary obligations that constrain incidental powers in the agency context.⁸⁰

My first methodological claim here is that if one wished to read into the Constitution the kind of intricate legal antecedents that the authors here identify, such a decision need not – and could not plausibly – rest on any claim that the framers or ratifiers subjectively intended to adopt the details of fiduciary law, administrative law, or corporate law. Rather, consulting such eighteenth-century legal minutia is appropriate only if, as some suggest, interpreters should read the document from the perspective of a reasonable person conversant in eighteenth-century legalese. For those who think that some form of original understanding is at least relevant to constitutional adjudication,⁸¹ the last quarter century has witnessed a pronounced movement

⁸⁰ As discussed, Professor Natelson believes that the term “proper” reflects the detailed obligations of fiduciaries – including impartiality, good faith, and due care. LAWSON ET AL., *supra* note 8, at 119. Stating that the term was not, so far as he knows, “defined in reported cases,” *id.* at 78, he deduces that the term “proper,” in a fiduciary context, means something proper for a fiduciary. *Id.* at 78-80. Natelson’s evidence that the founders ascribed that specific understanding of “proper” to the Necessary and Proper Clause is rather sparse and inferential. One piece of evidence is a quotation from Alexander Hamilton stating that a law’s propriety depends on “the nature of the powers upon which it is founded.” *Id.* at 108 (quoting THE FEDERALIST NO. 33, at 200-201 (Alexander Hamilton) (Modern Library 1941)). The other piece of evidence is a Federalist pamphlet by the “Impartial Citizen” that described matters, such as monopolies or unusual punishments, that would lie beyond Congress’s power under the Necessary and Proper Clause. *Id.* at 108-09 (quoting *An Impartial Citizen V*, PETERSBURG VA. GAZETTE, Feb 28 1788, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 431 (John P. Kaminski & Gaspare J. Saladino eds., 1988)). Natelson argues that the items described in that pamphlet would constitute classic breaches of fiduciary duties of impartiality and loyalty. *Id.* at 109 (“All of the items on the Impartial Citizen’s list of improper laws were violations of fiduciary duty.”). Whether or not Professor Natelson’s interpretation of these two pieces of evidence is correct, it is noteworthy that neither piece of evidence expressly ties its conclusion to the concept of fiduciary duty. Accordingly, quite apart from the sparseness of the evidence on this particular point, it is at least not clear from Natelson’s submission that the ratifiers subjectively understood themselves to be importing private law fiduciary duties into the clause.

⁸¹ The analysis here, of course, matters most to those who consider themselves originalists. Even committed nonoriginalists, however, find the text’s historical meaning at least relevant to, even if not dispositive of, constitutional decision making. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11-22 (1991) (finding the text to be one factor among many that our tradition recognizes as relevant to constitutional adjudication); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1799-1800 (1997) (“Resort to historical context enables the nonoriginalist judge to root normative arguments in values that derive from the Constitution’s text.”); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 880 (1996) (arguing that the text of the Constitution can serve as useful common point of reference for coordinating social action in some cases). Accordingly, I think it worth examining how one should make sense of relatively arcane legal antecedents

away from an originalism that stressed the constitutionmakers' actual intentions⁸² toward one that focuses on the original public meaning of the document – the way a reasonable person conversant with the social and linguistic conventions of the time would read the text in context.⁸³ The intent-based approach rests on the traditional view that meaning is a function of a speaker's intent and that fidelity to a lawmaker therefore entails recovery of the lawmaker's intended meaning.⁸⁴ The public meaning approach assumes

to a clause such as the Necessary and Proper Clause.

⁸² On the assumption that interpreters should try to determine what the drafters of a legal text intended it to mean, the first wave of modern originalism focused on the intent of the framers in the Philadelphia Convention. *See, e.g.*, Raoul Berger, *GOVERNMENT BY JUDICIARY* 8 (1977); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 13 (1971); Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 *S. TEX. L. REV.* 455, 465 (1986). A second wave of originalist theory emphasized "original understanding" – that is, the meaning that the Constitution's ratifiers would have attached to it. *See* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 *GEO. L.J.* 1113, 1136-39 (2003). This shift in emphasis reflected, at least in part, the recognition that the ratifiers, rather than the framers, ultimately exercised the final authority to give legal effect to the proposed Constitution. *See, e.g.*, Alex Kozinski & Harry Susman, *Original Mean[der]ings*, 49 *STAN. L. REV.* 1583, 1584 (1997) ("Strict originalist interpretations depend on sanctifying the words of the Ratifiers because their collective power gave the Constitution its special force. Strict originalists regard the Framers as mere drafters of language whose meaning the Ratifiers were free to change."). It is not entirely clear whether the original understanding approach seeks actual understandings that the ratifiers would have attached to the text, the objective meaning a reasonable ratifier would have ascribed to the text, or both. *See* Kesavan & Paulsen, *supra*, at 1138 (discussing varieties of original understanding); Robert G. Natelson, *The Founders' Hermeneutics: The Real Original Understanding of Original Intent*, 68 *OHIO ST. L.J.* 1239, 1305 (2007) (proposing a hybrid approach that looks for both subjective and objective meaning). To simplify the narrative and to sharpen the contrast with original public meaning, I emphasize the subjective elements of original intent and original understanding. That oversimplification of original understanding should not impose significant cost on the present analysis. To the extent that original understanding relies on the subjective or actual understandings, it raises the same concerns about intent-aggregation as does an approach grounded in original intent. *See infra* text accompanying notes 88-91. To the extent that original understanding seeks the understanding of a hypothetical reasonable ratifier, it implicates many of the same analytical considerations that the original public meaning approach does. *See infra* text accompanying notes 97-103.

⁸³ *See, e.g.*, Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 *U. CHI. L. REV.* 101, 105 (2001); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 *YALE L.J.* 541, 552 (1994); Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 *GEO. WASH. L. REV.* 1119, 1119 (1998); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 *GEO. WASH. L. REV.* 1127, 1132 (1998).

⁸⁴ *See, e.g.*, Larry Alexander & Saikrishna Prakash, "Is That English You're Speaking?" *Why Intention Free Interpretation Is an Impossibility*, 41 *SAN DIEGO L. REV.* 967, 974-78

that collective intent is hard to recover and that interpreters should focus as tightly as possible on the meaning of the text, which is all that made its way through the constitutionmaking process intact.⁸⁵

Whatever one thinks of these competing approaches to originalism in general,⁸⁶ it is hard to deny that reading relatively obscure legal antecedents into the text of the document seems even minimally plausible only if one subscribes to the original public meaning approach.⁸⁷ Why? In general, the constitutionmaking process is too far flung and complex to enable interpreters to know what the founders actually intended to achieve on virtually any unsettled issue of moderate complexity.⁸⁸ Consider legal realist Max Radin's famous critique of the very possibility of *legislative* intent:

The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinate, are infinitesimally small. The chance is still smaller that a given determinate, the litigated issue, will not only be within the minds of all these men but will be certain to be selected by all of them as the present limit to which the determinate should be narrowed. . . . Even if the contents of the minds of the legislature were uniform, we have no means of knowing that content except by the external utterances or behavior of these hundreds of men, and in almost every case the only external act is the extremely ambiguous one of acquiescence, which may

(2004); Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 MINN. L. REV. 1065, 1089 (1993); Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109, 1111-14 (2008).

⁸⁵ See Kesavan & Paulsen, *supra* note 82, at 1135-44 (describing the rise of public meaning originalism and defending its basic premises).

⁸⁶ The authors of *Origins* divide on the question. Professors Lawson and Seidman believe that constitutional interpretation "must always take place from the perspective of a hypothetical reasonable observer." LAWSON ET AL., *supra* note 8 at 8. Professor Natelson believes that the interpreter must first attempt to discover the founders' subjective understanding of the document and then default to objective meaning only when no subjective understanding is available. See Natelson, *supra* note 81, at 1305.

⁸⁷ I suspect that at least some of the authors of *Origins* would resist my description of their frameworks as "reasonably obscure." I think it fair to describe them as such for reasons given by the authors themselves: "These antecedents have thus far escaped notice because they are not found – or at least are not found without considerable interpretative background knowledge – in the sources to which constitutional scholars typically look for guidance: the Convention notes, the ratification debates, and early American constitutional history. LAWSON ET AL., *supra* note 8 at 5. In other words, to understand the relevance of fiduciary law, administrative law, or corporate law, a reasonable member of the founding generation would need this "considerable interpretative background knowledge."

⁸⁸ Professor Paul Brest made this point to devastating effect. See generally Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

be motivated in literally hundreds of ways, and which by itself indicates little or nothing of the pictures which the statutory descriptions imply.⁸⁹

Now apply that same insight to a constitutionmaking process that consisted of a multimember framing convention and thirteen multimember ratifying conventions spread across geographically, culturally, and politically diverse states in an era of relatively poor communication.⁹⁰ No one has yet improved upon Justice Story's account of the resulting problems of aggregation:

[T]he private interpretation of any particular man, or body of men, must manifestly be open to much observation. The constitution was adopted by the people of the United States; and it was submitted to the whole upon a just survey of its provisions, as they stood in the text itself. In different states and in different conventions, different and very opposite objections are known to have prevailed; and might well be presumed to prevail. Opposite interpretations, and different explanations of different provisions, may well be presumed to have been presented in different bodies, to remove local objections, or to win local favour. And there can be no certainty, either that the different state conventions in ratifying the constitution, gave the same uniform interpretation to its language, or that, even in a single state convention, the same reasoning prevailed with a majority, much less with the whole of the supporters of it. . . . It is not to be presumed, that, even in the convention, which framed the constitution, from the causes above-mentioned, and other causes, the clauses were always understood in the same sense, or had precisely the same extent of operation. Every member necessarily judged for himself; and the judgment of no one could, or ought to be, conclusive upon that of others.⁹¹

Even if one thought it possible to aggregate constitutionmakers' collective intent on certain large matters, one could hardly make that claim with respect to *Origins'* assertions about fiduciary law, administrative law, and corporate law. The very intricacy of the book's analysis forecloses any realistic claim that a constitutionally sufficient proportion of the constitutionmakers subscribed to the authors' view of the relevant law and its applicability to the Necessary and Proper Clause. One cannot read this book without being impressed, for example, at the way Professor Natelson deploys the subtleties of real property conveyance law to flesh out what "necessary" may have meant in

⁸⁹ Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870-71 (1930).

⁹⁰ See William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1309 (1998) ("The Constitution itself ran the gauntlet of the Philadelphia Convention and thirteen state ratifying conventions, involving thousands of people. The national 'understanding' of what the Constitution meant involved millions."); Jack N. Rakove, *Comment*, 47 MD. L. REV. 226, 229 (1987).

⁹¹ 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 406, at 388-89 (Boston, Hilliard, Gray & Co. 1833).

incidental powers doctrine.⁹² Similarly impressive is the way Professors Lawson and Seidman, for example, tease a general administrative law doctrine of proportionality from an English case dealing with the overreaching of a paving commission.⁹³ And consider the meticulousness with which Professor Miller goes clause-by-clause through scores, if not hundreds, of eighteenth-century corporate charters to identify patterns of word usage and context.⁹⁴ It is the very impressiveness and intricacy of the legal analysis that makes it hard to imagine that any meaningful set of constitutionmakers engaged in the same construction of meaning that the authors did here. Indeed, even if some number of constitutionmakers were familiar with – or diligently sought to discover – the same raw materials that the authors deploy, so many of the authors’ conclusions require the hard judgment calls that all good lawyers necessarily make.

Of course, a proponent of original intent might say that this intricacy tells us nothing conclusive. Constitutionmakers, after all, may have subjectively intended to incorporate by reference the intricacies of trust or administrative or corporate law, whether or not they actually took the trouble to parse the body of law in question.⁹⁵ Yet *Origins* offers no evidence of any such subjective intent. To the contrary, three sets of authors present three quite distinct stories about the legal origins of the clause. Accordingly, based on the book alone, one has no reason to imagine that well-informed constitutionmakers would have subjectively related to these complex materials in any uniform way.

To say that one cannot ascertain the founders’ subjective intent is not to say that interpreters can properly disregard the three constitutional backdrops reconstructed in *Origins*.⁹⁶ On the contrary, I join those who believe that theories of objective intent make the legal antecedents to constitutional language relevant, even if one thinks it impossible to conclude that constitutionmakers subjectively intended to embrace those antecedents. Legal philosopher Joseph Raz has shown that for any theory that rests on the premise of “legislative” supremacy – that is, fidelity to the lawmaker or lawmaking process – one must posit a minimum level of legislative intent.⁹⁷ He starts from the proposition that “[i]t makes no sense to give any person or body law-

⁹² LAWSON ET AL., *supra* note 8 at 63-67.

⁹³ *Id.* at 124-25, 140.

⁹⁴ *Id.* at 155-74.

⁹⁵ I am grateful to John Harrison for suggesting this qualification to the analysis.

⁹⁶ The term “constitutional backdrops” comes from Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. (forthcoming 2012), which thoughtfully explores the various ways in which legal frameworks preceding the Constitution retain relevance after the document’s adoption.

⁹⁷ See Joseph Raz, *Intention in Interpretation*, in *THE AUTONOMY OF LAW* 267 (Robert P. George ed., 1996).

making power unless it is assumed that the law they make is the law they intended to make.”⁹⁸ He elaborates:

[T]o assume that the law made by legislation is not the one intended by the legislature, we must assume that he cannot predict what law he is making when the legislature passes any piece of legislation. But if so, why does it matter who the members of the legislature are, whether they are democratically elected or not, whether they represent different regions of the country, or classes in the population, whether they are adults or children, sane or insane? Since the law they will end by making does not represent their intentions, the fact that their intentions are foolish or wise, partial or impartial, self-serving or public spirited, makes no difference.⁹⁹

Even in the absence of subjective intent, however, one can connect interpretation to the lawmaking process if the interpreter attributes to the lawmaker the minimum intention “to say what one would ordinarily be understood as saying, given the circumstances in which one said it.”¹⁰⁰ According to Raz, ascribing such objectified intent to legislators enables us to hold legislators accountable for the content of the laws they have passed, whether or not they had any actual intent, singly or collectively, respecting its details:

Legislators who have the minimal intention know that they are, if they carry the majority, making law, and they know how to find what law they are making. All they have to do is establish the meaning of the text in front of them, when understood as it will be according to their legal culture assuming that it will be promulgated on that occasion.¹⁰¹

Or, put another way, the idea of legislative supremacy necessarily rests on the assumption that lawmakers expect, at some level, to be able predict the way interpreters will read their words.¹⁰² This means that if one cannot find subjective intent, the most reliable way to read the lawmaker’s signals is to identify and apply, as accurately as one can, the social and linguistic conventions that prevailed at the time the lawmaker uttered the operative language. As Jeremy Waldron puts it:

A legislator who votes for (or against) a provision like “No vehicles shall be permitted to enter any state or municipal park” does so on the assumption that – to put it crudely – what the words mean to him is identical to what they will mean to those to whom they are addressed (in the

⁹⁸ *Id.* at 258.

⁹⁹ *Id.* at 258-59.

¹⁰⁰ *Id.* at 268.

¹⁰¹ *See id.* at 267.

¹⁰² *See* Gerald C. MacCallum, Jr., *Legislative Intent*, 75 *YALE L.J.* 754, 758 (1966) (“The words [a legislator] uses are the instruments by means of which he expects or hopes to effect . . . changes [in society]. What gives him this expectation or this hope is his belief that he can anticipate how others (e.g., judges and administrators) will understand these words.”).

event that the provision is passed). . . . That such assumptions pervade the legislative process shows how much law depends on language, on the shared conventions that constitute a language, and on the reciprocity of intentions that conventions comprise.¹⁰³

This framework explains the Court's longstanding practice of reading technical terms technically – that is, of giving effect to the nuanced meaning of legal terms of art. As Justice Jackson famously wrote for the Court:

[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.¹⁰⁴

That is, language has meaning only because of the shared practices of a linguistic community,¹⁰⁵ and lawmakers sometimes borrow the language of a specialized linguistic subcommunity – perhaps most often, the subcommunity of lawyers.¹⁰⁶ If respect for legislative supremacy entails reading language according to prevailing social and linguistic conventions, then it is reasonable to read the lawmaker's choice of an identifiable legal term of art as a signal to tap into the details of the relevant art.¹⁰⁷ (Why else would a drafter employ specialized language?) The interpreter need not establish that the lawmaker knew the contents of the art; rather, it suffices that the lawmaker obviously selected an off-the-rack term with an established technical meaning.¹⁰⁸

Accordingly, if any of the authors of *Origins* were claiming that “necessary and proper” constituted an established term of art that the founders would have understood as such, it would not matter to me that the ensuing analysis involved the subtle and intricate parsing of hoary treatises and common-law cases.¹⁰⁹ In those circumstances, a reasonable person would assume that a

¹⁰³ Jeremy Waldron, *Legislators' Intention and Unintentional Legislation*, in *LAW AND INTERPRETATION* 339 (Andrei Marmor ed., 1995).

¹⁰⁴ *Morissette v. United States*, 342 U.S. 246, 263 (1952).

¹⁰⁵ See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 134-142, at 51e-56e (G.E.M. Anscombe trans., 10th prt. 1965) (explaining that words or phrases have meaning because of the shared practices of a linguistic community); Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 359-60 (1992) (applying Wittgenstein's insight to constitutional interpretation).

¹⁰⁶ See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2464 (2003).

¹⁰⁷ See *Morissette*, 342 U.S. at 263.

¹⁰⁸ See Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536-37 (1947) (“Words of art bring their art with them. They bear the meaning of their habitat whether it be a phrase of technical significance in the scientific or business world, or whether it be loaded with the recondite connotations of feudalism.”).

¹⁰⁹ Indeed, modern textualists freely consult extrinsic sources such as dictionaries, treatises, and old cases to determine the content of a term of art. See, e.g., *Babbitt v. Sweet Home Chapter of Cmities. for a Great Or.*, 515 U.S. 687, 717-18 (1995) (Scalia, J.,

legislator selected “necessary and proper” as a shorthand way of instructing interpreters to rely on the technical meaning of that phrase, even if it took considerable parsing of extrinsic evidence to establish that meaning.¹¹⁰ The challenge posed by *Origins*, however, lies in the fact that the authors claim not that the Necessary and Proper Clause adopts a term of art, but that it borrows a familiar and widely used legal *construct* – the incidental powers clause. This difference alters the analysis in subtle but important ways.

III. THE LEVEL OF GENERALITY OF THE BORROWED CONSTRUCT(S)

One of the admirable things about *Origins* is the integrity with which the authors identify the limits of their claims. None argues that the phrase “necessary and proper” was an established term of art lifted wholesale from another context. Natelson comes the closest. He describes the term “necessary” as a term of art in the law of real property conveyances¹¹¹ and generally suggests that it was one of a family of similar words used to signal a grant of incidental powers.¹¹² At the same time, however, Natelson acknowledges that the meaning of the term “‘proper’ seems not to have been defined in reported cases.”¹¹³ Lawson and Seidman make no claim that English administrative law used the phrase “necessary and proper” or its components to describe the concept of reasonableness they would read into

dissenting) (relying on cases and treatises to determine the meaning of a statutory term of art); *Moskal v. United States*, 498 U.S. 103, 122-26 (1990) (Scalia, J., dissenting) (same). Although these extrinsic sources (much like legislative history) have not gone through bicameralism and presentment, textualists believe that it is their job to look for “‘objectified’ intent – the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.” Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 17 (1997). Presumably, a reasonable person using or reading a term of art would feel it necessary to ascertain the technical contents of the art.

¹¹⁰ Those who subscribe to the theory of “objective intent” or “original public meaning” find it necessary to posit a reasonable interpreter conversant with the details of applicable socio-linguistic conventions, whether or not there is evidence to suggest that lawmakers were in fact conversant with those conventions. See, e.g., Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 25 (2001) (“[W]e conceive of the inquiry in hypothetical terms: What would a fully-informed public audience, in possession of all relevant information about the Constitution and the world around it, have understood the Constitution to mean?”); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 348 n.89 (2002) (defining original meaning as “an objective, hypothetical construct that represents the meaning that the Constitution would have had to a fully-informed public audience in possession of all relevant facts and arguments”).

¹¹¹ See LAWSON ET AL., *supra* note 8, at 64.

¹¹² See *id.* at 72-78.

¹¹³ *Id.* at 78.

that phrase.¹¹⁴ And Miller repeatedly makes clear to the reader that “[t]he key terms ‘necessary’ and ‘proper’ have no definite meaning in [eighteenth-century] corporate practice”¹¹⁵ and that “[c]orporate practice was not uniform.”¹¹⁶ For him, the terms had interpretive significance simply because one could draw certain inferences from examining patterns of usage.¹¹⁷

As I have argued, if something is a recognizable term of art, then using the technical term sends a signal that the lawmaker is adopting all its details, however obscure.¹¹⁸ How can one intelligibly understand the congressional power to “grant Letters of Marque and Reprisal”¹¹⁹ or the constitutional injunction against enacting “any Bill of Attainder” or “ex post facto Law”¹²⁰ without looking up these terms in law books?¹²¹ In *Origins*, at least part of the claim is quite different. It is that despite the absence of any canonical terms, the borrowing of a discernable legal construct or framework from a given area of law brings along with it all of the limitations that attend the application of that framework in the particular area of law in which that construct has been used.¹²² That is to say, the authors’ analysis in *Origins* has two steps. First, the Necessary and Proper Clause would be recognizable as an incidental powers clause frequently used in private law settings. Second, interpretation of the Necessary and Proper Clause should pick up the constraints that accompany such clauses in particular legal areas in which they are used, such as agency law or corporate law.

Natelson makes these points most clearly: Since a “proper” exercise of incidental powers in fiduciary law must respect all of the private law limits on fiduciaries, we should read fiduciary duties such as due care and impartiality into the analogous incidental powers clause adopted by Congress in Article I, Section 8, clause 18.¹²³ Though more tentative, Miller’s contribution is to

¹¹⁴ See *id.* at 141-43.

¹¹⁵ *Id.* at 175-76.

¹¹⁶ *Id.* at 145.

¹¹⁷ See *supra* text accompanying notes 66-70.

¹¹⁸ See *supra* text accompanying notes 104-108.

¹¹⁹ U.S. CONST. art. I, § 8, cl. 11.

¹²⁰ *Id.* § 10, cl. 1.

¹²¹ In many contexts, the Court’s constitutional practice has reflected this very assumption. See, e.g., *U.S. Steel Corp v. Multistate Tax Comm’n*, 434 U.S. 452, 461-62 (1978) (“[T]he Framers used the words ‘treaty,’ ‘compact,’ and ‘agreement’ as terms of art, for which no explanation was required.”); *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935) (“The right of trial by jury thus preserved is the right which existed under the English common law when the [Seventh] Amendment was adopted.”); *Smith v. Alabama*, 124 U.S. 465, 478 (1888) (“The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.”).

¹²² Because the contributions of Professors Natelson and Miller define this problem most directly, this Part will focus on their work.

¹²³ See LAWSON ET AL., *supra* note 8, at 78-80, 118.

similar effect: Since the Necessary and Proper Clause resembles the incidental powers clauses in corporate charters, it should be read in light of the corporate law practices that constrain the application of those clauses.¹²⁴

I see no problem with the first step – acknowledging that drafters have adopted an established legal construct and assuming that a reasonable reader would take that choice as a signal to apply the usual practices that accompany that construct.¹²⁵ Just as a reasonable speaker may come to associate certain unstated legal details with a given word or phrase, such a speaker might also make similar associations with a particular *type* of clause. For example, no one can deny that, by dint of established practice, the enactment of an unqualified statute of limitations carries with it the implication that courts may apply the background doctrine of equitable tolling, even though the text does not so specify.¹²⁶ Similarly, one reads criminal statutes in light of well-established defenses.¹²⁷ In the constitutional setting, Professor Caleb Nelson demonstrated that the Supremacy Clause was modeled after the familiar construct of *non obstante* clauses, which had the routine and predictable consequence of signaling interpreters of statutes not to apply doctrines of implied repeal.¹²⁸

I have no problem concluding that the Necessary and Proper Clause is an incidental powers clause. Nor do I have any difficulty imagining that one might identify certain basic attributes shared by all incidental powers clauses. Full exploration of that question is beyond this Essay's scope. But my reading of *Origins* suggests to me, at least, that such a clause adds no novel power to the express grants it accompanies and that it requires at least some means-ends fit between the power granted and the incidental power.¹²⁹ Whatever array of features one would naturally associate with such a clause, its relevance to

¹²⁴ See *id.* at 155-74. Lawson and Seidman's contributions do not raise these issues.

¹²⁵ See Manning, *supra* note 106, at 2465-76 (explaining the Court's attribution of background legal practices to particular types of statutes).

¹²⁶ See, e.g., *Young v. United States*, 535 U.S. 43, 49-50 (2002) ("It is hornbook law that limitations periods are 'customarily subject to equitable tolling,' unless tolling would be 'inconsistent with the text of the relevant statute.' Congress must be presumed to draft limitations periods in light of this background principle." (citations omitted) (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990); *United States v. Beggerly*, 524 U.S. 38, 48 (1998))).

¹²⁷ See, e.g., *Brogan v. United States*, 522 U.S. 398, 406 (1998) ("Criminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law."); *Staples v. United States*, 511 U.S. 600, 605 (1994) ("[W]e must construe the statute in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded." (citations omitted)).

¹²⁸ See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000) (explaining that the "[t]he final phrase in the Supremacy Clause . . . is something called a '*non obstante* clause,'" and that *non obstante* clauses signaled to a court the ability to displace whatever prior law contradicted the new provision).

¹²⁹ See LAWSON ET AL., *supra* note 8, at 119, 175.

constitutional meaning depends on identifying the least common denominator shared by all incidental powers clauses, wherever they might be deployed.

For several reasons, I am more skeptical about the second step in *Origins* – reading into the Necessary and Proper Clause not only the general features of an incidental powers clause but also the specific requirements of trust law or corporate law that govern the use of such clauses in those particular areas. First, one can intelligibly think it useful to include in a constitution an incidental powers clause without thereby subscribing to all of the context-specific details of trust law or corporate law. This premise is particularly true when incidental power clauses are common to multiple areas. If incidental powers clauses recur in many contexts – various agency instruments, real estate conveyances, and corporate charters, to name a few – then why would someone have reason to think that the Necessary and Proper Clause imports the detailed legal criteria of any one of these areas rather than another? If the response is that incidental powers clauses imposed the same detailed constraints on actors in every area in which they were used, then the burden of persuasion lies with the authors to show that commonality – to identify the least common denominator of incidental powers clauses that captures the requirements of, for example, trust law and corporate law.

Second, apparently the phrase “necessary and proper” and its like appeared in numerous other contexts that would have been available to reasonable constitutionmakers. This fact makes it implausible to posit that a general formulation of the concept would have been discernible to a reasonable reader of the clause. In particular, Lawson and Seidman report that “[t]he phrase . . . was used in eighteenth-century British legislation more or less interchangeably with a range of other phrases to describe the discretion granted to actors, and it does not appear that any of those phrases had a distinctive or specialized meaning.”¹³⁰ To name just a few of the areas identified by Lawson and Seidman, the phrase appeared in eighteenth-century British statutes dealing with juries, revenue, judicial practice, hospital administration, internal improvements, construction, and bankruptcy.¹³¹ Lawson and Seidman conclude, in effect, that the statutes in this era display no discernible pattern of usage in the language used to grant discretion and that the precise choice of words often seemed to lack substantive significance.¹³² If words like “necessary and proper” recurred so often in British public law without any precise substantive significance, why would a reasonable person confronted with the phrase “necessary and proper” in the U.S. Constitution naturally assume that this must be a trust term or a corporate law term? A more likely hypothesis is that such a reader would think he or she was confronting an ill-

¹³⁰ *Id.* at 15.

¹³¹ *Id.* at 15-33.

¹³² *See id.* at 20, 21, 23, 24-25, 29; *id.* at 32 (“If American drafters of this era looked to British statutes for guidance, they would find very little.”).

defined term ubiquitously used in public and private law instruments to confer some degree of discretion.

Third, in interpretation, context is everything. And the context for the Constitution's incidental powers clause differs materially from the context of the private law settings discussed in *Origins*.¹³³ Recall that Professor Natelson suggests that the founders encountered fiduciary law through their service as "administrators of estates, attorneys (both public and private), bailiffs, executors, guardians, servants, stewards, and trustees."¹³⁴ Would a reasonable person naturally think that the constraints on incidental powers encountered in those contexts bear on the way one should read an incidental powers clause for the government of a great nation consisting of millions? In this context one can perhaps feel the pinch of Marshall's aphorism, "[W]e must never forget that it is a *constitution* we are expounding."¹³⁵ Some of the corporate charters identified by Professor Miller – including the Crown charters for the American colonies, the charters of the First and Second Banks of the United States, as well as the Massachusetts Bay Company charter – bear a closer resemblance to the context of a great charter of government.¹³⁶ Even so, one might at least wonder whether the choices made in provisions about hiring employees, setting salaries, paying dividends, and the like self-evidently bear on understanding the criteria for implementing an extensive and enduring plan of government.

To be sure, as the authors further argue, prominent members of the founding generation did at times use fiduciary or corporate metaphors to describe the Constitution and the government it created.¹³⁷ Even assuming, however, that a sufficient majority of constitutionmakers thought one or both of the metaphors to be apt, it is a long way from describing the Constitution as a "body corporate and politic"¹³⁸ to concluding that one should read into the document the details of eighteenth-century corporate law. Again, if "necessary and proper" were a term of art peculiar to corporate law or trust law, I would not hesitate to read the relevant particulars of that area into the Necessary and Proper Clause. Given the varied, fragmented, and seemingly ubiquitous use of the words "necessary and proper" and their like, it is at least unobvious that the

¹³³ Professor Miller takes pains to acknowledge this point, explaining that "[t]he interpretation of the Constitution . . . is not necessarily constrained by how similar words would be understood in a different legal context." *Id.* at 176.

¹³⁴ *Id.* at 56-57.

¹³⁵ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819); *see also id.* at 415 ("This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."). Professor Miller acknowledges the relevance of the statement quoted in text, but reads it as a tacit acknowledgment that the type of clause can be traced to another source of law – in Miller's view, corporate law. LAWSON ET AL., *supra* note 8, at 175.

¹³⁶ *See* LAWSON ET AL., *supra* note 8, at 148-50.

¹³⁷ *See id.* at 52-57, 148-49.

¹³⁸ *Id.* at 148.

founders' analogizing the government to a corporation should have a special bearing on how to read the Constitution's incidental powers clause. The founders used many private law metaphors to describe the government – fiduciary, corporate, and contractarian, to name a few. To say that we should read particular provisions of the U.S. Constitution in light of the substantive standards of any one of those private law fields, for me at least, triggers a fairly heavy burden of persuasion.

Some of my concerns here may stem from the nature of the book. As the introductory chapter explains, it originated as three distinct projects that the authors joined into a single book.¹³⁹ The authors admirably integrate their contributions and take pains to note similarities in the standards deployed in agency, administrative, and corporate law they discuss.¹⁴⁰ But given the many contexts in which terms like “necessary and proper” are used, the relevance of the book's findings to constitutional meaning require a more focused account of precisely what common threads a reasonable eighteenth-century American would have seen in the law of incidental powers. It is not that the authors fail to recognize this limitation. They observe that the book identifies enough convergence in the three areas of law “to permit reasonably confident assertions about the clause's actual origins,” but that it still leaves open the question “whether there is enough convergence to support a general theory of the [Necessary and Proper Clause's] actual meaning.”¹⁴¹ Until that question is answered, it is hard to justify reading specific principles of eighteenth-century agency law, administrative law, or corporate law into the Necessary and Proper Clause.

IV. RECOVERING LOST MEANINGS TWO CENTURIES OUT

What makes *Origins* so intriguing – the fact that it recovers long lost meanings – also threatens to limit its utility for present-day interpretation. After reading the book, it is hard to cling to the conventional wisdom that the Necessary and Proper Clause comes from out of nowhere. And yet, as discussed, the book's admirably honest account of the history portrays a highly complex legal backdrop that cuts across at least multiple different areas of law, public and private. If one is trying to ascertain how a reasonable person conversant with the relevant legal background would have read the Necessary and Proper Clause in 1789, one correct answer would seem to be that reasonable people almost surely would have differed on many important points. In particular, they might have differed over whether trust or administrative or corporate law governed the clause's meaning. They might have differed about the precise requirements of any of these areas of law. They even might have differed about precisely what common threads incidental powers clauses might have shared.

¹³⁹ See *id.* at 5.

¹⁴⁰ See, e.g., *id.* at 138.

¹⁴¹ *Id.* at 8.

When I read the book, therefore, I cannot help but think of Madison's famous observation about the inevitable opacity of the constitutional text:

All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects, and the imperfection of human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words and phrases distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the novelty of the objects defined.¹⁴²

Because this description so nicely captures the Necessary and Proper Clause – and no less so after the intricate historical analysis found in *Origins* – the most important factor in assessing the clause's present meaning may be, in Madison's words, the way it came to be “liquidated” over time.

Our constitutional tradition places great weight on the way our governing institutions came to interpret the document they are charged with implementing.¹⁴³ In many important areas of law, complex and uncertain questions have developed, often in fits and starts, into decisive constitutional doctrines through the process of liquidation.¹⁴⁴ For example, after an initial judicial embrace of federal common-law crimes and a prominent public debate over their legitimacy, our government set its face against the practice,¹⁴⁵ and

¹⁴² THE FEDERALIST NO. 37, at 229-30 (James Madison) (Clinton Rossiter ed., 1961).

¹⁴³ Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 526-36 (2003) (discussing the eighteenth-century expectation that constitutional meaning would become fixed through practical construction); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 910 (1985) (same).

¹⁴⁴ For an excellent and comprehensive examination of the way unfolding constitutional practice bears on constitutional meaning, see Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. (forthcoming 2012).

¹⁴⁵ See, e.g., Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1075-1111 (1985); Gary D. Rowe, Note, *The Sound of Silence: United States v. Hudson & Goodwin, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 YALE L.J. 919, 936-41 (1992).

the Court famously confirmed that outcome.¹⁴⁶ Similarly, though it was unobvious at the outset whether Article III courts could properly issue advisory opinions, a practical construction of Article III gave rise to a decisive constitutional prohibition against that practice.¹⁴⁷ The list could go on.

In this vein, the Court has embraced the proposition that early practical constructions of the Constitution may settle its meaning when the text is ambiguous.¹⁴⁸ Two standard justifications are offered for this approach. First, if one wants to find out how a reasonable person steeped in the relevant social and linguistic conventions would have understood the nuances of a text, one piece of evidence is the way people living in the relevant social and linguistic culture in fact understood the text.¹⁴⁹ As the Supreme Court has put it, an interpreter properly invokes early practical expositions because Americans at the time “must have had a keen appreciation of the influences which had shaped the Constitution and the restrictions which it embodied, since all questions which related to the Constitution and its adoption must have been, at that early date, vividly impressed on their minds.”¹⁵⁰ Second, at least when the

¹⁴⁶ See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 32 (1812) (rejecting federal common law crimes).

¹⁴⁷ Early federal judges often issued advisory opinions. See WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 178-79* (1995). In 1793, however, the Justices of the Supreme Court invoked separation of powers arguments to deny advice sought by Secretary of State Jefferson on legal questions concerning hostilities between England and France. See RICHARD H. FALLON, JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 93 (6th ed. 2009); see also WILLIAM R. CASTO, *FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL* 114-18 (2006) (discussing the early history of advisory opinions). It then became settled that advisory opinions fell outside federal courts’ Article III authority to decide “cases” or “controversies.” See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 12-13 (1985).

¹⁴⁸ The Court most often invokes this principle in connection with early congressional interpretations of the Constitution. See, e.g., *Myers v. United States*, 272 U.S. 52, 174-76 (1926); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888); *The Laura*, 114 U.S. 411, 416 (1885); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 420 (1821); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

¹⁴⁹ Kent Greenawalt, *The Nature of Rules and the Meaning of Meaning*, 72 *NOTRE DAME L. REV.* 1449, 1451 (1997) (explaining that the best way to understand and interpret certain texts is to ask the opinions of people familiar with the relevant context).

¹⁵⁰ *Knowlton v. Moore*, 178 U.S. 41, 56 (1900). Though the Court’s practice is well-settled, it poses some obvious risks as a means of identifying original meaning. For example, early Congresses may have held systematically different preferences from constitutionmakers, thereby opening the door for strategic interpretations of the Constitution. Cf. THORNTON ANDERSON, *CREATING THE CONSTITUTION* 174-83 (1993) (arguing that the First Congress had a more nationalist tilt than the ratifiers had). Still, despite these complications, early constitutional practice – if approached with a proper skepticism – may shed useful light on the way early officials, who were much closer to the

meaning of a particular clause is in doubt, there may be intrinsic value in the question's settlement.¹⁵¹ In short, a constitutional interpretation merits extra respect if it has withstood the text of time.

These considerations raise a cautionary flag when scholars discover lost meanings long after the fact.¹⁵² What should one make of the fact that a particular meaning was apparently lost? In this case, the recovery of lost meanings does not fill a gaping void in constitutional doctrine. The topic of the book is not a clause that lay dormant and uninterpreted for two centuries. Rather, it is a clause with a long and important history.

Origins does remarkably little with the post-ratification "liquidation" of the Necessary and Proper Clause. Professor Natelson's account of the debate over the First Bank of the United States convincingly shows that the adversaries agreed that the clause was an incidental powers clause.¹⁵³ The discussion does not, however, suggest the further conclusion that the opposing sides framed their debates in terms of the specific requirements of private fiduciary law. Natelson's passing references to *McCulloch*, moreover, make a similar point. For his part, Professor Miller mentions *McCulloch* largely to acknowledge that none of the lawyers tied the meaning of the clause to corporate practice¹⁵⁴ and that Chief Justice Marshall's opinion may implicitly contrast the constitutional context from the corporate context.¹⁵⁵ At a minimum, it is difficult to say that *Origins* establishes that any of its three positions was reflected in the post-ratification settlement of the clause's meaning.

relevant context than we are, understood the document they were charged with implementing. See Manning, *supra* note 24, at 2034.

¹⁵¹ See, e.g., *Ex parte Quirin*, 317 U.S. 1, 41-42 (1942) (stating that a legislative construction of the Constitution "which has been followed since the founding of our Government . . . is entitled to the greatest respect"); *The Laura*, 114 U.S. at 416 (1885) ("[T]he practice [under federal legislation] and acquiescence under it, 'commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.'" (quoting *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 308 (1803))).

¹⁵² Professor Lawson, of course, believes that the interpreter owes fidelity to the meaning of the text, irrespective of the subsequent practice. See Lawson, *supra* note 21, at 26-28. As the discussion in text suggests, I take a somewhat different view.

¹⁵³ See LAWSON ET AL., *supra* note 8, at 114-19.

¹⁵⁴ See *id.* at 146 ("[N]one of the attorneys who presented arguments in *McCulloch v. Maryland* relied on corporate practice . . .").

¹⁵⁵ Miller thinks the latter point cuts both ways. Referring to Chief Justice Marshall's famous statement that "we must never forget that it is a *constitution* we are expounding," *McCulloch v. Maryland*, 17 U.S. (6 Wheat.) 316, 406 (1819), Miller acknowledges that Marshall may have been "contrasting the appropriate methodology for interpreting the Constitution with an approach that would be appropriate for another, unnamed type of legal document." LAWSON ET AL. *supra* note 8, at 175. Miller speculates that the most "obvious" candidate for comparison would have been corporate charters. *Id.* Nevertheless, Miller adds that despite the Court's apparent rejection of the relevance of corporate law, its "apparent reference to corporate charters highlights the importance of these instruments as part of the legal background of American law." See *id.*

It is not my aim here to reconstruct how that clause's meaning came to be settled. Nor is it my objective to defend Chief Justice Marshall's reading of the clause. But in the absence of a thicker account of the clause's liquidation, I do find myself tugged by the fact that the cases that set the course for the Court's jurisprudence did not seem to read the clause in light of the specific requirements of agency law, English administrative law, or corporate law. In *United States v. Fisher*, the Court rejected the claim that a necessary and proper law must be "indispensably necessary to give effect to a specified power," finding it sufficient instead that the implemental law employ "means which are in fact conducive to the exercise of [such] a power."¹⁵⁶ In *McCulloch v. Maryland*, moreover, the Court of course wrote: "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."¹⁵⁷ Neither of these foundational cases invokes the detailed common law requirements of agency law, English administrative law, or corporate law.¹⁵⁸

It is true that Chief Justice Marshall's opinion in *McCulloch* uses the language of "incidental powers." For example, in defending Congress's power to incorporate the Second Bank of the United States, he wrote:

The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied *as incidental to other powers, or used as a means of executing them*. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted, in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built, with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something

¹⁵⁶ 6 U.S. (2 Cranch) 358, 396 (1806).

¹⁵⁷ 17 U.S. (6 Wheat.) at 421.

¹⁵⁸ To be sure, none of these early opinions squarely *rejects* the possibility of reading the clause in light of trust law, administrative law, or corporate law. Rather, the Court makes no discernible mention of them. But if early Americans had believed that those areas of law govern the meaning of the Necessary and Proper Clause, then presumably some of the constraints identified in *Origins* – such as the requirements of good faith, due care, proportionality, and reasonably close means-ends fit – would have at least come up when considering the validity of the bankruptcy priority law in *Fisher* or the Second Bank of the United States in *McCulloch*. See, e.g., LAWSON ET AL., *supra* note 8, at 78-79, 137-41, 175 (identifying those and other constraints).

else. No sufficient reason is, therefore, perceived, why it may not pass *as incidental to those powers* which are expressly given, if it be a direct mode of executing them.¹⁵⁹

From that description one might infer that the legitimate exercise of an incidental power must not operate as a new independent power and that the incidental power must be less significant than the power it implements – the shared elements that represent the least common denominator suggested by the book.¹⁶⁰ But there is no suggestion that the Court felt further constrained, in any way, by any *specific* obligations that agency law, English administrative law, or even corporate law may have placed on the exercise of incidental or delegated powers.¹⁶¹ If, as I suspect, the subsequent course of Necessary and Proper Clause jurisprudence followed suit, then it would raise serious questions about the appropriateness today of reading the clause in light of the particular constraints supplied by those three areas of law.

The relevant text is opaque enough, and the case made by the four authors of *Origins* is strong enough, that if the Court or early Congresses had embraced agency law, English administrative law, or corporate law as its benchmark, I would almost surely think it an appropriate interpretation of the Constitution. The authors, in other words, have made their claim at a level of plausibility that one could reasonably accept as the basis for sound constitutional interpretation. On the other hand, given the questions still lingering after their analysis – such as why a reasonable person would read the clause in light of any *one of several* competing legal backdrops – it is also reasonable to think it too late in the day to read the clause in light of those particular backdrops. For me, at least, it is crucial in a case like this to know how the law came to be settled.

¹⁵⁹ *Id.* at 411 (emphasis added); *see also id.* at 418 (“The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers.”); *id.* at 420-21 (“If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.”).

¹⁶⁰ *See supra* text accompanying note 129.

¹⁶¹ Note that in the passage previously quoted in text, *see supra* text accompanying note 159, Chief Justice Marshall uses corporate analogies *only* to explain that the power of incorporation – the very power at issue in *McCulloch* – is itself incidental to whatever substantive power is to be executed by the corporation. Accordingly, when Congress incorporated the Second Bank of the United States, such action was merely incidental to the substantive legislative powers that the Bank enabled Congress to implement. Nothing in that passage suggests that Chief Justice Marshall believed, in addition, that the Court should construe the Necessary and Proper Clause in light of the particulars of corporate law.

CONCLUSION

The four authors of *Origins* have solved an important mystery. They have shown beyond a reasonable doubt that the phrase “necessary and proper” was not pulled from thin air. They have also shown that the clause was most likely understood as an incidental powers clause, which means that it did not add new powers and only authorized lesser powers needed to carry out the explicit grants. Beyond that, they have offered a rich set of arguments about why the clause should be read in light of the more detailed requirements of fiduciary law, English administrative law, or corporate law. These accounts are intricate and surprisingly persuasive, given how much they cut against the conventional wisdom. But if the touchstone for interpreting the Necessary and Proper Clause is the way a reasonable person conversant with applicable conventions would have read it, there is room for doubt regarding the applicability of the more detailed requirements. Adopting a legal framework like an incidental powers clause may implicitly carry with it certain commonly understood connotations. But given that the phrase “necessary and proper” and its like was used in so many contexts, there is little reason to believe that a reasonable person would have associated the Necessary and Proper Clause with the particular requirements of any particular area of law. Most importantly, given the great complexity of the interpretive materials, the question whether to embrace any of the authors’ interpretations depends rather significantly on whether, during two centuries of practice, any of those interpretations made its way into the settled jurisprudence of the Necessary and Proper Clause. At least on preliminary investigation, early pivotal cases such as *Fisher* and *McCulloch* seem impervious to the details of eighteenth-century agency law, administrative law, or corporate law. Were the authors to take this project to its next phase, it would be useful for them to show that the detailed requirements of one or more of those areas of law, in fact, made its way into our understanding of the Necessary and Proper Clause well before these four legal academics turned their attention to the question two centuries after the fact.