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# Fiduciary Principles and Statutory Form in Relation to the Necessary and Proper Clause: Potential Constitutional Implications for Congressional Short Titles

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# **FIDUCIARY PRINCIPLES AND STATUTORY FORM IN RELATION TO THE NECESSARY AND PROPER CLAUSE: POTENTIAL CONSTITUTIONAL IMPLICATIONS FOR CONGRESSIONAL SHORT TITLES**

BY  
BRIAN CHRISTOPHER JONES\*

## *Abstract*

This article explores the principles of fiduciary duty and statutory form in relation to the “proper” portion of the Necessary and Proper Clause, and especially in regard to congressional short titles for bills and laws. While the clause is one of the most influential and controversial constitutional phrases, its meaning remains shrouded in mystery. At some level amongst the founders, the Constitution was regarded as a grant of fiduciary duty from the government to its people; given this, the clause should be read from such a perspective, and the duties of loyalty and good faith, among others, come into play when drafting and enacting legislation. Although the meaning of “proper” has historically been thought of from a propriety perspective, this article argues that all aspects of bills and laws should be “proper”. This would pose major problems for contemporary legislation, because many contain tendentious, promotional, and/or misleading short titles, many of which breach the duties of good faith, loyalty, due care, and impartiality. By analyzing the historical and contemporary definitions of “proper” and relying on state constitutions, case law, and legislative drafting manuals for the latter, this article determines that there is an abundance of room under the Necessary and Proper Clause to incorporate proper drafting form, stressing the concepts of accuracy, suitability,

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impartiality, and exactness. Additionally, in order to quell this irresponsible feature of legislative drafting, this article proposes a reasonable notice standard for congressional short titles, a quality which federal law currently lacks and which many contemporary bills and laws would undoubtedly fail.

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## I. INTRODUCTION

Readers of this publication are more than likely aware of the current state of congressional short bill titles. From the humorous to the farcical, the practical to the dreamily aspirational, these outlandish policy statements enshrined into law have only gotten more absurd throughout the Twenty-first Century. In recent times, Congress has passed some undoubtedly provocative short titles: the USA PATRIOT Act of 2001,<sup>1</sup> the No Child Left

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1. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

Behind Act of 2001,<sup>2</sup> the CAN-SPAM Act,<sup>3</sup> the SPEECH Act,<sup>4</sup> the Credit CARD Act,<sup>5</sup> the Patient Protection and Affordable Care Act,<sup>6</sup> and many more. A glance at these titles may produce an emotional reaction (i.e. laughter, patriotism, etc.), but to a large extent many congressional short titles are completely uninformative, unabashedly misleading, and according to this article, perhaps even unconstitutional.

Before commencing our journey into how the Necessary and Proper Clause relates to statutory titles, let us first ask a couple of basic questions. Suppose that Congress enacted laws in Latin or Old English. Would such laws be constitutionally “proper”? Or, say that instead of starting with Section 1, a law started with Section 10 and worked its way backwards. Would such a law be determined “proper”? Why might the response to these simple questions be “no”?<sup>7</sup> If laws written in such form could possibly be not “proper,” then this article’s main point, *that the “proper” aspect of the Necessary and Proper Clause establishes a minimum standard for congressional legislative form*, should be taken under serious consideration, especially given the fiduciary principles that legislators are granted as elected officials.

The Necessary and Proper Clause was written well over two centuries ago and to date there is still not an authoritative definition of “proper” or a clear consensus on its constitutional relevancy. In fact many individuals, from the Founders to contemporary constitutional scholars, question its inclusion and importance in the Constitution.<sup>8</sup> To date, the meaning of the term has largely been limited to a propriety context, determining whether or not Congress has overstepped its bounds between federal and state law or deviated from its lawmaking powers as the nation’s highest lawmaking

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2. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425.

3. Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act of 2003), Pub. L. No. 108-187, 117 Stat. 2699.

4. Securing the Protection of Our Enduring and Established Constitutional Heritage Act (SPEECH Act), Pub. L. No. 111-223, 124 Stat. 2380 (2010).

5. Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act of 2009), Pub. L. No. 111-24, 123 Stat. 1734.

6. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

7. As noted above, I am indebted to Professor Gary Lawson for his critique on an earlier draft of this essay. In fact, he raised some of these basic, thoughtful questions.

8. See Gary Lawson, *Discretion as Delegation: The “Proper” Understandings of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235 (2005) [hereinafter Lawson, *Discretion*]. Lawson notes that “there was, in fact, a fair number of founding-era figures, including such luminaries as Patrick Henry, James Monroe, and Daniel Webster, who either argued or assumed that the word ‘proper’ added nothing to the Sweeping Clause.” *Id.* at 253. See also Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002). In reference to the Necessary and Proper Clause they note that “[a] more plausible reading because a less dramatic one, is just that the phrase ‘necessary and proper’ is an example, among many in the Constitution, of an internally redundant phrase.” *Id.* at 1728 n.20.

authority.<sup>9</sup> In essence, the discussion has centered on the proper construction and application of how federalism in the U.S. should operate.<sup>10</sup> This debate seems appropriate regarding use of the word, but is also a somewhat narrow interpretation of a word which bears many definitions. With this article, I hope to shed light on a largely ignored application of the word, at the heart of which may lie much constitutional significance. It turns out that “proper” has possessed a remarkably similar definition from the time when the Constitution was written until present day. As will be seen below, the term embodies fiduciary principles (i.e. reasonableness, impartiality, good faith, and due care), yet also incorporates drafting principles, including: accuracy, suitability, and exactness. These principles will be further elaborated on as this paper unfolds.

If the only inferences that can be made of the word “proper” in Article I are in regard to the separation of powers between Congress and individual states, then its inclusion seems altogether superfluous. The Constitution certainly elaborates on these powers at length in Articles I and IV.<sup>11</sup> Of late there has been a renewed interest by the Supreme Court in the Necessary and Proper Clause, most of which has complemented the propriety view.<sup>12</sup> Yet, could it be that the founders included the phrase for reasons other than separation of powers issues, which they had already enumerated?<sup>13</sup> It seems

9. This has been noted in Supreme Court cases, such as: *Printz v. United States*, 521 U.S. 898, 923 (1997); *Alden v. Maine*, 527 U.S. 706, 732 (1999); *Gonzales v. Raich*, 545 U.S. 1, 34 (2005); *Jinks v. Richland Cty, S.C.*, 538 U.S. 456, 462 (2003); in law review articles, such as: Gary Lawson & Patricia B. Granger, *The ‘Proper’ Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993) [hereinafter Lawson & Granger, *Scope*]; Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183 (2003) [hereinafter Barnett, *Original Meaning*]; Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429 (2004) [hereinafter Barnett, *Police Power*]; or J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581 (2002) [hereinafter Beck, *New Jurisprudence*]; and even in founding documents, such as: THE FEDERALIST NO. 33 (Alexander Hamilton). Hamilton states that “The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded.” *Id.*

10. Beck, *New Jurisprudence*, *supra* note 9, at 637 n.368: “Other scholars have drawn upon Lawson and Granger’s analysis, relying on the term ‘proper’ as a source of federalism or separation of powers restraints.” He also notes that “the stronger evidence points toward treatment of the propriety limitation as an internal restraint, intended to ensure a ‘proper’ fit between a measure adopted by Congress and the constitutional end the measure purports to pursue. The propriety of a law does not depend on whether it interferes with unenumerated rights of states, individuals or other federal actors, but rather on whether Congress has selected a proper means in light of the nature of the constitutional power invoked.” *Id.* at 641 (emphasis in original). See also Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996) and Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535 (2000).

11. U.S. Const. art. I & art. IV.

12. *Printz*, 521 U.S. at 923; *Alden*, 527 U.S. at 732; *Jinks*, 538 U.S. at 462; *Gonzales*, 545 U.S. at 34; *Nat. Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2592 (2012).

13. Indeed, other scholars have challenged this propriety view as well. Beck notes that

logical that they would have desired *all* aspects of laws to be proper (including both substance and form), and not merely proper in regard to separation of powers issues. If they simply wished for them to be appropriate in a proprietary sense, this could have been easily stated without ambiguity.

Incorporating an analysis of the “proper” portion of the clause, this article establishes that many congressional short titles breach duties of fiduciary responsibility and thus cross the line of what should be deemed “proper” in regard to legislative statutory form. In doing so, it first investigates whether or not the Constitution and bills/acts of Congress can be viewed from a fiduciary standpoint. Next, it seeks to provide a more comprehensive meaning to the term “proper,” investigating both the historical and contemporary meaning of the word, and employing devices ranging from dictionaries to state legislative drafting manuals. Analyzing the intersection between fiduciary principles and proper statutory form, it then explores some of the major fiduciary principles in regard to how tendentious and misleading short titles on bills and laws breach these fiduciary principles. Finally, the article proposes that the titles of laws should properly fit their subject matter and thus provide reasonable notice to both lawmakers and the general public about the laws being proposed and those which have already been enacted.

## II. DISCLAIMER

The Constitution does not specifically mention a detailed form of congressional bills or construction of bill titles. Unlike some state constitutions, this was never introduced in Article I. When Congress began making law, most bills went by their long titles (i.e. “An Act to. . .”). Over the years, there have been few formal rules or regulations providing for how legislative short titles should be drafted.<sup>14</sup> For all intents and purposes, the

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“[h]istorical analysis and a close reading of *McCulloch* suggest that one should view the propriety requirement as regulating the fit between congressional means and constitutional ends, rather than as a textual hook for principles of federalism, separation of powers, or individual liberty.” Beck, *New Jurisprudence*, *supra* note 9, at 627.

14. There are no mentions of short titles in the House Rules, which can be found online through the Government Printing Office, *available at* <http://www.gpo.gov/fdsys/pkg/HMAN-112/pdf/HMAN-112-house.rules.pdf> (last visited Sept. 13, 2013). Additionally, there are only very short mentions of short bill titles in official drafting documents proffered by the U.S. House Drafting Manual, *available at* <http://www.house.gov/legcoun/pdf/draftstyle.pdf> (last visited Sept. 13, 2013). The Senate does not offer a publicly available drafting manual on any of their websites. However, I did find a Senate drafting manual from 1997 publicly available on Prof. William Eskridge Jr.’s Yale Law School website, *available at* [http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel\\_LegislativeDraftingManual\(1997\).pdf](http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual(1997).pdf) (last visited Sept. 13, 2013). The contents in relation to short titles are

lack of short title acknowledgment in the Constitution would make it very difficult to challenge the constitutionality of a short title. However, Article I, Section 8, Clause 18 of the U.S. Constitution proclaims that Congress shall have power “[T]o make all Laws *which shall be necessary and proper for carrying into Execution* the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>15</sup> Given the title the “Sweeping Clause”<sup>16</sup> by some, this phrase has both enamored and perplexed commentators ever since the document was ratified.

Similar to the reactions of many founding members, the contemporary meaning of the Necessary and Proper Clause produces heated debate concerning whether it expands or limits Congressional power, as it has become a lightning rod for advocates of both big and small government, depending on the interpretation one advocates.<sup>17</sup> Indeed, the clause has become so noticeable in recent years that Cambridge University Press recently published a book devoted to the origins of the terse yet powerful phrase, and this text is heavily cited throughout this article.<sup>18</sup> However, I wish to separate myself from the expansion/restriction arguments at the outset. Although I touch on both positions in this article in relation to the history and development of the clause, I am more concerned with whether

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very similar to those of the House manual available above.

15. U.S. Const. art. I, § 8, cl. 18 (emphasis added).

16. Lawson, *Discretion*, *supra* note 8, at 237.

17. A significant portion of debate concerns whether or not the clause is a restricting adjectival modifier or a ratchet to enhance congressional power. Many contemporary scholars have deemed the clause a limitation on congressional power. Lawson and Seidman call the phrase an “explicit textual limitation on congressional powers.” Gary Lawson & Guy I. Seidman, *Necessity, Propriety, and Reasonableness*, taken from LAWSON ET AL., *ORIGINS*, *infra* note 18, at 134. They also note that it is a “sensible, and even obvious place for such a constraint.” *Id.* at 135. In earlier works, Lawson unabashedly calls it “most obviously. . .not a self-contained grant of power.” Lawson & Granger, *Scope*, *supra* note 9, at 274. Engdahl considers the clause an “intrinsic restraint on federal lawmaking power,” and states that “as applied to Congress’s own powers, however, the Clause is not a ratchet; instead, it compounds the discretion given to Congress by the other grants of legislative power.” David E. Engdahl, *The Necessary and Proper Clause As an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J. L. & PUB. POL’Y 107 (1998). This may be a plausible interpretation, at least according to the way that the phrase is not worded; Miller notes that the clause does not say “as to it shall seem necessary and proper;” or which “it shall judge necessary and proper;” or even which “it may deem necessary and proper.” Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, taken from LAWSON ET AL., *ORIGINS*, *infra* note 18, at 158-159 [hereinafter, Miller, *Corporate Law*]. Therefore if the drafters wished to express the sentiment that Congress can capriciously determine what laws are necessary and proper, then they could have done so very easily. All of the above alternative phrases were common in corporate charters around the same time the Constitution was written, and it is quite significant that none of the phrases Miller suggests were used in the actual clause.

18. GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (2010) [hereafter LAWSON, ET AL., *ORIGINS*].

or not the clause, and specifically the word “proper,” can be analyzed and interpreted in terms of a “proper” form of laws. For in this one word it may be that the drafters of the Constitution have set a standard by which the laws of the United States should be upheld.

It should also be acknowledged that this is not another “single subject” rule article that critiques or advocates the implementation or reform of state-level single-subject provisions for bills and laws.<sup>19</sup> To propose a single subject amendment in a legislative body such as the U.S. Congress seems like an extremely challenging and ambitious recommendation, especially given the Senate’s non-germane amendment allowances.<sup>20</sup> That being said, this article does focus on accuracy and proper drafting form, so the two ideas are inextricably related, at least to some extent. Additionally, this article employs state constitutions, case law, and state legislative drafting manuals in order to ascertain a contemporary meaning of “proper;” thus, state-level influence is not completely abandoned in this analysis, but embraced as a possible source which could aid federal legislative practices.<sup>21</sup>

### III. THE CONSTITUTION AND CONGRESSIONAL BILLS/ACTS FROM A FIDUCIARY PERSPECTIVE

Some commentators believe that the Constitution supplied the government and its agents with certain fiduciary duties and thus should be read from a fiduciary perspective. Throughout the past decade, Robert Natelson has been instrumental in expounding this view, most recently in the book *The Origins of the Necessary and Proper Clause* mentioned

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19. See generally Brannon P. Denning & Brooks R. Smith, *The Truth-in-Legislation Amendment: An Idea Whose Time Has Come*, 78 TENN. L. REV. 831 (2010); Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687 (2010); Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 806-07 (2006); Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 HARV. J. ON LEGIS. 103 (2001).

20. MARTIN B. GOLD, SENATE PROCEDURE AND PRACTICE 106-110 (2d. ed. 2008).

21. Additionally, there is some question as to whether the Necessary and Proper Clause would come into play under certain situations. Many believe the clause is a recital of Congress’ incidental powers. If this is the case, the clause, and therefore the word “proper”, may only be a requirement for laws under the incidental powers doctrine and not all laws. Thus if Congress passes a safety standards law for ships, that is part of its core Commerce Clause authority, and the Necessary and Proper Clause may not factor into such a law, thus potentially excluding the applications laid out in this article. I thank Professor Natelson for raising this point and providing such an example. However, while an interesting and practical point, this is another debate for another time, and its significance will not be further analyzed or answered in this paper.

above,<sup>22</sup> but on many other occasions as well.<sup>23</sup> Natelson asserts that the “general welfare” provision “was one of a number of provisions inserted to impose fiduciary-style rules on the new federal government,” and noted that governmental conduct should “mimic that of the private-law fiduciary.”<sup>24</sup> In essence, he states that the government “had a fiduciary obligation to manage properly what had been entrusted to it.”<sup>25</sup> He further notes that essayists,<sup>26</sup> politicians,<sup>27</sup> and lawyers<sup>28</sup> all “routinely reaffirmed that public officials were merely the trustees, agents, guardians, or servants of the people.”<sup>29</sup> Natelson provides evidence that founders such as James Madison, Alexander Hamilton, Pierce Butler, Nathaniel Gorham, Gouverneur Morris, Edbridge Gerry, Luther Martin, Rufus King, and John Dickinson all viewed the operations of government from a fiduciary perspective.<sup>30</sup> He provides further evidence that many founders spoke of government officials as servants, agents, guardians, or trustees of the general public.<sup>31</sup> Although Natelson’s motives of asserting such fiduciary obligations are different from the aim of this article, it appears he has established, to a significant degree, that inherent in the Constitution was an implied fiduciary obligation that the government and its officials had to the people. Thus, not only can the Constitution be read from a fiduciary perspective, but also the inherent duties of elected officials should be viewed from this perspective. If this is the case, the main output provided

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22. See LAWSON, ET AL., *ORIGINS*, *supra* note 18, at ch. 4-5.

23. See Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243 (2004) [hereinafter Natelson, *Agency Law Origins*]; Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004) [hereinafter Natelson, *Public Trust*]; Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 (2003) [hereinafter Natelson, *General Welfare*]; Robert G. Natelson, *The Founders’ Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239 (2007) [hereinafter Natelson, *Founders*]; Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239 (2007) [hereinafter Natelson, *Judicial Review*].

24. Natelson, *Judicial Review*, *supra* note 23, at 244-245.

25. *Id.*, at 244 n.22 (citing JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT* § 136, at 190).

26. *Id.*, at 244 n.23 (citing WILLIAM PETYT, *JUS PARLIAMENTARIUM: OR, THE ANCIENT POWER, JURISDICTION, RIGHTS, LIBERTIES, AND PRIVILEGES, OF THE MOST HIGH COURT OR PARLIAMENT* (1741)).

27. *Id.*, at 244 n.24 (citing Natelson, *Public Trust*; also citing Edmund Burke, *Thoughts on the Cause of the Present Discontents* (1770), reprinted in 1 SELECT WORKS OF EDMUND BURKE at 118 (1999) (E.J. Payne, ed., 1874)).

28. *Id.*, at 244 n.25 (citing Natelson, *Public Trust*; also citing JAMES OTIS, *THE RIGHT OF THE BRITISH COLONIES ASSERTED AND PROVED* at 98 (2d ed. 1766)).

29. *Id.*, at 244 n.26.

30. Natelson, *Public Trust*, *supra* note 23, at 1083.

31. *Id.*, at 1084. The founders he mentions are: Madison, Dickinson, John Jay, Tench Coxe, George Washington, and James Kent.

by legislators—bills, and ultimately laws—can be viewed in the same manner and should apply to such principles.

From founders to modern theorists, others have explicitly mentioned this fiduciary obligation as well. James Madison noted this in Federalist No. 46, stating: “The federal and state governments are in fact but different agents and trustees of the people.”<sup>32</sup> More recently, Hannah Pitkin stated that “the representative’s duty, his role as a representative, is generally not to get reelected, but to do what is best for those he represents,”<sup>33</sup> and she argued that political representation is “a fiduciary relationship, involving trust and obligation on both sides.”<sup>34</sup> Additionally, Evan Criddle has argued that “[a]ll agents and instrumentalities of the state are . . . subject to fiduciary duties in discharging their responsibilities,”<sup>35</sup> and Lawson and Seidman note that what has historically been called “reasonableness” in the constitutional context is essentially a “principle of fiduciary public agency” doctrine, the latter being a more accurate description of such powers.<sup>36</sup>

Congress’ primary function is to produce law; and, most frequently, public law. Therefore, congressional bills and laws initiated by lawmakers would thus have to incorporate and abide by these fiduciary principles in order to maintain legitimacy.

## IV. DETERMINING THE MEANING OF “PROPER”

### A. HISTORICAL MEANING

The addition of the Necessary and Proper Clause into the Constitution is shrouded in mystery. It has been said that the clause was not “the subject of any debate from its initial proposal to the Convention’s final adoption of the Constitution.”<sup>37</sup> Added by the Committee of Detail, the clause inconspicuously made its way into the final version of the Constitution. Once enshrined into law, the clause did receive a good amount of attention from federalists and opponents regarding whether or not it expanded or limited congressional power, but the conversations provided scant evidence

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32. THE FEDERALIST NO. 46 (James Madison).

33. HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 164 (1967).

34. *Id.*, at 128.

35. Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 473 (2010).

36. LAWSON ET AL., ORIGINS, *supra* note 18, at 122. They also note that this could be called the “principle of public faithfulness” or the “principle of official responsibility.” For a further take on the fiduciary duties of politicians, see also Theodore Rave, *Politicians as Fiduciaries*, 126(3) HARV. L. REV. 671 (2013).

37. Randy Barnett, *The Choice Between Madison and FDR*, 31 HARV. J. L. & PUB. POL’Y 1007 (2008).

of the clause's significance.<sup>38</sup> This has led scholars to acknowledge that "it is often hard to figure out its meaning,"<sup>39</sup> and that they "can do no more than deduce [it]."<sup>40</sup> Analysis of state ratification debates have also proved unfruitful, leaving one commentator to suggest that, "[i]f there are nuggets to be mined in the standard sources of constitutional history, they seem thus far to have escaped notice."<sup>41</sup> Yet this bleak assessment has not stopped authors from exploring the word's historical meaning.

Discussion around the phrase has at times concerned whether or not a statute can be necessary without being proper. Some believe that "proper" is merely a synonym for "necessary"<sup>42</sup> and that the phrase is a constitutional redundancy.<sup>43</sup> The most authoritative response as to the phrase's constitutional significance derives from the 1819 Supreme Court decision of *McCulloch v. Maryland*.<sup>44</sup> In fact, throughout *McCulloch* "proper" is routinely overlooked,<sup>45</sup> which may add credence to this argument. Yet if the word is redundant, then its inclusion is superfluous, and many authors disagree with the notion that "proper" carries no constitutional meaning. Natelson states that "the manner in which the delegates employed the word 'proper' strongly suggested that federal laws, even if 'necessary', would not be 'proper' under certain conditions."<sup>46</sup> Barnett notes: "an otherwise necessary law can still be improper if it employs improper means."<sup>47</sup> Also, both adjectival components of the Necessary and Proper Clause were added at different points.<sup>48</sup> Therefore, they likely had separate and distinct meanings. Lawson considers this conclusion unquestionably definitive,

38. *Id.*, at 1008-1009.

39. Barnett, *Original Meaning*, *supra* note 9, at 216.

40. LAWSON ET AL., ORIGINS, *supra* note 18, at 78.

41. *Id.*, at 3.

42. *Id.*, at 89. In fact, this was the opposing view of the attorney in *McCulloch*, Daniel Webster, who lost the case.

43. Posner & Vermeule, *supra* note 8.

44. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

45. Beck notes that "Chief Justice Marshall did not explicitly define the term 'proper' in *McCulloch*. Though he indicated that 'necessary' and 'proper' create distinct requirements, he nowhere explained the latter restriction. . . one may look to *McCulloch* for the meaning of the term 'necessary', but must look elsewhere for the meaning of 'proper'." Beck, *New Jurisprudence* at 644. However, in *McCulloch* Marshall does say: "The propriety of this remark would seem to be generally acknowledged by the universal acquiescence in the construction which has been uniformly put on the 3rd section of the 4th article of the Constitution. The power to 'make all needful rules and regulations respecting the territory or other property belonging to the United States' is not more comprehensive than the power 'to make all laws which shall be necessary and proper for carrying into execution' the powers of the Government. Yet all admit the constitutionality of a Territorial Government, which is a corporate body." *McCulloch*, 17 U.S. at 422.

46. LAWSON ET AL., ORIGINS, *supra* note 18, at 93. Natelson states that they would not be proper if they violated Congress's fiduciary responsibilities.

47. Barnett, *Original Meaning*, at 220 (emphasis in original).

48. Natelson, *Framing and Adoption*, at 89.

remarking: “[a]t least one thing is very clear: the words would have meant something;”<sup>49</sup> and he further states that assigning meaning to “proper” in this day and age is not only “downright banal,”<sup>50</sup> but “blandly conventional.”<sup>51</sup>

Since the Necessary and Proper Clause received little debate during its constitutional implementation, those wishing to attribute meaning to it must find alternative ways of doing so. The most recent text devoted to the clause by Lawson, et al., attempts to shed some light on the clause’s origins.<sup>52</sup> In doing this, they analyze a variety of sources that could potentially aid in understanding the clause, such as: 18th Century statute drafting in England and America; agency law and the role of fiduciaries; examination of state constitutions and other state statutes; and administrative law and corporate charters.<sup>53</sup> Their endeavor is interesting and illuminating in many respects, as the authors lend substantial significance to the clause and examine it accordingly.

One article in the text examines state constitutions around the time the Constitution was drafted. Lawson and Seidman note that on several occasions “the word ‘proper’ is used to mean something quite strict, such as ‘distinctively fitted to or suited for,’” and at times these referred to: “proper forms of government;” “‘proper laws’ for creating districts and counties;” and “proper form for submission to the people for initiatives.”<sup>54</sup> Others have gone back to dictionaries published around the time the clause was written. Samuel Johnson’s Dictionary of 1786 had two overlapping entries that were adaptable for the legal context: one of which was “‘suitable’” and another stating “‘exact; accurate; just’.”<sup>55</sup> The former would seem to fall under both the proprietary and drafting perspective of proper, while the latter fittingly corresponds with only the drafting perspective.<sup>56</sup>

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49. Lawson, *Discretion*, at 241.

50. *Id.*, at 254. Lawson says the following: “the simple view that the words ‘necessary’ and ‘proper’ have distinct meanings, and that the word ‘proper’ incorporates some set of structural principles into the Sweeping Clause, is downright banal. That view has been specifically endorsed by a large assortment of scholars, including (and these are just the major scholars who I personally know will not be offended by being named) Randy Barnett, Steve Calabresi, Stephen Gardbaum, Richard Garnett, Mike Paulsen, and Sai Prakash. Less to the point for me, though perhaps more to the point for others, the position has been specifically endorsed by the Supreme Court on at least three occasions in recent years.” The Supreme Court cases he mentions were: *Jinks v. Richland County*, 538 U.S. 456, 462-465 (2003); *Alden v. Maine*, 527 U.S. 706, 732-733 (1999); *Printz v. United States*, 521 U.S. 898, 923-924 (1997).

51. LAWSON, *Discretion*, *Id.*, at 255.

52. LAWSON, ET AL., ORIGINS, *supra* note 18.

53. *Id.*

54. LAWSON, ET. AL., ORIGINS, *supra* note 18, at 47. State examples in this case are taken from the Pennsylvania, South Carolina, and Massachusetts Constitutions.

55. Natelson, *Legal Origins*, at 79.

56. Although, a “suitable” short title could easily follow from this meaning as well.

Sources outside the political realm have also been examined. From his analysis of corporate charters around the U.S. constitutional drafting period, Miller notes: “terms such as ‘necessary’ and ‘proper’ were not defined in colonial or early federal charters,” and although they were used, “there is also plenty of variation.”<sup>57</sup> Yet in concluding his analysis regarding corporate charters Miller notes that “proper” could:

convey the idea that in carrying out a given authority, the company or its managers should design the actions taken so as to consider the effect on stakeholders in the firm. As applied to the Constitution’s Necessary and Proper Clause, the message could be that laws must not only serve the general interests of the country as a whole, but must also take into account the individual interests of particular citizens. Thus even if a law qualifies as ‘necessary’, it could still be outside congressional authority if, without adequate justification, it discriminates or disproportionately affects the interests of individual citizens vis-à-vis others.<sup>58</sup>

Thus, it appears that many scholars emphasize the “proper” portion of the clause to have real, significant meaning. And though these arguments seemed to align more with legislative substance rather than its form or drafting qualities, the latter corresponds well with the early definitions of the word put forward in both political and non-political contexts. However, as noted above, attributing a definition to “proper” from a historical context in light of the Necessary and Proper Clause is exceedingly difficult, mainly because of the dearth of source material as to why the term was added to the Constitution. Therefore, an exploration into contemporary materials is in order.

#### B. CONTEMPORARY MEANING

Since the historical attempt to unearth the definition of proper has proven varied and undeveloped, this article now looks to more modern instruments to help guide its meaning. In fact, Miller states that “the meaning of the Necessary and Proper Clause today is not necessarily governed by inferences about original understanding.”<sup>59</sup> The simple fact that the precise constitutional meaning of “proper” has escaped definition for over two hundred years lends credence to Miller’s statement. To aid in

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57. Miller, *Corporate Law*, at 145.

58. *Id.*, at 174.

59. *Id.*

providing a contemporary definition of the word, the discussion which follows employs state constitutions, case law, drafting manuals, and legal and non-legal dictionaries.

Many state constitutions use the word in relation to laws or bill titles, and these are helpful when attempting to decipher a contemporary meaning for “proper.”<sup>60</sup> It should be noted, however, that many of these references are in relation to one-subject clauses for bills, a rule that Congress does not have in relation to legislation. Nonetheless, analyzing the use of proper in this context aids our endeavor; unlike federal short titles, state laws have been challenged in courts to determine their constitutionality.<sup>61</sup> Resultantly, certain jurisdictions have established definitions and criteria for the phrase “properly connected,” which is commonly used in many state constitutions. These will be explored more below.

Examples of “proper” used throughout state constitutions are many: Florida’s constitution states that “[e]very law shall embrace but one subject and matter *properly* connected therewith, and the subject shall be briefly expressed in the title;”<sup>62</sup> Idaho’s constitution says “[e]very act shall embrace but one subject and matters *properly* connected therewith, which subject shall be expressed in the title;”<sup>63</sup> Indiana’s constitution declares “[a]n act . . . shall be confined to one subject and matters *properly* connected therewith;”<sup>64</sup> Nevada’s constitution reads “[e]ach law enacted by the Legislature shall embrace but one subject, and matter, *properly* connected therewith, which subject shall be briefly expressed in the title;”<sup>65</sup> New Jersey’s constitution asserts that “[t]o avoid *improper* influences which may result from intermixing in one and the same act such things as have no *proper* relation to each other, every law shall embrace but one object, and that shall be expressed in the title;”<sup>66</sup> Oregon’s constitution declares “[e]very Act shall embrace but one subject, and matters *properly* connected therewith, which subject shall be expressed in the title;”<sup>67</sup> and Arizona’s

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60. Although it is acknowledged that some of these provisions were implemented in the 19<sup>th</sup> and 20<sup>th</sup> centuries (See Dragich, *supra* note 19), yet they are still in use today, and as will be seen below, are still adjudicated in state courts.

61. My previous piece on drafting short titles (Brian Christopher Jones, *Drafting Proper Short Bill Titles: Do States Have the Answer?*, 23(2) STAN. L. & POL’Y REV. 455 (2012) [hereinafter Jones, *Short Titles*]) touches on these, but its focus is altogether quite different. That piece explores the differing policies and procedures that states have in regard to drafting short titles. This piece focuses on determining the meaning of “proper” in relation to the Necessary and Proper Clause, and is only using state constitutions or drafting manuals as devices to enable exploration of the meaning behind this particular word.

62. FLA. CONST. art. III, § 6 (emphasis added).

63. IDAHO CONST. art. III, § 16 (emphasis added).

64. IND. CONST. art. IV, § 19 (emphasis added).

65. NEV. CONST. art. IV, § 17 (emphasis added).

66. N.J. CONST. art. IV, § 7, cl. 4 (emphasis added).

67. OR. CONST. art. IV, § 20 (emphasis added).

constitution acknowledges “[e]very act shall embrace but one subject and matters *properly* connected therewith, which subject shall be expressed in the title.”<sup>68</sup>

State courts have dealt with challenges to their single-subject provisions and some have set standards to remedy these situations in the future, especially in terms of the “properly connected” phrase. According to Florida courts, “[t]here is a proper connection between a provision and the subject ‘(1) if the connection is natural or logical, or (2) if there is a reasonable explanation for how the provision is (a) necessary to the subject or (b) tends to make effective or promote the objects and purposes of legislation included in the subject.’”<sup>69</sup> The courts also note that “[i]n determining whether a reasonable explanation exists for the connection between a specific provision and the single subject, the court may consider the citation name, the full title, the preamble, and the provisions in the body of the act.”<sup>70</sup> Thus, “natural” and “logical” are the first aspects Florida courts establish in terms of titles. The second aspect is a bit more difficult to determine, but still calls for reasonableness.

The Indiana Supreme Court believes in a liberal interpretation of the “properly connected” phrase in its constitution, and has held the following: “if there is any reasonable basis for grouping together in one act various matters of the same nature, and the public cannot be deceived reasonably thereby, the act is valid.”<sup>71</sup> Minnesota courts also believe that Minnesota’s constitution’s single-subject clause should be liberally construed, and notes in relation to its “properly connected” phrase, that the “term ‘subject’, as used in the constitution, is to be given a broad and extended meaning. All that is necessary is that the act should embrace some one [sic] general subject; and by this is meant, merely, that all matters treated of should fall under some one [sic] general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject.”<sup>72</sup>

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68. ARIZ. CONST. art. IV, § 13 (emphasis added).

69. *Ellis v. Hunter*, So. 3d 373; 2009 Fla. App. LEXIS 1974 (citing *Franklin v. State*, 887 So. 2d 1063, 1072 (Fla. 2004)).

70. *Id.*

71. *Loparex, LLC. v. MPI Release Technologies, LLC.*, 964 N.E.2d 806, 813 (Ind. 2012) (citing *Stith Petroleum Co. v. Dep’t of Audit & Control*, 5 N.E.2d 517, 521 (Ind. 1937)).

72. *Associated Builders and Contractors v. Ventura*, 610 N.W.2d 293, 299-300 (Minn. 2000) (citing *Johnson v. Harrison*, 50 N.W.2d 923, 924 (Minn. 1891)). It further notes that “[a]s to the title provision, we explained that the clause is intended to prevent fraud or surprise upon the legislature and the public by prohibiting the inclusion of ‘provisions in a bill whose title gives no intimation of the nature of the proposed legislation’, but we accord it the same liberal construction as the single subject provision” (citing *State ex rel. Olsen v. Board of Control of State Inst.*, 88 N.W. 533, 536 (Minn. 1902)).

The selected examples above find common ground in that they stress certain factors: “properly connected” includes being “reasonable” and “logical.” These attributes correspond with fiduciary principles and proper drafting form. To a certain extent, they also take into consideration those interacting with legislation that are not legislative insiders writing or voting on legislation: Indiana mentions the “public” and Minnesota mentions a “popular understanding.” This language is not accidental. Many of the constitutional and case law uses of “proper” also compare well with Samuel Johnson’s Dictionary of 1786, as both his entries of the word apply to the examples above.<sup>73</sup> His first entry, “suitable,” ensures that the title of a law is suitable for the legislation in question. This seems to be a more general type of interpretation, and could be applied in a proprietary sense. Yet the second portion, “exact; accurate; just” also characterizes the above examples, as they ensure that the title is an accurate description or indication of the proposed law. Johnson’s entries correspond with the other devices examined below as well, such as drafting manuals and dictionaries.

In order to complement state constitutional and case law use of “proper,” state legislative drafting manuals were examined to ascertain if they use the word in relation to bills and/or bill titles. Since these manuals aid in crafting law, their use of the word should provide some guidance for this article’s endeavor. Indeed, many of these legislative drafting instruments do use the word frequently: Alaska’s manual consistently mentions “*proper form*” and “*proper technique*,”<sup>74</sup> Colorado’s manual states that “[t]he drafter’s function is to devise appropriate statutory language in *proper form* to carry out the sponsor’s objectives;”<sup>75</sup> Hawaii’s manual speaks of a “*proper appreciation of the legislative intent*,”<sup>76</sup> Maine’s manual states that “[e]ach legislative instrument must have a *proper authority for introduction*,”<sup>77</sup> Maryland’s manual notes that “[i]f a bill’s subject matter is broader than its title, the bill is unconstitutional because the requirement of *proper notice* to legislators and citizens is not fulfilled;”<sup>78</sup> Montana’s manual speaks of the “*proper form and arrangement*

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73. Natelson, *Legal Origins*, *supra* note 18, at 79.

74. ALASKA LEGIS. AFFAIRS AGENCY, MANUAL OF LEGISLATIVE DRAFTING, at 19, 37, 38, 41, 50, 59, etc. (2007), available at <http://w3.legis.state.ak.us/docs/pdf/DraftingManual2007.pdf> (last visited Sept. 13, 2013) (emphasis added).

75. COLO OFFICE OF LEGIS. LEGAL SERVS., COLO. LEGIS. DRAFTING MANUAL, § II on Preliminary Drafting Considerations, at 1-4 (2012) (emphasis added).

76. KEN TAKAYAMA, LEGIS. DRAFTING BUREAU, HAW. LEGIS. DRAFTING MANUAL, at 6 (9th ed. 2007), available at <http://www.state.hi.us/lrb/rpts96/dftman.pdf> (last visited Sept. 13, 2013) (emphasis added).

77. LEGIS. COUNSEL, ME. LEGIS. DRAFTING MANUAL, at 2 (2009), available at <http://www.maine.gov/legis/ros/manual/Draftman2009.pdf> (last visited Sept. 13, 2013) (emphasis added).

78. DEP’T OF LEGIS. SERVS., LEGIS. DRAFTING MANUAL, at 29-30 (2010), available at

of a bill;”<sup>79</sup> New Mexico’s guide declares that “[s]ince a *properly* prepared title is essential to the constitutionality of any bill that becomes law, the title should be carefully reviewed to determine that it covers everything in the bill;”<sup>80</sup> when providing a checklist for legislative drafters, North Dakota’s manual asks, “[d]oes the bill or resolution have a *proper* title?”<sup>81</sup> and South Dakota’s manual acknowledges that “[a] *properly* prepared bill consists of a title, an enacting clause, and a body of provisions. The correct form of the title and the enacting clause is specified in the Constitution and further defined by statute and custom.”<sup>82</sup>

State drafting manuals repeatedly use the term “proper,” and many of them are in reference to “proper” form and technique; some mentions are even specifically in regard to bill titles. The elements of propriety are apparent in some usages, such as in Maine’s and Hawaii’s drafting manuals.<sup>83</sup> However, that such official drafting devices mix both propriety and accuracy is of significance. Accuracy, it seems, has an inherently robust connection to the propriety aspects of the word “proper.”

More contemporary instruments can also be consulted in regard to the definition of “proper,” because these could provide a more complete picture of the term’s use and significance in modern times. The *Oxford English Dictionary* supplies three main definitions of the word “proper,” which are: (1) truly what something is said or regarded to be; genuine; (2) of the required or correct type or form; suitable or appropriate; (3) belonging or relating exclusively or distinctively to; particular to.<sup>84</sup> *Merriam-Webster* provides nine definitions of the word, four of which would help with the current legal analysis: (1) belonging to one; own; (2) strictly limited to a specified thing, place, or idea; (3) strictly accurate: correct; and (4) marked by suitability, rightness, or appropriateness: fit.<sup>85</sup>

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[http://dls.state.md.us/data/legandana/legandana\\_bildra/legandana\\_bildra\\_bildraman/BillDraftingManual2011.pdf](http://dls.state.md.us/data/legandana/legandana_bildra/legandana_bildra_bildraman/BillDraftingManual2011.pdf) (last visited Sept. 13, 2013) (emphasis added).

79. MONT. LEGIS. SERVS. DIV., BILL DRAFTING MANUAL, at 45 (2010), *available at* <http://leg.mt.gov/content/Publications/2010-bill-drafting-manual.pdf> (last visited Sept. 13, 2013) (emphasis added).

80. N.M. LEGIS. COUNSEL SERV., NEW MEXICO LEGISLATIVE DRAFTING MANUAL, at 21 (2008) *available at* <http://www.nmlegis.gov/lcs/lcsdocs/draftman.pdf> (last visited Sept. 13, 2013).

81. LEGIS. COUNSEL, N.D. LEGISLATIVE DRAFTING MANUAL, at 2 (2013), *available at* <http://www.legis.nd.gov/files/general/2013draftingmanual.pdf?20130912231414> (last visited Sept. 13, 2013) (emphasis added).

82. S.D. DRAFTING MANUAL, at 7, *available at* <http://legis.state.sd.us/general/DraftingManual.pdf> (last visited Sept. 13, 2013) (emphasis added).

83. ME. LEGIS. DRAFTING MANUAL, *supra* note 77; HAW. LEGIS. DRAFTING MANUAL, *supra* note 76.

84. OXFORD ENGLISH DICTIONARY, *available at* [www.oxforddictionaries.com](http://www.oxforddictionaries.com) (last visited Sept. 13, 2013).

85. MERRIAM-WEBSTER ONLINE DICTIONARY, *available at* <http://www.merriam-webster.com/dictionary/proper> (last visited Sept. 13, 2013).

Modern editions of *Black's Law Dictionary* do not actually define the word "proper."<sup>86</sup> However, an older version of *Black's* defines the word as: "That which is fit, suitable, appropriate, adapted, correct. Reasonably sufficient. Peculiar; naturally or essentially belonging to a person or thing; not common; appropriate; one's own."<sup>87</sup> The first line of this definition appears to be the most appropriate for legislation in the necessary and proper context. "Fit," "suitable," "appropriate," and "correct" all correspond with the "proprietary" and the drafting model of interpretation, and it is not unreasonable to say that short titles for bills and laws should "fit" the requisite text of a piece of legislation, or that they should be "appropriate" or "correct."

The combined evidence from the sources above poses major problems for contemporary congressional short titles for bills and laws, in which many tend to be tendentious and overly promotional. Moreover, if such titles had to be genuine, suitable, appropriate, and/or accurate then many congressional short titles would therefore be improper. For example: does patriotism *genuinely* describe the USA PATRIOT Act; is the label "No Child Left Behind" *suitable* or *appropriate* for an education bill (or any bill, for that matter); or does the CAN-SPAM Act *accurately* or *appropriately* portray the piece of legislation in question? If one were to draw on the contemporary definitions of the word proper supplied from state constitutions, court decisions, drafting manuals, and legal and non-legal dictionaries, numerous questions arise as to the appropriateness and constitutionality of many congressional bill titles.<sup>88</sup> From the evidence supplied above, "proper" should be the constitutional standard by which bills and laws are drafted, and this standard should be upheld in short titles.

## V. THE INTERSECTION BETWEEN FIDUCIARY PRINCIPLES AND STATUTORY FORM

Given that some type of fiduciary obligation is an inherent aspect of public service, and thus provides a significant dimension of lawmaking authority, an exploration into some of the basic fiduciary principles is in

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86. BLACK'S LAW DICTIONARY 1335 (9th ed. 2009).

87. BLACK'S LAW DICTIONARY 953 (1st ed. 1991) (definition of "proper").

88. A further question for titles is whether the acronym, the actual title, or both should be taken into consideration when determining whether such names are indeed proper. This author believes that both should be taken into consideration in regard to this matter. For, the "proper" standard would be irrelevant if one of the components was not taken into consideration. Having an acronym cannot be viewed as a loophole where the actual short title describes the bill somewhat sufficiently, but the acronym displays the bill in a much different light. Also, it is the acronym by which legislation is usually referred, and thus it should be taken into consideration when analyzing short titles.

order, especially in terms of how they relate to statutory form and short titles in particular.

Complicit in the role of obtaining fiduciary powers are principles that one must abide by in such a role. Natelson identifies six basic fiduciary duties that the Constitution imparted into the government: (1) the duty to follow instructions and remain within authority; (2) the duties of loyalty and good faith; (3) the duty of care; (4) the duty to exercise personal discretion; (5) the duty to account; and (6) the duty of impartiality.<sup>89</sup> These shall now be examined in turn in regard to how they would apply to a “proper” form of congressional bills and laws, and specifically to short titles.<sup>90</sup>

#### A. THE DUTY TO FOLLOW INSTRUCTIONS AND REMAIN WITHIN AUTHORITY

This discussion mainly takes into consideration the first part of the phrase, the “duty to follow instructions.”<sup>91</sup> Article 1, Section 5 of the Constitution notes that “[e]ach House may determine the rules of its proceedings.”<sup>92</sup> Yet neither the House nor the Senate Standing Rules take short titles into consideration,<sup>93</sup> and *Jefferson’s Manual* barely touches on them.<sup>94</sup> While there is nothing formal in the Constitution and/or the standing orders for each body, there are drafting rules provided by the House and Senate Legislative Counsels.<sup>95</sup> However, many congressional short titles, especially those emanating from the House, are not following their own legislative counsel’s drafting recommendations.<sup>96</sup> Short titles are supposed to be “short,” used sparingly, and should follow other rules, such as listing “. . . Amendments Act of [year]” in the title if the new law was amending a

89. Natelson, *Legal Origins*, *supra* note 18, at 57-60.

90. It is important to note that I am examining these principles in terms of short titles for bills and laws, not the further substance of legislation for bills and laws. However, the further substance of such measures can certainly be taken into consideration in future examinations of these issues.

91. The “remain[ing] within authority” portion seems to be part of the propriety model which is discussed throughout this article in relation to the Necessary and Proper Clause, and on which many commentators and judges have previously touched, but is not the focus of this article.

92. U.S. CONST. art. I, § 5.

93. RULES OF THE HOUSE OF REPRESENTATIVES, 112th Congress, *available at* <http://www.gpo.gov/fdsys/pkg/HMAN-112/pdf/HMAN-112-house.rules.pdf> (last visited Sept. 13, 2013); STANDING RULES OF THE SENATE, *available at* <http://www.rules.senate.gov/public/index.cfm?p=RulesOfSenateHome> (last visited Sept. 13, 2013).

94. RULES OF THE HOUSE OF REPRESENTATIVES, *supra* note 93. *Jefferson’s Manual of Parliamentary Practice* is included in House Rules for the 112th Congress.

95. HOUSE LEGISLATIVE COUNSEL, 104th CONG., MANUAL ON DRAFTING STYLE (1995); SENATE LEGISLATIVE COUNSEL, 105TH CONG., MANUAL ON DRAFTING STYLE (1997).

96. Jones, *Short Titles* at 455.

current law, which is often the case.<sup>97</sup> Unfortunately, in contemporary times these drafting rules are rarely followed.<sup>98</sup> Therefore, at least in the duty to “follow[ing] instructions,” many short titles provided by lawmakers for bills and laws are failing to uphold this principle.

## B. THE DUTIES OF LOYALTY AND GOOD FAITH

This is perhaps the most severe breach in terms of congressional short titles, as many do not heed any duty of loyalty to the public and do not make a good faith effort to describe the legislation in question. Here Natelson notes that “[f]iduciaries were to represent their beneficiaries honestly and with undivided loyalty and not act in a way prejudicial to them.”<sup>99</sup> If this is so, many current short titles are misguided. Oleszek’s *Congressional Procedures* text notes that some lawmakers believe these titles can help get bills noticed and remembered.<sup>100</sup> Yet this is not the proper function of short titles, and this rationale for such titles is just one of the reasons that the titles have become more evocative. Many contemporary congressional names are designed to pressure other lawmakers into supporting or voting for particular laws, or to gather public support.<sup>101</sup> It is clear that many are not remotely designed to provide information to lawmakers or the general public about laws being introduced, debated, and/or enacted. The fact that many short titles contain overly tendentious and aspirational language is evidence enough that such titles are not enacted in line with duties of loyalty and/or good faith: many are misleading not only to lawmakers, but constituents as well.<sup>102</sup> There seems to be little that

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97. HOUSE LEGISLATIVE COUNSEL, 104TH CONG., MANUAL ON DRAFTING STYLE, 26, 27 (1995) (emphasis in original).

98. See Jones, *Short Titles* at 464, which demonstrated that some short titles are almost as long as their long titles. The piece notes that the USA PATRIOT Act’s short title is just four words shorter than its long title. Also, the PROTECT Act of 2003 employs a short title that is merely one word shorter than the long title. Additionally, a working paper of mine (Brian Christopher Jones, *The Congressional Short Title (R)Evolution: Changing the Face of America’s Public Laws*, 101 KY. L.J. ONLINE 42 [hereinafter, Jones, *Short Title (R)Evolution*]), tracks the short titles of acts from the 93rd to the 111th Congress and finds that short titles have gotten longer throughout successive congresses, have increased the number of both personalized and acronym short titles, and have decreased the use of technical legal words while increasing the use of more evocative, positive sounding words. See also Brian Christopher Jones, *One Redeeming Quality About the 112th Congress: Refocusing on Descriptive Rather than Evocative Short Titles*, 112 MICH. L. REV. FIRST IMPRESSIONS 1.

99. Natelson, *Legal Origins*, at 58. Unfortunately Natelson does not elaborate on this throughout the text.

100. WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 93 (8th ed. 2011).

101. See Jones, *Short Titles*.

102. Brian Christopher Jones, *Processes, Standards and Politics: Drafting Short Titles in the Westminster Parliament, Scottish Parliament and US Congress* 25(1) FLA. J. INT’L L. 57, 83-88.

may be gleaned from a cursory glance at such laws as the PACT Act,<sup>103</sup> the CALM Act,<sup>104</sup> or the STOCK Act.<sup>105</sup> Additionally, should the general public believe that bills such as the Prison Rape Elimination Act of 2003,<sup>106</sup> Patient Protection and Affordable Care Act,<sup>107</sup> or the Fair Sentencing Act of 2010,<sup>108</sup> actually do what they say on the tin? If so, many problems arise with labeling legislation in this manner.<sup>109</sup>

The Restatement (Third) of Agency states under the duties of loyalty: "An agent who acts for more than one principal [i.e. legislators] in a transaction between or among them has a duty[:] (a) to deal in good faith with each principal, (b) to disclose to each principal . . . and (c) otherwise to deal fairly with each principal."<sup>110</sup> Employing language in the short titles of bills and laws that is meant to pressure legislators into voting for the measures, and to cast the legislation in the most positive light possible, rather than briefly to describe the legislation, therefore is not upholding the principles of loyalty and good faith that such a fiduciary agreement would warrant.

### C. THE DUTY OF CARE

This standard does not have as much overarching applicability as the previous one, but it still touches on proper short titles. Here, Natelson notes that the "duty was expressed as an obligation not to neglect the business nor be guilty of 'folly or negligence.'"<sup>111</sup> Certainly, questions arise as to whether particular short titles are "folly" and/or "negligent."<sup>112</sup>

103. Prevent All Cigarette Trafficking Act of 2009 (PACT Act), Pub. L. No. 111-154, 124 Stat. 1087 (2010).

104. Commercial Advertisement Loudness Mitigation Act (CALM Act), Pub. L. No. 111-311, 124 Stat. 3294 (2010).

105. Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act), Pub. L. No. 112-105, 126 Stat. 291. Additionally, it is unclear how one is supposed to take in acronym titles. Are they supposed to be taken at face value, with the underlying words treated as nullity? Or are the underlying words of more value than the actual acronym? This is unclear with contemporary congressional short titles, and something that needs to be further clarified by Congress.

106. Pub. L. No. 108-79, 117 Stat. 972.

107. Pub. L. No. 111-148, 124 Stat. 119 (2010).

108. Pub. L. No. 111-220, 124 Stat. 2372.

109. For an example regarding the Prison Rape Elimination Act of 2003, and how it has not remotely led to a reduction in prison rape, see Brian Christopher Jones & Randall Shaheen, *Thought Experiment: Would Congressional Short Bill Titles Survive FTC Scrutiny?*, 37(1) SETON HALL LEG. J. 57.

110. Restatement (Third) of Agency, § 8.06(2) (2006). § 8.06(2)(b)(i-ii) says: "(i) the fact that the agent acts for the other principal or principals, and (ii) all other facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them."

111. Natelson, *Legal Origins* at 58.

112. In fact, in the 18th Century these words were used somewhat interchangeably. The

Contemporary short titles likely fall within the historical and contemporary definitions of “folly”: Samuel Johnson’s Dictionary of 1768 defines the word as: “1. Want of understanding; weakness of intellect. 2. Criminal weakness; depravity of mind. 3. Act of negligence or passion unbecoming wisdom.”<sup>113</sup> The phrase “unbecoming wisdom” complements this endeavor, as the politically tendentious titles employed by Congress do not embody wise lawmaking. In terms of contemporary definitions of “folly” (i.e. akin to “foolishness”),<sup>114</sup> it would be difficult not to classify many contemporary short bill titles as such (e.g. the CALM Act,<sup>115</sup> the PACT Act,<sup>116</sup> or the CHIMP Act<sup>117</sup>), not to mention the myriad of short titles that are proposed each year in bills that never pass. Incorporating slogans, puns, and/or catchy acronyms into official federal law is perhaps the definition of “folly,” be it historical or modern. Yet whether or not some titles are negligent is difficult to assess. Should short titles be subject to FTC scrutiny on deceptive advertising practices, many of them would indeed be classified as such.<sup>118</sup> However, is that merely deceitful, or negligent? Negligence would potentially be a situation where Congress thought they were ameliorating a problem by enacting a law, when ultimately they did not. Unfortunately there are many instances of this misguided lawmaking. Take the CAN-SPAM Act,<sup>119</sup> for example, which some have dubbed the “you CAN-SPAM Act”.<sup>120</sup> The fact that Congress tendentiously labels many bills and acts strongly suggests that lawmakers have not followed a duty of care when preparing many short titles.

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definition of folly uses negligence to explain its meaning.

113. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1768). Other Johnson dictionaries define it in the following manner: “Want of understanding; weakness of intellect; criminal weakness; depravity of mind; act of negligence or passion unbecoming gravity or deep wisdom” (SAMUEL JOHNSON & JOHN WALKER, A DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1828).

114. OXFORD ENGLISH DICTIONARY, available at <http://oxforddictionaries.com/definition/english/folly?q=folly> (last visited Sept. 13, 2013). First definition of “folly” is: “lack of good sense; foolishness.”

115. Commercial Advertisement Loudness Mitigation Act (CALM Act), Pub. L. No. 111-311, 124 Stat. 3294 (2010).

116. Prevent All Cigarette Trafficking Act of 2009 (PACT Act), Pub. L. No. 111-154, 124 Stat. 1087 (2010).

117. Chimpanzee Health Improvement, Maintenance, and Protection (CHIMP) Act, Pub. L. No. 106-551, 114 Stat. 2752 (2000).

118. See Jones & Shaheen, *supra* note 109.

119. Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act of 2003), Pub. L. No. 108-187, 117 Stat. 2699.

120. Amit Asaravala, *With this Law, You Can Spam*, WIRED, Jan. 23, 2004, <http://www.wired.com/techbiz/media/news/2004/01/62020> (last visited Sept. 13, 2013); See also, W. Parker Baxter, *Has Spam Been Canned? Consumers, Marketers, and the Making of the Can-Spam Act of 2003*, 8 N.Y.U. J. LEGIS. & PUB. POL’Y 163 (2004-2005).

#### D. THE DUTY TO EXERCISE PERSONAL DISCRETION

This is an interesting principle for this article based on the fact that congressional members are voted into office by the will of the people; ours is a system of representative government that provides lawmakers with a certain amount of personal discretion. Short titles apparently fall into this category, as legislative counsel of both the House and the Senate will draft a large amount of legislation, but leave short titles in the privy of the member sponsoring the legislation.<sup>121</sup>

However, over the last four decades there has been a short title revolution in Congress, as more technical, legal words were dropped for more patriotic, evocative sounding words.<sup>122</sup> An increased use of acronyms and personalized short titles has become rampant throughout the years.<sup>123</sup> Due to this increased focus on the presentational aspects of short titles, the more descriptive technical aspects of such titles have fallen by the wayside, while more positive-sounding words have been on the rise. Many of these new evocative words are tendentious and promotional, and could be misleading lawmakers and the general public about what the effects of a particular law may be (e.g. “efficient,” “effective” and/or “responsible”). Though personal discretion is granted to lawmakers from a fiduciary perspective, this does not trump the other duties, such as the duties of care, loyalty, and good faith. If lawmakers acted under the other duties while exercising discretion, there would be less overly tendentious and misleading short titles. This, unfortunately, is not the case.

#### E. THE DUTY TO ACCOUNT

The word “account” and its derivations have been on the rise in public law short titles over the past few decades,<sup>124</sup> but this duty seems to bear little impact on this article’s endeavor, as it mainly describes the monetary relationship between a fiduciary and his or her principal.

#### F. THE DUTY OF IMPARTIALITY

It is laughable nowadays to think that congressional legislative drafting, especially in regard to short titles for bills and laws, is impartial. Though “impartiality” was one of the core principles that Thomas Jefferson laid out in his *Manual*, the fact is that many contemporary titles are policy statements designed to promote a particular law, lawmaker, or political

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121. See Jones, *supra* note 102.

122. See Jones, *Short Title (R)Evolution*.

123. *Id.*

124. *Id.*

party.<sup>125</sup> And though lawmakers have a substantial responsibility to their constituents, their responsibilities are actually much larger, as the public laws they pass do not merely govern their own districts, states, or political parties, but the United States as a whole. Therefore a short title celebrating a particular policy, individual, or political party is not impartial, and thus breaches the fiduciary duty of impartiality.

While Natelson explains that propriety should be taken into consideration regarding the clause, he also expands on this notion by suggesting the following: “[t]o be ‘proper’, a law had to be, at the least, in compliance with the fiduciary duties expected of all public officials. Thus, to be proper, the law had to be within constitutional authority, reasonably impartial, adopted in good faith, and with due care—that is, with some reasonable, factual basis.”<sup>126</sup> The final four criteria are especially relevant to this endeavor. Being reasonably impartial, adopted in good faith, with due care, and with some reasonable, factual basis are four valuable criteria that could be ascertained when drafting proper short titles for bills and laws. Moreover, the legitimacy of many congressional short titles would certainly be called into question under these principles.

## VI. POTENTIAL REMEDY: A REASONABLE NOTICE STANDARD

Reasonable notice is an element directly related to short titles that accentuates fiduciary responsibilities and proper drafting form that could (and should) come into play regarding this matter. The primary difference between some U.S. states and Congress is that many explicitly require bill titles to provide fair notice and be comprehensible to citizens and lawmakers. Reasonable notice also fits the contextual nature of the Necessary and Proper Clause. For, if a law misleads either legislators or the general public, then it certainly is not “*proper for carrying into execution* the foregoing powers,”<sup>127</sup> and is therefore unconstitutional.

What is recognized here is the fundamental right, where practicable, of citizens and lawmakers to have reasonable access not only to the bills being proposed, but eventually to the law that governs them. For example: Montana states that “the title of a bill gives reasonable notice of the content

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125. Thomas Jefferson, *A MANUAL OF PARLIAMENTARY PRACTICE: COMPOSED ORIGINALLY FOR THE USE OF THE UNITED STATES SENATE* 2 (1856).

126. Natelson, *Framing and Adoption*, at 119.

127. U.S. Const. art. I, § 8, cl. 18 (emphasis added).

to legislators and the public;<sup>128</sup> Oregon states that “the purpose of the constitutional title requirement is to prevent the concealment of the true nature of the provisions of the bill from the legislature and the public,”<sup>129</sup> as noted above, Maryland’s manual notes that “[i]f a bill’s subject matter is broader than its title, the bill is unconstitutional because the requirement of proper notice to legislators and citizens is not fulfilled;”<sup>130</sup> and the Texas Constitution declares that the “rules of procedure of each house shall require that the subject of each bill be expressed in its title in a manner that gives the legislature and the public reasonable notice of that subject. The legislature is solely responsible for determining compliance with the rule.”<sup>131</sup> This list could easily be elongated, as the principle of reasonable notice was one of the primary rationales behind state single-subject provisions.<sup>132</sup>

In regard to endorsing a simple or straightforward reasonable notice requirement in any manner whatsoever, Congress clearly lacks such standards. There appear to be no restrictions or standards, formal or informal, in regard to how bill titles are named, and congressional interviewees involved in my doctoral research admitted that short titles are often misleading.<sup>133</sup> In turn, if such titles are misleading to lawmakers, they

128. LEGISLATIVE SERVICES DIVISION, MONTANA BILL DRAFTING MANUAL at 45 (2008), available at [http://leg.mt.gov/content/publications/2008\\_bill\\_drafting\\_manual.pdf](http://leg.mt.gov/content/publications/2008_bill_drafting_manual.pdf) (last visited Sept. 13, 2013).

129. *Northern Wasco County PUD v. Wasco County*, 210 Or. 1, 305 P.2d 766 (1957); *State v. Williamson*, 4 Or. App. 41, 475 P.2d 593 (1970). Citation from OREGON BILL DRAFTING MANUAL, Section 5.1 (2012), available at <http://www.lc.state.or.us/pdfs/draftingmanual.pdf> (last visited Sept. 13, 2013).

130. DEPARTMENT OF LEGISLATIVE SERVICES, MARYLAND LEGISLATIVE DRAFTING MANUAL, at 29 (2011), available at [http://dls.state.md.us/data/legandana/legandana\\_bildra/legandana\\_bildra\\_bildraman/BillDraftingManual2011.pdf](http://dls.state.md.us/data/legandana/legandana_bildra/legandana_bildra_bildraman/BillDraftingManual2011.pdf) (last visited Sept. 13, 2013).

131. TEX. CONST. art. III, § 35(b).

132. For example, the following excerpt comes from a Supreme Court case in Iowa: “The second provision requires the subject of a bill to be expressed in the title. The primary purpose of this provision is to provide reasonable notice of the purview of the act to the legislative members and to the public. The title provides an easy ‘means for concerned parties to find out what a bill or act is about without reading it in full’. The provision ultimately serves to prevent surprise and fraud from being visited on the legislature and the public. Thus, the title requirement is directed more to the integrity of the legislative process by preventing laws from being surreptitiously passed with ‘provisions incongruous with the subject proclaimed in the title’. It surfaced as a constitutional requirement as a result of public demand derived from a prevailing sense that bills giving substantial grants to private parties were often ‘smuggled through the legislature under an innocent and deceptive title’.” *Godfrey v. State*, 752 N.W.2d 413, 426-427 (Iowa 2008) (citing *Giles v. State*, 511 N.W.2d 622, 625 (Iowa 1994); *Long v. Bd. of Supervisors*, 142 N.W.2d 378, 383 (Iowa 1966); NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 17:1 at 5, 40, 41, 50 (6th ed. 2000)). Also, the Iowa Supreme Court states that “[t]he first provision is referred to as the single-subject requirement. It exists to ‘facilitate concentration on the meaning and wisdom of independent legislative proposals or provisions’.” *Godfrey*, 752 N.W.2d at 426.

133. Jones, *supra* note 102; Interview with Member of Congress (MCON1) in Washington D.C. (Oct. 29, 2009), Interview with Member of Congress 2 (MCON2) in Washington D.C. (Oct.

are very likely misleading and confusing to constituents, both in terms of the laws proposed and of the laws enacted. Implementing a set of rules or regulatory guidelines in regard to short titles that provide a necessary informational component to both lawmakers and citizens of the bills introduced and the laws that govern them would be of much benefit at the federal level. Additionally, it would satisfy the fiduciary obligations and proper drafting form that appear to be inherent in the Constitution itself.

## VII. CONCLUSION

What I have proposed here is not an exceedingly difficult or burdensome standard to which congressional legislation should be held. The simple fact that a fiduciary should not deceive the principal is not an issue that is widely debated; it is exceedingly conventional. Additionally, that bills, and specifically short titles, should be properly drafted and provide reasonable notice to lawmakers and constituents is not a radical idea; it has been implemented and adjudicated in states for many decades. Thus, what possible justification could lawmakers provide, outside of their own personal benefit, for permitting short titles that are deliberately tendentious or promotional, and mislead those who encounter them?

After two hundred plus years, it is unlikely that an authoritative and decisive interpretation will be found that reveals or comprehensively describes the true meaning of the Necessary and Proper Clause. The best modern scholars can do at this point is to keep constructing, hypothesizing, and providing evidence for the best possible historical and modern interpretations of the phrase “necessary and proper.”

Although a good amount of concern has been devoted to the meaning of “proper” from a proprietary standpoint, and understandably so, there appears to be a legitimate place underneath the Necessary and Proper Clause to incorporate the drafting aspects of bills and laws, and acknowledge the notion that *all* aspects of federal law should be “proper.” Laws that mislead legislators, citizens, and others about the true nature of what those laws are going to accomplish or about what those laws inherently regard would not be “proper” under any of the historical or modern definitions which this article has examined.

Although Thomas Jefferson gave short shrift to bill titles in his *Manual of Parliamentary Practice*, his closing statement on the preface to the manual could serve as general guidance on such matters:

But I have begun a sketch, which those who come after me will successively correct and fill up, till a code of rules shall be formed for use of the Senate, the effects of which may be *accuracy* in business, economy of time, order, uniformity and *impartiality*.<sup>134</sup>

A focus on the positive presentational aspects of legislation at times disregards the substance of such legislation, the latter of which is paramount not only to the lawmakers involved in approving such measures, but also to the citizens who are governed by such laws. As Jefferson aptly points out, “[i]t is material that order, decency and regularity be preserved in a dignified public body.”<sup>135</sup> These words could not ring truer than they do today in regard to congressional bills and laws, and especially in relation to short titles. And it just so happens that a curt, yet much debated, constitutional clause may indeed contain the solution to such measures: that they “be. . .proper.”<sup>136</sup>

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134. JEFFERSON, *supra* note 125, at vi (emphasis added).

135. *Id.*, at 14.

136. U.S. Const. art. I, § 8.